**No. 16-8071**

*In The*

# *Supreme Court of the United States*

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JOE CLARENCE SMITH,

*Petitioner*,

v.

CHARLES L. RYAN AND RON CREDIO,

*Respondents*.

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**On Petition For A Writ Of Certiorari**
**To The Court Of Criminal Appeals Of Arizona**

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## BRIEF OF HUMAN RIGHTS ADVOCATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S APPLICATION FOR CERTIORARI

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## AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER'S APPLICATION FOR CERTIORARI

## STATEMENT OF INTEREST[**]

*Amicus Curiae* hereby requests that this Court consider the present brief pursuant to Supreme Court Rule 37.2(a) in support of Petitioner's application for certiorari. Human Rights Advocates (HRA) is a California non-profit corporation founded in 1978 with national and international membership. It endeavors to advance the cause of human rights to ensure that the most basic rights are afforded to everyone. HRA has Special Consultative Status at the United Nations and has participated in meetings of its human rights bodies for over thirty years. HRA has participated as *amicus curiae* in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal laws. Cases it has participated in include: *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005); *Grutter v. Bollinger*, 539 U.S. 306 (2003); and *Cal. Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

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[**] Pursuant to Rule 37.6, *Amicus* confirms that no counsel for a party authored this brief in whole or in part, and no person other than *Amicus*, its members, and/or its counsel has made a monetary contribution intended to fund the preparation or submission of the brief. *Amicus* timely notified all parties of its intention to file this brief, and, pursuant to Rule 37.2(a), letters and e-mails of consent from all parties to the filing of this brief have been submitted to the Clerk of the Court.

*Amicus* respectfully urges the Court to consider international, regional and national laws and practices of other nations when applying the standards of the United States Constitution. Under international law, and the laws of most if not all common law countries, execution of those subject to prolonged incarceration under a death sentence is unconstitutional and/or in violation of international human rights norms.

## STATEMENT OF THE CASE

For the purposes of this brief, *Amicus* adopts the statement of facts in the Petition for a Writ of Certiorari filed by Joe Clarence Smith on February 21, 2017, and files this *amicus curiae* brief in support of the Petitioner. In particular, *amicus* refers specifically to the following facts in Petitioner's brief: Mr. Smith has spent almost four decades alone in a cell that, according to the Arizona Department of Corrections, measures 86.4 square feet,[1] or roughly the size of a compact parking space.[2] The cell has no window to the outside.[3] There is therefore no natural light except that

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[1] ARIZONA DEP'T OF CORR., DEATH ROW INFO. AND FREQUENTLY ASKED QUESTIONS, https://corrections.az.gov/public-resources/death-row/death-row-information-and-frequently-asked-questions (last visited Jan. 6, 2017) [hereinafter DEPARTMENT FAQ].

[2] *See* City of L.A. Dep't of Bldg. and Safety, Parking Design (Mar. 1, 2016), https://www.ladbs.org/docs/default-source/publications/information-bulletins/zoning-code/parking-lot-design-ib-p-zc2002-001.pdf?sfvrsn=17; *see also Davis v. Ayala*, 135 S. Ct. 2187, 2208 (Kennedy, J., concurring).

[3] *See* Craig Haney, Expert Rep. at 84, *Parsons v. Ryan*, No. CV 12-00601-PHX-NVW (D. Ariz.)

which filters into the cell from a skylight in the pod and through the door of the cell, which is made of perforated metal that is difficult to see through.[4] In contrast to the lack of sunlight, prisoners on death row are subjected to constant artificial light; at night, although the lights in the pod are turned off, a dimmed light remains on in the cells.[5] Several days a week, Mr. Smith is in his cell twenty-four hours a day. He is permitted to shower up to three times per week and to participate in up to three, two-hour blocks of outdoor recreation per week,[6] which is completed in a concrete box.[7] Meals are served and medication is dispensed at the cell.[8]All visits, including with attorneys, are

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https://www.aclu.org/sites/default/files/field_document/Parsons%20v%20Ryan%20HaneyExpertReport2013.11.07.pdf [hereinafter "Haney Report"]; Eldon Vail, Expert Rep., at 17, *Parsons v. Ryan*, No. CV 12-00601-PHX-NVW (D. Ariz.), https://www.aclu.org/sites/default/files/field_document/Parsons%20v%20Ryan%20VailExpertReport2013.11.08.pdf.

