No. 18-1109

IN THE

Supreme Court of the United States

JAMES ERIN MCKINNEY,
Petitioner,

v.

ARIZONA,
Respondent.

On Writ of Certiorari to the Supreme Court of Arizona

BRIEF OF THE ADVOCATES FOR HUMAN RIGHTS AND THE WORLD COALITION AGAINST THE DEATH PENALTY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1]

The Advocates for Human Rights (hereinafter, "the Advocates"), established in 1983, is a volunteer-based nongovernmental organization committed to the impartial promotion and protection of international human rights standards and the rule of law. The Advocates has engaged in issue-specific advocacy opposing capital punishment for many years, and in 1991 adopted a formal commitment to oppose the death penalty worldwide, organizing a Death Penalty Project to provide pro bono assistance on post-conviction appeals, as well as education and advocacy to end capital punishment. The Advocates serves on the Steering Committee of the World Coalition Against the Death Penalty. The Advocates is opposed to the death penalty and has a strong interest in ensuring that as long as capital punishment is practiced in the United States, execution methods conform to international human rights standards.

The World Coalition Against the Death Penalty (hereinafter, "the World Coalition"), an alliance of more than 150 non-governmental organizations, bar associations, local authorities, and unions, was created in Rome on May 13, 2002. The aim of the World Coalition is to strengthen the international dimension of the fight against the death penalty. Its ultimate objective is to obtain the universal abolition of the

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus curiae* briefs have been filed with the Clerk of the Court.

death penalty. To achieve its goal, the World Coalition advocates for a definitive end to death sentences and executions in those countries where the death penalty is in force. In some countries, it is seeking to obtain a reduction in the use of capital punishment as a first step towards abolition.

SUMMARY OF ARGUMENT

The Arizona Supreme Court's refusal to remand Petitioner's case for resentencing eliminated the possibility for the sentencing court to consider all mitigating circumstances before deciding whether to impose the death penalty. The Arizona Supreme Court's decision thus violates international human rights law. More specifically, the decision violates Article 6 of the International Covenant on Civil and Political Rights (hereinafter, "ICCPR" or "Covenant"), read in light of General Comment No. 36 of the United Nations Human Rights Committee (hereinafter, "Human Rights Committee"). Paragraph 37 of General Comment No. 36 requires that "[i]n all cases involving the application of the death penalty, the personal circumstances of the offender and the particular circumstances of the offence, including its specific attenuating elements must be considered by the sentencing court." The Arizona Supreme Court's decision is also at odds with the representations systematically made by the United States to the international community through its "Periodic Reports" submitted to the Human Rights Committee under Article 40 of the ICCPR to the effect that United States courts take into account mitigating circumstances before deciding whether to impose the death penalty.

This Court has consistently recognized international law as a persuasive source of authority in considering the Eighth Amendment's prohibition of "cruel and unusual punishment,"[2] in particular as a reflection of the country's "evolving standards of decency."[3] The Advocates and the World Coalition thus respectfully urge the Court, when assessing the constitutionality of the Arizona Supreme Court's decision, to consider international human rights law. By ensuring that Petitioner is given a chance to be sentenced by a jury that will give due consideration to all relevant circumstances and attenuating elements of his case, this Court has the opportunity to ensure that United States' practice with respect to the death penalty comports not only with international human rights law, but also with the United States' representations to the international community regarding that practice.

ARGUMENT

I. BY FAILING TO REMAND MCKINNEY'S CASE, THE ARIZONA SUPREME COURT HAS, IN VIOLATION OF INTERNATIONAL HUMAN RIGHTS LAW, IMPOSED THE DEATH PENALTY WITHOUT ALLOWING THE SENTENCING COURT TO CONSIDER MITIGATING CIRCUMSTANCES

By refusing to remand McKinney's case for resentencing, the Arizona Supreme Court eliminated the possibility for the sentencing court to consider mitigating circumstances before imposing the death

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[2] *Graham v. Fla.,* 560 U.S. 48, 80 (2010).

