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June 26, 2016

Submission Regarding the Death Penalty to the UN Committee Against Torture for the List of Issues For the Sixth Periodic Review of the United States of America

Introduction

1. This report is submitted by Human Rights Advocates, San José State University Human Rights Program, and the Medical Whistleblower Advocacy Network (MWAN). This report urges the Committee Against Torture to address issues related to the use of the death penalty in the United States, which continues to be used in the majority of states though a few states have recently abolished it. MWAN submitted a report on this issue to the Human Rights Council in its review of the United States under the Universal Periodic Review in 2015 which included the following information: 29 states have not had an execution in the last 5 years, including Kansas which has had no executions since 1976 and has 10 people currently on death row; and 143 innocent people have been freed from death row. Overall facts include: 31 states, the US government, and military still have the death penalty on the books though four states have governor issued moratoriums; 19 states and the District of Columbia do not have the death penalty.¹ The state of Connecticut abolished the penalty in 2012 and its Supreme Court ruled that the statute is retroactive for the 19 people on death row in 2015. Due to a court order regarding the methods of execution, California has not had an execution in 10 years but has over 743 persons on death row.

2. The Convention Against Torture and Other Cruel, Inhuman or Degrading treatment or punishment (“CAT”) defines torture as any act by which severe pain or suffering whether physical or mental is intentionally inflicted upon a person by or through the instigation or consent of a public official acting his official capacity to intimidate, punish or obtain info, among other motives.² CAT further prohibits use of torture or cruel, inhuman, or degrading punishment or treatment committed by officials or under authorization and consent as well.

3. This report will focus on three issues that constitute violations of CAT: the death row phenomena, methods of execution, and the use of the death penalty for disabled persons.

¹ Death Penalty Information Center (July 1, 2015).

² Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (Dec. 10, 1984), 1465 U.N.T.S. 85, Article 1, *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

Death Row Phenomena

4. The death row phenomenon constitutes torture under CAT's definition because it's a condition in which those who await execution suffer from severe mental trauma and physical deterioration while incarcerated. Article 1 of the CAT does not limit torture to physical acts or physical pain and suffering only. The article embraces the idea that torture may be inflicted through mental pain and suffering.³ The Special Rapporteur on Torture identifies the circumstances to create the death row phenomenon as to "include the lengthy and anxiety-ridden wait for uncertain outcomes, isolation, drastically reduced human contact and even the physical conditions in which some inmates are held."⁴ This phenomenon has become commonplace in international jurisprudence. Regional courts have also found for holding these executions to be invalid.⁵

5. In the United States the conditions of death row phenomenon are amplified due to the combination of circumstances in the American system that produces severe mental trauma, physical suffering, solitary confinement, horrible prison conditions, lack of exposure to the outside. Arguably, the inmates themselves are consequently serving more than just their sentence. It's a death sentence plus life without parole due to the grossly long time served on death row. The average wait time on death row now far exceeds the five years deemed to be torture by the Judicial Committee of the Privy Counsel in *Pratt v. Jamaica* where it recognized that the death row phenomenon was a violation of the Jamaica Constitution, ruling that the execution of Earl Pratt and Ivan Morgan who have been on death row for over 15 years would violate the spirit and letter of Jamaica Constitution.⁶ The court held that there was an instinctive revulsion against the possibility of execution for anyone who has already suffered prolonged "agony of suspense for so many years" on death row and that executions following 5 or more years of delay are strong grounds for violation of the Constitution.⁷ The Court was concerned with the issues regarding condemning a person for exercising their rights to an appeal and taking advantage of the appellate system. In such circumstances, the individual is not to be blamed, but rather, the system itself needs blaming for any unnecessary delays.

6. The Human Rights Committee has also expressed concerns about the death row phenomenon in two seminal cases. *Cox v. Canada* involved an individual who claimed that extradition from Canada to the U.S.⁸ should be denied because the conditions of his imprisonment on death row would amount to a violation of the ICCPR Article 7

³ *Supra* note 2, Article 1.

