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## **Complaint**

**on behalf of Mr. Alan Eugene Miller in custody under sentence of death in  
the Alabama Department of Corrections**

### **Submission to**

**Dr. Alice Jill Edwards, UN Special Rapporteur on Torture and Other  
Cruel, Inhuman or Degrading Treatment or Punishment**

**Mr. Morris Tidball-Binz, UN Special Rapporteur on Extrajudicial,  
Summary or Arbitrary Executions**

### **OHCHR-UNOG**

**8-14 Avenue de la Paix, 1211 Geneve 10, Switzerland**

*Monday 12<sup>th</sup> September, 2022*

#### **1. Authors of Complaint**

1. This is a joint-authored complaint on behalf of Mr. Alan Eugene Miller who is currently in the custody of the Alabama Department of Corrections at William C. Holman Correctional Facility. He is under a sentence of death and the State of Alabama has set the execution date as 22 September 2022.
2. The authors are:

Professor Jon Yorke, Professor of Human Rights and the Director of the Centre for Human Rights, School of Law, Birmingham City University, The Curzon Building, 4 Cardigan Street, Birmingham, B4 7BD, United Kingdom

Dr Joel Zivot, MD, FRCP(C), MA, Associate Professor of Anesthesiology and Surgery, Emory University School of Medicine, 1364 Clifton Road Northeast, Atlanta, GA 30322, United States of America

Professor Deborah Denno, Arthur A. McGivney Professor of Law and the Director of the Neuroscience and Law Center, Fordham University Law School, 150 W. 62nd Street, New York, NY 10023, United States of America

3. The issues raised in this complaint are:
  - a. On 28 July 2022 Mr. Joe Nathan James was executed through lethal injection by the Alabama Department of Corrections. The execution process took 3 hours to complete. This clearly constituted an inordinate amount of time which *prima facie* indicates maladministration and the presence of error in the execution process.
  - b. The autopsy conducted by Dr. Zivot found evidence that Mr. James had been subjected to significant pain due to a ‘cut-down’ procedure for cannulation. This was an invasive procedure and invasion of Mr. James’ body unsanctioned by the State of Alabama’s Execution Protocol.
  - c. During the evaluation of Mr. James’ lungs, Dr. Zivot found evidence of pulmonary edema fluid indicating that he had experienced the traumatic sensation of suffocation.
  - d. The State execution protocol does not provide adequate protection of the rights of the condemned inmate. Therefore, the state and federal capital judicial process is unable to currently provide adequate safeguards against Alabama inflicting torture and inhuman punishment.
  - e. The State has failed to safeguard condemned inmates against receiving a lethal injection that complies with international human rights. Considering international guidelines, it has failed to adequately review its lethal injection protocol to ensure that the punishment will be administered in a humane way that respects human dignity and protects against torture.
  - f. Consequently, there is an intolerable risk that Mr. Alan Eugene Miller will receive torture and an inhuman form of punishment during his execution scheduled for 22 September 2022.
  - g. It would be appropriate under international human rights law for the execution of Mr. Alan Eugene Miller to be suspended until Alabama is able to adequately review its execution protocol.
  - h. We therefore respectfully request that in accordance with your Special Procedure mandates under Human Rights Council resolutions, that appropriate interventions are made in this case with the State of Alabama and the US Secretary of State.

## 2. UN Special Procedure Mandates for the Consideration of the Death Penalty

1. Pursuant to the mandates adopted through the resolutions of the Human Rights Council, this complaint is submitted to Dr. Alice Jill Edwards, UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and to Mr. Morris Tidball-Binz, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.
2. For our submission to Dr. Edwards, it is respectfully presented under the Human Rights Council resolution 43/20, particularly:

[Preambular text]

*Recalling* that freedom from torture and other cruel, inhuman or degrading treatment or punishment is a non-derogable right under international law that must be respected and protected under all circumstances;

...

1. [] the mandate of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment []:
  - (a) To seek, receive, examine and act on information from Governments, intergovernmental and civil society organizations, individuals and groups of individuals regarding issues and alleged cases concerning torture or other cruel, inhuman or degrading treatment or punishment;<sup>1</sup>
3. For our submission to Mr. Tidball-Binz, it is respectfully presented under the Human Rights Council resolution 44/5, particularly:
  7. Requests the Special Rapporteur, in carrying out the mandate:
    - (e) To continue to monitor the implementation of existing international standards on safeguards and restrictions relating to the imposition of capital punishment, bearing in mind the comments made by the Human Rights Committee in its interpretation of article 6 of the International Covenant on Civil and Political Rights, and the Second Optional Protocol.<sup>2</sup>

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<sup>1</sup> Resolution adopted by the Human Rights Council on 22 June 2020 43/20. Torture and other cruel, inhuman or degrading treatment or punishment: mandate of the Special Rapporteur, A/HRC/RES/43/20, 2 July 2020.

<sup>2</sup> Resolution adopted by the Human Rights Council on 16 July 2020 44/5. Mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/RES/44/5, 22 July 2020.

4. We note the appropriateness of this joint submission to both Special Rapporteurs consistent with the mandate holder's joint statements made in previous death penalty cases in the United States,<sup>3</sup> and also for the state focus of this complaint, previous mandate holder's letters to the US Secretary of State and the Office of the Governor of Alabama in the complaints submitted on behalf of Mr. Tomas 'Tommy' Arthur on 3 November 2016<sup>4</sup> and Mr. Doyle Hamm on 15 February 2018.<sup>5</sup>

### **3. The Medical Assessment of Alabama's Execution by Lethal Injection**

#### *a. The Execution of Mr. Joe Nathan James*

1. On 28 July 2022, Mr. Joe Nathan James was executed by the Alabama Department of Corrections under the authority of the State of Alabama in the United States. The method of killing that was utilized for this execution is referred to as 'lethal injection.' Broadly, lethal injection describes a technique of killing that involves the establishment of intravenous access and once established, various chemicals are injected into the blood stream that are chosen because these chemicals have been demonstrated to cause death in a fashion that outwardly appears essentially bloodless and occurs with some rapidity.
2. Lethal injection was created as an alternative method to other known methods of execution that include the gas chamber, hanging, the electric chair and the firing squad. In the United States, the law requires that punishment not be cruel and lethal injection appeared to satisfy this requirement. The definition of cruelty has naturally evolved commensurate with the evolution and maturation of civil society. In the United States, lethal injection is currently the most common method of state-sponsored judicial execution.

