No. 07-5439

In the Supreme Court of the United States

RALPH BAZE, ET AL.,

Petitioners,

v.

JOHN D. REES, ET AL.,

Respondents.

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF OF HUMAN RIGHTS WATCH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amicus will address the following question:

Does Kentucky's three-drug lethal injection protocol, which is used in some form by every State employing lethal injection as a method of execution, violate the Eighth Amendment's prohibition against cruel and unusual punishment?

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BRIEF OF HUMAN RIGHTS WATCH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

Human Rights Watch is a non-governmental organization established in 1978 to monitor and promote observance of internationally recognized human rights. It has Special Consultative Status at the United Nations, regularly reports on human rights conditions in the United States and more than seventy other countries around the world, and actively promotes legislation and policies worldwide that advance protections of domestic and international human rights and humanitarian law. *Amicus* has extensively researched lethal injections in the United States and published a report on the matter. *So Long as They Die: Lethal Injections in the United States*, Human Rights Watch (Human Rights Watch, New York, N.Y.) (April 2006).[1]

Because amicus has unique expertise in the intersection between these areas of law and the Eighth Amendment, it submits this brief to assist the Court in resolving this case.

[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and its counsel made a monetary contribution to its preparation or submission. Letters from the parties' counsel consenting to the filing of this brief have been filed with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

Lethal injection has been touted as the most humane method of execution and, to a layman, the claim is appealing. The methodology mimics controlled medical procedures and even evokes the euphemistic "putting to sleep" characterization of animal euthanasia. The reality is considerably less predictable and, at times, the equivalent of torture.

State and federal courts across the country have faced a deluge of challenges to the three-drug protocol used by every State that approves lethal injection as a method of execution. Even before the Court approved § 1983 claims in *Hill* v. *McDonough*, 126 S. Ct. 1096 (2006), mounting evidence revealed serious flaws in the three-drug lethal injection protocol. Since prisoners have been able to bring § 1983 challenges, evidentiary records in those proceedings support the claims of opponents that the three-drug protocol is inherently flawed and likely to cause severe pain and suffering.

Although the evidence has been consistent, lower courts' decisions have been varied and unpredictable, primarily because they lack guidance on the appropriate legal standard to apply to Eighth Amendment method-of-execution claims. This Court has not directly addressed such a claim in over a century. Fortunately, international human rights law provides a clear and practicable standard—whether the method of execution utilized inflicts the minimum possible pain and suffering.

The international standard is unambiguous and consistent with, indeed supported by, this Court's Eighth Amendment jurisprudence. By contrast, the standard applied by the Supreme Court of Ken-

tucky—whether the method of execution bears a substantial risk of the wanton infliction of unnecessary pain—is unworkable. It fails to provide meaningful guidelines that comply with international human rights law and the Eighth Amendment.

The history of Kentucky's adoption of its current three-drug lethal injection protocol reveals a legislature acting with the intent to adopt a method of execution more humane than electrocution. Nevertheless, both the legislature and the Department of Corrections, the State entity charged with developing and implementing the lethal injection protocol, failed to conduct any research to ensure that the three-drug protocol was in fact less likely to cause pain and suffering than electrocution. Nor did the Kentucky Legislature and Department of Corrections consider substantial evidence that other States' experience with the three-drug protocol proved that the protocol was inherently flawed and likely to cause excruciating pain.

Kentucky must address this dearth of research and evaluate the three-drug protocol it utilizes in executions. If independent research reveals that its current protocol does not minimize pain and suffering, Kentucky must implement the alternative that satisfies that standard.

ARGUMENT

THE EIGHTH AMENDMENT'S CRUEL AND UNUSUAL PUNISHMENT STANDARD SHOULD BE INFORMED BY INTERNATIONAL LAW NORMS REGARDING PERMISSIBLE METHODS OF EXECUTION.

