No. 11-6029

In The Supreme Court of the United States

MANUEL VALLE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Florida

MOTION FOR WAIVER OF TIME AND LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE BAR HUMAN RIGHTS COMMITTEE OF ENGLAND AND WALES, THE INTERNATIONAL BAR ASSOCIATION'S HUMAN RIGHTS INSTITUTE, THE LAW SOCIETY OF ENGLAND AND WALES, AND THE SPANISH SOCIETY FOR INTERNATIONAL HUMAN RIGHTS LAW (ASOCIACIÓN ESPAÑOLA PARA EL DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS) IN SUPPORT OF PETITIONER

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MOTION FOR WAIVER OF TIME AND LEAVE TO FILE *AMICUS CURIAE* BRIEF OF THE BAR HUMAN RIGHTS COMMITTEE OF ENGLAND AND WALES, THE INTERNATIONAL BAR ASSOCIATION'S HUMAN RIGHTS INSTITUTE, THE LAW SOCIETY OF ENGLAND AND WALES, AND THE SPANISH SOCIETY FOR INTERNATIONAL HUMAN RIGHTS LAW IN SUPPORT OF PETITIONER

The *Amici Curiae,* pursuant to Supreme Court Rule 37(2)(a) and (b), respectfully move this Court for a waiver of the 10-day notice requirement and for leave to file the accompanying *amicus curiae* brief in support of Petitioner. Petitioner has provided *Amici Curiae* a waiver of time and consent to file the attached *amicus curiae* brief. Respondent, the State of Florida, has refused to waive time or consent to file.

Petitioner's execution date is set for September 6, 2011 and the Petition for Writ of Certiorari was filed timely on August 25, 2011. There is insufficient time between the opportunity to file this *amicus* brief and have 10 days pass, making a waiver essential. If this Court grants certiorari, this *amicus* brief is timely filed.

The Bar Human Rights Committee of England and Wales is the international human rights arm of the Bar of England and Wales primarily concerned with the protection of the rights of advocates and judges around the world and with defending the rule of law and internationally recognized legal standards relating to the right to a fair trial.

The International Bar Association's Human Rights Institute is an international body, headquartered in London, which helps promote, protect and enforce human rights under a just rule of law, and works to preserve the independence of the judiciary and legal profession worldwide.

The Law Society of England and Wales is the professional body representing and regulating over 140,000 solicitors in England and Wales. Its concerns include maintaining the independence of the legal profession, and upholding human rights and the rule of law internationally.

The Spanish Society for International Human Rights Law promotes among academia, public institutions, international organisations and civil society international human rights law values, thus ensuring States' compliance with decisions and recommendations adopted by the international human rights bodies and mechanisms.

International law and opinion have informed the laws of the United States from the Declaration of Independence forward. Today, more than ever, international laws and norms influence and enlighten this Court's understanding of the evolving standards of decency and legal development.

Amici consider the requirement, under international law and practice, to provide a clemency process to those under sentence of death and the international law and practice relating to the detention of those who have been sentenced to death for many years

after imposition of sentence, to be of particular interest to this Court in carrying out its role under U.S. constitutional law.

The requirement that there be a clemency investigation and proceeding available to those under sentence of death is widely accepted in the international community and is almost universal amongst democratic countries. In those countries which have a clemency procedure in place it would be unconscionable for a prisoner facing execution to be denied the right to present a case for clemency.

Worldwide courts have held that prolonged incarceration of those sentenced to death is unconstitutional because it adds a significant degree of suffering and punishment over and beyond the judicial sanction of the death sentence itself and accordingly amounts to cruel, inhumane and degrading treatment. *Amici* submit that such detention violate Constitutional Rights which are broadly the same as those protected by the Eighth Amendment, the experience and judgments of these courts can inform this Court's Eighth Amendment analysis.

The various *Amici* have engaged courts around the world in defense of the Rule of Law and individual rights, especially the advancement of Human Rights. In this Court, The Bar Human Rights Committee has previously appeared as *amicus curiae* in cases before the United States Supreme Court, including *Roper v. Simmons*, 543 U.S. 551 (2005). The Law Society of England and Wales has previously

submitted *amicus curiae* briefs in cases before the United States Supreme Court, including *Kennedy v. Louisiana,* 554 U.S. 407 (2008), and *Sullivan and Graham v. Florida,* 560 U.S. ___ (2010). (Decided May 17, 2010). These two *Amici* represent 100's of years of common law legal traditions and protections of the Rule of Law.

