No. 05-8794

In The Supreme Court of the United States

CLARENCE E. HILL,

Petitioner,

v.

JAMES R. MCDONOUGH, Interim Secretary, Florida Department of Corrections, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF *AMICI CURIAE* OF HUMAN RIGHTS ADVOCATES, HUMAN RIGHTS WATCH, AND MINNESOTA ADVOCATES FOR HUMAN RIGHTS IN SUPPORT OF PETITIONER

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BRIEF *AMICI CURIAE*

INTEREST OF *AMICI CURIAE*

Human Rights Advocates, Human Rights Watch, and Minnesota Advocates for Human Rights hereby request that the Court consider this brief pursuant to Rule 37.2(a) in support of Petitioner Hill. Consent of Petitioner's Counsel of Record and the State District Attorney's Office has been obtained.[1]

Human Rights Advocates, a California non-profit corporation, founded in 1978, with national and international membership, endeavors to advance the cause of human rights to ensure that the most basic protections are afforded to everyone. Human Rights Advocates has a Special Consultative Status at the United Nations. Human Rights Advocates has submitted briefs as *amicus curiae* in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal statutes at issue.[2]

Human Rights Watch is a non-governmental organization established in 1978 to monitor and promote observance of internationally recognized human rights. It also

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[1] Letters from both counsel consenting to the filing of this brief are being sent with this brief to the Clerk of this Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, their members or their counsel made a monetary contribution to the preparation and submission of the brief.

[2] Examples of *amicus* briefs filed by Human Rights Advocates include those in the following cases: *Roper v. Simmons,* 543 U.S. 551 (2005); *Coalition for Econ. Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997); *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996); *Butt v. State*, 842 P.2d 1240, 4 Cal. 4th 668 (1992).

has Special Consultative Status at the United Nations. It regularly reports on human rights conditions in more than seventy countries around the world, and it actively promotes legislation and policies worldwide that advance protections in the area of domestic and international human rights and humanitarian law.

Minnesota Advocates for Human Rights ("Minnesota Advocates"), founded in 1983, is a volunteer-based nonprofit organization committed to the impartial promotion and protection of international human rights standards and the rule of law. Minnesota Advocates conducts a broad range of innovative programs to promote human rights in the United States and around the world, including human rights monitoring and fact finding, direct legal representation, education and training, and publications. Minnesota Advocates has produced more than fifty reports documenting human rights practices in more than twenty-five countries; educated more than 10,000 students and community members on human rights issues; and provided legal representation to thousands of low-income individuals. Minnesota Advocates' Death Penalty Project was organized in 1991 to recruit Minnesota attorneys to assist death row inmates with their post-conviction appeals. Minnesota Advocates previously has submitted *amicus curiae* briefs in numerous cases, including to the Inter-American Court of Human Rights.

Amici would like to take the opportunity to advise this Court of the pertinent international standards that may provide assistance in interpreting the United States constitutional provisions involved in this case. Specifically, *amici* would like to address issues raised by Petitioner regarding the use of the use of the lethal injection protocol currently employed by Florida Department of Corrections.

The applicable international standards include: 1) two international treaties ratified by the United States, and 2) the interpretation of relevant clauses of one of the treaties by the body specifically charged with enforcing the treaty.

While international law does not prohibit the death penalty, it does limit methods that may be used. The treaty law in this area requires that the death penalty be applied in such a manner as to cause the least possible physical and mental suffering. The parties have failed to address that requirement. Because the Court may find this new information helpful, *amici* request that the Court consider it.

STATEMENT OF FACTS

In a complaint brought under 42 U.S.C. § 1983 and filed in the United States District Court for the Northern District of Florida, petitioner Clarence Hill alleged that the defendants, acting under color of state law, are using a protocol for carrying out executions by lethal injection that creates a foreseeable and unnecessary risk of inflicting pain. This Court granted *certiorari* in order to determine whether such a claim is properly brought under 42 U.S.C. § 1983, or in a petition for writ of habeas corpus. *Amici* urge the Court to consider the international treaty obligations in determining the appropriateness of raising this claim under Section 1983.

Florida's procedures for lethal injection are not prescribed by statute but are left to the discretion of the Department of Corrections. At the present time, they appear to be the same as when they were described in *Sims v. State*, 754 So. 2d 657, 665 n.17 (2000):

> In all, a total of eight syringes will be used, each of which will be injected in a consecutive order into the IV tube attached to the inmate. The first two syringes will contain "no less than" two grams of sodium pentothal, an ultra-short-acting barbiturate which renders the inmate unconscious. The third syringe will contain a saline solution to act as a flushing agent. The fourth and fifth syringes will contain no less than fifty milligrams of pancuronium bromide, which paralyzes the muscles. The sixth syringe will contain saline, again as a flushing agent. Finally, the seventh and eighth syringes will contain no less than one-hundred-fifty milliequivalents of potassium chloride, which stops the heart from beating.