[3] *Trop v. Dulles,* 356 U.S. 89, 101 (1958).

penalty, in violation of international human rights law.

Upon ratifying the ICCPR, the United States joined the international community in recognizing, under Article 6(1) of the ICCPR, that "[e]very human being has the inherent right to life" and that "[n]o one shall be arbitrarily deprived of his life."[4] The United States further recognized, under Article 6(2) of the ICCPR, that any "sentence of death may be imposed only for the most serious crimes" and that "[t]his penalty can only be carried out pursuant to a final judgement rendered by a competent court."[5]

The Human Rights Committee has recently given these provisions of the ICCPR further meaning. The Human Rights Committee is the independent body of the United Nations specifically established to oversee the interpretation and implementation of the ICCPR and monitor the State Parties' compliance with it. The Human Rights Committee's role is of utmost importance. According to the International Court of Justice, the Human Rights Committee's interpretations must be "ascribe[d] great weight" in order "to achieve the necessary clarity and the essential consistency of international law, as well as legal security."[6]

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[4] International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Doc. E., 95-2, 999 U.N.T.S. 171, Article 6(1).

[5] *Id*.

[6] *Ahmadou Sadio Diallo* (Republic of Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. Rep. 639, ¶ 66 (Nov. 30). International law scholars have also long considered that the Human Rights Committee's interpretations of the ICCPR must be considered highly persuasive, *see* International Law Association (ILA), Committee on Human Rights Law and Practice, *Final Report on*

In October 2018, the Human Rights Committee issued General Comment No. 36, which is the product of a four-year consultation process whereby the Human Rights Committee received feedback from States, other United Nations institutions, national human rights institutions, academics and civil society regarding the scope and content of Article 6 of the ICCPR on the right to life.[7] General Comment No. 36 thus reflects international consensus.

In particular, in paragraph 37 of General Comment No. 36, the Human Rights Committee clarified that Article 6(2) of the ICCPR should be read to mean that "[i]n all cases involving the application of the death penalty, the personal circumstances of the offender and the particular circumstances of the offence, including its specific attenuating elements must be considered by the sentencing court."[8] International

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the Impact of Findings of the United Nations Human Rights Treaty Bodies, in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SEVENTYFIRST CONFERENCE 621, at 631–57 (2004); International Law Association (ILA), Committee on International Human Rights Law and Practice, *Interim Report on the Impact of the Work of the United Nations Human Rights Treaty Bodies on National Courts and Tribunals*, *in* REPORT OF THE SEVENTIETH CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION 507, at 516–18 (2002); PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 691 (2012); MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGE FROM DEPRIVATION 82-83 (2007).

[7] Sarah Joseph, *Extending the Right to Life under the International Covenant on Civil and Political Rights: General Comment 36*, 19 HUM. RTS. L. REV. 347, 347 (2019).

[8] U.N. Human Rights Comm., General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, U.N. Doc. CCPR/C/GC/36, ¶ 37 (Oct. 30, 2018) at

obligations under Article 6 of the ICCPR, and Article 6(2) in particular, must, therefore, be read in light of the "great weight" that international law "ascribes" to paragraph 37 of General Comment No. 36.[9]

The international consensus reflected in paragraph 37 of General Comment No. 36 stems, in fact, from this Court's 1976 decision in *Woodson v. North Carolina*, declaring a mandatory death penalty law unconstitutional.[10] As acknowledged by the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions (hereinafter, the "Special Rapporteur") in his 2007 Report to the United Nations Human Rights Council,[11] this Court's reasoning in *Woodson* spearheaded the trend of national courts and international treaty bodies to

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https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf.

[9] *Ahmadou Sadio Diallo* (Republic of Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. Rep. 639, ¶ 66 (Nov. 30).

[10] *Woodson v. N.C.*, 428 US 280, 304 (1976) (holding that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment […] requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.").