Petitioner has asked for the granting of a Writ reviewing, among other issues, the totality of the punishment wrought on Mr. Valle, specifically his 33 years on Florida's death row which violates the Eighth Amendment, and the failure of the State of Florida to provide a meaningful clemency hearing.

Amici fully support the analysis and arguments of Petitioner and wish to bring to the Court's attention the numerous international common law decisions, treaties, rulings and norms in support of Petitioner's arguments. This Court has noted that:

> "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, 10, 11. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."

Roper v. Simmons, 543 U.S. 551, 575-78 (2005).

Amici submit that the same respect for and confirmation of Petitioner's arguments are found in the opinions of the world community regarding

unconscionably lengthy incarcerations on death row and denial of any meaningful clemency process. Accordingly, as discussed in more detail in the accompanying *amicus* brief, this Court should grant the Petition for Writ of Certiorari.

WHEREFORE, *Amici* respectfully request that under the short time constraints of this case, this Court grant *Amici* a waiver of the 10-day notice rule and leave to participate in this case as *Amici Curiae* in support of Petitioner and to file the accompanying *Amicus Curiae* Brief.

DATED this 30th day of August, 2011.

Respectfully submitted,

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STATEMENT OF INTEREST[1]

The Bar Human Rights Committee of England and Wales (BHRC) is the international human rights arm of the Bar of England and Wales. It is an independent body primarily concerned with the protection of the rights of advocates and judges around the world and with defending the rule of law and internationally recognized legal standards relating to the right to a fair trial. The BHRC regularly appears in cases where there are matters of human rights concern, and has experience of legal systems throughout the world. The BHRC has previously appeared as *amicus curiae* in cases before the United States Supreme Court, including *Roper v. Simmons*, 543 U.S. 551 (2005).

The International Bar Association's Human Rights Institute (IBAHRI) is an international body, headquartered in London, which helps promote, protect and enforce human rights under a just rule of law, and works to preserve the independence of the judiciary and legal profession worldwide.

The Law Society of England and Wales is the professional body representing and regulating over 140,000 solicitors in England and Wales. Its concerns

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[1] A letter of consent accompanies the filing of this brief and will be filed with the Clerk of Court. Counsel for the parties did not write this brief in whole or in part, and only *Amici* and their counsel made monetary contributions to the preparation of this brief.

include maintaining the independence of the legal profession, and upholding human rights and the rule of law internationally. The Law Society regularly intervenes in cases that relate to its core mandate. It has previously submitted *amicus curiae* in cases before the United States Supreme Court, including *Kennedy v. Louisiana*, 554 U.S. 407 (2008) and *Sullivan and Graham v. Florida*, 560 U.S. ___ (2010). (Decided May 17, 2010).

The Spanish Society for International Human Rights Law (The Asociación Española Para El Derecho Internacional De Los Derechos Humanos) was founded in 2004 as a pluralistic, independent organization. It aims to build bridges of permanent communication among academia, public institutions, international organisations and civil society to promote and implement international human rights law values, thus ensuring States' compliance with decisions and recommendations adopted by the international human rights bodies and mechanisms. It submits this brief as *amicus curiae* in the course of fulfilling that mandate.

STATEMENT OF THE CASE

Amici adopt the statement of facts in the Petition for Writ of Certiorari filed by Manuel Valle and files this *amicus curiae* brief on behalf of Petitioner.

SUMMARY OF ARGUMENT

International law and opinion have informed the law of the United States from the Declaration of Independence forward. The Founders were greatly influenced by international legal and social thought; and throughout the history of this country, courts have referred to international standards in considering the permissibility of practices under the Constitution. This is particularly true with respect to the Eighth Amendment's "cruel and unusual punishments" clause. Thus, *Amici* considers the requirement under international law and practice to provide a clemency process to those under sentence of death and international law and practice relating to the unconstitutional detention of those who have been sentenced to death for many years after sentence, to be of particular interest to this Court in carrying out its role under U.S. constitutional law.