#### *i. Historical Overview of Lethal Injection*

3. Forensic pathologist, Dr. Jay Chapman, originally proposed a three-drug protocol involving a drug to render the inmate unconscious followed by a neuromuscular blocking agent to paralyze the muscles of respiration and potassium chloride to stop electrical activity in the heart as a more humane alternative to death in the electric chair. Lethal

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<sup>3</sup> Both the mandates of the Special Rapporteur on extrajudicial, summary or arbitrary executions, and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, have submitted following numerous complaints concerning the death penalty in the United States, and these include: UA G/SO 214 (33-27) G/SO 214 (53-24) USA 19/2013; AL USA 13/2014; UA USA 18/2014; UA USA 20/2014; AL USA 13/2015; UA USA 17/2015; UA USA 4/2017; UA USA 4/2018; UA USA 28/2020; UA USA 11/2021; UA USA 12/2021; UA USA 4/2022.

<sup>4</sup> Mandates of the Special Rapporteur on extrajudicial, summary or arbitrary executions, and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Reference: UA USA 13/2016.

<sup>5</sup> Mandates of the Special Rapporteur on extrajudicial, summary or arbitrary executions, and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Reference: UA USA 4/2018.

injection protocols have varied over time in the USA but currently, states use either a three-drug protocol or a one-drug protocol.

4. In the three-drug protocol, a large intravenous dose of Midazolam (usually 500 mg) is given that is believed to create a state of stupor. This is followed by a paralyzing drug that blocks spontaneous movement and finally Potassium is injected to stop cardiac contraction. This has been used in seven states, including the State of Alabama. In the one-drug protocol, Pentobarbital is injected in a large and super therapeutic quantity and the effect is to create the state of stupor while also weakening cardiac contraction to the point of death. This has been employed in 14 states.
5. Protocols involving midazolam have generated controversy with eyewitness reports of movement following administration of the drug and observations indicating respiratory distress. Lethal injection is not a medical act and protocol revisions have been driven by drug availability and not as an act of technical refinement or process improvement. Lethal injection has not been subject to the oversight of medical science as a consequence of a prohibition of involvement according to medical ethical opinion.<sup>6</sup>
6. The State of Alabama has a document entitled, “Execution Procedures, Confidential, March 2021.” This document has multiple redactions but describes the method of execution utilized by the State. It is presumed this method was intended to be used for the execution of Mr. Joe Nathan James. Section H.I.1. states simply that “the IV Team will be escorted into the execution chamber to start the IV.” By all accounts, this was the beginning of what was clearly a profound departure from this necessary first step.

*ii. Establishing intravenous access*

7. As a physician and anesthesiologist for the past 27 years, I (Dr. Joel Zivot) am skilled in establishing intravenous access. Under normal circumstance, an arm is selected, and a tourniquet is applied proximal to the elbow to a degree sufficient to overcome the pressure of venous blood as it would naturally return to the heart. The resulting effect is to increase the blood engorgement and prominence of veins rendering them more easily palpable. An intravenous needle contains a metal shaft with a razor-sharp tip surrounded tightly by a hollow plastic catheter that has a distal tapered tip. The vein is punctured, and pressurized blood now flows into the metal shaft that can rapidly be seen in a collection space situated at the opposite end of the metal tube. At this point, the plastic catheter is slid into the vein and the inner metal tube is removed. The plastic tube has a connection port that attaches to specialized intravenous tubing. The catheter is secured in place by the application of tape to the skin. In the hand of a skilled person, the task of

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<sup>6</sup> See, Annalise Norling, *AMA Code of Medical Ethics’ Opinions Related to Health Care for Incarcerated People*, *AMA J Ethics*. 2017: 19(9).

establishing IV access can be completed easily in under 5 minutes. In the execution of Joe Nathan James, this same procedure took over 3 hours to complete.

8. On occasion, IV access can be difficult to obtain, even when the person placing the IV is skilled. The reasons for this have to do with certain anatomical reasons. Joe Nathan James had no known anatomical barriers that would have made it particularly difficult to locate a suitable vein for intravenous cannulation. When intravenous cannulation is established in a medical setting, the patient is generally willing and the physician may also first inject a small amount of local anesthetic, using a very small needle, in the area when the vein will be punctured. Puncturing the skin is very painful and for some, even the anticipation of this particular pain can be terrifying. The State of Alabama execution document does not provide for the injection of a local anesthetic prior to establishing an IV.
9. In the Alabama execution document, Annex C, section c. indicates the IV team will perform a central line if the standard procedure for inserting intravenous catheters should fail. The qualifications of the IV team are not stated or covered by redaction. No formal and recognized training exists for the specific training of establishing intravenous catheters for execution. Eye-witness account of the intravenous access stated that multiple attempts in both arms were needed. At some point, an unknown substance was administered to Mr. James in order to pharmacologically mollify him as he was resisting and struggling against the multiple attempts to establish IV access.
10. After 3 hours, Mr. James was brought before witnesses as the execution was to begin. According to the public accounting, witnesses observed that Mr. James had his eyes closed and was unresponsive. The State of Alabama later commented that they could not be certain if Mr. James was actually conscious at the beginning of the execution. At a certain moment, the execution began. The drugs used were presumed to be those stated in the Alabama execution document. After death was confirmed, the body was taken by the state and an autopsy was performed.