⁴ Human Rights Council, Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN doc. A/67/279, para. 42, (Aug. 9, 2012), *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/458/12/PDF/N1245812.pdf?OpenElement>.

⁵ *See* *Soering v. The United Kingdom*, 1/1989/161/217, European Court of Human Rights, (July 7, 1989); *Pratt and Morgan v. Jamaica*, (1993) 4 All E.R. 769; *Paul Lallion v. Grenada*, Case 11.765, Report No. 55/02, Inter-Am. C. H.R., Doc. 5 rev. 1, (Oct. 21, 2002).

⁶ *Pratt et al v. Attorney-General for Jamaica et al*, 4 All ER 769 (1993).

⁷ *Id.*

⁸ *Cox v. Canada*, Communication No. 539/1993, U.N. Doc. CCPR/C/52/D/539/19930, (Dec. 9, 1994), *available at* <http://www1.umn.edu/humanrts/undocs/html/vws539.htm>.

prohibition against torture.⁹ The Committee ultimately denied his request and granted extradition since the specific facts of the case did not rise to the level of violation.¹⁰ The Committee, however, did acknowledge that prolonged imprisonment under death sentence could raise an issue under Article 7.¹¹ In *Francis v. Jamaica* the Committee found that incarceration of an individual sitting on death row for over 12 years causing him mental and physical suffering would amount to a cruel, inhuman, and degrading treatment in violation of Article 7 of the ICCPR.¹² Here, the Committee focused specifically on the psychological impact on the individual as an important factor in determining whether there was a violation.¹³

7. Waits on death row in the United States now far exceed 12 years. Examples include, a case man in California who was sentenced to death in 1992 has now spent 24 years on death row without even having his first appeal. It took 5 years for the California to appoint counsel, and another 10 years to reconstruct lost transcripts. The Inter-American Commission on Human Rights acknowledged these facts in an admissibility decision in March 2012.¹⁴ In Texas, inmate Bobby Moore currently awaits his appeal in a case pending before in the United States Supreme Court. Moore was sentenced to death in 1980 at the age of 20. He has spent over 35 years on death row, fifteen of which were in solitary confinement.¹⁵ The grant of review by the U.S. Supreme Court will not consider the time Mr. Moore has spent on death row.

Methods of Execution

8. Most U.S. states retaining the death penalty believe lethal injection is the most humane form of execution; however, the truth is that some executions last from 20 minutes to an hour as the convict struggles in pain, while gasping for air.¹⁶ The use of lethal injection has gone under scrutiny as numerous instances of botched executions occurred throughout the states. One example is the case of Clayton Lockett in Oklahoma. It took over 43 minutes for Lockett to die. The injection of the first sedative had proven problematic, leaving Lockett paralyzed although still awake, “effectively locked in his own body, suffocating for several minutes before his heart finally stopped.”¹⁷ The UN

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Francis v. Jamaica*, Communication No. 606/1994, U.N. Doc. CCPR/C/54/D/606/1994, (Aug. 3, 1994), available at <http://www1.umn.edu/humanrts/undocs/html/vws606.htm>.

¹³ *Id.*

¹⁴ N.I. Sequoyah, Admissibility Report No. 42/10, Inter-Am. Commission of H.R., available at www.cidh.org/annualrep/2010eng/USAD120-07EN.doc.

¹⁵ Center for Constitutional Rights, available at <https://ccrjustice.org/home/blog/2016/01/20/death-penalty-horrific-here-s-something-makes-it-even-worse>

¹⁶ Amnesty International, Lethal Injection: Anything But Humane, available at <http://www.amnestyusa.org/our-work/issues/death-penalty/lethal-injection>

¹⁷ Aljazeera America, The Death penalty: How We Kill, (June 29, 2015), available at <http://america.aljazeera.com/multimedia/2015/6/the-death-penalty-how-we-kill.html>.