The requirement that there be a clemency investigation and proceedings available to those under sentence of death is widely accepted in the international community and is almost universal amongst democratic countries. In those countries which have a clemency procedure in place it would be unconscionable for a prisoner facing execution to be denied the right to present a case for clemency.

Worldwide, appeal courts have held that prolonged incarceration of those sentenced to death is unconstitutional because it adds a significant degree of suffering and punishment over and beyond the

judicial sanction of the death sentence itself and accordingly amounts to cruel, inhumane and degrading treatment. Since such detention violates constitutional rights which are broadly the same as those protected by the Eighth Amendment, the experience and judgments of these courts can inform this court's Eighth Amendment analysis.

ARGUMENT

I. INTERNATIONAL LAW AND OPINION FORM A BASIS OF LAW AND GOVERNMENT IN THE UNITED STATES

From the beginning, the laws of the United States have been informed and shaped by laws and opinions of other members of the international community. Indeed, the Declaration of Independence 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). This Court has affirmed 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 today 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).

In urging courts to afford the "decent respect to the opinions of mankind" intended by the Founders, 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 law of nations."

Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39 (1994) (citation and footnotes omitted).

Thomas Jefferson, the principal drafter of the Declaration of Independence, had a keen appreciation for international opinion and law. Accordingly, the Declaration of Independence reflects a broad understanding of eighteenth century political thought, and

was greatly influenced by French, English and Scottish Enlightenment philosophers and their understanding of ancient Greek democracy and the Roman Republic.

Similarly, John Adams was sensitive to, and familiar with, international opinion as it related to the Nation's laws and institutions. During his time as Minister to Great Britain, Adams wrote a multivolume defense of the new Constitution and its form of government. In it he demonstrates his deep knowledge of various forms of government and the necessity of selecting the best the world had to offer to create a better government. *See* John Adams, *A defence of the Constitutions of Government of the United States of America*, Preface, Grosvenor Square (Jan. 1, 1797), http://www.constitution.org/jadams/ja100.htm.

Consistent with the approach of the Founders, this Court has recognized the relevance of international norms to the evolution of societal norms and to the scope and content of Constitutional rights – irrespective of the precise legal status of the norms at issue. In *Roper v. Simmons*, 543 U.S. 551 (2005), which abolished juvenile executions, the Court considered not only the evolution of international law, but also the evolution of the practice in the community of nations of referring to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." *Id.* at 575-78; *see also*, *e.g., Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003) (holding Texas law prohibiting

sodomy unconstitutional when other nations "have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct," a right which "has been accepted as an integral part of human freedom in many other countries"); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (referencing provisions in International Convention on the Elimination of All Forms of Racial Discrimination as basis for holding law school's affirmative action program did not violate Equal Protection Clause); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (reversing death penalty for felony murder conviction, referencing that practice was unknown, abolished or severely restricted in other countries); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (taking into account "the climate of international opinion concerning the acceptability of a particular punishment," noting 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").

The very Constitutional provision at issue in this case, namely the Eighth Amendment's prohibition on "cruel and unusual punishments inflicted," traces its origins directly to the laws of another nation. 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 Declaration of Rights of 1688, and the principle came from Magna Carta. *Id.* For this reason, the Amendment's

meaning must be drawn from the "evolving standards of decency that mark the progress of a maturing society." *Id.* at 101.

This Court has a proud history of looking to the standards of the international community, in particular in determining the contours of the Eighth Amendment's "cruel and unusual punishment" clause. *See, e.g., Roper v. Simmons*, 543 U.S., at 575-78; *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (considering international community's rejection of the death penalty for persons with mental retardation); *Trop v. Dulles*, 356 U.S. at 102 (noting "virtual unanimity" within the international community that denationalization constitutes cruel and unusual punishment); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion) (considering abolition of juvenile death penalty by leading nations in Western Europe and among countries sharing our Anglo-American heritage), recognized in *Roper*, 543 U.S. at 575; *see also Coker v. Georgia*, 433 U.S. at 596). To view the evolving standards of decency in an isolated and insular domestic environment would be contrary to all that the Founders considered essential to joining the ranks of nations and to the precedents of this Honorable Court.

