

Mandates of the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

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14 December 2023

Excellency,

We have the honour to address you in our capacity as Special Rapporteur on extrajudicial, summary or arbitrary executions; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the independence of judges and lawyers and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolutions 53/4, 51/21, 53/12 and 52/7.

In this connection, we would like to bring the attention of your Excellency's Government to information we have received concerning the **imminent execution of Kenneth Eugene Smith, scheduled to occur on 25 January 2024 in the State of Alabama, by nitrogen hypoxia** – an untested method of execution, which may subject him to cruel, inhuman or degrading treatment or even torture.

Previously the special procedures mandate holders raised concerns regarding executions using lethal injection via communications, including USA 5/2022, USA 4/2018, and USA 13/2016. In these cases, serious concern was raised over the three-drug combination used, which may cause severe physical and mental suffering of the condemned before death. Regrettably, we have not received responses from your Excellency's Government to these communications.

According to the information received:

The judicial proceedings and conviction of Kenneth Eugene Smith

Kenneth Eugene Smith is a US citizen who was 22 years old when he was charged and convicted of the murder of Elizabeth Dorene Sennett in her home in Colbert County, Alabama in 1988. Mr. Smith was sentenced to death in 1989, but his conviction was set aside in 1992¹, for procedural reasons, and he was resentenced to death in 1996 after a second trial. At the second sentencing hearing, the jury found one aggravating circumstance – the fact that the murder was for hire – and several mitigating circumstances, including his young age, that he had no significant criminal history, he appeared to be remorseful for what he had done, his good conduct in jail, and that he was neglected and deprived as a young child. The jury convicted him of capital murder but recommended, by a vote of 11 to 1, to impose life imprisonment without parole. The trial judge, however, overrode their nearly unanimous

¹ In *Smith v. State*, 620 So.2d 732 (Ala.Cr.App. 1992), the original conviction was set aside due to a Batson violation and the case was then remanded for a new trial. A Batson violation refers to the act of [objecting to](#) the validity of a [peremptory challenge](#), on grounds that the other [party](#) used it to exclude a potential [juror](#) based on race, ethnicity, or sex. The result of a successful Batson challenge differs, but may be a new trial.

recommendation and sentenced Mr. Smith to death. The practice of judicial override was abolished in 2017.

Mr. Smith has been on death row again since 1996 and is currently in the custody of the Alabama Department of Corrections (“ADOC”) at William C. Holman Correctional Facility (“Holman”).

The State of Alabama attempted to execute Mr. Smith on 17 November 2022. Mr. Smith survived ADOC’s attempt to execute him by lethal injection when the prison personnel were unable to place intravenous lines to administer lethal drugs to him and proceeded to attempt to do so for approximately four hours. During this botched attempt at his execution, Mr. Smith had needles inserted in his arms, muscles, collarbone region, neck, and chest, which subjected him to excruciating pain. Mr. Smith’s was the third consecutive execution that ADOC failed for the same reason. This failed attempt to execute Mr. Smith caused him severe and ongoing physical and psychological pain, including severe post-traumatic stress disorder (“PTSD”), lingering pain in his arms and collarbone region, as well as back spasms.

ADOC seeks to execute Mr. Smith on 25 January 2024 using nitrogen hypoxia—an execution method that has never been used before.

Execution by nitrogen hypoxia

ADOC proposes to carry out Mr. Smith’s execution using nitrogen hypoxia by following its recently released and heavily redacted Execution Procedures as of August 2023 (the Protocol). Despite the ADOC’s position for years that nitrogen hypoxia was not a feasible, alternative method of execution, ADOC has recently changed course, now claiming it is prepared to carry out executions using nitrogen hypoxia.

Attempting to execute Mr. Smith by nitrogen hypoxia exposes him to severe distress and excruciating pain during the execution process, including but not limited to hypoxemia and hypoxia short of death. It is reported that, if the protocol is successful, Mr. Smith will die whilst experiencing seizures, the sensation of choking, and great pressure within his internal organs. This is tantamount to torture and other cruel inhuman degrading treatment or punishment.

