

No. 00-8727

IN THE SUPREME COURT OF THE UNITED STATES

ERNEST PAUL McCARVER,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent

**ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA**

**BRIEF OF *AMICUS CURIAE* THE EUROPEAN UNION
IN SUPPORT OF THE PETITIONER**

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Interest of *Amicus Curiae*

Like the United States, the European Union (“EU”) is founded on principles of liberty, democracy, respect for human rights, fundamental freedoms and the rule of law. These principles are common to its fifteen member states: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.¹

¹ Counsel of record is the author of this brief. Counsel wishes to acknowledge the contributions of Professor Stanley Herr, William J. Edwards and Patricia Williams to sources and arguments included in the brief, as well as research assistance from Cara Ciuffani, Allison Posner and Dena Marshall, students at the Washington College of Law. No monetary contributions were made for preparation or submission of this brief. Supreme Court Rule 37.6. A blanket consent letter for all *amicus curiae* briefs, signed by the parties, is on file with the Clerk of this Court.

The EU and its member states are opposed to the death penalty in all cases and accordingly aim at its universal abolition. The abolition of the death penalty contributes to the enhancement of human dignity and the progressive development of human rights. This view has been expressed to the government of the United States through various general demarches and through specific demarches in cases involving, *inter alia*, the pending execution of persons with mental retardation. The EU and its member states pursue this policy consistently in different international fora such as the United Nations and the Council of Europe, as well as through bilateral contacts with many countries that retain the death penalty. See, European Union, *Guidelines to EU Policy Towards Third Countries on the Death Penalty* (3 June 1998), www.eurunion.org/legislat/DeathPenalty/Guidelines.htm. The EU provides a special and unique perspective to this Court that is not available through the views of the parties or other amici.

Summary of Argument

There is growing international consensus against the execution of persons with mental retardation. The European Union invites this Court to join with it in condemning the practice of such executions. The EU as a whole bars the imposition of capital punishment in all circumstances, but more importantly, since 1995 only three countries in the world are reported to have carried out executions of mentally retarded defendants: Kyrgyzstan, Japan and the United States. Countries are also explicitly limiting or abolishing the application of the death penalty generally, as well as specifically in the case of the mentally retarded. In a 2001 report of the Secretary General of the United Nations, for example, only Togo reported that its law would allow a death sentence for a

person with mental retardation, although no executions on that basis are reported there. The only jurisdictions in the Western Hemisphere permitting the execution of the mentally retarded are those U.S. states that, like North Carolina, continue to pursue death sentences irrespective of a defendant's mental retardation. Because of this growing consensus against the execution of the mentally retarded, it is likely that extradition to the United States of mentally retarded defendants accused of capital crimes increasingly will require assurances that the death penalty not be imposed.

Experts appointed by the United Nations have found that the United States' practice of executing the mentally retarded contravenes international standards and norms. The international standards and norms on mental retardation, the disabled and the handicapped focus on the ways such individuals are treated in general as well as the ways in which the mentally retarded are treated within the criminal justice system. All such standards call for humane treatment of mentally retarded persons, and within the criminal justice system, these standards call for adherence with due process of law and protection from degrading treatment.

The United Nations Human Rights Commission, over the negative vote of the United States, has passed resolutions since 1997 that call on countries that maintain the death penalty to observe UN Safeguards that specifically condemn the death penalty for "persons suffering from mental retardation." Since 1992, a Special Rapporteur for the UN Human Rights Commission also explicitly has condemned the execution of persons with mental retardation. The United States was criticized by the Human Rights Committee, which oversees compliance with the International Covenant on Civil and Political Rights, for its lack of protection from the death penalty of the mentally retarded. Finally, at a

meeting in November of 2000 of the Organization for Security and Cooperation in Europe, a security organization of 55 countries including the United States, the EU noted its concern that executions of the mentally retarded continue to be carried out in the OSCE region.