Virtually all U.S. jurisdictions that perform executions by lethal injection appear to use a similar three-chemical protocol. Recently, problems with California's cognate protocol were found in *Morales v. Hickman*, __ F. Supp.2d __, 2006 WL 335427 (N.D. Cal. Feb. 14, 2006), where the district court noted than in six out of thirteen California executions by lethal injection, the State's own execution logs "raise[d] at least some doubt as to whether the protocol actually is functioning as intended," *id*. at *6, and particularly observed that four of the logs "contain indications that there may have been problems associated with the administration of the chemicals that may have resulted in the prisoners being conscious during portions of the executions," *id*. at 4 (quoting *Beardslee v. Woodford*, 395 F.3d 1064, 1075 (9th Cir. 2005)).

The trauma experienced by a person who regains or retains consciousness, who cannot communicate that fact because he has received a paralytic agent, and who is then

subjected to a painful procedure is almost unimaginable, as shown by the experience of Carol Weihrer:

> According to Weihrer's affidavit, she underwent eye surgery. The sedative she received was ineffectual and left her conscious during the entire surgery. Because of the administration of a neuromuscular blocking agent like pancuronium bromide, however, she was unable to indicate her consciousness and horrific pain to the doctor removing her eyeball for surgical repair: "I therefore experienced what has come to be known as Anesthesia Awareness, in which I was able to think lucidly, hear, perceive, and feel everything that was going on during the surgery, but I was unable to move. It burnt like the fires of hell. It was the most terrifying, torturous experience you can imagine. The experience was worse than death."

Press Release, Office of the Ohio Public Defender, Ohio's Execution Procedure's Not Fit for a Dog, http://opd.ohio.gov/press/pr_12_31-03.htm (Dec. 31, 2003) (quoting Affidavit of Carol Weihrer and describing Section 1983 complaint and attachments filed that day by condemned inmates Lewis Williams Jr. and John Glenn Roe).

In the instant case, the district court did not address the substance of Clarence Hill's Section 1983 complaint, and instead dismissed the action on jurisdictional grounds. The Eleventh Circuit affirmed that decision.

ARGUMENT

UNITED STATES TREATY OBLIGATIONS SUPPORT PETITIONER'S CONTENTION THAT THE CURRENT PROTOCOL FOR LETHAL INJECTION VIOLATES THE EIGHTH AMENDMENT

The International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter Covenant], is a United Nations treaty ratified by the United States in 1992. S. Res. 4783, 102d Cong., 2d Sess., 138 CONG. REC. S4781-84 (1992) (enacted). As of February 27, 2006, there were 155 parties to the Covenant. United Nations Treaty Collection, *Multilateral Treaties Deposited with the Secretary-General*, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp (last visited February 27, 2006). The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, annex, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter Convention Against Torture], is also a treaty ratified by the United States in 1994. S. Res. 17491-2, 101st Cong., 2d Sess., 136 CONG. REC. S. 17486-01 (1990) (enacted). As of February 27, 2006, there were 141 parties to the Convention. United Nations Treaty Collection, *Multilateral Treaties Deposited with the Secretary-General*, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp (last visited February 27, 2006).

Under Article VI of the United States Constitution, a ratified treaty is part of the supreme law of the land. Ratification is not to be treated lightly, and such action by the President and the Senate evidences the acceptance of the language of the Covenant, except to the extent that

reservations are specified. The document should, therefore, provide meaningful guidance to the Court.[3]

Article 7 of the Covenant provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Covenant, *supra*, at art. 7. Article 4(2) of the Covenant indicates that Article 7 is at no times derogable. *Id.* at art. 4(2). In addition to the prohibition against torture, the Convention Against Torture, *supra,* in Article 16, § 1 provides:

> Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The Human Rights Committee is the body which officially monitors compliance with the Covenant. In its

[3] The Senate consent to the Covenant was accompanied by a declaration "that the provisions of Articles 1 through 27 are not self-executing." S. Res. 4783, 102d Cong., 2d Sess. (1992). The legislative history shows that those words were intended to prohibit only a private and independent cause of action. The declaration does not preclude courts from using the treaty as a guide in elucidating constitutional guarantees. The United States government's position is that "courts could refer to the Covenant and take guidance from it." Statement of Conrad Harper, Legal Advisor, United States Department of State, to the United Nations Human Rights Committee, U.N. GAOR Hum. Rts. Comm., 53d Sess., 1405th mtg., U.N. Doc. HR/CT/404 (1995). Further, the declaration does not affect the obligations of the United States under the Covenant. *See*, David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: the Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183 (1993).

comments concerning Article 7 the Committee stated that "when the death penalty is applied by a State party for the most serious crimes, . . . it must be carried out in such a way as to cause the least possible physical and mental suffering." CCPR Gen. Comment 20, U.N. Hum. Rts. Committee, 44th Sess., at ¶ 6, U.N. Doc. CCPR/C/21/Add. 3 (1992). The Eighth Amendment to the United States Constitution prohibits "cruel and unusual punishments." U.S. CONST. amend. VIII. Because the United States now has ratified the Covenant, the development of Article 7 should help courts construe the scope of the Eighth Amendment's final clause. The Covenant has become a part of United States law and thus surely is relevant to the meaning of the Eighth Amendment.[4]

The allegations in this case indicate that carrying out an execution using the current protocol for lethal injection does violate Article 7, as plainly written and officially construed. The use of this protocol does not reliably "cause the least possible physical and mental suffering."[5]

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[4] International human rights standards have often been useful tools for interpreting United States laws. *See generally,* Connie de la Vega, *Protecting Economic, Social and Cultural Rights,* 15 WHITTIER L.REV. 471, 476-77 (1994); Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses,* 52 U. CIN. L. REV. 3 (1993). *See also*, Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue,* 1 RUTGERS RACE & L.REV. 193 (1999); Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1 (1993).