Nitrogen gas is inert and contributes to the low reactivity of the atmosphere. Yet, pure nitrogen provides no anesthetic advantage in any workable concentration. It is argued that it is not in dispute that if a person breathes pure nitrogen gas for a period of time, death will be the result, as it will lead to a rapid drop in oxygen levels. Rapid fall in ambient oxygen is an added concern. The experience of being short of breath is extremely uncomfortable. This response first functions as a nonspecific warning sign for a person to increase inspired oxygen. Most individuals can hold their breaths for between 30 seconds to 2 minutes. If one hyperventilates prior to a holding the breath, it is possible to extend this for a longer period. In simple breath holding experiments, the sensation to breathe may occur before significant hypoxia. If

² Hypoxia is a state in which oxygen is not available in sufficient amounts at the tissue level to maintain adequate homeostasis.

carbon dioxide levels are maintained in the normal range, hypoxia may also be better tolerated. A lower limit for hypoxia does exist and at some point, hypoxia becomes distressing even when carbon dioxide levels are maintained.

Though nitrogen has no therapeutic nor anesthetic uses, it is possible to speculate how dying by the inhalation of nitrogen gas might be experienced and what those watching would observe. Unlike lethal injection, nitrogen gas execution will require a prisoner to cooperate by continuing with natural breathing. Nitrogen gas will have to be inhaled. A prisoner may attempt to hold their breath at the beginning to delay the exposure to nitrogen gas. Such holding of breath at the beginning of an execution will ultimately end by great discomfort and an unwilling breath. This is likely how every nitrogen gas execution begins.

As per the Protocol, reportedly the ADOC intends to deliver pure nitrogen to the condemned person from a cannister through tubing that flows into a “one size fits all” mask that a member of the Execution Team will place over the condemned person’s face and adjust. The gas will then be passed through the mask into the prisoner for 15 minutes, or for five minutes beyond the moment that he flatlines, whichever is longer, the Protocol establishes.

However, the Protocol does not provide any information on the type of mask that will be used, or how the mask will be secured so that it remains sealed and in proper position over the condemned person’s face throughout the process. Indeed, the Protocol contemplates that the condemned person will be permitted to make a statement after the mask is placed over his face. The protocol therefore assumes the mask will be secured in such a way that the inmate will be able to speak after it is in place, which can dislodge the mask and break the seal. If the mask is not sealed throughout the process, natural air with oxygen can leak in and the condemned person can inhale it. If the condemned person can inhale oxygen, that likely would prolong the time to reach unconsciousness and could lead to a persistent vegetative state, stroke, or the painful sensation of suffocation. The Protocol, thus, does not account for those variations among condemned people to ensure that a mask is fitted securely to each condemned person that ADOC intends to execute by nitrogen hypoxia.

Moreover, the Protocol does not contemplate any mechanism to remove the carbon dioxide under the mask as the condemned person exhales so that carbon dioxide does not build to dangerous levels in the condemned person. If the condemned person inhales carbon dioxide after the mask is placed on his face, he will experience the painful sensation of suffocating. It also does not specify the purity of the nitrogen that will be used or how the tanks will be stored when not in use, which is critical to prevent contamination. If ADOC uses less than 100% pure nitrogen to execute a condemned person, that likely would prolong the time to reach unconsciousness and could lead to the dire consequences.

There is sparse research on how long a human must be exposed to 100% pure nitrogen to cause death, what happens if a human is exposed to less than 100% pure nitrogen for a prolonged period of time, or on the pain or sensations that a human exposed to nitrogen might experience.

Thus, assuming the scenario where a mask is properly fitted and the prisoner cooperates with breathing, the result is still unknown.