Argument

Since the Court's decision in Penry v. Lynaugh, 492 U.S. 302 (1989), the international community has solidified its opposition to death sentences imposed upon mentally retarded or otherwise incapacitated defendants. It is for this Court to determine those factors it deems appropriate when considering the constitutional propriety of death sentences for persons with mental retardation. *See, e.g., Stanford v. Kentucky*, 492 U.S. 361, 369 n. 1 (1989). In the past, however, the Court has "recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual." Thompson v. Oklahoma, 487 U.S. 815, 830 n. 31 (1988).

I. THERE IS A GROWING CONSENSUS IN THE PRACTICE OF NATIONS AGAINST THE EXECUTION OF MENTALLY RETARDED DEFENDANTS.

The United States stands virtually alone in its practice of sentencing to death those defendants who show any significant level of mental retardation. None of the fifteen member states of the European Union permit capital punishment, and the EU has consistently asserted that the execution of persons "suffering from any form of mental disorder . . . [is] contrary to internationally recognized human rights norms and neglect[s]

the dignity and worth of the human person.”² Most countries in the world bar the execution of the mentally retarded, and since 1995, only three countries are reported to have carried out the execution of a mentally retarded defendant: Kyrgyzstan, Japan and the United States.³

The fifteen nations of the European Union, in adopting the final act of the Treaty of Amsterdam on October 2, 1997, included a declaration stating that the death penalty is no longer applied in any EU member state. Any expansion of the EU will require that the admitted countries also abolish the death penalty.⁴ Indeed, the EU itself has presented demarches opposing the execution of several individuals who are mentally retarded or have been diagnosed with serious mental disorders.⁵

The EU is also part of the forty-three member states of the Council of Europe, which have stated that “the death penalty can no longer be regarded as an acceptable

² *EU Memorandum on the Death Penalty* (Feb. 25, 2000) on the Internet at <<http://www.eurunion.org/legislat/DeathPenalty/eumemorandum.htm>> (visited on Jan. 4, 2001), at 4.

³ U.N. Commission on Human Rights, *Report by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, E/CN.4/1997/60 (1996), at ¶ 89; U.N. Commission on Human Rights, *Report by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, E/CN.4/1995/61(1996), at ¶ 380.

⁴ *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Declaration on the abolition of the death penalty* (2 October 1997), on the Internet at <<http://ue.eu.int>>, at 125. See also, Dorean Marguerite Koenig, *A Death Penalty Primer: Reviewing International Human Rights Development & the ABA Resolution for a Moratorium on Capital Punishment in Order to Inform Debates in U.S. State Legislatures*, 4 ILSA J. INT’L & COMP. L. 513, 520-521 (1998). The EU has made its policies known to the United States government through general demarches against the death penalty to the government of the United States in February of 2000 and in May of 2001. *EU Demarche on the Death Penalty* (February 25, 2000), on the Internet at <<http://www.eurunion.org/legislat/DeathPenalty/Demarche.htm>> (visited on Jan. 4, 2001); *EU Policy on the Death Penalty* (May 10, 2001), on the Internet at <<http://www.eurunion.org/legislat/DeathPenalty/Demarche10May.htm>> (visited on May 15, 2001).

⁵ E.g., *EU Demarche to the Honorable Bob Holden, Governor of Missouri, Concerning Mr. Antonio Richardson* (21 Feb. 2001), on the Internet at <<http://www.eurunion.org/legislat/DeathPenalty/Richardson.htm>> (visited on April 20, 2001); *EU Demarche to the Honorable Kenny Guinn, Governor of Nevada, Concerning Mr. Thomas Nevius* (26 March 2001), on the Internet at <<http://www.eurunion.org/legislat/DeathPenalty/NeviusGovLett.htm>> (visited on April 20, 2001); *EU Letter to Governor George W. Bush, Governor of Texas, Concerning Mr. John Paul Penry* (7 Nov. 2000), on the Internet at <<http://www.eurunion.org/legislat/DeathPenalty/Penry.htm>> (visited on April 20, 2001).