[11] The Human Rights Council is "is an inter-governmental body within the United Nations system made up of 47 States responsible for the promotion and protection of all human rights around the globe", *see* U.N. HUMAN RIGHTS COUNCIL, https://www.ohchr.org/en/hrbodies/hrc/pages/home.aspx (last visited Aug. 22, 2019).

favor individualized sentencing in the move away from the mandatory death penalty.[12]

At the level of international treaty bodies, the Human Rights Committee stated, already as of 1995 in its decision[13]

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[12] Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, U.N. Doc. A/HRC/4/20, n. 136 (Jan. 29, 2007) ("The first national court to strike down the mandatory death penalty as a violation of rights was that of the United States Supreme Court in 1976. *Woodson v. N.C.*, 428 U.S. 280 (1976); *Sumner v. Shuman*, 483 U.S. 66 (1987) (clarifying that the holding in Woodson did not have exceptions). The Supreme Court of India invalidated that country's last remaining mandatory death penalty law in 1983, and the Constitutional Court of Uganda followed suit in 2005. *Mithu v. State of Punjab*, 2 S.C.R. 690 (1983); *Susan Kigula and 416 others v. Attorney General*, Constitutional Petition No. 6 of 2003, Supreme Court of Uganda (Jun. 10, 2005). (Influenced by the reasoning of the US and Indian decisions, international treaty bodies began contributing to the jurisprudence in the mid-1990s.").

[13] The decisions the Human Rights Committee adopts in addressing communications from individuals alleging to be victims of violations of any of the rights set forth in the ICCPR under the First Optional Protocol are called "Views," and they are advisory, rather than obligatory in character, *see* Thomas Buergenthal, *The U.N. Human Rights Committee*, 5 MAX PLANCK Y.B. OF U.N. L. 397 (2001). Their advisory character does not mean however that they have no normative effect: in its General Comment No. 33, the Human Rights Committee clarified that even though it is not a judicial body, its Views "exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members." Its Views should thus be considered as "an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument" and that they "derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant", *see* U.N.

in *Lubuto v. Zambia*,[14] that the death penalty is to be applied exceptionally and only to the "most serious crimes", and that the mandatory imposition of the death penalty violates Article 6(2) of the ICCPR because it precludes a sentencing court from considering the actual circumstances of the offense.[15]

Human Rights Comm., General Comment No. 33: Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/GC/33, ¶¶ 11,13 (Oct. 31, 2008) at https://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.GC.33.pdf. *See also* VENICE COMMISSION OF THE COUNCIL OF EUROPE, REPORT ON THE IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS TREATIES IN DOMESTIC LAW AND THE ROLE OF COURTS ¶¶ 77-78 (2014) (noting that the State Parties to the ICCPR have a good faith obligation to take the Committee's Views into consideration. The authoritative status of the Committee's Views is also in line with the *pacta sunt servanda* principle, exemplified in Article 26 of the Vienna Convention on the Law of Treaties, which provides that "[e]very treaty in force is binding upon the parties to it and must be performed in good faith.").

[14] U.N. Human Rights Comm, *Lubuto v. Zam*., U.N. Doc. CCPR/C/55/D/390/1990 (Oct. 31, 1995), at http://hrlibrary.umn.edu/undocs/session55/vws390r1.htm.

[15] U.N. Human Rights Comm, *Lubuto v. Zam*., U.N. Doc. CCPR/C/55/D/390/1990, ¶ 7.2 (Oct. 31, 1995), at http://hrlibrary.umn.edu/undocs/session55/vws390r1.htm. ("Considering that in this case use of firearms did not produce the death or wounding of any person and that the court could not under the law take these elements into account in imposing sentence, the Committee is of the view that the mandatory imposition of the death sentence under these circumstances violates article 6, paragraph 2, of the Covenant") (emphasis added); U.N. Human Rights Comm., *Chisanga v. Zam*., U.N. Doc. CCPR/C/85/D/1132/2002, ¶ 7.4 (Oct. 18, 2005), at http://www.worldcourts.com/hrc/eng/decisions/2005.10.18_Chisanga_v_Zambia.htm.