*iv. Autopsy of Mr. Joe Nathan James*

11. As a physician, I have made a formal study of autopsies performed on individuals executed by lethal injection. My research shows the common and unexpected finding of pulmonary edema – fluid in the lungs – that could only have been the direct consequence of the lethal injection chemicals. The reality of death by lethal injection is more akin to death by suffocation and drowning and not simply falling to sleep and then dying. I sought to obtain the autopsy report performed on Mr. James but was refused. As a consequence of that refusal, with permission of the family of Mr. James I arranged to perform a second autopsy in order to ascertain what had happened to Joe Nathan James in the three hours prior to the commencement of his execution.<sup>7</sup>

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<sup>7</sup> See, Private Autopsy Documents ‘Carnage’ Experienced by Alabama Death-Row Prisoner Joe Nathan James During Longest Botched Lethal-Injection Execution in History, Death Penalty Information Center, 16 August

12. My review of the body uncovered serious findings suggesting a period of cruel, inhuman and degrading treatment in the period leading up to the execution. In each arm, I saw multiple signs of bruising that would be explained by multiple attempts at establishing intravenous access. It is impossible to know the order of these attempts but both arms had multiple bruises. On the anterior surface of the left arm I saw two slices into the skin, one in the crease of the elbow and the other just below the elbow. These two slices were horizontal to the long axis of the arm and approximately 2 inches in length.
13. On closer inspection, I determined these slices were evidence of a procedure known as a “cut-down.” In this procedure, the skin overlying the presumed location of a vein is opened with a surgical knife to the depth needed to visually locate a vein. This is a surgical procedure and without anesthesia, would be extraordinarily painful. In a medical setting, such a procedure has been almost virtually eliminated as a result of the use of ultrasound, a non-invasive method that utilizes reflecting sound waves to locate a vein. If a cut-down was ever contemplated in a medical setting, anesthesia would be absolutely utilized to block the intense pain of having the skin opened with a razor-sharp knife.
14. Upon review of the Alabama Execution document, I find no provision that allows for the use of a cut-down and no instruction under what circumstance such an intervention can be contemplated. I examined the body of Mr. James and saw no evidence that a central line was attempted. A central line would also be painful to place and requires a skill-set likely beyond what the State of Alabama IV team was capable of performing. That a cut-down was done suggests a further and wanton disregard for the resulting suffering and indignity on Mr. James. I cannot determine if either cut down procedure successfully found a vein for cannulation. It is possible that the procedure itself only resulted in pain and had no purpose beyond the infliction of pain and humiliation in the time before the execution.
15. Upon review of a microscopic evaluation of the lungs of Joe Nathan James, pulmonary edema fluid was seen. This is an expected finding and further indicates that Joe Nathan James suffered a tortuous death. The State of Alabama is aware of the evidence that Lethal Injection commonly causes pulmonary edema and has made no provision to address this finding. Knowingly subjecting inmates to death by pulmonary edema is another clear example of indifference and cruelty on the part of the State of Alabama.
16. The skill set needed to attempt a cut-down was likely beyond what was possessed by the regular intravenous team. This raises the possibility that the cut-down was performed by a physician working at the behest of the state. The World Medical Association strictly forbids the use of physicians to facilitate torture or cruel or inhuman treatments. A cut-down serves no therapeutic purpose in the setting of execution.

17. The State of Alabama has refused direct requests to reveal what it learned from the first autopsy of Joe Nathan James and has proved no refutation of the findings of the autopsy arranged by myself.

*b. The Intolerable Risks to Alan Eugene Miller*

1. The State of Alabama has shown itself to be unwilling and unable to follow its own execution document and intends to proceed with the execution of Alan Eugene Miller scheduled for 22 September 2022. The method of execution will very likely be lethal injection and will follow the same sequence as laid out as occurred in the execution of Joe Nathan James.
2. No evidence has been provided that the IV team has remediated its deficient skill set nor intends to do so prior to the execution of Alan Eugene Miller. As Joe Nathan James had no obvious anatomical barrier to establishing IV access in a conventional fashion, it raises the real concern that the IV team will be equally challenged by the need to establish IV access for Alan Eugene Miller.
3. If the IV fails to establish conventional IV access, the team is under no constraint to proceed with a cut-down, or any other method, either included or excluded from the Alabama execution document. Alan Eugene Miller will know about the tortuous execution of Joe Nathan James and he will face the added terror of now anticipating a period of torture prior to his own execution.
4. Alan Eugene Miller is aware that pulmonary edema is a common finding in lethal injection execution. The combination of the anticipation of an extremely painful and prolonged period of time leading up to his planned execution and followed by death by pulmonary edema and suffocation constitutes a cruel and torturous death. The possibility of physician involvement to make further torture possibilities is an anathema to the profession of medicine and strictly prohibited by the World Medical Association and other medical societies.

#### **4. The US Capital Judicial Assessment of Lethal Injection**

*a. Background and History*

1. Many commentators consider 1976 to be the start of the modern era of the death penalty in the United States and a turning point in litigation involving execution methods, particularly lethal injection. In 1976, in *Gregg v. Georgia*,<sup>8</sup> the United States Supreme Court ruled that the death penalty is not a per se violation of the Eighth Amendment.<sup>9</sup>

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<sup>8</sup> 428 U.S. 153 (1976).

<sup>9</sup> *Id.* at 187, 206–07 (plurality opinion). The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend VIII.



Thus, *Gregg* revitalized the U.S. death penalty, ending a nearly ten-year moratorium (from 1967 to 1976).<sup>10</sup>

2. With this resurgence came what has been called America’s “experiment” with the death penalty — the Court’s unpredictable attempt to reinstate and reform a punishment that most thought had ended with the moratorium.<sup>11</sup> Such attempts at reform also applied to execution methods. Indeed, after *Gregg*, several states were concerned about implementing electrocution, long considered a problematic form of execution due to a number of highly publicized and gruesomely botched electrocutions.<sup>12</sup>
3. As a result, states turned to lethal injection, purportedly a more humane and medicalized procedure that they believed would be more visually acceptable to the public. Oklahoma first adopted lethal injection in 1977 upon the recommendations of two physicians who created a three-drug lethal injection protocol consisting of the following: (1) a barbiturate anesthetic that would induce unconsciousness (sodium thiopental); (2) a total muscle relaxant that would paralyze an individual’s voluntary muscles (pancuronium bromide); and (3) a toxin that would induce cardiac arrest (potassium chloride). This method was supposed to put an inmate to death easily and compassionately, with the appearance of merely falling asleep.<sup>13</sup>
4. A large cluster of states quickly adopted lethal injection as their sole or primary mode of execution, even before the first lethal injection execution ever took place (in 1982). However, it was not until 2009 that every death penalty state in the country used lethal injection either as its sole execution method or one of two execution methods (along with electrocution, lethal gas, hanging, or the firing squad).<sup>14</sup> Yet, from the first lethal-injection execution in 1982<sup>15</sup> to the most recent executions close to forty years later in

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<sup>10</sup> See Michael Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment*, 106–25 (1973).