[4] *See* Amnesty Int'l, *Cruel Isolation: Amnesty International's Concerns About Conditions in Arizona Maximum Security Prisons*, Apr. 2012, at 1 [hereinafter Amnesty]; Haney Report at 84.

[5] *See* Amnesty at 1; Haney Report at 39; J.E. Relly, *Supermax: Inside No One Can Hear You Scream*, TUCSON WEEKLY, Apr. 29 1999, http://www.tucsonweekly.com/tw/04-29-99/feat.htm.

[6] *See Ceja v. Stewart*, 134 F.3d 1368, 1369 (9th Cir. 1998) (Fletcher, J., dissenting); *Comer v. Stewart*, 230 F. Supp. 2d 1016, 1034 (D. Ariz. 2002); Arizona Department of Corrections Director's Instruction 326, at Attachment F (Mar. 27, 2014), https://corrections.az.gov/sites/default/files/policies/DI/DI%20326.pdf ; The Arthur Liman Pub. Interest Program, *Rethinking "Death Row": Variations in the Housing of Individuals Sentenced to Death*, July 2016, at App. at 4 [hereinafter Rethinking Death Row].

[7] *See* Haney Report at 86.

[8] *See* Rethinking Death Row at App. at 4-5.

non-contact visits conducted behind plexi-glass.[9] When Mr. Smith does leave his cell, he is strip-searched and shackled.[10]

Mr. Smith cannot be blamed for any delays caused by the exercise of his right to review his convictions and sentences. As noted in his petition, "much of the delay has been the result of two constitutionally defective sentencing proceedings." (Petition for Writ of Certiorari at page 13.)

**SUMMARY OF ARGUMENT**

The United States Supreme Court has its own rich jurisprudence regarding the definition and scope of "cruel and unusual punishments" under the Eighth Amendment to the Constitution. As this Court has a long history of having regard to jurisprudence from other jurisdictions and international law, this brief summarizes the available jurisprudence.

*Amicus* submits that execution following prolonged detention violates constitutional rights and/or international human rights norms which are broadly the same as those protected by the Eighth Amendment. As explained herein, clear consensus has emerged in national courts, regional and international courts and bodies around the world that

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[9] *See* Am. Friends Serv. Comm. of Ariz., *Buried Alive: Solitary Confinement in Arizona's Prisons and Jails*, May 2007, at 27; Sandra Babcock, Death Row Conditions (June 2008), http://www.deathpenaltyinfo.org/death-row (follow Death Row Conditions link); DEPARTMENT FAQ.

[10] *See* Am. Friends Serv. Comm. of Ariz., *Still Buried Alive: Arizona Prisoner Testimonies on Isolation in Maximum-Security*, Dec. 2014, at 6.

execution of those who have been subject to prolonged incarceration under a death sentence is unconstitutional and/or in violation of international human rights norms because it adds a significant degree of suffering and punishment over and above the judicial sanction of the death sentence itself and accordingly amounts to cruel, inhuman and/or degrading treatment. Put simply, it is an affront to the human dignity of the convicted. This harm is aggravated when the convicted is subjected to long periods of solitary confinement.

As two judges on the Judicial Committee of the Privy Council (*Privy Council*)[11] have noted:

> [T]here is a formidable case for suggesting that execution after inordinate delay would have infringed the prohibition against cruel and unusual punishments to be found in section 10 of the Bill of Rights 1689. . . .
>
> It is no exaggeration . . . to say that the jurisprudence of the civilised world, much of which is derived from common law principles and the prohibition against cruel and unusual punishments in the English Bill of Rights, has recognised and

[11] The Privy Council sits in the United Kingdom and is the final court of appeal for several independent Commonwealth countries, British overseas territories and British Crown dependencies, including Commonwealth countries in the Caribbean, with the exception of Guyana. The Privy Council is primarily comprised of judges of the UK Supreme Court (and formerly the House of Lords).

> acknowledged that prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading.

*Riley v. Att'y-Gen. of Jamaica*, [1983] 1 A.C. 719 (P.C.) 734-35 (citations omitted).[12]

Moreover, courts around the world have recognized that the penological purposes of the death penalty—namely, deterrence and retribution—are not served when execution occurs after an excessively long period of incarceration under a death sentence. These courts have recognized that the convicted cannot be criticised for exploring any available legitimate legal avenue. Nevertheless, it is incumbent on a State to ensure that constitutionally-guaranteed appeal procedures take place in a time period that is not so excessive as to amount to an additional punishment that is cruel and unusual, and/or to negate the penological purposes of the death penalty.