II. INTERNATIONAL LAW REQUIRING A CLEMENCY INVESTIGATION AND PROCEEDINGS AND PROHIBITING LENGTHY INCARCERATION BEFORE EXECUTION IS INSTRUCTIVE TO THE COURT'S EIGHTH AMENDMENT ANALYSIS

A. International treaties require clemency investigation and proceedings be available to those under sentence of death

There is a clear and unequivocal right to a clemency process in international law. Moreover that process must be a fair one and not merely a formality capable of arbitrarily denying clemency. Article 6(4) of the International Convention on Civil and Political Rights states that "anyone sentenced to death shall have the right to seek a pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases." *International Convention on Civil and Political Rights, G.A. Res. 2200A (XXXI)*, 999 U.N.T.S. 171 (16 December 1966) The United States is a ratified signatory of the ICCPR and as such has clearly recognized the importance of the rights contained therein, including the right to clemency.

Other international treaties may also prove instructive in this Court's Eighth Amendment analysis. Paragraph 7 of the "Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty" adopted as United Nations Economic and Social Council resolution 1984/50 states that "anyone

sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment." Paragraph 8 of the same resolution states that "capital punishment shall not be carried out pending an appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence." Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty, adopted as United Nations Economic and Social Council resolution 1984/50. Article 4(6) of the American Convention on Human Rights states that: "every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority." *American Convention on Human Rights, O.A.S. Treaty Series No. 36*, 1144 U.N.T.S. 123 (18 July 1978). While the United States is not a signatory to the ACHR, its widespread adoption in the America's is relevant to this issue.

B. The consistency of international law and opinion concerning prolonged detention on death row should provide guidance to this Court in interpreting the Constitution

The practice of sentencing an offender to death row for a prolonged period is rapidly being acknowledged as a cruel, inhumane and degrading punishment.

Indeed, this Court has expressed concern about prolonged death row detention. *See Lackey v. Texas,* 514 U.S. 1045 (1995), (noting that the Court indicated concern regarding a sentence of 17 years on death row amounting to a violation of the Eighth Amendment). However, this Court, unlike other comparable jurisdictions, did not go so far as to prohibit prolonged detention on death row. Such prolonged detention is being rejected by the community of nations and its prohibition is now forming part of customary international law. Its rapidly increasing worldwide condemnation represents an expectation for all nations, particularly the United States with its history of respect and promotion of Human Rights, to comply. The consistency of international law and opinion concerning prolonged detention on death row should provide guidance to this Court in interpreting the Constitution. Indeed, it should weigh heavily in this Court's determination that Mr. Valle's prolonged detention on death row is inconsistent with the Eighth Amendment's prohibition of cruel and unusual punishment.

C. Ratified treaty recognizes that prolonged death row detention can be cruel and unusual

The International Covenant on Civil and Political Rights (ICCPR) provides individuals with the right to petition to the United Nations Human Rights

Committee (UNHRC). The United States has ratified[2] the ICCPR and therefore recognizes the jurisdiction of the UNHRC to hear matters of treaty violation and interpret relevant provisions. The 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 of the Covenant." *Concluding Observations of the Human Rights Committee: United States of America* (3 Oct. 1995), U.N. Doc. CCPR/C/79/Add.50, ¶281.

Article 7 provides that "no one shall be subjected to cruel, inhumane or degrading treatment or punishment." In their interpretation of Article 7 of the ICCPR, the UNHRC acknowledges the cruelty of prolonged death row detention. The Committee clearly indicates that Article 7 requires "when the death penalty is applied . . . it must be carried out in such a way as to cause *the least possible physical and mental suffering." Human Rights Committee General Comment 20*, Article 7 (Forty-fourth session, 1992), U.N. Doc. HR1\GEN\1\Rev.1 at 30 (1994), ¶6.

In a case involving an applicant who had spent 12 years on death row in dehumanizing conditions before being granted commutation, the Committee acknowledged prolonged detention on death row as a cruel, inhumane and degrading punishment. It determined that such detention could constitute a violation

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[2] The ICCPR was ratified by the U.S. on June 8, 1992 and the Convention against Torture on Oct. 21, 1994

of 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." *Francis v. Jamaica*, Communication No. 606/1994 (25 July 1995), U.N. Doc. CCPR/C/54/D/606/1994 (1995), ¶9.1.