In a veterinary euthanasia study designed to compare death from pentobarbital injection vs nitrogen gas inhalation, most animals developed early convulsions when exposed to nitrogen gas.³ In an earlier physiology experiment set to understand the physiological adaptations by humans to hypoxia, a series of healthy volunteers were given pure nitrogen to breathe. Volunteers were very often observed to have seizures by 17-20 seconds after breathing nitrogen. A seizure is a chaotic firing of neurological activities in the brain. A person will shake violently, may urinate, and aspirate gastric contents into the lungs leading to a chemical lung burn. While this may not occur in every case in the most extreme fashion, seizures occurred in almost every case.⁴

It is noted that, the use of nitrogen gas for execution has been described as an experiment. In this scenario, the “experiment” does not follow the scientific standards to be considered as such. If one considers nitrogen to be a drug, it has no approval by the US Food and Drug Administration (FDA) for any therapeutic use and cannot be prescribed. FDA approval requires a series of clinical trials that ultimately lead to human use in a specific therapeutic indication. ADOC makes no specific claim that using nitrogen for execution is a form of treatment.

It is concluded that this method of execution has never been used before and the written protocol supplied by ADOC contains redacted sections and missing information, making it difficult to evaluate this new method. To understand the use of nitrogen in this setting, it is necessary to review the chemistry of nitrogen, the predicted physiological response to nitrogen inhalation, and how the medical and scientific community would normally evaluate novel usage of chemical effects on the body.

While we do not wish to prejudge the accuracy of the aforementioned allegations, if the above allegations prove to be true, they may constitute a violation of the International Covenant on Civil and Political Rights (ICCPR), ratified by the United States of America in 1992, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), ratified by the United States of America in 1994, and of the United Nations Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty (1984).

According to the Human Rights Committee “the death penalty cannot be reconciled with the full respect for the right to life, and abolition of the death penalty is both desirable and necessary of enhancement of human dignity and progressive development of human rights.”⁵ Against this background, we wish to refer your Excellency’s Government to article 6 (6) of ICCPR, which is clear in asserting that “Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.” Noting that your

³ Quine JP, Buckingham W, Strunin L. “Euthanasia of small animals with nitrogen; comparison with intravenous pentobarbital.” *Can Vet J.* 1988 Sep;29(9):724-6. PMID: 17423118; PMCID: PMC1680841.

⁴ Ernsting J, “The effect of brief profound hypoxia upon the arterial and venous oxygen tensions in man.” *J Physiol* 1963; 169:292

⁵ [CCPR/C/GC/36](#), para.50

Excellency's Government seems to be expanding its use of the death penalty by adding a new method of execution, we are concerned that it is against current international law standards, particularly the above-mentioned article of ICCPR.

We would, thus, wish to express our utmost concern for the resumption of executions at both federal and State levels, which firmly contradict global trends toward the abolition of the death penalty.

Additionally, as per, capital punishment shall be carried out in a manner that inflicts the minimum possible suffering⁶. The Human Rights Committee has asserted⁷, that article 7 of the ICCPR prohibits certain methods of execution, such as untested lethal drugs and gas chambers (para. 40). It also stressed that failure to respect article 7 "inevitably render[s] the execution arbitrary in nature." The Committee has also clarified that the right to security of persons protects individuals from intentional infliction of bodily or mental harm⁸.

We also wish to emphasise it is of concern that despite Mr. Smith being sentenced to life in prison without the possibility of parole by a near unanimous jury decision (vote of 11-1), the sentencing judge overrode the jury decision and sentenced Mr. Smith to death. It is noted that since 2017, such 'judicial override' has been abolished in the State of Alabama, reinforcing the potential violations of Mr. Smith's fair trial and due process rights. Therefore, Mr. Smith's execution may lead to a violation of article 14 of the ICCPR, and of the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.⁹

We would also like to particularly draw the attention of your Excellency's Government to the execution method in question – nitrogen hypoxia. The lack of scientific evidence of the consequences of pure nitrogen inhalation, and the fact that this will be the first attempt at nitrogen hypoxia execution are of grave concern.