The Human Rights Committee expanded its observations in the year 2000 in *Thompson v. St. Vincent & the Grenadines*,[16] deciding that, when the death penalty is imposed automatically and "without regard to the defendant's personal circumstances or the circumstances of the particular offense," it constitutes an arbitrary deprivation of life in violation of Article 6 of the ICCPR. Specifically, the Human Rights Committee found that ignoring mitigating circumstances deprives the convicted "of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her case."[17]

In 2002, in *Carpo v. Philippines*, the Human Rights Committee similarly emphasized that an arbitrary deprivation of life occurs "in circumstances where the death penalty is imposed without regard being able to be paid to the defendant's personal circumstances or the circumstances of the particular offense."[18] Also in 2002, in *Kennedy v. Trinidad and Tobago*, the Human Rights Committee considered that, when "no room is left to consider the personal circumstances of the

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[16] U.N. Human Rights Comm., *Thompson v. St. Vincent*, U.N. Doc. CCPR/C/70/D/806/1998 (Oct. 18, 2000), at http://www.worldcourts.com/hrc/eng/decisions/2000.10.18_Thompson_v_Saint_Vincent_and_Grenadines.htm.

[17] U.N. Human Rights Comm., *Thompson v. St. Vincent*, U.N. Doc. CCPR/C/70/D/806/1998, ¶ 8.2 (Oct. 18, 2000), at http://www.worldcourts.com/hrc/eng/decisions/2000.10.18_Thompson_v_Saint_Vincent_and_Grenadines.htm.

[18] U.N. Human Rights Comm., *Carpo v. Phil.*, U.N. Doc. CCPR/C/77/D/1077, ¶ 8.3 (May 6, 2002), at https://www.refworld.org/cases,HRC,3f588eec0.html.

accused or the particular circumstances of the offense", it "would deprive the author of his right to life, without considering whether, in the particular circumstances of the case, this exceptional form of punishment is compatible with the provisions of the Covenant."[19]

A few years later, in 2005, in *Chisanga v. Zambia*, the Human Rights Committee decided that, when "the judge [has no] margin to evaluate the circumstances of the particular offense," this constitutes "mandatory capital punishment [that] would deprive the author of the benefit of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment could be appropriate in the circumstances of his case."[20]

A year later, in 2006, in *Larranaga v. Philippines*, the Human Rights Committee recalled that "where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence," the imposition of the death penalty "constitutes an arbitrary deprivation of life."[21]

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[19] U.N. Human Rights Comm., *Kennedy v. Trin. & Tobago*, U.N. Doc. CCPR/C/74/D/845/1998, ¶ 7.3 (Mar. 26, 2002), at http://www.worldcourts.com/hrc/eng/decisions/2002.03.26_Kennedy_v_Trinidad_and_Tobago.htm.

[20] U.N. Human Rights Comm., *Chisanga v. Zam.*, U.N. Doc. CCPR/C/85/D/1132/2002, ¶ 7.4 (Oct. 18, 2005), at http://www.worldcourts.com/hrc/eng/decisions/2005.10.18_Chisanga_v_Zambia.htm

[21] U.N. Human Rights Comm., *Larranaga v. Phil.*, U.N. Doc. CCPR/C/87/D/1421/2005, ¶ 7.2 (Jul. 14, 2006), at http://www.worldcourts.com/hrc/eng/decisions/2006.07.24_Larranaga_v_Philippines.htm.