These general conclusions of numerous jurisdictions are particularly compelling in the present case. The circumstances of Mr. Smith's detention awaiting execution are unusually extreme: he has been on death row for almost 40 years, and held in solitary confinement most of that time. His cell has no window and he is subject to artificial light day and night.

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[12] Dissenting judgment of Lords Scarman and Brightman. See also *Glossip v. Gross*, 135 S.Ct. 2726, 2767 (2015) (Breyer, J., dissenting) (citing *Riley*). In 1993, the Privy Council accepted this view. See Section B below.

*Amicus Curiae* submits that to execute Mr. Smith after spending almost 40 years in solitary confinement, would constitute cruel and unusual punishment (or the equivalent legal standard) under any of the national, regional and international legal systems discussed herein. Indeed, the delay in Mr. Smith's case far exceeds the periods of time found to be unacceptable in other jurisdictions.

## ARGUMENT

### A. The role of international and comparative jurisprudence in interpreting the U.S. Constitution

International law and opinion and practice of other nations have informed the laws of the United States from the Declaration of Independence through to today. Indeed, the Declaration of Independence itself speaks of the relevance of other nations:

> When, in the course of human events, it becomes necessary for one people to dissolve the political bonds which have connected them with another, and to assume among the powers on earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, *a decent respect to the opinions of mankind* requires that they should declare the causes which impel them to the separation.

THE DECLARATION OF INDEPENDENCE, para. 1 (U.S. 1776) (emphasis added).

Thomas Jefferson, drafter of the Declaration of Independence, had a keen appreciation for international opin-

ion and law. He had a broad understanding of eighteenth century political thought, and was greatly influenced by European Enlightenment philosophers and their understanding of Greek democracy and the Roman Republic. *See* Darren Staloff, *Hamilton, Adams, Jefferson: The Politics of Enlightenment and the American Founding* 250-51 (2005). John Adams also understood the need to select the best the world had to offer in order to create a better government, and he believed that international opinion should inform the new nation's laws and institutions. *See* John Adams, *A Defence of the Constitutions of Government of the United States of America*, Preface, (1787), *available at* *http://www.constitution.org/jadams/ja1_00pre.htm* (Da Capo Press Reprint ed., last visited February 12, 2017).

In *The Paquete Habana*, 175 U.S. 677, 700 (1900), this Court noted that "[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, . . . "

In urging courts to afford the "decent respect to the opinions of mankind" required by the Declaration of Independence, Justice Blackmun has explained that:

> [T]he early architects of our Nation understood that the customs of nations—the global opinion of mankind—would be binding upon the newly forged union. John Jay, the first Chief Justice of the United States, observed . . . that the United States "had, by taking a place among the nations of the earth, become amenable to the laws of nations."

Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39 (1994-1995) (citation and footnotes omitted). This Court has recognized that history and noted that:

> For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. . . . It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.

*Sosa v. Alvarez-Machain*, 542 U.S. 692, 729-30 (2004) (citations omitted).

Consistent with the approach of the Founders, this Court has repeatedly recognized the relevance of international norms to the evolution of societal norms and to the scope and content of Constitutional rights,[13] including the Eighth Amendment. For example, in *Roper v. Simmons*, 543 U.S. 551 (2005), in abolishing executions for juvenile offenders, the Court noted:

> [A]t least from the time of the Court's decision in *Trop* [1958], the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth

[13] *See also* Ruth Bader Ginsburg & Deborah Jones Merritt, *Fifty-First Cardozo Memorial Lecture—Affirmative Action: An International Human Rights Dialogue*, 21 Cardozo L. Rev. 253, 282 (1999-2000) ("comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights") (emphasis in original).

> Amendment's prohibition of "cruel and unusual punishments. . . ."
>
> It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty . . . . See Brief for Human Rights Committee of the Bar of England and Wales et al. as *Amici Curiae* . . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.

*Id.* at 575-578.[14]

Other examples of the Court considering international and comparative law jurisprudence in relation to the death penalty include:

- *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002): "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."

[14] *See also Roper v. Simmons*, 543 U.S. 551, 587 (2005) (O'Connor, J., dissenting from the majority's "categorical rule forbidding the execution of any offender for any crime committed before his 18th birthday, no matter how deliberate, wanton, or cruel the offense." but noting that "[o]ver the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency.").

- *Thompson v. Oklahoma*, 487 U.S. 815, 830 & n.31 (1988): "The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community. . . . We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual."