Similarly, the United Nations Committee Against Torture 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 (26 May 2008), ¶19. 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.*

D. Regional courts prohibit prolonged death row detention

The European Court of Human Rights (ECtHR) has long recognized the cruel and unusual nature of prolonged death row detention. It held that the extradition of a person facing the circumstances in which a "condemned prisoner has to endure for many year the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death" would violate Article 3 of the European

Convention on Human Rights (ECHR). *Soering v. United Kingdom,* [1989] 11 EHRR 439, Series A, No. 161, ¶106. Article 3 of the ECHR provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment." Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS 5 (Nov. 4 1950).

When considering the cause of prolonged detention on death row, the ECtHR acknowledged that the primary reason was as a result of prisoners pursuing habeas proceedings before state and federal courts. It recognized that these proceedings acted as a safeguard to avoid the arbitrary imposition of the death penalty but concluded that the state could not exempt itself from responsibility for prolonged delays on death row. It stated that "Just as some lapse of time between sentence and execution is inevitable if appeal safeguards are to be provided to the condemned person, so it is equally part of human nature that the person will cling to life by exploiting those safeguards to the full." *Soering,* [1989] 11 EHRR 439, ¶93-99. Further, the ECtHR made it clear that any imposition of a death sentence following a trial which did not meet the "strict standard of fairness required in cases involving a capital sentence . . . amounted to inhuman treatment." *Öcalan v. Turkey*, Application No. 46221/99, (Grand Chamber Judgment of 12 May 2005), ¶174-75.

In the Caribbean 200 death sentences were commuted to life[3] following the Judicial Committee of the Privy Council's (JCPC)[4] finding that a prolonged delay on death row amounts to cruel and unusual punishment. In the leading case, the JCPC held that where there are significant delays between a death sentence and execution "there will be strong grounds for believing that the delay is such as to constitute 'inhuman or degrading punishment'." *Pratt & Morgan v. The Attorney General of Jamaica,* [1994] 2 AC 1 (PC), 35. The JCPC added:

> There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence for 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.

Pratt & Morgan, [1994] 2 AC 1, 29.

In considering the question of delay attribution, the JCPC identified three reasons for delay on death

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[3] *Brian Tittemore, The Mandatory Death Penalty in the Commonwealth Caribbean and the Inter-American Human Rights System: An Evolution in the Development and Implementation of International Human Rights Protections*, 13 Wm.& Mary Bill Rts. J. 445, 465 (2004).

[4] The JCPC sits in the United Kingdom and is the final court of appeal for territories in the Commonwealth Caribbean with the exception of Guyana.

row: frivolous appeals or escape from custody; delay attributed to shortcomings of the State and legitimate appeals. It stated

> A condemned man will take every opportunity to save life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not the prisoner who takes advantage of it.

Pratt & Morgan, [1994] 2 AC 1, 33.

The JCPC concluded that a 5-year delay following sentence would be unconstitutional. In later cases, the JCPC found that four years 10 months was unconstitutional and stated that the five year rule in *Pratt and Morgan* " . . . was not intended to provide a limit or yardstick." *Guerra v. Baptiste and Others,* [1996] 1 AC 397, 414.

The JCPC also held that "execution after excessive delay is an inhuman punishment because it adds to the penalty of death the additional torture of a long period of alternating hope and despair." *Higgs and Mitchell v. Minster of National Security (Bahamas),* [2000] 2 AC 228, 247.

The Inter-American Court of Human Rights (IACHR) supports the findings of the ECtHR and JCPC. In enforcing and interpreting the American Convention on Human Rights, it held that prolonged death row detention can amount to a violation of

Article 5 of the American Declaration of Human Rights prohibiting torture, cruel, inhumane or degrading punishment or treatment. *See Fermin Ramirez v. Guatemala*, Order of the Inter-American Court of Human Rights, Judgement of June 20, 2005. (noting that seven years on death row under harsh conditions which led to mental suffering without treatment violated a prisoner's right to human treatment under Article 5).