In his 2007 report to the Human Rights Council, the Special Rapporteur referred approvingly to these decisions of the Human Rights Committee and observed that the Human Rights Committee's approach had been adopted "by almost every judicial or quasi-judicial human rights body in the world" and by "a wide range of national courts and other judicial bodies."[22]

To confirm the international consensus – again, spearheaded by *Woodson* and confirmed by the Human Rights Committee – that courts must consider mitigating circumstances before imposing the death penalty, the Special Rapporteur also referred in his 2007 report to the jurisprudence of the Inter-American Court of Human Rights (hereinafter, "the Inter-American Court"), as one of two bodies in the Inter-American system for the promotion and protection of human rights (the other being the Inter-American Commission on Human Rights, discussed further below).[23]

In its 1983 Advisory Opinion on Capital Punishment, the Inter-American Court noted that "certain considerations involving the person of the

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[22] Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, U.N. Doc. A/HRC/4/20 (Jan. 29, 2007). *See also*, U.N. Secretary General, *Capital Punishment and Implementation of the Safeguards guaranteeing Protection of the Rights if those facing the Death penalty*, U.N. Doc. E/2010/10, ¶ 62 (June 28 – July23, 2010).

[23] Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, U.N. Doc. A/HRC/4/20, ¶ 56, n. 143 (Jan. 29, 2007).

defendant, which may bar the imposition or application of the death penalty must be taken into account."[24] The Inter-American Court has consistently applied this principle in the cases before it.

For instance, in the 2002 case of *Hilaire et al. v. Trinidad and Tobago*, the Inter-American Court expressly referred to a series of mitigating circumstances that sentencing courts should consider in death penalty cases, such as the "prior criminal record of the offender," "the subjective factors that could have motivated his conduct," "the degree of his participation in the criminal act," "the probability that the offender could be reformed and socially readapted," and generally, "whether the death penalty is the appropriate punishment or not for the specific case in light of the circumstances of the offender's conduct."[25]

In 2009, in *DaCosta Cadogan v. Barbados*, the Inter-American Court found a violation of the applicant's right to a fair trial because, among other reasons, a full evaluation of his mental health had not been ordered by the sentencing court and he was denied the opportunity to submit a more detailed evaluation of his mental health on appeal.[26] As the Inter-American

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[24] Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3, ¶ 55 (Sept. 8, 1983).

[25] *Hilaire et al. v. Trin. & Tobago*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 87 (June 21, 2002).

[26] *DaCosta Cadogan v. Barb.*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 204, ¶ 88 (Sept. 24, 2009) ("the State failed to order that a

Court explained, death penalty cases are "[u]nlike other criminal proceedings in which the State's passive conduct with regard to the availability of mental health evaluations would be admissible,"[27] because a failure to consider a defendant's mental health as a mitigating factor against his sentencing could literally make "the difference between the defendant's life or death."[28]

To ensure that mitigating circumstances related to the defendant's mental health would be appropriately considered in death penalty cases, the Inter-American Court found that heightened fair trial and due process guarantees are applicable in death penalty cases,[29]

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psychiatric evaluation be carried out in order to determine, inter alia, the existence of […] 'personality disorders' that could have affected Mr. DaCosta Cadogan at the time of the offense, and it also failed to ensure that Mr. DaCosta and his counsel were aware of the availability of a free, voluntary, and detailed mental health evaluation in order to prepare his defense in the trial. [This] may have resulted in the exclusion of evidence relevant to the preparation of his defense."), ¶ 89 ("Mr. DaCosta Cadogan requested during his appeal process that he be allowed the opportunity to submit a more detailed evaluation of his alleged personality disorder and alcohol dependence, which was denied.").

[27] *DaCosta Cadogan v. Barb.*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 204, ¶ 89 (Sept. 24, 2009).

[28] *DaCosta Cadogan v. Barb.*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 204, ¶ 87 (Sept. 24, 2009).

[29] *DaCosta Cadogan v. Barb.*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 204, ¶ 85 (Sept. 24, 2009) ("In analyzing whether the State respected and ensured Mr. DaCosta's due process rights, the Court recalls that this obligation is most broad and demanding in

which require courts to "adopt a more active role in ensuring that all necessary measures were carried out in order to guarantee a fair trial."[30]

In addition to the foregoing, in his 2007 report, the Special Rapporteur referred to decisions of the Inter-American Commission on Human Rights [hereinafter, "the Commission"] which, along with the Inter-American Court, monitors compliance with and defense of human rights in the Americas.