- *Enmund v. Florida*, 458 U.S. 782, 796-97 n.22 (1982): the doctrine of felony murder has been eliminated or restricted in England, India, Canada and a "number of other Commonwealth countries."

- *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977): considering "the climate of international opinion concerning the acceptability of a particular punishment," and noting that it was "not irrelevant here that out of 60 major nations in the world . . . only 3 retained the death penalty for rape where death did not ensue."

- *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (plurality opinion): "The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime."

*Amicus* considers that the international law and practice of other nations relating to the execution of those who

have been sentenced to death many years after imposition of sentence to be of particular interest to this Court in carrying out its role under the U.S. Constitution. The overwhelming weight of this authority confirms the unconscionability and unconstitutionality of execution after lengthy periods of incarceration on death row, particularly when coupled with lengthy periods of solitary confinement.

### B. The origins of the Eighth Amendment: the 1689 English Bill of Rights, and decisions of the Privy Council, prohibit execution after an excessively long period of incarceration under a death sentence

The Constitutional provision at issue in this case, the Eighth Amendment's prohibition on "cruel and unusual punishments inflicted," traces its origins directly to the laws of another nation. As this Court has recognized, the foundation for the phrase "cruel and unusual" stems from the "Anglo-American tradition of criminal justice." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). The phrase was taken directly from the English Bill of Rights of 1689, and had its origins in the Magna Carta. *Id*. *See also, e.g., Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (Scalia, J., plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 169-70 (1976); *In re Kemmler*, 136 U. S. 436, 446 (1890).

This Court has noted that the United Kingdom's experience is particularly instructive in interpreting the Eighth Amendment, not just because of the historical ties between the two countries, but also because the Eighth Amendment was derived from the English Bill of Rights of 1689. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 577

(2005) ("it is instructive to note that the United Kingdom abolished the juvenile death penalty before these [international] covenants [prohibiting the practice] came into being. The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins. The Amendment was modeled on a parallel provision in the English Declaration of Rights of 1689 . . . ."); *Weems v. United States*, 217 U.S. 349, 371-72 (1910) (Justice McKenna, delivering the opinion of the Court, discussing English law). *Id.* at 389 (Justice White, in dissent, referring to, *inter alia*, the Eighth Amendment's "origin in the mother country and the meaning there given to it prior to the American Revolution . . . .").

The phrase "cruel and unusual punishment" in the 1689 Bill of Rights was intended to ensure "fairness" in respect of both the type of punishment and length of punishment:

> The English evidence shows that the cruel and unusual punishments clause of the Bill of Rights of 1689 was, first, an objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties.

Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57(4) Cal. L. Rev. 839, 860 (1969).

This is relevant in light of the Court's conclusion that "the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the [1791 U.S.] Bill of Rights was adopted." *Ford v. Wainwright*, 477 U.S. 399, 405 (1986). In this context, it is instructive to note that Great Britain's "Murder Act" of 1751 prescribed that execution take place on the next day but one after sentence. *See Pratt v. Att'y-Gen. for Jamaica*, [1994] 2 A.C. 1, (P.C.) 18; *see also* Brent E. Newton, *The Slow Wheels of* Furman's *Machinery of Death*, 13 J. App. Prac. & Process 41, 55-57 & nn.64-70 (2012), noting the "prevailing view in England and the colonies at the time of America's independence" that delays of "several months" of confinement under a death sentence would be cruel and unusual punishment. Thus, the "original understanding" of the Eighth Amendment in 1791 would have prohibited prolonged periods of incarceration followed by execution.

This is consistent with the 1983 opinion of two judges in the Privy Council, Lords Scarman and Brightman:

> [T]here is a formidable case for suggesting that execution after inordinate delay would have infringed the prohibition against cruel and unusual punishments to be found in section 10 of the Bill of Rights 1689.
>
> Such research as we have been able to conduct shows that many judges in other countries have recognised the inhumanity and degradation a delayed death penalty can cause. We cite four in-

> stances (but there are many others). . . . (citations to U.S., India, and European Court of Human Rights omitted).
>
> It is no exaggeration, therefore, to say that the jurisprudence of the civilised world, *much of which is derived from common law principles and the prohibition against cruel and unusual punishments in the English Bill of Rights,* has recognised and acknowledged that prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading.