E. National courts in comparable common law jurisdictions prohibit prolonged death row detention

1. Zimbabwe

Zimbabwe recognizes the unconstitutionality of prolonged death row detention. Adopting *Soering v. United Kingdom,* [1989] 11 EHRR 439, Series A, No. 161, the Court set aside four death sentences where prisoners had spent five years on death row in harsh conditions. *Catholic Commission for Justice & Peace v. Attorney General,* [1993] 4 SA 239 (ZSC). It held that the prolonged detention of these prisoners violated Article 15(1) of the Zimbabwe Constitution which provides that "no one shall be subjected to torture or to inhuman or degrading punishment or other such treatment."[5]

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[5] Chapter 3, Article 15 of the Declaration of Rights, The Constitution of Zimbabwe (As amended to No. 16 of 20 April 2000).

The Chief Justice stated that "[f]rom the moment he enters the condemned cell, the prisoner is enmeshed in a dehumanizing environment of near hopelessness . . . the condemned prisoner is the living dead." *Catholic Commission for Justice & Peace v. Attorney General*. *Id.* at 268. The Court accepted that "fear, despair and mental torment are the inevitable concomitant of a sentence of death . . . ." *Id*. at 313.

2. India

The Supreme Court of India expanded Article 21 of their Constitution which incorporates the prohibition against cruel punishment by judicial interpretation, (*See Mullin v. The Administrator, Union Territory of Delhi and Others* AIR, 1993 SC 746), to include the right of protection against delayed execution. *See Umni Krishnan v. State of Andhra Pradesh and Others* AIR, 1993 SC 217 (noting 9 rights to be included within Article 21). Further the Court stated:

> The dehumanizing factor of prolonged delay in execution of a sentence of death has the constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable way as to offend the constitutional guarantee that no person shall be deprived of his life or personal liberty expect according to procedure established by law. The appropriate relief in such a case is to vacate the sentence of death.

Vatheeswaran v. State of Tamil Nadu, [1983] 2 SCR 348, 359-60.

The Court also found that if there is "inordinate delay in execution, the condemned prisoner is entitled to come to the court requesting to examine whether it is just and fair to allow the sentence of death to be executed." *Treveniben v. State of Gujarat,* [1989] 1 SCJ 383, 410.

3. Canada

Canada acknowledges the cruelty of prolonged death row detention in the context of its extradition legislation. The Supreme Court recognized "the widening acceptance amongst those closely associated with the administration of justice in retentionist states that the finality of the death penalty, combined with the determination of the criminal justice system to satisfy itself fully that the conviction is not wrongful, seems inevitably to provide lengthy delays, and the associated psychological trauma." *United States v. Burns*, 2001 SCC 7, ¶122. The Court held that this was a "relevant consideration" in determining that it would be inconsistent with "principles of fundamental justice" to extradite the defendant unless assurances were obtained from the United States that the death penalty would not be sought. *Id.* ¶123-24.

4. Uganda

In the recent landmark case, the Supreme Court of Uganda found that prolonged death row detention or "inordinate delay" was incompatible with constitutional safeguards against cruel, inhumane and

degrading treatment. *Attorney General v. Susan Kigula & 417 Ors* (Constitutional Appeal No. 03 of 2006), [2009] UGSC 6 (21 January 2009), 47-49. The Court held that a period of more than three years from the date upon which the death sentence was confirmed by the highest appellate court would constitute an inordinate delay. The Court stated that if, at the end of the three year period, the President had not exercised his prerogative one way or the other the death sentence shall be deemed to be commuted to life imprisonment without remission. *Id.* at 57.

5. Kenya

In 2009, President Mwai Kibaki of Kenya commuted over 4,000 death sentences to life imprisonment stating that "an extended stay on death row causes undue mental anguish and suffering, psychological trauma, anxiety, while it may as well constitute inhuman treatment."[6] Almost one year later, the Kenyan Court of Appeal in the context of finding the mandatory death penalty unconstitutional considered prolonged death row detention. It referred in great length to the Ugandan position outlined above and said "We agree with the Constitutional court that to hold a person beyond three years after the confirmation of sentence is unreasonable." *Godfrey Ngotho*

[6] Amnesty International, 4000 Kenyans on Death Row Get Life, August 5, 2009 http://www.amnesty.org/en/news-and-updates/good-news/4000-kenyans-death-row-get-life-20090805

Mutiso v. Republic, [2010] eKLR, Crim. App. No. 17 of 2008, ¶18.