form of punishment from a human rights perspective.” See, Koenig, *supra*, n. 4, at 523.⁶ Membership in the Council of Europe is conditioned upon abolition of or a moratorium on the death penalty and on ratification of Protocol 6 to the European Convention on Human Rights, concerning abolition of the death penalty.⁷ More importantly for purposes of the case at hand, however, is the fact that an overwhelming majority of nations limit the imposition of the death penalty in cases where the defendant is mentally retarded out of a conviction that the execution of persons with mental retardation is an “inhuman, medieval form of punishment [that is] unworthy of modern societies.”⁸

Patterns in national law and practice on the execution of the mentally retarded further illustrate its world-wide elimination. A growing number of countries specifically prohibit the execution of the mentally retarded, either by treaty or legislation. Indeed, in a 2001 report of the Secretary General of the United Nations, only Togo reported that its law would allow the death sentence to be imposed on persons who are mentally retarded (although no executions on that ground are reported there). United Nations Commission on Crime Prevention and Criminal Justice, *Report of the Secretary-General, Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of Those Facing the Death Penalty*, UN Doc. E/CN.15/2001/10 (2001), at ¶ 105. In 1997, Mr.

⁶ The current member states of the Council of Europe include Andorra, Armenia, Austria, Azerbaijan, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom. This listing can be found at the Council of Europe’s web page at <www.coe.int>. On the commitment of member and prospective states to abolition, see Peter Hodgkinson, *Europe - A Death Penalty Free Zone: Commentary and Critique of Abolitionist Strategies*, 26 OHIO N.U. L. REV. 625, 626 (2000).

⁷ *Protocol No. 6, European Convention for the Protection of Human Rights and Fundamental Freedoms*, E.T.S. 114. Entered into force March 1, 1985.

⁸ Statement of Rt. Hon. Christopher Patten delivered to the European Parliament, October 25, 2000, cited in HUMAN RIGHTS WATCH, UNITED STATES: BEYOND REASON, THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION 18, n. 55 (March 2001).

Bacre Waly Ndiaye visited the United States in his capacity as Special Rapporteur for the UN Commission on Human Rights. In his report, Mr. Ndiaye expressed particular concern about the execution of mentally retarded persons in the United States, concluding that such executions are “in contravention of relevant international standards.” U.N. Commission on Human Rights, *Report by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on a Mission to the United States of America*, E/CN.4/1998/68/Add.3 (1998), at ¶ 145.

The tiny number of nations reporting the execution of mentally retarded persons must be put into a context of the overall trend toward general abolition of the death penalty throughout the world. That trend among the nations of the world accelerated over the last decade. In every corner of the globe countries have limited or abolished the imposition of the death penalty.⁹ The Secretary General of the United Nations reported in March of this year that of the 194 countries in the world, 123 have abolished the death penalty in law or practice. United Nations Commission on Crime Prevention and Criminal Justice, *Report of the Secretary-General, Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of Those Facing the Death Penalty*, UN Doc. E/CN.15/2001/10 (2001), at 7, Table 1. The only jurisdictions in the Western Hemisphere permitting the execution of the mentally retarded are those handful of U.S. states that, like North Carolina, continue to pursue death sentences irrespective of a defendant’s mental retardation. *Id.*, at ¶ 142.

Practice with regard to extradition from other countries to face the death penalty in the United States will unquestionably be affected by the Court’s decision in this case.