<sup>11</sup> Justice Blackmun referred to this process as an “experiment,” *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

<sup>12</sup> See generally Richard Moran, *Executioner’s Current: Thomas Edison, George Westinghouse, and the Invention of the Electric Chair* (2002) (discussing the history and development of the electric chair and the botched electrocution of William Kemmler); Austin Sarat, *Gruesome Spectacles: Botched Executions and America’s Death Penalty*, 179–210 (2014) (archiving botched executions, including by electrocution, from 1890 to 2010); Deborah Denno, *Is Electrocutation an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 *Wm. & Mary L. Rev.* 551 (1994) (detailing botched electrocution executions); *Botched Executions*, Death Penalty Info. Ctr., <http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions> [<https://perma.cc/KN6T-GE43>].

<sup>13</sup> See Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Dismantled the Death Penalty*, 76 *Fordham L. Rev.* 49, 65–70 (2007).

<sup>14</sup> See Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 *Geo. L. J.* 1331, 1341–43 (2014); See Death Penalty Information Center, <https://deathpenaltyinfo.org/n> Center.

<sup>15</sup> See Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 *Iowa L. Rev.* 319, 428–29 (1997) (discussing the execution of Charles Brooks, Jr., by lethal injection).

2022,<sup>16</sup> lethal injection has been an egregious and cruel method of execution that has only worsened over time.

5. With rare exception, lethal injection has not been subject to the Court's top-down regulation of states through the enforcement of federal constitutional law.<sup>17</sup> Instead, all execution statutes, including lethal injection statutes, have been state-created, except for the Federal Death Penalty Act.<sup>18</sup> My examination of all lethal injection statutes in the country shows that there are six main types;<sup>19</sup> state legislatures often share information and approaches and therefore influence one another as they change from one method of execution to the next.
6. From the late 1800s to the present, states commonly followed one another in a pattern, changing execution methods in the same general direction and order, from hanging to electrocution to lethal gas and then lethal injection.<sup>20</sup> As my two surveys (in 2001 and 2005) of all lethal injection protocols in all death penalty states showed, lethal injection protocols were—and remain—deficient and lacking in numerous ways, ranging from the shocking types and amounts of lethal injection drugs given to inmates, to the paltry selection, training, and qualifications of the lethal injection team and the lack of medical oversight.<sup>21</sup>
7. Indeed, century-long efforts by departments of corrections to seek the contributions of physicians, nurses, and other medical personnel in executions have demonstrated mixed results in terms of quality and accountability. While much of the involvement of medical personnel has been covert given the professional repercussions that could result, there is substantial evidence that physicians and other medical professionals have long participated in the development and application of methods of execution.<sup>22</sup> At the same

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<sup>16</sup> See Death Penalty Information Center, <https://deathpenaltyinfo.org/news/alabama-execution-of-joe-nathan-james-marred-by-failures-to-set-iv-line-embarrassing-dress-code-controversy-and-disrespect-of-victims-family> (discussing the execution of Joe Nathan James). See also Austin Sarat, *Lethal Injection and the False Promise of Humane Execution* (2022) (detailing the U.S.'s long history of lethal injection botches); Deborah W. Denno, *Back to the Future with Execution Methods*, in the Eighth Amendment and its Future in a New Age of Punishment, 212-33 (Meghan J. Ryan & William W. Berry III, eds. 2020) (discussing recent botched executions).

<sup>17</sup> The two exceptions are *Baze v. Rees*, 553 U.S. 35 (2008) (plurality opinion), and *Glossip v. Gross*, 135 S. Ct. 2726 (2015), in which the Court rejected challenges to state lethal injection protocols.

<sup>18</sup> 18 U.S.C. §§ 3591–3598 (2012).

<sup>19</sup> See Denno, *supra* note 8, at 409-11.

<sup>20</sup> *Id.* at 364–70, 373–75; Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 90–125 (2002) [hereinafter Denno, *When Legislatures Delegate Death*].

<sup>21</sup> Denno, *When Legislatures Delegate Death*, *supra* note 13, at 116–25 (discussing the survey conducted in 2001); see Denno, *supra* note 6, at 91–101 (discussing the survey conducted in 2005).

<sup>22</sup> See Am. Coll. Of Physicians et al., *Breach of Trust: Physician Participation in Executions in the United States*, 44 (1994) (“In the course of our research, we found that physicians are involved in all methods of executions, especially ones performed by lethal injection, in violation of professional ethical guidelines.”); Ty Alper, *The Role of State Medical Boards in Regulating Physician Participation in Executions*, *J. Med.*

time, the presence of doctors or medical personnel does not ensure a humane execution. For example, in the tragedy that spurred *Glossip v. Gross*<sup>23</sup> — Clayton Lockett’s terribly botched 2014 execution in Oklahoma — both a doctor and an emergency medical technician attempted to infuse Lockett with drugs in a situation that suggested gross incompetence.<sup>24</sup> Moreover, doctors’ ethical obligations can unexpectedly interact with legal dictates in ways that preclude their participation in executions — a clash evident in *Morales v. Hickman*,<sup>25</sup> the incident led to California’s 2006 stalemate on all executions. Thus, while helpful in some cases, medical professionals generally would not necessarily provide the extralegal remedy that lethal injection needs to survive without warranted scrutiny.