In light of the aforementioned concerns, we recall the obligations of your Excellency's Government to prohibit and prevent acts of torture or other cruel, inhuman or degrading treatment or punishment (articles 1, 2 and 16 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)), and note that punishments that cause severe pain or suffering, beyond harms inherent in lawful sanctions, and applied for the purpose of discrimination is covered by the definition of torture in article 1 of CAT.

We would also like to recall principle 22 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which unequivocally states that "No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health."¹⁰ Moreover, article 7 of the ICCPR provides that no one shall be subjected without their consent to medical or scientific experimentation. As nitrogen hypoxia is experimental, we would consider it to be in violation of the ICCPR.

⁶ [Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty](#), ECOSOC 1984/50., Safeguard 9; and Human Rights Committee, Gen. Comment 20.

⁷ Human Rights Committee, General Comment 36 ([CCPR/C/GC/36](#))

⁸ Human Rights Committee, general comment 35, [CCPR/C/GC/35](#)

⁹ Ibid. Safeguard 4.

¹⁰ [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment | OHCHR](#)

Furthermore, we remind your Excellency's Government that all persons who come into conflict with the law are entitled to be treated with dignity and respect. The recently approved Executions' Protocol of the State of Alabama, which allows for the use of nitrogen gas asphyxiation as a means for execution, may violate the international law standards mentioned above. The Human Rights Committee, in its Concluding Remarks of on the fourth periodic report of the United States of America¹¹ already expressed concern over the reports about the administration, by some States, of untested lethal drugs to execute prisoners and the withholding of information about such drugs.

The Human Rights Committee also expressed its regret concerning the lack of transparency of execution protocols and the prevalence of botched executions in the country¹². It is noted that the Execution Protocol from the State of Alabama is redacted in relevant aspects, against the guidance of the General Assembly, in its Resolution on the moratorium on the use of the death penalty¹³, and of the Human Rights Council's Resolution on the question of the death penalty.¹⁴ We are concerned that nitrogen hypoxia constitutes an example of "painful and humiliating" methods of execution. We also express our utmost concern that Mr. Smith will likely be subject to excruciating pain, and that the externalization of this method of execution will subject Mr. Smith to humiliation, due to the possible "seizures, urination, and other unknown consequences".

We further recall that the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has taken the view that most methods of execution amount to ill-treatment, if not torture, and that States applying the death penalty cannot guarantee that the prohibition of torture or ill-treatment is scrupulously observed¹⁵ and that there is an evolving international standard to consider the death penalty in itself as a violation of the prohibition of torture and ill-treatment¹⁶. The UN expert also warned that executions by gas asphyxiation – as is the case of nitrogen hypoxia – is already clearly prohibited under international law.¹⁷

In this regard, we would like to call your attention to an emerging international customary norm prohibiting the death penalty as a form of cruel, inhuman, or degrading punishment. The International Law Commission's Draft conclusions on identification and legal consequences of peremptory norms of general international law of 2022 provides a guiding methodology for UN Special Procedures to state the *jus cogens* violations of the death penalty (either as a new norm or in violation of the right to life or the prohibition of torture). This is also the conclusion of a recent report from the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, which on the basis of latest medical and medico-legal research, found that "the idea

¹¹ [CCPR/C/USA/CO/4](#)

¹² [CCPR/C/USA/CO/5](#), 3 November 2023. The Human Rights Committee, 'regrets the lack of information regarding the allegations of the use of untested lethal drugs to execute prisoners and about reported cases of excruciating pain caused by the use of these drugs and botched executions (arts. 2, 6, 7, 9, 14 and 26),' para 30, and in para. 31(d), called on the United States to 'Guarantee that all methods of execution fully comply with article 7 of the Covenant.'

¹³ Moratorium on the use of the death penalty, [A/RES/77/222](#), 15 December 2022, para. 7(i).

¹⁴ Question on the use of the death penalty, [A/HRC/RES/54/35](#), para.9.

¹⁵ [A/67/279](#), paras. 75-77

¹⁶ *Ibid.*, para. 72

¹⁷ *Ibid.*, paras 32 and 77

that the death penalty does not constitute torture simply lacks persuasion”¹⁸.