Many countries, both within the EU and outside of it, are more frequently demanding assurances that individuals extradited from their countries to the United States be protected from the possible imposition of the death penalty. The Charter of Fundamental Rights of the European Union contains an explicit provision stating that “[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty . . .”.¹⁰

Recently, in Minister of Justice v. Burns and Rafay, 2001 SCC 7 (S.C. of Canada, 22 March 2001),¹¹ the Canadian Supreme Court held that the Canadian Minister of Justice’s decision to decline to request assurances from the state of Washington that the death penalty would not be imposed as a condition of extradition violated the defendants’ rights under the Canadian Charter of Rights and Freedoms. RIVKIND & SHATZ, *supra*, n. 11, at 762, ¶ 132.¹²

The decision of the Canadian Supreme Court follows strong precedent in Europe beginning more than a decade ago with the decision of the European Court of Human Rights in Soering v. United Kingdom, 161 Eur. Ct. H.R. (Ser.A) (1989) (holding that the extradition of a German defendant from England to face the death row phenomenon in Virginia would constitute a violation of the prohibition against cruel, inhuman or degrading treatment within the meaning of Article 3 of the European Convention on

⁹ In 1995, South Africa abolished the death penalty in its entirety, and in 1999 Russia did the same. Stephen B. Bright, *Will the Death Penalty Remain Alive in the Twenty-First Century?: International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent*, 2001 WIS. L. REV. 1, 2.

¹⁰ *Charter of Fundamental Rights of the European Union*, 2000/C 364/01 (7 December 2000), at Article 19.2, on the Internet at <<http://ue.eu.int>>.

¹¹ Excerpted in NINA RIVKIND & STEVEN F. SHATZ, *CASES AND MATERIALS ON THE DEATH PENALTY* 748 (2001).

¹² *See also*, the more recent decision of the Constitutional Court of South Africa finding that the removal from South Africa to the United States of Khalfan Khamis Mohamed, one of the defendants accused in the bombing of the U.S. embassy in Dar es Salaam in 1998, was illegal without assurances against the possibility of the death penalty. Mohamed and another v. President of Republic of South Africa and others,

Human Rights,¹³ thus producing assurances from the government of Virginia that the death penalty would not be sought or imposed in order to effect the requested extradition). This precedent is followed in more recent decisions involving extradition-based requests for assurances against the death penalty in the US by national courts in France, the Netherlands and Italy. See, William Schabas, *International Law and Abolition of the Death Penalty: Recent Developments*, 4 ILSA J. INT'L & COMP. L. 535, 565 (1998).¹⁴

At the most recent session of the UN Commission on Human Rights, completed only last month, the Commission adopted a resolution on the death penalty requesting that “States that have received a request for extradition on a capital charge . . . reserve explicitly the right to refuse extradition in the absence of effective assurances from relevant authorities of the requesting State that capital punishment will not be carried out.” UN Commission on Human Rights, *The Question of the Death Penalty*, E/CN.4/RES/2001/68 (2001).¹⁵

CCT 17/01 (Const. Ct. S. Africa, 28 May 2001), on the Internet at <http://www.concourt.gov.za/cases/2001/mohamedsum.shtml> (visited on May 20, 2001).

¹³ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221. Signed 4 November 1950, entered into force 3 February 1953. Article 3 provides in full: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

¹⁴ Some of the Justices of this Court have explored the domestic aspects of legal issues arising from the death row phenomenon. See, e.g., *Lackey v. Texas*, 514 U.S. 1045 (1995) (dissent from denial of certiorari by Justice Stevens); *Ellidge v. Florida*, 525 U.S. 944 (1998) (dissent from denial of certiorari by Justice Breyer); *Knight v. Florida* and *Moore v. Nebraska*, 528 U.S. 990 (1999) (Opinion on denial of certiorari by Justice Stevens, concurrence in denial of certiorari by Justice Thomas, and dissent from denial of certiorari by Justice Breyer).

¹⁵ The United States voted against the resolution. The measure carried by a vote of 27 in favor, 18 opposed, and 7 abstentions. In remarking on the resolution, the US representative reportedly did not raise specific concerns as to extradition or any other specific provisions. United Nations, *Press Release, Commission on Human Rights Adopts Ten Resolutions, Measures on the Death Penalty, Impunity, and Other Issues Concerning the Promotion and Protection of Human Rights*, 25 April 2001, at 4.