For at least half a century, this Court's Eighth Amendment jurisprudence has looked to interna-

tional standards and practices in giving meaning to the prohibition against cruel and unusual punishment. *Trop* v. *Dulles*, 356 U.S. 86 (1958), acknowledged the guidance derived from the "civilized nations of the world" in interpreting the Eighth Amendment; the Court looked to "the evolving standards of decency that mark the progress of a maturing society." *Id.* at 102, 101. The Court also stated that the "[Eighth] Amendment stands to assure that this power be exercised within the limits of civilized standards." *Id.* at 100. Like international human rights law, the underpinning of the Eighth Amendment is "nothing less than the dignity of man." *Ibid.*

Since deciding *Trop*, the Court has consistently looked "to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of cruel and unusual punishment." *Roper* v. *Simmons*, 543 U.S. 551, 575 (2005) (internal quotation marks omitted). See also *Thompson* v. *Oklahoma*, 487 U.S. 815, 830 n.31 (1988) (overruled on other grounds); *Enmund* v. *Florida*, 458 U.S. 782, 796, n.22 (1982). Justice Kennedy's opinion for the Court in *Roper* elucidated the delicate balance this Court strikes between our own laws and the laws we share with the international community:

> It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

Roper, 543 U.S. at 578.

The Court has not addressed an Eighth Amendment challenge to a particular method for administering the death penalty for nearly 130 years. See *Wilkerson* v. *Utah*, 99 U.S. 130 (1878) (upholding execution by a firing squad). The lower courts addressing the issue therefore have based their decisions on different aspects of Eighth Amendment jurisprudence, with no specific link to the concerns peculiar to execution methods. As a result, the lower courts have reached dissimilar conclusions in factually similar cases. See, *e.g., Taylor* v. *Crawford*, 487 F.3d 1072 (8th Cir. 2007); *Hamilton* v. *Jones*, 472 F.3d 814 (10th Cir.), cert. denied, 127 S. Ct. 1054 (2007); *Morales* v. *Hickman*, 438 F.3d 926 (9th Cir.), cert. denied, 546 U.S. 1163 (2006); *Taylor* v. *Crawford*, 445 F.3d 1095 (8th Cir. 2006); *Timberlake* v. *Buss*, 2007 WL 1280664 (S.D. Ind. May 1, 2007); *Evans* v. *Saar*, 412 F. Supp. 2d 519 (D. Md. 2006); *Morales* v. *Hickman*, 415 F. Supp. 2d 1037 (N.D. Cal. 2006); *Morales* v. *Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006); *Walker* v. *Johnson*, 448 F. Supp. 2d 719 (E.D. Va. 2006); *Beardslee* v. *Woodford*, 395 F.3d 1064 (9th Cir. 2005); *Bieghler* v. *State*, 839 N.E.2d 691 (Ind. 2005), cert. denied, *Bieghler* v. *Indiana*, 546 U.S. 1159 (2006); *Abdur'Rahman* v. *Bredesen*, 181 S.W.3d 292 (Tenn. 2005), cert. denied, 126 S. Ct. 2288 (2006).

International human rights law, by contrast, directly addresses the standard that a particular method of execution must satisfy in order to be permissible under standards analogous to the Eighth Amendment. Moreover, unlike the standard applied below, the international law rule is clear, practical and unambiguous. This Court's adoption of the in-

ternational standard will result in consistent decisions by the lower courts.

A. International Law Requires That Any Execution Pursuant To A Lawfully-Imposed Death Penalty Be Accomplished With The Minimum Possible Pain And Suffering.

Several sources of international law support the conclusion that executions are permissible only when they inflict the minimum possible suffering.[2] Thus, Article 7 of the International Covenant on Civil and Political Rights, provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 7, 999 U.N.T.S. 171 [hereinafter "Covenant"].

The United Nations Human Rights Committee ("HRC"), the international body charged with monitoring compliance with the Covenant, has interpreted Article 7 in the context of government executions. Its formal guidance states that "when the death penalty is applied by a State party for the most serious crimes, * * * it must be carried out in such a way as to cause the least possible physical and mental suffering." ICCPR Gen. Comment 20, U.N. Hum. Rts. Comm., 44th Sess., at p. 6, U.N. Doc. CCPR/C/21/Add.3 (Oct. 3, 1992).