### *b. Supreme Court Involvement*

1. By 2007, there were so many legal challenges to the constitutionality of the three-drug protocol — particularly targeting the pain inflicted when the barbiturate fails to render the inmate unconscious — that states had trouble carrying out executions. The Court ultimately tried to resolve this uncertainty in *Baze v. Rees*, where it rejected an Eighth Amendment challenge to Kentucky’s three-drug lethal injection protocol,<sup>26</sup> which was essentially the same as that created in Oklahoma in 1977. As the *Baze* Court explained, the petitioners failed to show that Kentucky’s protocol created a “substantial risk of serious harm” or “an ‘objectively intolerable risk of harm’”<sup>27</sup> to the inmate compared to “known and available alternative[.]” methods of execution.<sup>28</sup>
2. Ironically, within a year of *Baze*, a national shortage of sodium thiopental — the crucial first drug in the three-drug protocol — began to affect every death penalty state’s ability to carry out lethal injection.<sup>29</sup> States scrambled for a substitute either domestically or abroad, most notably in European countries. Yet, not only did European sources of lethal injection drugs run dry, but the FDA also prohibited importing lethal injection drugs from all countries.<sup>30</sup> States next began experimentation with many different substitutes for lethal injection drugs, creating a

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Licensure & Discipline Fall 2009, at 16, 18; Denno, *supra* note 8, at 412–38; Deborah W. Denno, *The Firing Squad as “a Known and Available Alternative Method of Execution”* *Post-Glossip*, 49 Mich. J. L. Reform 749, 769–70 (2016).

<sup>23</sup> 135 S. Ct. 2726 (2015) (plurality opinion).

<sup>24</sup> See Cary Aspinwall & Ziva Branstetter, *Records Reveal Lack of Protocol in Clayton Lockett’s Oklahoma Execution*, *Tulsa World* (Mar. 16, 2015, 11:47 PM), [http://www.tulsaworld.com/homepagelatest/records-reveal-lack-of-protocol-in-clayton-lockett-s-oklahoma/article\\_e4f17853-160c-530a-9f36-928a0fd9f605.html](http://www.tulsaworld.com/homepagelatest/records-reveal-lack-of-protocol-in-clayton-lockett-s-oklahoma/article_e4f17853-160c-530a-9f36-928a0fd9f605.html) [<https://perma.cc/2P8M-4ZR3>] (documenting that both a paramedic and doctor were attempting to locate a vein on Lockett and to start an IV for his lethal injection).

<sup>25</sup> 415 F. Supp. 2d 1037 (N.D. Cal. 2006).

<sup>26</sup> 553 U.S. 35, 41 (2008) (plurality opinion).

<sup>27</sup> *Id.* at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846 (1994)).

<sup>28</sup> *Id.* at 61.

<sup>29</sup> Denno, *supra* note, 15 at 765–69.

<sup>30</sup> *Id.*; see also *Cook v. FDA*, 733 F.3d 1 (D.C. Cir. 2013).

multitude of protocols.<sup>31</sup> Because all of these drugs are made for healing, commentators vehemently argued that their use in bringing about death is essentially experimental.

3. In 2015, the issue of drug substitutes came to the Court in *Glossip v. Gross*<sup>32</sup> seven years after *Baze* had validated the original three-drug protocol. The *Glossip* Court upheld Oklahoma’s use of a controversial drug (midazolam), concluding that it did not create “a substantial risk of severe pain” and that petitioners failed to “identify a known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment method-of-execution claims.”<sup>33</sup> Yet, states’ uses of midazolam have led to some of the most shocking lethal injection botches this country has experienced, and this inhumane chaos has continued.<sup>34</sup>
4. Both *Baze* and *Glossip* have hardly sapped the ongoing strength of lethal injection litigation. As my research has shown, because of the drug shortages, *Baze* was greatly weakened as precedent — in essence, the decision upholds a lethal injection protocol that relies on one drug that is no longer available. Conversely, *Glossip* upholds the use of a controversial lethal injection drug that many states still will not use despite the Supreme Court’s stamp of approval. While lethal injection litigation has continued full force, it is clear that the medical profession and, increasingly, pharmaceutical companies, are the prime “extra-legal institutions” that help steer the litigation’s direction.
5. In 2019 the Court’s third lethal injection case, *Bucklew v. Precyth*,<sup>35</sup> did not concern the effects of a particular drug but rather the impact of a lethal injection execution on a Missouri death row inmate, Russell Bucklew, with a severe and irreversible physiological impairment. Bucklew had blood-filled tumors in his head, neck, and throat that could rupture and cause him to choke and suffer “excruciating” pain.<sup>36</sup> He was also concerned about the experience, training, and qualifications of the team that would be instrumental in his execution, particularly questioning how much they had been told about his condition and whether they would be able to accommodate it and control his pain.<sup>37</sup> In addition, although Bucklew identified nitrogen hypoxia as an alternative method of execution, his prevailing argument was that he should not have to identify an alternative method at all, given his unusual medical condition.<sup>38</sup> Yet again, the Court defended a state’s lethal injection protocol, rejecting Bucklew’s claim

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<sup>31</sup> Denno, *supra* note 7, at 1380; *see generally* Denno, *supra* note 9 (detailing the vast array of lethal injection protocols).

<sup>32</sup> 135 S. Ct. 2726 (2015) (plurality opinion).

<sup>33</sup> *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015) (citing *Baze*, 553 U.S. at 61 (2008) (plurality opinion)).

<sup>34</sup> See Death Penalty Information Center, <https://deathpenaltyinfo.org/>.

<sup>35</sup> 139 S. Ct. 112 (2019).

<sup>36</sup> *Id.* at 4.

<sup>37</sup> *Id.* at 24 n.2.

<sup>38</sup> *Id.* at 6-7.

that executing him using the state's lethal-injection protocol would violate the Eighth Amendment.<sup>39</sup> While many commentators found the 5-to-4 decision disturbing, it is difficult to forecast the nature and extent of *Bucklew's* impact given the opinion's unusual facts and circumstances.<sup>40</sup> Furthermore, neither side of the case sufficiently specified a nitrogen hypoxia protocol, leaving open the question of how the technique would be implemented.

6. The Court's decisions in *Baze*, *Glossip*, and *Bucklew* have yet to quell the litigation concerning lethal injection, either with respect to the drugs used in lethal injection protocols or the physical challenges facing particular inmates. In addition, the ongoing litigation has rendered lethal injection a patchwork quilt of the types and amounts of drugs, so much so that the *Baze* Court's safety-in-numbers claim that lethal injection states were unified in their use of a standard three-drug protocol is no longer viable.