II. INTERNATIONAL NORMS AND STANDARDS ESTABLISH THE IMPROPRIETY OF THE EXECUTION OF PERSONS WITH MENTAL RETARDATION.

The United Nations and other bodies concerned with human rights have articulated a body of norms and standards that prohibit the execution of the mentally retarded. Standards on mental health focus both on the way in which the mentally retarded are treated in general by a particular community and on the way in which the mentally retarded interact with the criminal justice system. With the Declaration on the Rights of the Mentally Retarded, adopted thirty years ago in 1971, the United Nations began a long history of advocating on behalf of the retarded, a group that has been too long misunderstood and misrepresented throughout the world.¹⁶ The resolution called on nations to recognize the right of the mentally retarded person to protection from degrading treatment, and to assure that, “if prosecuted for any offense, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.” United Nations General Assembly, *Declaration on the Rights of Mentally Retarded Persons*, GA Resolution 2856 (XXVI), UN Doc. A/8429 (1971), at ¶ 6.

Subsequent resolutions of the United Nations have made increasingly nuanced distinctions between retarded, disabled and handicapped persons, but all of these resolutions share a common perspective protecting the fundamental human dignity of the mentally retarded person. See, e.g., United Nations General Assembly, *Declaration on the Rights of Disabled Persons*, A/RES/33447 (XXX) (1975) (defining disability and recognizing, in its Preamble, “the dignity and worth of the human person”); United

¹⁶ See, James W. Ellis and Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414 (1985) (discussing, *inter alia*, the distinction between mental illness and mental retardation, and explaining the history of attempts to ascertain appropriate levels of criminal responsibility for the mentally retarded, beginning in thirteenth century Europe.)

Nations General Assembly, *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, A/RES/46/119 (1991), Annex (Principle 1.2: “All persons with a mental illness . . . shall be treated with humanity and respect for the inherent dignity of the human person,” and Principle 9.3: “Mental health care shall always be provided in accordance with applicable standards of ethics . . . in the protection of prisoners . . . against torture and other cruel, inhuman or degrading treatment or punishment”); United Nations General Assembly, *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, A/RES/48/96 (1993) (recognizing, in the Preamble, “the dignity and worth of the human person”); World Health Organization, Division of Mental Health and the Prevention of Substance Abuse, *Guidelines for the Promotion of Human Rights of Persons with Mental Health Disorders*, WHO/MNH/MND/95.4 (1996) (containing a list of questions for local government officials on treatment under the Principles for the Protection of Persons with Mental Illness, above).

Similar actions have been taken at the regional level. See, e.g., Parliamentary Assembly of the Council of Europe, *Recommendation 1235 (1994) on Psychiatry and Human Rights* (noting a body of case-law developed under the European Convention on Human Rights on treatment of persons with mental disorders, as well as observations from the European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment regarding practices followed in the matter of psychiatric placements of patients); Organization of American States, *Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities* (8 June 1999) (not yet entered into force, reaffirming “the inherent dignity and equality” of

persons with disabilities.¹⁷); Pan American Health Organization/WHO Regional Office for the Americas, *Declaration of Caracas* (14 November 1990) (noting a commitment to defend the human rights of mental patients in accordance with national legislation and international agreements); Organization of American States, Inter-American Commission on Human Rights, *Recommendation of the Inter-American Commission on Human Rights for the Promotion and Protection of the Rights of the Mentally Ill*, 4 April 2001 (calling on member states of the OAS to establish laws that “guarantee respect for the fundamental freedoms and human rights of persons with mental disability . . . incorporating international standards and the provisions of human rights conventions that protect the mentally ill,” at ¶ 3).