It is clear that international law has expressed grave concern about the length of time prisoners spend on death row prior to execution. Several jurisdictions have prohibited such a practice finding it to violate cruel, inhumane and degrading treatment provisions. Europe's and Canada's abolition of the death penalty has meant that these countries need only address the prolonged death row detention issue in relation to extradition legislation. Both have made it clear that extradition where a defendant faces prolonged death row detention is unconstitutional. Zimbabwe, India, Uganda, Kenya and the Caribbean have prohibited the practice and commuted a high number of death sentences to life imprisonment. These countries, along with Europe and Canada, represent a significant section of the common law world. It is respectfully submitted that the United States should follow suit. This is especially true in the case of Mr. Valle who has spent over three decades on death row, a period of time which far exceeds the thresholds of delay considered as cruel by the international community.

III. THE LAW AND OPINIONS OF THE UNITED KINGDOM ARE PARTICULARLY RELEVANT TO THIS COURT'S EIGHTH AMENDMENT ANALYSIS

A majority of this Court has noted that the United Kingdom's experience is instructive to interpreting

the Eighth Amendment not just because of the historic ties between our two countries but also because the Eighth Amendment was derived from the English Declaration of Rights of 1689. *Roper*, 543 U.S. at 577; *Lawrence*, 539 U.S. at 576. The close relationship and mutual respect for legal analysis between the United Kingdom and the United States has a long history and recent developments in world affairs have made that relationship even closer. The President has noted, "the special relationship between the United States and Great Britain is one that is not just important to me, it's important to the American people. And it is sustained by a common language, a common culture; our legal system is directly inherited from the English system; our system of government reflects many of these same values . . . " Remarks of President Obama, Mar. 3, 2009, U.S. Embassy, London. http://www.usembassy.org.uk/gb083.html. The United States not only shares fundamental values with the United Kingdom, but also a common law heritage consistently recognized by this Court. *See*, *e.g.*, *Roper v Simmons*, 543 U.S. at 577 ("it is instructive to note that the United Kingdom abolished the juvenile death penalty" before international covenants prohibiting the practice came into being); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 273 (1989) (discussing Magna Carta and the English Bill of Rights in determining the scope of Eighth Amendment Excessive Fines Clause); *Ferguson v. Georgia*, 365 U.S. 570, 581-82 (1961) (considering evolution of legal competency of criminal defendants in England and United States); *United States v. Lee*, 106 U.S.

196, 205 (1882) (American legal doctrines "derived from the laws and practices of our English ancestors."). Consequently, the experience of British law in ensuring a clemency process is available to those under sentence of death can provide guidance for this Court.

A. In the United Kingdom the availability of a clemency investigation and process in capital cases has always been regarded as an important safeguard against injustice

Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted. *Hererra v. Collins*, 506 U.S. 390, 412 (1993)

Executive clemency in the United Kingdom has historically played a vital role in ensuring that the conviction and sentence of those convicted of capital offences were subject to review and if appropriate sentences were commuted. In the eighteenth century judges trying capital cases either at assizes throughout England or at the Old Bailey in London regularly exercised their discretion to recommend clemency to the crown. *See* John H. Langbein, *The Origins of Adversary Criminal Trial*, page 60 n.245 (Oxford 2003). The exercise of the royal pardon power on recommendation of the trial judges was a regular feature of the criminal procedure of that time. Op cit.

page 324. The King would from time to time meet with members of the Privy Council to consider such recommendations for clemency and decide whom to execute and whom to spare.

One of the most eminent seventeenth century English jurists, Sir Matthew Hale wrote in The History of the Pleas of the Crown (S. Emlyn ed.) (London 1736) (2 vols.) (posthumous publication, written before 1676):

> [I]f the jury will convict a man against or without evidence, and against the direction or opinion of the court, the court hath this salve, to reprieve the person convict before judgment, and to acquaint the King, and certify for his pardon.