### c. Conclusion

1. On the legislative, judicial, and prison-administrative levels there has been a collective, concerted effort over the decades to perpetuate the death penalty at the risk of preserving torturous executions. If it appeared as though a method of execution was going to come under constitutional attack, a state would switch to another method of execution (usually lethal injection). Or prison officials would change to a new type of drug if the last one proved problematic (for example, if it was associated with a botched execution). Moreover, at all three levels of administration, many states make similar kinds of decisions about their lethal injection procedures in order to overcome national-level challenges to the death penalty. These similarities may come about when one state simply follows what another state is doing or when states share strategies or sources of pharmaceuticals.
2. The future of execution methods is challenging to predict given the secrecy, incompetence, politics, and ignorance that long have enveloped the death penalty in the U.S. The coming years will gauge the extent to which inmates will press for methods beyond ever-changing lethal injection drugs that create risks and constitute experimentation. The drug fiasco has raised doubts about the humaneness and effectiveness of lethal injection, thus fostering a legal, cultural, and scientific story that will continue to have a devastating effect on the lethal injection process and, perhaps, on the death penalty as a whole.

## 5. Alabama's Lethal Injection as a Violation of International Law

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<sup>39</sup> *Id.* at 29-31.

<sup>40</sup> See Deborah W. Denno, *Physician Participation in Lethal Injection*, 380 *New Eng. J. Med.* 1790-91 (2019).

1. The medical evidence presented in this complaint concerning the torture and inhuman punishment inflicted during Alabama’s execution of Mr. Joe Nathan James (in section 3), and the inability of the US capital judicial process to provide either state or federal safeguards protecting future condemned prisoners from receiving torture and inhuman punishment (in section 4), demonstrates that there is an intolerable likelihood that Mr. Alan Eugene Miller will receive similar torturous and inhuman treatment in his execution.

2. It is submitted in this section, therefore, that such a circumstance constitutes a failure of the State of Alabama and the federal government of the United States to adhere to international standards prohibiting torture and inhuman punishment.

a. *International Standards Prohibiting Torture and Inhuman Punishment through Lethal Injection*

1. The articulation of execution methods as manifesting torture and inhuman punishment has incrementally evolved under UN assessment. The UN treaty standards have been supplemented by ECOSOC definitions, and further enhanced by the various UN review mechanisms applying the legislative language to the protocols for the administration of lethal injection.

2. Torture and inhuman punishment is prohibited under the *Universal Declaration of Human Rights*, (UDHR)<sup>41</sup> article 5, and the *International Covenant on Civil and Political Rights*, (ICCPR)<sup>42</sup> article 7, provides the enumeration of, ‘No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.’ The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (CAT)<sup>43</sup> provides a confined definition:

Article 1

1. For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as...punishing him for an act he or a third person has committed or is suspected of having committed.

3. These treaty thresholds have been provided contextual enhancement within the ECOSOC *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, (Safeguards)<sup>44</sup> and Safeguard 9 states, ‘[w]here capital punishment occurs, it

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<sup>41</sup> Universal Declaration of Human Rights, GA Res. 217 A (III), UN Doc. A/180.

<sup>42</sup> International Covenant on Civil and Political Rights, (1976) 999 UNTS 171.

<sup>43</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46.

<sup>44</sup> Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ECOSOC Res. 1984/50.

shall be carried out so as to inflict the minimum possible suffering.’ This was iterated in *General Comment No. 20: Article 7*, as the Committee noted:

when the death penalty is applied by a State party for the most serious crimes, it must not only be limited in accordance with article 6 but it must be carried out in such a way as to cause the least possible physical and mental suffering.<sup>45</sup>

b. *The Failure of the State of Alabama to Provide Adequate Review of its Lethal Injection Protocol*

1. The State of Alabama has failed to adequately review its execution protocol and remedy the deficiencies which cause torture and inhuman punishment in violation of the above cited, UDHR, ICCPR, CAT and Safeguards.
2. Under the CAT article 2 (1), ‘[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction,’ and what constitutes effective investigation to prevent torture and inhuman punishment is identified in the, *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (Principles):
  1. The purposes of effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment [] include the following:
    - (a) Clarification of the facts and establishment and acknowledgement of individual and State responsibility for victims and their families;
    - (b) Identification of measures needed to prevent recurrence;<sup>46</sup>
3. This complaint provides medical information concerning the physical trauma inflicted upon Mr. Joe Nathan James which demonstrates that the State of Alabama has failed to provide an adequate review of its method of lethal injection, and the state and federal capital judicial process is currently ill-equipped to remedy the execution protocol to ensure it is sufficiently consistent with the ICCPR, CAT, Safeguards, and the Principles, identified above.
4. The arguments within our complaint find cumulative support through the numerous historical failings of the United States identified in previous state reviews by various

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<sup>45</sup> General Comment 20: Article 7 (Prohibition of Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment), Adopted at the Forty-fourth Session of the Human Rights Committee, on 10 March 1992, para. 6.

<sup>46</sup> Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Resolution 4 December 2000.

UN mechanisms. In 2006 the Conclusions and recommendations of the periodic review of the United States of America, by the Committee Against Torture stated:

31. The Committee is concerned at the fact that substantiated information indicates that executions in the State party can be accompanied by severe pain and suffering [].

5. Therefore the Committee recommended:

The State party should carefully review its execution methods, in particular lethal injection, in order to prevent severe pain and suffering.<sup>47</sup>

6. The Office of the High Commissioner for Human Rights noted that following the botched execution of Clayton Lockett in 2014, the ‘apparent extreme suffering caused by malfunctioning lethal injections,’<sup>48</sup> may, ‘amount to cruel, inhuman and degrading treatment according to international human rights law,’<sup>49</sup> and so the, ‘United States [should] review its execution methods in order to prevent severe pain and suffering.’<sup>50</sup>

7. Furthermore in 2014 the Human Rights Committee’s Concluding observations on the fourth periodic report of the United States of America also:

notes with concern reports about the administration, by some states, of untested lethal drugs to execute prisoners and the withholding of information about such drugs [].