By the same token, the United Nations has taken increasingly assertive measures to protect the mentally retarded from execution. These measures began with the Economic and Social Council’s 1984 adoption of the *Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, ECOSOC Res. 1984/50, UN Doc. E/1984/92 (1984) (protecting, in Safeguard 3, “the insane” from execution). The Safeguards were endorsed by the General Assembly in the same year. UN General Assembly, *Human Rights in the Administration of Justice*, GA Res. 39/118, UN Doc. A/39/700 (1984). The Council continued its work five years later by clarifying that Safeguard 3 includes elimination of the death penalty for “persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution.” United Nations Economic and Social Council, *Implementation of the Safeguards Guaranteeing Protection of Rights of those Facing the Death Penalty*, ECOSOC Res. 1989/64, UN Doc. E/1989/91 (1989), at 51, ¶ 1(d). Finally, in 1996, the

¹⁷ Available at <<http://www.oas.org/juridico/english/ga-res99/eres1608.htm>>, visited on 23 May 2001.

Council reiterated its call for full implementation of the Safeguards, in part because of concerns for the lack of protection from the death penalty of those who are mentally retarded. United Nations Economic and Social Council, *Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, ECOSOC Res. 1996/15, UN Doc. E/CN.15/1996/15 (23 July 1996).

Since 1997, the United Nations Human Rights Commission, a governmental body made up of representatives from 53 countries, has called on countries that maintain the death penalty to observe the UN Safeguards. UN Commission on Human Rights, *Question of the Death Penalty*, UN Doc. E/CN.4/1997/12 (1997); UN Commission on Human Rights, *Question of the Death Penalty*, UN Doc. E/CN.4/1998/8 (1998). Since 1999, the resolution has been adopted with additional language urging retentionist countries “[n]ot to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person.” UN Commission on Human Rights, *Question of the Death Penalty*, UN Doc. E/CN.4/1999/61 (1999); UN Commission on Human Rights, *Question of the Death Penalty*, UN Doc. E/CN.4/2000/65 (2000); UN Commission on Human Rights, *Question of the Death Penalty*, UN Doc. E/CN.4/2001/68 (2001).¹⁸

Since 1982, the UN Commission on Human Rights also has appointed a Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution, whose mandate has included review of those countries which still apply the death penalty. A decade ago, in 1991, the Special Rapporteur called on the United States to eliminate the death penalty

¹⁸ The United States, which was a member of the Commission in each of the years in question, consistently voted against the resolution on the death penalty. The express concerns of the United States, however, did not go directly to the issue of the clause about execution of persons with mental disorders. See discussion at n. 15, *supra*.

for persons with mental retardation.¹⁹ Each annual report from the Special Rapporteur since 1992 has raised issues about the execution of mentally retarded defendants in the United States and/or called for elimination of capital punishment in those circumstances.²⁰ After a special mission to the United States, the only one conducted in this country, the Special Rapporteur was particularly critical of the practice of execution of the mentally retarded, concluding that the practice was prohibited by international law and calling for its discontinuance. UN Commission on Human Rights, *Report by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on a Mission to the United States of America*, E/CN.4/1998/68/Add.3 (1998), at ¶¶ 36, 145 and 156(b).

The United States is also one of 147 States party to the International Covenant on Civil and Political Rights. One of the U.S. government's duties under the Covenant is to submit periodic reports of treaty compliance. These reports are filed with and reviewed by the Human Rights Committee, a panel of 18 experts appointed by the States party to the treaty to act in their private capacities. The United States submitted its first report to that body in 1995. After review of the submission, the Committee expressed regret that

¹⁹ UN Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. E/CN.4/1991/36 (1991), ¶¶ 514-515.