Furthermore, the cruelty of the death penalty goes beyond the execution itself. The concept of the “death row phenomenon” explains that prisoners on death row may experience severe mental trauma and physical deterioration.¹⁹ Considering that Mr. Smith has been on death row since 1996, and previously from 1989-1992, and has already been the victim of a failed attempt of execution, we express our utmost concern over the potential violation of articles 7 of the CAT and 10 of the ICCPR, which guarantee the protection of the humanity and human dignity of those deprived of their liberty. The fact that failed executions are extremely rare, and the physiological and psychological impact of such an event, with the prospect of a second attempt, has not been adequately researched, we express our utmost concern at the substantial risk that Mr. Smith will be subjected to torture, cruel, and inhumane punishment, in violation of articles 6(1), 7 and 10 of the ICCPR, as well as the provisions in CAT.

In this context, we also draw the attention of your Excellency’s Government to the contributions of the Special Rapporteur on on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, which guarantees the highest attainable standard of mental health for every individual, irrespective of them having been convicted of crimes. In this regard, the Special Rapporteur has recalled the The Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), which includes provisions on the responsibility of States regarding health care for persons detained in prisons²⁰. Moreover, we wish to refer to the report of the former Special Rapporteur, in which he makes reference to the fact that “[i]n contexts of confinement and deprivation of liberty, violations of the right to health interfere with fair trial guarantees, the prohibition of arbitrary detention and of torture and other forms of cruel, inhuman or degrading treatment, and the enjoyment of the right to life” and that [v]iolations of the right to health emerge as both causes and consequences of confinement and deprivation of liberty”.

Furthermore, the Human Rights Committee has observed that “extreme delays in the implementation of a death penalty sentence, which exceed any reasonable period of time necessary to exhaust all legal remedies, may also entail the violation of article 7 of the Covenant, especially when the long time on death row exposes sentenced persons to harsh or stressful conditions, ... and when they are particularly vulnerable due to factors such as age, health or mental state.”²¹

Considering the irreversibility of the death penalty, we respectfully call on your Excellency’s Government to intervene and halt the execution of Mr. Kenneth Eugene Smith, pending a review of the execution protocol in the State of Alabama. We wish to request that your Excellency’s Government brings our concerns to the relevant executive, legislative and judicial authorities of the State of Alabama.

The full texts of the human rights instruments and standards recalled above are available on www.ohchr.org or can be provided upon request.

¹⁸ [A/77/270](#) para. 93

¹⁹ [A/HRC/43/49](#), paras. 59 and 64.

²⁰ [A/HRC/38/36](#), para. 23, referring to rules 24-35.

²¹ Human Rights Committee, General Comment 36 ([CCPR/C/GC/36](#)), para.40

In view of the urgency of the matter, we would appreciate a response on the initial steps taken by your Excellency's Government to safeguard the rights of the above-mentioned person in compliance with international instruments.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned allegations.
2. Please explain whether the enforcement of the death sentence against Mr. Kenneth Eugene Smith in the circumstances described above would comply with the international standards and human rights obligations of the United States of America under the International Covenant on Civil and Political Rights.
3. Please provide details on the measures that the Government of the United States of America has taken or intends to take to fully prevent individuals from being subjected to a method of execution that reportedly constitutes cruel, inhuman or degrading treatment or punishment, or even torture, as per the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (CAT).
4. Please provide information concerning the scientific evidence that ensures the safety and nature of the execution through nitrogen hypoxia, and the measures taken to ensure that an execution through this method occurs without violating the obligations of the United States of America under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (CAT).

We may continue to publicly express our concerns in the near future on this case, which in our view merits prompt attention, as Mr. Smith's life is at stake, and the execution of a death penalty is irreversible. We also believe that this matter is one of public concern and that the public should be informed about it, and about its human rights implications. Any public expression of concern from our part would indicate that we have been in contact with your Excellency's Government to clarify the issues in question.

We would appreciate receiving a response within 60 days. Past this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

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