*Riley v. Att'y-Gen. of Jamaica*, [1983] 1 A.C. 719 (P.C.) 734-35 (emphasis added).[15]

Subsequent decisions of the Privy Council have recognized the core principles that underlie the 1689 Bill of Rights. The seminal decision is *Pratt v. Attorney-General for Jamaica*, [1994] 2 A.C. 1 (P.C.). In this case, the Privy Council held that to execute the applicants after a prolonged delay on death row of 14 years was unconstitutional.[16] *Id.* at 33. Lord Griffiths, delivering the judgment of the Court, said:

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[15] This was a dissenting opinion, but it was adopted by the full Privy Council in *Pratt v. Attorney-General for Jamaica*, discussed below. *Riley v. Attorney-General of Jamaica* was also cited by Justice Breyer (in dissent) in *Glossip v. Gross*, 135 S.Ct. 2726, 2767 (2015).

[16] In both *Riley* and *Pratt*, the relevant constitutional standard was Section 17(1) of the Jamaica Constitution: "[n]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment". *Pratt* was cited by this Court in, *e.g.*, *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting denial of certiorari); *Foster v.*

> It is difficult to envisage any circumstances in which in England a condemned man would have been kept in prison for years awaiting execution. But if such a situation had been brought to the attention of the court their Lordships do not doubt that the judges would have stayed the execution to enable the prerogative of mercy to be exercised and the sentence commuted to one of life imprisonment.

*Id.* at 19.

In reaching its conclusion that execution would be unconstitutional, the Privy Council noted:

> There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time.

*Id.* at 29.

The Privy Council thus concluded that execution following years after sentence would be unconstitutional. In reaching this conclusion, the Privy Council quoted Mr. Winston Churchill as follows:

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*Florida*, 123 S.Ct. 470, 472 (2002) (Breyer, J., dissenting); *Glossip v. Gross*, 135 S.Ct. 2726, 2767, 2769 (2015) (Breyer, J., dissenting).

> "[P]eople ought not to be brought up to execution, or believe that they are to be executed, time after time whether innocent or guilty, however it may be, whatever their crime. This is a wrong thing."

*Id.* at 18.

The Privy Council concluded:

> The total period of delay is shocking and now amounts to almost 14 years. . . .
>
> To execute these men now after holding them in custody in an agony of suspense for so many years would be inhuman punishment within the meaning of section 17(1). In the last resort the courts have to accept the responsibility of saying whether the threshold has been passed in any given case and there may be difficult borderline decisions to be made. This, however, is not a borderline case. The delay in this case is wholly unacceptable and this appeal must be allowed.

*Id.* at 33.

In *Pratt*, execution after more than a 5-year period of incarceration under a death sentence was held to be unconstitutional (even though the actual case before the court involved 14 years of incarceration under a death sentence). In later cases, the Privy Council found that four years and ten months was unconstitutional, and stated

that the five year rule in *Pratt* "was not intended to provide a limit, or a yardstick . . ." *Guerra v. Baptiste*, [1996] 1 A.C. 397 (P.C.) 414.

In 2000, the Privy Council affirmed the key findings in *Pratt,* holding that "execution after excessive delay" is an "inhuman punishment because it add[s] to the penalty of death the additional torture of a long period of alternating hope and despair." *Higgs v. Minister of Nat'l Sec.*, [2000] 2 A.C. 228 (P.C.) 247 (appeal taken from Bah.).

English law has also long confirmed the dangers of extended periods of solitary confinement under a death sentence. For example, in *In re Medley*, 134 U.S. 160, 170 (1890), this Court discussed the "statutory history of solitary confinement in the English law," and noted that solitary confinement:

> "was considered as an additional punishment of such a severe kind that it is spoken of in the [statutory] preamble as 'a further terror and peculiar makr [sic] of infamy' to be added to the punishment of death. In Great Britain, as in other countries, public sentiment revolted against this severity, and by the statute of 6 & 7 Wm. IV. c. 30, the additional punishment of solitary confinement was repealed."

The court also noted that:

> "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which

> he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place."

*Id.* at 172.

In light of the historical connections between the Eighth Amendment and the English Bill of Rights, these cases are particularly persuasive. As explained below, these authorities have been echoed by numerous international, regional and domestic courts and tribunals.