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[2] The treaties and resolutions cited herein, and the body of international human rights law that has developed around them, do not prohibit the death penalty per se. Rather, they seek to preserve the "inherent dignity of the human person." Preamble to the International Covenant on Civil and Political Rights.

Applying that standard to the case of Charles Chitat Ng, an individual who faced execution by lethal gas after extradition from Canada to the United States, the HRC determined that the proposed method of execution was "particularly abhorrent" and "contrary to internationally accepted standards of human treatment." *Chitat Ng* v. *Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (Jan. 7, 1994) (Hum. Rts. Comm.) ¶ 16.1. The HRC noted that, while article 6, paragraph 2 of the Covenant allows for the death penalty under limited circumstances, the "method of execution provided for by law must be designed in such a way as to avoid conflict with article 7." *Id*. Because the manner by which the execution was to take place "would not meet the test of 'least possible physical and mental suffering'" it violated the standards of the Covenant and constituted cruel and inhuman treatment. *Id.* ¶ 16.4.[3]

Also relevant are the terms of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by the United States in 1994. It states in pertinent part:

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[3] Significantly, the United States has recognized that "[m]any of the most cherished rights protected by the U.S. Constitution, such as * * * the prohibition on cruel and unusual punishments, also find expression and protection in the Covenant." Matthew Waxman, Head of U.S. Delegation, Opening Statement on the Report Concerning the International Covenant on Civil and Political Rights (July 17, 2006), *available at* http://www.state.gov/g/drl/rls/70392.htm. Also, that "courts could refer to the Covenant and take guidance from it." Statement of Conrad Harper, Legal Advisor, United States Department of State, to the United Nations Human Rights Committee, U.N. GAOR Hum. Rts. Comm., 53d Sess., 1405th mtg., U.N. Doc. HR/CT/404 (1995).

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

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 16(1), 1465 U.N.T.S. 113 [hereinafter "Convention Against Torture"]. Implementing the death penalty may violate the Convention Against Torture—as an act of "cruel, inhuman or degrading treatment or punishment"—not only when the method of execution runs counter to the standards of the Convention, but also when the circumstances of a particular execution fail to comply with the Convention's standards.[4]

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[4] A similar prohibition is contained in the American Convention on Human Rights, signed by the United States in 1977 and entered into force by the Organization of American States in 1978, which states that no person shall be subjected to "cruel, inhuman or degrading punishment or treatment." American Convention on Human Rights, Nov. 22, 1969, art. 5(2), O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. The Organization of American States in 1985 adopted its Inter-American Convention to Prevent and Punish Torture, reaffirming the determination that "cruel, inhuman, or degrading treatment or punishment constitute[s] an offense against human dignity." Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, Preamble, O.A.S.T.S. No. 67.

Non-treaty sources of international law also address limitations on the manner of execution. The Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the UN Economic and Social Council, requires that "[w]here capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering." E.S.C. res. 1984/50, annex, 1984 U.N. ESCOR Supp. (No. 1) at 33, U.N. Doc. E/1984/84 (1984). The European Union, in 2001, also adopted principles which urge third countries that practice the death penalty to ensure that the method of execution causes the "least possible physical and mental suffering." European Union General Affairs Council, Guidelines to EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Apr. 9, 2001).

The overwhelming weight of international authority thus requires that the death penalty be administered in a manner that preserves the principles of human dignity. That standard obligates a state actor implementing a death sentence to make every effort to minimize possible pain and suffering by the individual to be executed, even if that means that the state must reject a particular method in favor of an alternative that causes less suffering.