Through its decision in *McKenzie et al. v. Jamaica*,[31] the Commission stressed the need for individual

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those processes in which a penalty of death may be imposed. This is so because such a penalty entails the deprivation of the most fundamental of rights, the right to life, with the consequent impossibility of reversing the penalty once it has been carried out.").

[30] *DaCosta Cadogan v. Barb.*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 204, ¶ 89 (Sept. 24, 2009) (emphasis added).

[31] *McKenzie et al. v. Jam.*, Case No. 12.023, Inter-Am. Comm'n. H.R., Report No. 41/00, OEA/Ser.L/V/II.16 doc. 3, ¶ 195 (Apr. 13, 2000) ("mandatory death sentences cannot be reconciled with Article 4 of the Convention in several respects.") ¶ 196 ("imposing a mandatory death penalty […] prohibits a reasoned consideration of each individual case to determine the propriety of the punishment in the circumstances. […] [and] therefore results in the arbitrary deprivation of life, within the ordinary meaning of […] Article 4(1) of the Convention"),¶ 200 ("a mandatory death sentence precludes any effective review by a higher court as to the propriety of a sentence of death in the circumstances of a particular case. […] There is no opportunity for a reviewing tribunal to consider whether the death penalty was an appropriate punishment in the circumstances of the particular offense or offender. This consequence cannot be reconciled with the fundamental principles of due process under Articles 4 and 8

consideration in death penalty cases, finding that "a principle of law has developed common to those democratic jurisdictions that have retained the death penalty, according to which the death penalty should only be implemented through 'individualized' sentencing. Through this mechanism, the defendant is entitled to present submissions and evidence in respect of all potentially mitigating circumstances relating to his or her person or offense, and the court imposing sentence is afforded discretion to consider these factors in determining whether the death penalty is a permissible or appropriate punishment."[32]

The Commission then listed several mitigating factors commonly considered in capital cases, which "may relate to the gravity of the particular offense or the degree of culpability of the particular offender, and may include such factors as the offender's character and record, subjective factors that might have motivated his or her conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender."[33]

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of the Convention that govern the imposition of the death penalty, which, as the Inter-American Court has recognized, include strict observance and review of the procedural requirements governing the imposition or application of the death penalty.").

[32] *McKenzie et al. v. Jam.*, Case No. 12.023, Inter-Am. Comm'n. H.R., Report No. 41/00, OEA/Ser.L/V/II.16 doc. 3, ¶ 208 (Apr. 13, 2000).

[33] *McKenzie et al. v. Jam.*, Case No. 12.023, Inter-Am. Comm'n. H.R., Report No. 41/00, OEA/Ser.L/V/II.16 doc. 3, ¶¶ 207-09 (Apr. 13, 2000).

In sum, in discussing the cases above, the Special Rapporteur's report confirms that, at least as of 2007, there has been an international consensus that "respect for human rights can be reliably ensured in death penalty cases only if the judiciary engages in case-specific, individualized sentencing that accounts for all the relevant factors" pertaining to the offender and his or her offense.[34]

This long-standing consensus is now reflected in paragraph 37 of the Human Rights Committee's General Comment No. 36 which, as referenced above, must be "ascribed great weight"[35] in interpreting international obligations under Article 6(2) of the ICCPR and requires that "[i]n all cases involving the application of the death penalty, the personal circumstances of the offender and the particular circumstances of the offence, including its specific attenuating elements must be considered by the sentencing court."[36]

Not all such circumstances and elements were considered in Petitioner's case. James McKinney's

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[34] Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, U.N. Doc. A/HRC/4/20, ¶ 56 (Jan. 29, 2007).

[35] *Ahmadou Sadio Diallo* (Republic of Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. Rep. 639, ¶ 66 (Nov. 30).

[36] U.N. Human Rights Comm., General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, U.N. Doc. CCPR/C/GC/36, ¶37 (Oct. 30, 2018) at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf.

childhood was abusive and traumatic.[37] He was frequently beaten, locked out of his home in extreme weather conditions, and denied adequate food and clothing throughout his childhood.[38] Both McKinney's aunt and half-sister testified that McKinney's father and step-mother inflicted significant trauma on McKinney consistently over his formative years.