8. And therefore, advised the government to:

(d) Ensure that lethal drugs used for executions originate from legal, regulated sources, and are approved by the United States Food and Drug Administration and that information on the origin and composition of such drugs is made available to individuals scheduled for execution.<sup>51</sup>

9. In referring to this HRC observation on the review of the United States, the latest edition in 2019 of the *General Comment No. 36 on the right to life* states:

40. States parties that have not abolished the death penalty must respect article 7 of the Covenant, which prohibits certain methods of execution. Failure to

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<sup>47</sup> Conclusions and recommendations of the Committee against Torture, United States of America, CAT/C/USA/CO/2, 25 July, 2006, para. 31.

<sup>48</sup> UN rights office calls on US to impose death penalty moratorium after botched execution, 2 May 2014 <https://news.un.org/en/story/2014/05/467422>

<sup>49</sup> Press briefing notes on South Sudan, Ethiopia, United States, Palestine and Thailand / South East Asia 02 May 2014, <https://www.ohchr.org/en/press-briefing-notes/2014/05/press-briefing-notes-south-sudan-ethiopia-united-states-palestine-and>

<sup>50</sup> Ibid.

<sup>51</sup> Concluding observations on the fourth periodic report of the United States of America, CCPR/C/USA/CO/4, 23 April 2014, para. 8.



respect article 7 would inevitably render the execution arbitrary in nature and thus also in violation of article 6. The Committee has already opined that...injection of untested lethal drugs...[is] contrary to article 7.<sup>52</sup>

10. These issues have also been raised in 2020 at the United State's 3<sup>rd</sup> Cycle of the Universal Periodic Review in the Human Rights Council by the Joint Submission of the UPR Project at BCU and the Pace Criminal Justice Institute:

19. Although the US Supreme Court affirmed the constitutionality of lethal injection in *Baze v. Rees*, there is a significant lack of transparency about the execution protocols in many US states. Consequently, states have encountered various difficulties in procuring the requisite drugs for use in executions. There have been examples of state prison maladministration in which inmates have suffered severe pain following the use of unsanctioned drugs, and other examples where, had the inmate been executed, he could have been subjected to severe pain due to the wrong drugs being used.

20. The situation has been complicated further as, in July 2019, the Department of Justice (DOJ) assumed oversight from the Food and Drug Administration (FDA) over the regulation of execution drugs. This change in policy could potentially widen the opportunities for executions to take place using unsafe drugs which could render "needless suffering" in executions, violating the Eighth Amendment of the US Constitution. This would also implicate the prohibition of inhumane punishment under the ICCPR Article 7 and Safeguard 9.<sup>53</sup>

11. It is clear that the UN's review mechanisms have significantly questioned the United States' compliance with the corpus of international safeguards against torture and inhuman punishment. Due to our concerns in the present case and as evidenced by the botched execution of Mr. Joe Nathan James, we believe that the United States and the State of Alabama, has not fulfilled the various UN mechanism's recommendations for careful review of its lethal injection protocol. The State has failed to adequately review its punishment process consistent with the safeguards in international law as cited above, including, CAT article 2(1) and the Principles article 1.

*c. Human Dignity in Executions*

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<sup>52</sup> General Comment No. 36, Article 6: right to life, CCPR/C/GC/36, 3 September 2019, para 40.

<sup>53</sup> Joint Stakeholder Report of the Centre for Human Rights, the Centre for American Legal Studies, and the Centre for Law, Science and Policy at the School of Law, Birmingham City University, and the Pace Criminal Justice Institute at the Elisabeth Haub School of Law, Pace University, 3<sup>rd</sup> UPR Cycle, 36<sup>th</sup> Session of the UPR Working Group, May 2020, <https://www.bcu.ac.uk/law/research/centre-for-human-rights/consultancy/upr-project-at-bcu/upr-project-usa>

1. We propose that a focus on human dignity should also be applied to the consideration of this complaint. In 2012, Mr. Juan Méndez, a former UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, stated:

a new approach was needed to frame the debate over the legality of the death penalty within the context of human dignity and the ban on torture and cruel, inhuman or degrading punishment.<sup>54</sup>

2. We agree and argue that this would be a cogent human rights lens through which to review the torture and inhuman punishment applied by Alabama's use of lethal injection.
3. Supplementing the consideration of the presence of torture and inhuman punishment with an assessment of the violation of human dignity would create a holistic approach consistent with the ICCPR article 10 (1), which states:

All persons deprived of their liberty shall be treated with humanity and with respect of the inherent dignity of the human person.

4. The importance of a specific consideration of human dignity is also reflected within the preambular text of the CAT which affirmed that the rights identified within the convention, 'derive from the inherent dignity of the human person.'
5. This would also be consistent and reflective of the jurisprudence identifying that the death penalty is a violation of human dignity, for example, by Justice William Brennan in the US Supreme Court in *Furman v. Georgia*<sup>55</sup> and *Gregg v. Georgia*,<sup>56</sup> and by Chaskalson P, in the Constitutional Court of South Africa in *State v. Makwanyane and Mchunu*.<sup>57</sup>

#### *d. The Human Rights Committee Decisions*

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<sup>54</sup> In Third Committee, Special Rapporteur on Torture Calls on States to Seriously Reconsider Whether Death Penalty Amounts to Cruel, Inhuman Treatment, Sixty-seventh General Assembly, Third Committee, 20th & 21st Meetings (AM & PM), GA/SHC/4046, 23 October 2012. This has continued through the wider UN considerations on the death penalty, including High-level panel discussion on the question of the death penalty, Report of the United Nations High Commissioner for Human Rights, UNGA, A/HRC/30/21 (16 July 2015), Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty Report of the Secretary-General UN Doc E/2015/49 (13 April 2015).

<sup>55</sup> *Furman v. Georgia*, 408 U.S. 238, 305 (1972), Justice Brennan stated that the death penalty, "stands condemned as fatally offensive to human dignity," and that the punishment, "quite simply, does not . . . comport[] with human dignity."

<sup>56</sup> *Gregg v. Georgia*, 428 U.S. 153, 230 (1976), Justice Brennan stated, 'The fatal constitutional infirmity in the punishment of death is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.'

<sup>57</sup> *State v. Makwanyane and Mchunu*, Case No. CCT/3/94, 6 June 1995, Chaskalson, P., stated, '[the death penalty] is an inhuman punishment for it '...involves, by its very nature, a denial of the executed person's humanity', (citing *Furman*) and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state,' para. 26.

