

**PUBLIC**

**AI Index: AMR 51/079/2004**

**11 May 2004**

**Further information on UA 136/04 (AMR 51/060/2004, 2 April 2004) - Death penalty / Legal concern**

**USA (Oklahoma)                      Osvaldo Netzahualcóyotl Torres Aguilera (m), Mexican national, aged 29**

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On 7 May the Oklahoma Pardon and Parole Board voted 3-2 to recommend clemency for Mexican national Osvaldo Torres. The Board's recommendation – that Osvaldo Torres' death sentence be commuted to life imprisonment – now goes to Governor Brad Henry, who can accept or reject it. He can also issue a temporary reprieve. Osvaldo Torres is scheduled to be executed on 18 May 2004 for a double murder committed in 1993. He was sentenced to death in 1996.

At the clemency hearing, the Mexican ambassador to the USA appealed for the death sentence not to be carried out. Osvaldo Torres was denied his consular rights under the Vienna Convention on Consular Relations (VCCR). Under Article 36 of the VCCR, the authorities must notify all detained foreign nationals "without delay" of their right to have their consulate informed of their detention. Osvaldo Torres's case featured in a 31 March 2004 judgment by the International Court of Justice (ICJ), in a case brought by Mexico on behalf of its nationals on US death rows, that the USA had violated its VCCR obligations and that it must provide effective judicial review and reconsideration of the impact of the violations in the cases of the foreign nationals involved.

At the time of his arrest, Osvaldo Torres was an 18-year-old without a lawyer who had had minimal contact with the US criminal justice system. He was registered with the immigration authorities as a resident alien, which would have become known to the police when they conducted a routine background check on him upon his arrest. Despite this, the authorities never informed him of his rights under the VCCR. Mexico only learned of the case in 1996 when his family contacted the Mexican consulate for help. By then, Osvaldo Torres had already been convicted and sentenced to death. Timely assistance from the Mexican consulate could have prevented the imposition of the death penalty, either by persuading the prosecutor not to seek a death sentence or by assisting the defence at the trial.

The crime in question was the murder of Maria Yanez and her husband Francisco Morales, who were shot dead in their Oklahoma City home in July 1993. Their 14-year-old daughter was woken by gunfire and rang the police. On their way to the house, police arrested George Ochoa and Osvaldo Torres not far from the crime scene. The two men were tried jointly on charges of first degree burglary and first degree murder with malice aforethought. On this latter charge, the prosecution had to prove beyond a reasonable doubt that each defendant intended to kill the victims. According to the Oklahoma Court of Criminal Appeals, "the State's theory, which is supported by the evidence, shows that Torres was not the shooter." In order to obtain a first degree murder conviction, the state therefore had to prove that Osvaldo Torres "personally intended the death of the victim and aided and abetted with full knowledge of the intent of the perpetrator." The state produced some evidence which, although not watertight, tended to show that Osvaldo Torres was present at or near the crime. The evidence in support of the aiding and abetting theory was not strong, however, with no evidence presented that Osvaldo Torres committed, planned or helped to plan the murders, or knew that his co-defendant planned to kill. George Ochoa remains on death row, without an execution date.

One of the state's witnesses, a 15-year-old girl, testified that the man she saw with George Ochoa before the crime had carried a gun. The pistol she described at trial, never found, was not the weapon used in the murders. This witness has since recanted her testimony and said that she was coerced by the prosecution into saying that she saw a gun. Despite her affidavit, the Oklahoma Court of Criminal Appeals relied upon her trial testimony in upholding Torres's conviction for first degree murder with malice aforethought: "The

circumstantial evidence supports a finding of intent, *particularly given the evidence that Torres had a gun with him prior to the killings*" (emphasis added). The 10<sup>th</sup> Circuit Court of Appeals has in turn upheld the conviction and death sentence, despite acknowledging that the evidence against Torres is "susceptible to interpretation". One of the three judges wrote: "I do not believe that the evidence is sufficient to support Mr Torres's murder convictions."

At the clemency hearing on 7 May, Osvaldo Torres told the Pardon and Parole Board: "I'm not going to sit here and tell you I never did anything wrong." He acknowledged that he intended to burgle the house where the victims were shot. He said, however, that "I never killed anyone, and I never knew George was going to kill anyone."

Six of the seven recommendations for clemency made by the state Pardon and Parole Board in capital cases since 2001 have been rejected by Governor Henry or his predecessor.

For more detail see: *USA: Osvaldo Torres, Mexican national denied consular rights, scheduled to die*, AI Index: AMR 51/057/2004, 2 April 2004, <http://web.amnesty.org/library/Index/ENGAMR510572004>.

**RECOMMENDED ACTION: Please send appeals to arrive as quickly as possible, in English or your own language, in your own words:**

- expressing sympathy for the family and friends of Maria Yanez and Francisco Morales, and explaining that you are not seeking to condone the manner of their deaths or to deny the suffering caused;
- noting the finding of the International Court of Justice that Osvaldo Torres's consular rights were violated;
- noting the state's position that Osvaldo Torres did not actually kill anyone, and noting that a key prosecution witness has withdrawn her testimony indicating that Torres was armed, thereby further weakening the evidence supporting his first degree murder conviction;
- welcoming the Pardon and Parole Board's recommendation of clemency;
- urging the Governor to accept the Board's recommendation in the interest of justice and the rule of law.

**APPEALS TO:**

Governor Brad Henry, 212 State Capitol, 2300 N. Lincoln Blvd, Oklahoma City. OK 73105, USA

**Fax:** + 1 405 521 3353

**Email via:** <http://www.governor.state.ok.us/message.php>

**Salutation:** Dear Governor

**COPIES TO:**

The Honorable Colin Powell, Secretary of State, Department of State, 2201 C Street, NW, Washington DC 20520, USA

**Fax:** + 1 202 261 8577

and to diplomatic representatives of the USA and Mexico accredited to your country.

**PLEASE SEND APPEALS IMMEDIATELY.**