2 Hale, *History of the Pleas of the Crown*, 309-10.

Writing in 1753 Henry Fielding a London magistrate emphasised the importance of these post-verdict proceedings:

> And yet, if after all this precaution [of the trial procedure] it should manifestly appear, that a person hath been unjustly condemned, either by bringing to light some latent circumstance, or by discovering that the witnesses against him are certainly perjured, or by any other means of displaying the party's innocence, the Gates of Mercy are still left open, and upon a proper and decent application, either to the Judge before whom the trial was had, or to the Privy Council, the condemned person will be sure of obtaining a

> pardon, or preserving his life, and of regaining both his liberty and reputation.

Henry Fielding, *A Clear State of the Case of Elizabeth Canning* (London 1753), in Fielding, *An Enquiry into the Causes of the Late Increase of Robbers* (1st edn. 1751), in Henry Fielding, *An Enquiry into the Causes of the Late Increase of Robbers and Related Writings*, 63 (Malvin R. Zirker ed.) (1988).

The unique importance to be accorded in England and Wales to the right to seek clemency in the form of the royal prerogative of mercy continues to be acknowledged by the courts despite the fact that the United Kingdom abolished the death penalty almost half a century ago – *see* Murder (Abolition of Death Penalty) Act 1965. In *R.v. Home Secretary ex.p. Bentley,* [1994] Q.B. 349 the continued existence of the prerogative of mercy was recognized and was applied in the case of a man who had been executed in 1953. At p. 365 the High Court noted that "the prerogative is a flexible power and its exercise can and should be adapted to meet the circumstances of the particular case. We would adopt the language used by the Court of Appeal in New Zealand in *Burt v. Governor-General,* [1992] 3 N.Z.L.R. 672, 681: "the prerogative of mercy [can no longer be regarded as] no more than an arbitrary monarchial right of grace and favour." It is now a constitutional safeguard against mistakes. It follows, therefore, that, in our view, there is no objection in principle to the grant of a posthumous conditional pardon where a death sentence has already been carried out."

The law of England and Wales continues to place great importance on maintaining a right to seek clemency in capital cases even in cases considered many years after the United Kingdom abolished capital punishment. In recognition of the special relationship between the jurisprudence of England and the United States, and the direct roots of the Eighth Amendment in English law, this Court should follow suit and recognize that the Eighth Amendment prohibits the carrying out of a death sentence in the absence of a proper clemency process.

B. In the United Kingdom the practice and law has always regarded lengthy incarceration of a prisoner facing death before execution to be unlawful and inappropriate

In England, a date of execution was historically fixed in the fourth week following sentence and in Scotland, it was fixed between 15 and 27 days pursuant to section 2 of the Criminal Law (Scotland) Act 1830, 11 Geo. 4 & 1 Will. 4, c.37. After 1907, the Court of Appeal heard an appeal in a capital case within three weeks of the verdict. If unsuccessful, the execution would be set for a date in 14-18 days, during which the Secretary of State would consider whether to commute the sentence. The average delay in 1950 was 6 weeks if there was an appeal and 3 weeks if not. *See* Report of the Royal Commission on Capital Punishment 1949-53 (1953) (Cmd 8932).

In *Pratt & Morgan,* [1994] 2 AC 1, the JCPC, which hears appeals from the superior courts of Commonwealth countries and UK dependencies, considered an appeal from two appellants who had been on death row in Jamaica for over fourteen years. The JCPC pointed out that in England sentence of death was always carried out within weeks or months dependent on the appeals process and that delays in terms of years were unheard of. Lord Griffiths who gave the judgment of the court said:

> 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.

Pratt & Morgan, at 19.

IV. CONCLUSION

Judicial opinions, common law and international treaties and norms condemn the execution of any individual who has been denied meaningful clemency process. Clemency's deep roots in Anglo-American law should be honored in this case given the substantive changes to law, social attitudes and Mr. Valle that have occurred over the past 33 years.

Likewise, judicial opinions from common law courts and many international treaties and practices establish that it is inhumane and degrading to detain prisoners for many years on death row knowing and fearing that the sentence will be carried out at some point. This adds mental anguish and physical hardships beyond the sentence of death and amounts to cruel and unusual punishment. The universality of this experience makes international law and opinions instructive in interpreting the Eighth Amendment under the circumstances of this case.

Respectfully submitted,

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