1. In 1993 in *Ng v. Canada*, the Human Rights Committee stated in considering execution by gas asphyxiation, that it ‘may cause prolonged suffering and agony and does not result in death as swiftly as possible, as asphyxiation by cyanide gas may take over 10 minutes.’<sup>58</sup> Part of the Committee’s determinations that the execution method did not meet the standard of least possible physical and mental suffering, involved a temporal assessment of the duration from the time of the initiation of the execution to the moment of the death of the inmate.
2. In his 2012 discussion of the Committee’s earlier jurisprudence, Mr. Juan Méndez, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, stated that along with the time and temporal assessment, the Committee in its review, ‘called on the United States of America, as one of the countries in which lethal injection is used, to review its execution methods in order to prevent severe pain and suffering,’<sup>59</sup> and so:

38. Following a number of executions in the United States, it has recently become apparent that the regimen, as currently administered, does not work as efficiently as intended. Some prisoners take many minutes to die and others become very distressed. New studies conclude that even if lethal injection is administered without technical error, those executed may experience suffocation, and therefore the conventional view of lethal injection as a peaceful and painless death is questionable. Experts suggest that current protocols used for lethal injection in the United States probably violate the prohibition of cruel and unusual punishment.<sup>60</sup>

3. Although *Ng v. Canada* considered gas asphyxiation as an execution method, it provided a temporal assessment under the ICCPR article 7 of the ‘duration of the agony.’ This is implicated in the present complaint as time and temporal pressures in the lethal injection protocol (it took 3 hours in the case of Mr. Joe Nathan James) renders error which contributes to the infliction of physiological and psychological trauma.
4. Following this temporal assessment, it is clear that in taking 3 hours to execute Mr. James, the State of Alabama has violated the threshold of ICCPR article 7.
5. However, we must consider the historical adjudicative context, and the greater clarity now provided of the deficiencies of the lethal injection execution protocol in our present

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<sup>58</sup> *Ng v. Canada*, communication no. 469/1991, 5 November 1993.

<sup>59</sup> Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/67/279, 9 August 2012, para. 32.

<sup>60</sup> *Ibid.*, para. 38. Other UN Special Rapporteurs have proposed that the death penalty is a cruel, inhumane and degrading punishment, see Mr. Manfred Novak, in his report as UN Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, UN Doc. A/HRC/10/44 (14 January 2009), para 38.

time. In 1993 in *Kindler v. Canada*,<sup>61</sup> the Human Rights Committee stated that in the absence of significant evidence the argument that lethal injection violated ICCPR article 7 was dismissed, and whilst some evidence was presented in *Cox v. Canada*,<sup>62</sup> in 1994 the Committee followed the *Kindler* reasoning. We argue that over the past 28-years there is now a corpus of evidence sufficient to demonstrate that placing all of the deficiencies of lethal injection within a cumulative assessment, proves that there is a systemic presence of torture and inhuman punishment.

6. Hence, as cited above, within the period of 1994-2022 various UN bodies and mechanisms have reviewed the US application of lethal injection. There is now a comprehensive position ascertainable from the perspective of the UN's standards and safeguards against torture. Through the cumulative observations and recommendations of the periodic state reviews, the Universal Periodic Review, and the UN Special Procedures, it can be argued that the United States and the State of Alabama has inflicted torture and inhuman punishment through its administration of the state's lethal injection protocol.
7. In *Cox* the Committee noted the contribution of the US expert on the death penalty, Professor Michael Radelet:

14.4 As to the method of execution, author's counsel...contends that execution by lethal injection would violate article 7 of the Covenant. He argues, on the basis of a deposition by Professor Michael Radelet...that there are many examples of 'botched' executions.<sup>63</sup>

8. We argue that since 1994 there have been numerous further botched executions. What Professor Radelet submitted in *Cox* is still evident today. The execution of Mr. Joe Nathan James falls into the category of a botched execution, and there is an intolerable risk that Mr. Kenneth Eugene Smith will suffer the same fate.
9. If initiated, Mr. Smith's execution will very likely violate international human rights law.

## 6. Concluding Comments

1. We therefore request that Dr Alice Jill Edwards and Mr. Morris Tidball-Binz make appropriate communications under your HRC resolution mandates based upon the following complaints:
  - a. On 28 July 2022 Mr. Joe Nathan James was executed through lethal injection by the Alabama Department of Corrections. The execution process took 3 hours

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<sup>61</sup> *Kindler v. Canada*, communication no. 470/1991, 30 July 1993.

<sup>62</sup> *Cox v. Canada*, communication no. 539/1993, 31 October 1994.

<sup>63</sup> *Ibid.*, para. 14.4.

to complete. This clearly constituted an inordinate amount of time which *prima facie* indicates maladministration and the presence of error.

- b. The autopsy conducted by Dr. Zivot found evidence that Mr. James had been subjected to significant pain due to a 'cut-down' procedure for cannulation. This was an invasive procedure and invasion of Mr. James' body unsanctioned by the State of Alabama's execution protocol.
- c. During the evaluation of Mr. James' lungs, Dr. Zivot found evidence of pulmonary edema fluid indicating that he had experienced the traumatic sensation of suffocation.
- d. The State execution protocol does not provide adequate protection of the rights of the condemned inmate. Therefore, the state and federal capital judicial process is unable to currently provide adequate safeguards against Alabama inflicting torture and inhuman punishment.
- e. The State has failed to safeguard condemned inmates against receiving a lethal injection that complies with international human rights. Considering international guidelines, it has failed to adequately review its lethal injection protocol to ensure that the punishment will be administered in a humane way that respects human dignity and protects against torture.
- f. Consequently, there is an intolerable risk that Mr. Alan Eugene Miller will receive torture and an inhuman form of punishment during his execution scheduled for 22 September 2022.
- g. It would be appropriate under international human rights law for the execution of Mr. Alan Eugene Miller to be suspended until Alabama is able to adequately review its execution protocol.
- h. We therefore respectfully request that in accordance with your Special Procedure mandates under Human Rights Council resolutions, that appropriate interventions are made in this case with the State of Alabama and the US Secretary of State.

*Respectfully submitted by:*



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