[5] The United States reservation to the Covenant that cruel, inhuman, or degrading treatment or punishment means the cruel and unusual punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments, S. Res. 4783, 102d Cong., 2d Sess. (1992), by no means precludes Article 7's application to this case. Article 7 is not inconsistent with the Eighth Amendment regarding the facts of this case. The

(Continued on following page)

The Human Rights Committee was given the opportunity to again construe Article 7 in the case of Charles Chitat Ng. U.N. Hum. Rts. Committee, 49th Sess., U.N. Doc. CCPR/C/49/D/469 (1991). After fleeing to Canada, Ng was returned to the United States under the extradition treaty between the two nations. He submitted to the Human Rights Committee a communication claiming that the extradition to California exposed him to probable execution by gas asphyxiation which violated his rights under the Covenant. Under the extradition treaty, Canada could have sought assurance that he would not be punished with death, but did not.

The Human Rights Committee concluded that Canada violated Article 7 when it refused to seek such assurance since it could reasonably have foreseen that Ng, if sentenced to death, would be executed by means of lethal gas. The Committee specifically held that "execution by gas asphyxiation, should the death penalty be imposed on [Ng], would not meet the test of 'least possible physical and mental suffering,' and constitutes cruel and inhuman treatment . . . " and Canada thus violated Article 7 of the Covenant. *Id.* at 21. The Committee based its findings on evidence submitted by Ng regarding the length of consciousness after asphyxiation begins. Ng also referenced the execution record of Robert Harris, noting that death by asphyxiation can take up to twelve minutes, during which time "condemned persons remain conscious, experience

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language of the Eighth Amendment is broad enough to forbid the use of this particular protocol for lethal injection as a means of execution, and United States courts should not ignore international pronouncements on treaties to which it is party.

obvious pain and agony, drool and convulse and often soil themselves." *Id.* at 14.

There is evidence that protocols similar to that used in Florida have resulted in unnecessary suffering and potentially excruciating pain and thus in executions that violate the prohibitions of Article 7 and of the Cruel and Unusual Punishments Clause of the Eighth Amendment. As the District Court in *Morales* found, the evidence of its use in California raises "at least some doubt as to whether [it] actually is functioning as intended." *Morales*, 2006 WL 335427, at *6. Petitioner should not be subjected to death by use of that protocol until there is a judicial assessment of the potential for extreme pain that has been involved in its past use and a determination of whether it will be "carried it out in such a way as to cause the least possible and physical and mental suffering." CCPR Gen. Comment 20, *supra*.

Other courts have examined particular methods of execution and found them constitutionally wanting. A court in California made the following factual findings with respect to death by lethal gas:

> [I]nmates who are put to death in the gas chamber at San Quentin do not become immediately unconscious upon the first breath of lethal gas. . . . [A]n inmate probably remains conscious anywhere from 15 seconds to one minute, and . . . there is a substantial likelihood that consciousness, or a waxing and waning of consciousness, persists for several additional minutes. During this time . . . inmates suffer intense, visceral pain, primarily as a result of lack of oxygen to the cells. The experience of "air hunger" is akin to the experience of a major heart attack, or to being held under water. Other possible effects to

> the cyanide gas include tetany, an exquisitely painful concentration of the muscles, and painful build-up of lactic acid and adrenaline. Cyanide-induced cellular suffocation causes anxiety, panic, terror, and pain.

Fierro v. Gomez, 865 F. Supp. 1387, 1404 (N.D. Cal. 1994) (citations omitted). Even though the district court's decision in *Fierro* has been vacated, the Ninth Circuit has upheld the findings of extreme pain and has concluded that the use of execution by lethal gas is unconstitutionally cruel and unusual and violates the Eighth and Fourteenth Amendments. *See, LaGrand v. Stewart*, 173 F.3d 1144, 1149 (9th Cir. 1999). That decision is in conformity with the Human Rights Committee decision in the Ng case.

At this point in Florida, persons on death row not only face the possibility of being subjected to extreme pain, but in addition must suffer the anxiety that they may. *Amici* ask the Court to consider the significant parallel between the cases and the treaty standards that apply when reviewing this case.

CONCLUSION

The imposition of the death penalty using the current protocol for lethal injection potentially violates the International Covenant on Civil and Political Rights and the Convention Against Torture. Because the United States is a party to both treaties, the Eighth Amendment should be construed so as not to conflict with it. Hence, the case should be remanded to the lower courts so that there can

be a proper trial on the protocol for lethal injection and a determination can be made on the merits on whether it does cause the least amount of suffering.

Date: March 3, 2006

Respectfully submitted,

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