High Commissioner for Human Rights commented that Lockett's suffering during execution potentially amounted to cruel, inhuman and degrading treatment according to international standards.¹⁸ Even when administered correctly, studies have indicated that those executed under this method may still suffer from asphyxiation.¹⁹

9. Electrocution once served as a humane method of execution but now is practiced in a few states. The killing is carried out by discharging strong electrical currents from the head to the leg of a prisoner as they are mounted to a chair.²⁰ The current runs through the body, causing the heart to quiver and stop pumping blood to the brain. The individual is left unconscious within thirty seconds and may be declared dead within three to five minutes.²¹ This result is not always achieved on the first try. Since the electric current may not always pass through the heart, additional jolts are discharged and the process continues until the individual is dead.²² Exposure to additional shocks have led to additional cruel and gruesome results, including combustion, cooked organs, and ruptures on the skin due to the extremely high temperature.²³ This form of execution was the sole method used in Nebraska until 2008 when the Nebraska Supreme Court declaring such practice unconstitutional and constituting cruel and unusual punishment.²⁴ There the Court stated, "condemned prisoners must not be tortured to death, regardless of their crimes."²⁵ Currently, only seven U.S. states maintain the practice.²⁶

Use of the Death Penalty for Persons with Disabilities

10. In 2002 The Supreme Court set the federal standard to protect intellectually disabled persons from being executed. The Supreme Court ruled in the *Atkins v. Virginia* case that executing inmates with intellectual disabilities was unconstitutional. There continued to be a risk that the use of the death penalty would constitute torture or cruel, inhuman or degrading treatment or punishment when states attempt to redefine the intellectual minimum standard used for sentencing in capital punishment cases, rather than abiding by federal standards. A May 27, 2014 Supreme Court decision of *Hall v Florida* held that Florida's threshold requirement, as interpreted by the Florida Supreme Court, that defendants show an IQ test score of 70 or below before being permitted to submit additional intellectual disability evidence may result in violations because it creates an unacceptable risk that persons with intellectual disabilities will be executed. The

¹⁸ UN News Centre, UN rights office calls on US to impose death penalty moratorium after botched execution, (May 2, 2014), available at <http://www.un.org/apps/news/story.asp?NewsID=47706#.VsDR0wrJKN>.

¹⁹ For example, Teresa A. Zimmers and others, "Lethal injection for execution: chemical asphyxiation?", *PLOS Medicine*, vol. 4, No. 4 (Apr. 24, 2007). available at <http://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.0040156>.

²⁰ *Supra* note 36.

²¹ *Id.*

²² Death Penalty Information Center, Descriptions of Execution Methods, available at <http://www.deathpenaltyinfo.org/descriptions-execution-methods>.

²³ *Supra* note 36.

²⁴ *State v. Mata*, 275 Neb. 1 N.W.2d 229 (2008).

²⁵ *Id.*

²⁶ *Supra* note 16.

Supreme Court has recently agreed to review the issue in Bobby Moore's case referred to in Paragraph 7.

Conclusion

10. Human Rights Advocates, San José State University Human Rights Program, and the Medical Whistleblower Advocacy Network (MWAN) urge the Committee Against Torture to ask the United States about what steps it has taken to address violations of CAT with respect to the use of the death penalty, in particular those related to the death row phenomena, the methods of execution, and the use of the death penalty for disabled persons. Of concern should also be the number of people who have been found innocent and whether any innocent people have been executed. The following questions are recommended with respect to these issues.

11. What steps has the United States taken to assess and address the length of time that persons sentenced to death spend on death row?

12. What steps has the United States taken to assess the potential that the various methods of execution being used to execute persons constitute torture and what steps are being taken to prevent this from happening?

13. What steps has the United States taken to ensure that persons with higher IQ than 70 do not have mental disabilities that would result in the death penalty constituting torture or cruel, inhuman or degrading punishment if imposed on them?

Sincerely,

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