A psychologist testified at McKinney's original sentencing proceeding that he suffered from PTSD owing to an abusive childhood. The psychologist believed that his PTSD could cause withdrawal from violent situations and that his trauma could be "re-triggered" by violence producing "diminished capacity."[39] The state trial court judge did not consider McKinney's PTSD diagnosis when sentencing McKinney.[40]

When the state of Arizona petitioned the Arizona Supreme Court for a rehearing in the McKinney case, the Arizona Supreme Court undertook a *de novo* review and did not remand the case for sentencing by a jury.[41] In weighing aggravating and mitigating factors in the McKinney case, the Arizona Supreme Court did not consider the psychologist's conclusion that McKinney's PTSD could be retriggered by violence, producing reduced capacity, and affirmed his

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[37] *McKinney v. Ryan,* 730 F.3d 903, 915 (9th Cir. 2013).

[38] *Id.*

[39] *McKinney v. Ryan,* 813 F.3d 798, 808 (9th Cir. 2015).

[40] *Id.* at 809.

[41] *State v. McKinney,* 426 P.3d 1204, 1206-08 (Ariz. 2018).

death sentence.[42] The Arizona Supreme Court could not give full consideration to the mitigating evidence of McKinney's PTSD because evidence in the original sentencing proceeding focused on demonstrating a causal nexus between McKinney's PTSD and the crime, instead of exploring whether the PTSD diagnosis itself warranted leniency.

The Arizona Supreme Court thus did not have sufficient evidence in the record to evaluate and weigh the relevance of McKinney's PTSD to meet international norms before sentencing McKinney to death. The case should have been remanded for resentencing by a jury considering the entirety of mitigating circumstances. The failure of the Arizona Supreme Court to remand McKinney's case for sentencing has thus prevented, in the words of paragraph 37 of the Human Rights Committee's General Comment No. 36, his "personal circumstances" and "the particular circumstances of the offense, including its specific attenuating elements" from being considered by the sentencing court, in violation of Article 6(2) of the ICCPR.

II. INTERNATIONAL LAW PROVIDES PERSUASIVE AUTHORITY FOR INTERPRETING THE CONSTITUTIONAL ISSUES BEFORE THIS COURT

This Court recognizes international law as persuasive authority for questions presented under the U.S. Constitution and will look to international law and comparative law in considering the Eighth Amendment's prohibition against cruel and unusual

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[42] *Id.*

punishment.[43] To find a punishment "cruel and unusual", this Court has looked to "evolving standards of decency that mark a maturing of society."[44] In *Roper v. Simmons,* this Court held that execution of individuals for crimes committed as juveniles is a disproportionate punishment that violates the Eighth Amendment. In reaching its decision, the Court looked "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."[45] More recently, in *Graham v. Florida,* the Court affirmed the relevance of international law to the proper interpretation of the Eighth Amendment. In its analysis of the constitutionality of Florida's juvenile life without parole policies, the Court examined the practices of other countries in sentencing juveniles, continuing the Court's "longstanding practice in noting the global consensus against the sentencing practice in question."[46] The Court noted that even in the absence of on-point international law binding on the United States, international law, agreements, and practices are "relevant to the Eighth Amendment … because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the

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[43] U.S. Const. amend VIII.

[44] *Trop v. Dulles,* 356 U.S. 89, 101 (1958).

[45] *Roper v. Simmons,* 543 U.S. 551, 575 (2005) (citing *Trop,* 356 U.S. at 102-103).

[46] *Graham v. Fla.,* 560 U.S. 48, 80 (2010).

Court's rationale has respected reasoning to support it."[47]

Significantly, with regard to the constitutional issues here, this Court has consulted and cited international authorities and the practices and decisions of other nations in assessing whether domestic practices comport with evolving standards of decency in the treatment of condemned prisoners.[48]

The Court should be all the more sensitive to international standards here, taking into account the representations made by the United States to the international community when submitting the country's Periodic Reports to the Human Rights Committee under Article 40 ICCPR.[49] In the Periodic

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[47] *Id.* at 82.