²⁰ UN Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. E/CN.4/1992/30 (1992), at ¶¶ 577-578; UN Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. E/CN.4/1993/46 (1992), ¶¶ 629-630, 679; UN Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. E/CN.4/1994/7 (1993), ¶¶ 620, 686-687; UN Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. E/CN.4/1995/61 (1994), ¶¶ 325, 373, 380; UN General Assembly, *Note by the Secretary General, Annexed with a Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. A/51/457 (1996), ¶¶ 115-116; UN Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. E/CN.4/1997/60 (1996), ¶¶ 90, 116; UN Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. E/CN.4/1998/68 (1998), Section V, A. 3.3 and Recommendation 1.1; UN Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. E/CN.4/1999/39 (1999), ¶¶ 62, 82; Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. E/CN.4/2000/3 (2000), ¶¶ 69, 97; Commission on Human Rights, *Report of*

“in some cases, there appears to have been a lack of protection from the death penalty of those mentally retarded.” United Nations, Human Rights Committee, *Concluding Observations of the Human Rights Committee: United States of America*, CCPR/C/79/Add.50; A/50/40 (1995), at ¶ 281.

The European Court of Human Rights has considered the issue of penalty in criminal cases where applicants have challenged their extradition to third states that apply the death penalty. It has held that the manner in which the death penalty is imposed or executed, and the circumstances of the condemned persons, can bring treatment of the condemned person within the proscription of Article 3 of the European Convention on Human Rights, which prohibits inhuman or degrading punishment. The possibility of the death penalty for a person with mental retardation is likely to raise issues of incompatibility with Article 3.

There are also concerns about application of the death penalty within the Organization for Security and Co-operation in Europe (“OSCE”), a security organization of 55 participating states.²¹ It is the largest existing regional security organization, with a geographic area that covers continental Europe, the Caucasus, Central Asia and North America, including the United States. Beginning with the Helsinki process in 1973, the Conference on Security and Co-operation in Europe, or CSCE as it then was known, has expressed itself on a wide range of issues on the promotion and protection of human rights, including the death penalty.

In 1990, at the Second Conference on the Human Dimension of the CSCE, held in 1990, the representatives of the participating states noted “the restrictions and safeguards

the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN.4/2001/9 (2001), ¶ 82.

regarding the use of the death penalty which have been adopted by the international community.” Conference for Security and Co-operation in Europe, *Document of the 1990 Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, 5 June - 29 July, 1990, at Article 17.3. At the November, 2000 OSCE “Human Dimension Implementation Meeting,” held in Warsaw, the EU noted with concern that “executions of mentally retarded persons continue in the OSCE region,” which includes the United States.

Conclusion

The United States is well known for its prominent role in setting standards for human rights throughout the world. But the United States is also a member of the community of nations, and with regard to the execution of mentally retarded defendants, the United States stands apart from that community as one of the last remaining nations in the world still executing mentally retarded persons. The propriety of that which is cruel and unusual in this country should, at least in part, be informed by considerations of international law, practice and morals. The position of the United States on the death penalty is an issue of great concern within the European community and other nations, especially where the defendant is mentally retarded.²²

Taken together, the evidence from throughout the world demonstrates a growing consensus against the death penalty for persons with mental retardation. This is evidence

²¹ A full list of the participating states can be found on the OSCE web site at www.osce.org.

²² See, e.g., *Europe's View of the Death Penalty*, N. Y. TIMES, May 13, 2001, at D12; Phyllis Bennis, *U.N. Sets Its Sights on U.S. Arrogance*, BALTIMORE SUN, May 13, 2001, at 1C; Felix G. Rohatyn, *U.S. Leadership is Compromised by Death Penalty*, NEWSDAY, Feb. 21, 2001, at A32; T.R. Reid, *Some Europeans Deride Bush as a 'World Champion Executioner,'* HERALD TRIBUNE (FRANCE), Dec. 20, 2000, at 6; Suzanne Daley, *Europeans Deplore Executions in the U.S.*, N. Y. TIMES, Feb. 26, 2000, at A8.

of the law and practice of nations that this Court should neither ignore nor avoid. Accordingly, the European Union and its member states respectfully urge this Court to join that growing consensus by eliminating capital punishment for the mentally retarded.

Respectfully submitted,

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