Because "the opinion of the world community * * * provide[s] respected and significant confirmation for [the Court's] own conclusions," *Roper*, 543 U.S. at 578, the Court should hold that a lethal injection protocol is permissible under the Eighth Amendment only if it inflicts the minimum possible pain and suffering. That standard fits naturally with the Eighth Amendment's prohibition of cruel and unusual punishment: the Court specifically admon-

ished in *In re Kemmler*, 136 U.S. 436, 447 (1890), that capital punishment is cruel when it "involve[s] torture or a lingering death * * * something more than the *mere extinguishment of life*" (emphasis added).

The standard adopted by the court below—whether the method of execution creates "a substantial risk of wanton or unnecessary infliction of pain," *Baze* v. *Rees*, 217 S.W.3d 207, 211 (Ky. 2006)—does not comport with this settled international law norm. To begin with, the lower court's standard is vague, because the "substantial risk" element provides insufficient guidance to those tasked with designing an execution protocol. Before a State can determine what makes the risk of pain and suffering "substantial" enough to be unconstitutional, it must determine the standard against which the risk is measured.

Moreover, unlike the international law norm, a "substantial risk" test permits a State to disregard available low-risk execution protocols as long as the protocol it adopts does not pose a "substantial risk." That necessarily permits States to utilize an execution procedure that inflicts more pain and suffering than an alternative method. International human rights law conversely and sensibly demands that the method causing the least pain and suffering always be employed.

That test is clear and administrable and complies with the Eighth Amendment. The Kentucky Supreme Court's vague, cumbersome standard does neither.

B. Kentucky Adopted The Three-Drug Lethal Injection Protocol Notwithstanding The Protocol's Demonstrated Failure To Minimize Pain And Suffering.

Kentucky replaced electrocution with lethal injection in 1998. See Ky. Rev. Stat. Ann. § 431.220(1)(a) (1998). At that time, legislators disregarded a report from Kentucky's own Legislative Research Commission warning of claims by doctors that prisoners could "strangle or suffer excruciating pain" during the chemical injections but may be "prevented by the paralytic agent from communicating their distress." Legislative Research Committee, *Issues Confronting the 1998 General Assembly, Informational Bulletin No. 198*, at 99 (Sept. 1997), *available at* www.lrc.ky.gov/lrcpubs/Ib198.pdf (internal citation omitted). The same report also pointed to evidence of numerous botched executions in other States that used substantially the same lethal injection protocol. *Ibid.*

Moreover, the statute that Kentucky adopted failed to comply with the governing Eighth Amendment principles. It provides that "every death sentence shall be executed by continuous intravenous injection of a substance or combination of substances sufficient to cause death." Ky. Rev. Stat. Ann. § 431.220(1)(a) (1998). Precisely which substances to use and how to inject them were questions consigned to the discretion of the Kentucky Department of Corrections. That Department simply adopted the procedures used in other States; it "did not conduct any independent scientific or medical studies or consult any medical professionals concerning the drugs and dosage amounts to be injected into the condemned." *Baze* v. *Rees*, No. 04-Cl-1094, 2005 WL 5797977, at

*6-7 (Ky. Cir. Ct. Jul. 8, 2005). That is plainly insufficient to conform to the requirements of the Eighth Amendment.

Certainly the description of the execution carried out by Kentucky provides no assurance that Kentucky's only lethal injection execution was not constitutionally flawed. "Harper went to sleep within 15 seconds to one minute from the moment that the warden began the execution and never moved or exhibited any pain whatsoever subsequent to losing consciousness." *Baze*, 217 S.W.3d at 212. There can be no guarantee Harper actually did lose consciousness. After the warden administered the pancuronium bromide, a conscious Harper would have suffocated to death in silent paralysis, unable to express his agony when the potassium chloride burned his veins on its way to his heart.

Moreover, it is disingenuous for the State to claim that the protocol is humane on the basis of one execution when executions around the country have gone tragically awry. The protocol was flawed at its conception, and its continued use despite clear evidence that alternatives would minimize pain and suffering violates the Eighth Amendment.

CONCLUSION

The judgment of the Supreme Court of Kentucky should be reversed.

Respectfully submitted.

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