## C. Other jurisdictions confirm that to carry out the death penalty after an excessively long period constitutes cruel and unusual punishment

### *1. European Court of Human Rights*

Article 3 of the European Convention on Human Rights (*ECHR*) provides: "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."[17] In interpreting Article 3 of the ECHR, the European Court of Human Rights (*ECtHR*) has long recognized the cruel and unusual nature of prolonged death row detention. The leading case in this area is *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H.R. Rep. 439 (1989).[18] In this case,

[17] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

[18] Cited in, *e.g.*, *Foster v. Florida*, 123 S.Ct. 470, 472 (2002) (Breyer, J., dissenting); *Glossip v. Gross*, 135 S.Ct. 2726, 2767 (2015) (Breyer, J.,

the ECtHR held that the extradition of a person to the U.S. would violate Article 3 of the ECHR, due to the circumstances in which a "condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death." *Id.* ¶ 106.

The ECtHR noted:

> In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment. . . . In this connection, account is to be taken not only of the physical pain experienced but also, where there is a considerable delay before execution of the punishment, of the sentenced person's mental anguish of anticipating the violence he is to have inflicted on him. . . .
>
> The manner in which [the death penalty] is imposed or executed, the personal circumstances of

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dissenting) (same). This Court has looked to decisions of the ECtHR in other contexts. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (citing ECtHR decisions, also referring to "values we share with a wider civilization" and actions taken by "[o]ther nations . . . consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct.").

> the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3 (art. 3). . . .
>
> For any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable. . . .
>
> However, in the Court's view, having regard to the *very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty*, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3 (art. 3). A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration.

*Id.* ¶¶ 100, 104, 111 (emphasis added).

In relation to solitary confinement, the ECtHR has repeatedly confirmed that this "can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason."[19] The ECtHR has described solitary confinement as "a form of 'imprisonment within the prison'" to be imposed "only exceptionally and after every precaution has been taken . . . ."[20]

### *2. Inter-American Commission and Court of Human Rights*

Article 5(2) of the American Convention on Human Rights (*ACHR*) prohibits "cruel, inhuman, or degrading punishment or treatment"[21] while Article 26 of the American Declaration of the Rights and Duties of Man (*AD*) prohibits "cruel, infamous or unusual punishment."[22] The ACHR and AD are interpreted by the Inter-American Court of Human

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[19] *Ilaşcu v. Moldova & Russia*, App. No. 48787/99, 40 Eur. H.R. Rep. 46, ¶ 432 (2005). *See also Ramirez Sanchez v. France*, App. No. 59450/00, 45 Eur. H.R. Rep. 49, ¶ 123 (2006).

[20] *Piechowicz v. Poland*, App. No. 20071/07, 60 Eur. H.R. Rep. 24, ¶ 165 (2012). *See also Onoufriou v. Cyprus*, App. No. 24407/04, ¶ 70 (2010).

[21] Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. The U.S. has not yet ratified the ACHR.

[22] See American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992). The Inter-American Commission has held that the AD does give rise to binding legal obligations on the U.S. *See, e.g.* Case 2141 (united states), Inter-Am. Comm'n H.R., Resolution No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 ¶¶ 15-17 (1981).

Rights and the Inter-American Commission on Human Rights, which have repeatedly affirmed that a "prolonged period of detention while awaiting execution" constitutes "cruel", "inhuman", "degrading" and "unusual" treatment:

- *N.I. Sequoyah v. United States*, Petition 120-07, Inter-Am. Comm'n H.R., Report No. 42/10, ¶¶ 38, 49 (2010)(Admissibility Decision): a person detained on death row for 15 years is not required to exhaust domestic remedies since these delays were deemed unwarranted and were preventing the exhaustion of remedies to present a valid claim before the Commission. Also, "the claims regarding the undue delay in the process of Mr. Sequoyah's appeal and the related prolonged period of incarceration on death row are not manifestly groundless or out of order."

- *Denton Aitken v. Jamaica*, Case 12.275, Inter-Am. Comm'n H.R., Report No. 58/02, doc. 5 rev. 1 at 763, ¶ 133 (2002): "detention conditions, when considered in light of the lengthy period of nearly four years for which he has been detained on death row, fail to satisfy the standards of humane treatment." These conditions included "solitary confinement on death row, in confined conditions with inadequate hygiene, ventilation and natural light."

- *Hilaire, Constantine and Benjamin v. Trinidad and Tobago*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 9, ¶ 167 (June 21, 2002): affirming the ECtHR's holding in *Soering v. United Kingdom*'s that "the 'death row phenomenon' is a cruel, in-

human and degrading treatment, and is characterized by a prolonged period of detention while awaiting execution . . . ."