[48] *See, e.g., Atkins v. Va.*, 536 U.S. 304, 316 n. 21 (2002), (examining the opinions of "the world community" to support its conclusion that execution of persons with severe intellectual disabilities would offend the standards of decency required by the Eighth Amendment); *Thompson v. Okla.*, 487 U.S. 815, 830-31 (1988) (Stevens, J.) (looking to the opinions and practices of "other nations that share our Anglo-American heritage" and "leading members of the Western European community" as aids to the proper interpretation of the Eighth Amendment). This Court has also found international law relevant to the interpretation of other constitutional provisions. *See Lawrence v. Tex.*, 539 U.S. 558, 560 (2003) (referencing a decision of the European Court of Human Rights to determine that a Texas sodomy law violated plaintiff's privacy rights under the due process clause of the Fourteenth Amendment); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring, joined by Breyer, J.) (noting that the Court's opinion with regard to affirmative action "accords with the international understanding of the office of affirmative action" reflected in four international treaties).

[49] Article 40 of the ICCPR provides:

Reports, the United States has systematically represented to the international community that its courts, in keeping with international consensus, do indeed consider mitigating circumstances before imposing the death penalty.

In its First Periodic Report in 1994, the United States reported to the Human Rights Committee that "it is not enough for imposition of capital punishment that the crime resulted in death; the crime must also have attendant aggravating circumstances. In other

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1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned; (b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

words, restrictions on imposition of the death penalty are tied to a constitutional requirement that the punishment not be disproportionate to the personal culpability of the wrongdoer, *Tison v. Arizona,* 481 U.S. 137, 149 (1987), and the severity of the offence, *Coker v. Georgia,* 433 U.S. 584, 592 (1977)."[50]

In its combined Second and Third Periodic Reports submitted in 2005, the United States built on its prior statements to assure the Human Rights Committee that, in the United States, "a death penalty eligible defendant is entitled to an individualized determination that the death sentence is appropriate in his case, and the jury must be able to consider and give effect to any mitigating evidence that a defendant proffers as a basis for a sentence less than death." *See Johnson v. Texas,* 509 U.S. 350 (1993)."[51] That obviously did not occur here, as the jury was not afforded the opportunity to consider such evidence.

More recently, in its Fourth Periodic Report of 2012, the United States affirmed that under the "[h]eightened procedural protections" and "guarantees which are well respected and enforced by the courts", defendants in capital punishment cases are "entitled to an individualized determination" of the appropriateness of the death sentence for their case, whereby "the jury must be able to consider and give

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[50] U.N. Human Rights Comm., Initial Periodic Report submitted by the United States of America Under Article 40 of the Covenant, U.N. Doc. CCPR/C/81/Add.4, ¶ 140 (Aug. 24, 1994).

[51] U.N. Human Rights Comm., Second and Third Periodic Reports submitted by the United States of America Under Article 40 of the Covenant, U.N. Doc. CCPR/C/USA/3, ¶ 109 (Nov. 28, 2005) (emphasis added).

effect to any mitigating evidence that a defendant proffers as a basis for a sentence less than death."[52]

This Court has the opportunity to not only ensure that McKinney is given a chance to be sentenced in conformity with international human rights law – that is, considering all of the mitigating circumstances offered by McKinney during his trial – but also to send a message to the international community that the United States will act consistently with the representations it has made before the Human Rights Committee in this very regard.

[52] U.N. Human Rights Comm., Fourth Periodic Report submitted by the United States of America Under Article 40 of the Covenant, U.N. Doc. CCPR/C/USA/4, ¶ 152 (May 22, 2012).

CONCLUSION

For the foregoing reasons, as well as those argued by Petitioners, the Court should reverse the decision of the Arizona Supreme Court.

Respectfully submitted,

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August 28, 2019