- *William Andrews v. United States*, Case 11.139, Inter-Am. Comm'n H.R., Report No. 57/96, OEA/Ser.L/V/II.95, doc. 7 rev. at 570, ¶ 178 (1998): "He spent eighteen years on death row, and was not allowed to leave his cell for more than a few hours a week. . . . [T]he Commission finds that the United States violated Mr. Andrews' right not to receive cruel, infamous or unusual punishment pursuant to Article XXVI of the American Declaration."

### *3. UN Human Rights Committee*

Article 7 of the International Covenant on Civil and Political Rights (*ICCPR*) provides that: "no one shall be subjected to cruel, inhuman or degrading treatment or punishment."

The United Nations Human Rights Committee (*UNHR Committee*) is the body responsible for monitoring States Parties' compliance with the ICCPR and interpreting its provisions. This Committee has stated that Article 7 requires the death penalty to "be carried out in such a way as to cause the least possible physical and mental suffering," and noted that "prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7." *CCPR General Comment 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)(*adopted Mar. 10, 1992), ¶ 6, Compilation of General Comments and General Recommen-

dations Adopted by Human Rights Treaty Bodies, U.N. Doc. HR1\GEN\1\Rev.9 (Vol. I) (May 27, 2008).

In relation to the United States' implementation of Article 7 of the ICCPR, the UNHR Committee has expressed concern regarding the "long stay on death row" in the United States "which, in specific instances, may amount to a breach of article 7." *Comments of the Human Rights Committee: United States of America*, ¶ 16, U.N. Doc. CCPR/C/79/Add.50, (Apr. 7, 1995).

In deciding an individual communication under the Additional Protocol to the ICCPR, the UNHR Committee found a breach of Article 7 in a case involving, *inter alia,* extended death row detention of nearly 12 years in dehumanizing conditions before being granted commutation. *Francis v. Jamaica*, Communication No. 606/1994, U.N. Doc. CCPR/C/54/D/606/1994, ¶ 9.1-9.2 (Aug. 3, 1995) (The UNHR Committee found that prolonged detention on death row was cruel, inhuman and degrading punishment, and violated Article 7 "bearing in mind the imputability of delays in the administration of justice on the State party, the specific conditions of imprisonment in the particular penitentiary and their psychological impact on the person concerned.")

### *4. UN Committee Against Torture and UN Special Rapporteur on Torture*

In 1984, the UN adopted and opened for signature the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[23] The implementation of this Convention is monitored by the UN Committee Against Torture (*UNCAT*).

The UNCAT has found that prolonged death row detention amounts to cruel, inhumane or degrading treatment where conditions, such as overcrowding, compound the mental anguish associated with an "excessive length of time on death row". *Concluding observations of the Committee against Torture: Zambia*, U.N. Doc. CAT/C/ZMB/CO/2, ¶ 19 (May 26, 2008). It also stated that, where such circumstances exist, "the State party should ensure that its legislation provides for the possibility of the commutation of a death sentence where there have been delays in its implementation." *Id.*

Commenting specifically on the United States, the UNCAT recently expressed concern "at the continued delays in recourse procedures, which keep prisoners sentenced to death in a situation of anguish and incertitude

[23] In 1994, the U.S. ratified this Convention, subject to certain declarations and reservations, including a statement that the Convention does not "restrict or prohibit the United States from applying the death penalty consistent with the … Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty". 136 Cong. Rec. 36192-36199 (Oct. 27, 1990).

for many years." *Concluding observations of the Committee against Torture: USA*, U.N. Doc. CAT/C/USA/CO/3-5, ¶ 25 (Dec. 19, 2014). The Committee concluded that "in certain cases, such situation amounts to torture" and encouraged the United States to "reduce the procedural delays that keep prisoners sentenced to capital punishment in death row for prolonged periods." *Id*.

Similarly, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Professor Juan Mendez (*UN Special Rapporteur*), has recognized that the "lack of notice as to the date of the execution" compounds the "mental trauma of persons sentenced to death."[24] The UN Special Rapporteur has also emphasized that solitary confinement "may cause serious psychological and physiological adverse effects on individuals regardless of their specific conditions."[25] In an August 2013 report to the UN General Assembly, the UN Special Rapporteur noted that "[p]rison regimes of solitary confinement often cause mental and physical suffering or humiliation, that amounts to cruel, inhuman or degrading

[24] See Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *(Special Rapporteur on Torture) Interim report*, ¶ 50, U.N. Doc. A/67/279 (Aug. 9, 2012) ( Juan Méndez); *see also id.* ¶ 44 ("a prolonged stay on death row and the anxiety created by the threat of death, as well as other conditions, constitute a violation of the prohibition of torture and cruel, inhuman or degrading treatment.").

[25] Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Interim report*, ¶¶ 79-81, U.N. Doc. A/66/268 (Aug. 5, 2011) (by Juan Méndez).

treatment or punishment."[26] In December 2015, the U.N. General Assembly passed a Resolution specifically prohibiting indefinite and/or prolonged solitary confinement.[27]

### *5. Decisions of courts of other common law countries*

Many courts in common law countries have expressed grave concern about the length of time prisoners spend on death row prior to execution. Several jurisdictions have prohibited such practice, finding it to violate constitutional provisions and/or international human rights norms:

- Canada: *United States v. Burns*, [2001] 1 S.C.R. 283, paras. 94, 122-24, 132 (Can.) (Canadian Supreme Court quoting *Pratt* and finding, *inter alia*, that the potential for lengthy incarceration before execution is "a relevant consideration" in determining whether extradition to the U.S. violates "principles of fundamental justice").[28]

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[26] Special Rapporteur on Torture, *Interim report*, ¶ 60, U.N. Doc A/68/295 (August 9, 2013), (Juan Méndez).

[27] Resolution 70/175 adopted by U.N. General Assembly on December 17, 2015, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, U.N. Doc A/RES/70/175, Jan. 8, 2016, Rules 43-45 (defining "solitary confinement" as "confinement of prisoners for 22 hours or more a day without meaningful human contact" and "[p]rolonged solitary confinement" as "a time period in excess of 15 consecutive days").

[28] Cited in *Foster v. Florida*, 123 S.Ct. 470, 472 (2002) (Breyer, J., dissenting); *Glossip v. Gross*, 135 S.Ct. 2726, 2767 (2015) (Breyer, J., dissenting).

- India: *Sher Singh v. State of Punjab*, A.I.R. 1983 S.C. 465 (Indian Constitution protects individuals against prolonged incarceration followed by execution);[29] *Jagdish v State of Madhya Pradesh,* [2009] INSC 1608, ¶ 12 (prolonged incarceration of those sentenced to death undermines the retributive and deterrent purposes of the death penalty); *Shatrughan Chauhan v Union of India*, (2014) 3 SCC 1, [2014] INSC 44, ¶ 43 (commuting 13 death sentences, and finding that "prolonged delay in execution of sentence of death has a dehumanizing effect on the accused. Delay caused by circumstances beyond the prisoners' control mandates commutation of death sentence.").

- Singapore: *Jabar bin Kadermastan v. Public Prosecutor*, [1995] SGCA 18, [1995] 1 SLR(R) 326, ¶¶ 46, 63 (Singapore Court of Appeal holding that "condemned prisoners on death row should not be subjected to a prolonged period of imprisonment;" and noted that "undue and unconscionable delay in the execution" not attributable to the appellant may be unconstitutional).

## CONCLUSION

International, regional and foreign decisions and opinions confirm that it is cruel and unusual punishment and/or inhuman and degrading to execute prisoners who have been incarcerated for long periods of time under a death sentence. To do so causes mental anguish and physical

[29] Cited in *Knight v. Florida*, 528 U.S. 990, 995-96 (1999) (Breyer, J., dissenting).

hardships beyond the imposed sentence of death, and amounts to cruel and unusual punishment, particularly when combined with extended periods of solitary confinement. The international legal consensus on this issue is instructive in interpreting the Eighth Amendment in the circumstances of this case. Further, Mr. Smith cannot be blamed for any delays caused by the exercise of his rights challenging the constitutionality of the sentence.

*Amicus Curiae* respectfully urges the Supreme Court of the United States to consider the jurisprudence from the Privy Council, the European Court of Human Rights, the Inter-American Court of Human Rights, the U.N. Human Rights Committee, the U.N. Committee Against Torture, the U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Supreme Courts of Canada, India and Singapore, all of which have concluded that execution after prolonged incarceration on death row is unconstitutional and/or contrary to international human rights norms.

These general principles of international and regional law and the practice of other nations are particularly compelling in the present case. The petitioner has been incarcerated for almost 40 years, under a sentence of death, most of it in solitary confinement. In these circumstances, executing Mr. Smith would be considered cruel and unusual punishment (or the equivalent legal standard) under all of the national, regional and international legal systems discussed herein.

*Amicus Curiae* respectfully request this Court to exercise its discretion in this case, and grant the petition for a writ of certiorari.

Respectfully submitted,

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