

IN THE FOURTH JUDICIAL DISTRICT
DISTRICT COURT, FRANKLIN COUNTY, KANSAS

THE STATE OF KANSAS,)
Plaintiff,)
)
vs.)
)
KYLE FLACK)
Defendant.)
_____)

Case No. 13 CR 104

**MOTION TO PROHIBIT STATE FROM SEEKING THE DEATH PENALTY
DUE TO EVOLVING STANDARDS OF DECENCY**

*"The right to life and dignity are the most important of all human rights . . .
And this must be demonstrated by the State in everything that it does,
including the way it punishes criminals."*¹

COMES NOW the Accused, Kyle Flack., by and through his attorneys, and pursuant to the Eighth and Fourteenth Amendments to the United States Constitution and Section Nine of the Bill of Rights to the Kansas Constitution moves this Court to enter an order prohibiting the State from seeking the death penalty in this matter. In support of this motion, Mr. Flack shows the Court:

- I. THE EIGHTH AMENDMENT'S PROHIBITION AGAINST "CRUEL AND UNUSUAL" PUNISHMENT IS APPLIED UPON AN "EVOLVING STANDARD OF DECENCY"

¹Makwanyane and Mchunu v. The State, 16 HRLJ 154 (Const. Ct. of S. Africa, 1995)
Justice Chaskalson.

Dec #264

The protection from cruel and unusual punishment as reflected in the Eighth Amendment to the United States Constitution flows from the basic “precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” Atkins v. Virginia, 536 U.S. 304, 311, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) quoting Weems v. United States, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed 793 (1910). “By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.” Roper v. Simmons, 543 U.S. 551, 560, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). Interpretation of the “cruel and unusual punishment” prohibition is based upon its text, by considering history, tradition, and precedent, and with due regard the provisions purpose and function in the constitutional design. Roper, 543 U.S. at 560. To determine whether a punishment is so disproportionate as to be cruel and unusual, the Court refers to “the evolving standards of decency that mark the progress of a maturing society.” Trop v. Dulles, 356 U.S. 86, 100-101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion). “Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force.” Roper, 543 U.S. at 568 citing Thompson v. Oklahoma, 487 U.S. 815, 856, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (O’Connor, J. concurring in the judgment).

II. EVOLVING STANDARDS OF DECENCY ARE BASED, IN PART, UPON THE LAWS OF OTHER COUNTRIES AND INTERNATIONAL AUTHORITY

The United States Supreme Court has long referred 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.” See for example Trop, 546 U.S. at 102-103 (“The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime”); Atkins, 536 U.S. at 317, n. 21; (recognizing that “within the world community, the

imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved"); Thompson, 487 U.S. at 830-831, n. 31 (noting the abolition of the juvenile death penalty "by other nations that share our Anglo-American heritage, and by the leading members of the Western European community," and observing that "[w]e have previously recognized the relevance of the views of the international community in determining whether punishment is cruel and unusual") and Coker v. Georgia, 433 U.S. 584, 596 n. 10, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) ("It is . . . not irrelevant here that out of the 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue"). Most recently, in Roper the United States Supreme Court relied, in part, on international law to find that the execution of those who, at the time of the offense, are under the age of 18 violates the Eighth Amendment's "cruel and unusual" prohibition.

III THE INTERNATIONAL STANDARD OF DECENCY IS FOR THE ABOLITION OF THE DEATH PENALTY

"International developments in the past decade have produced a clear and emphatic trend away from capital punishment as countries abandon its use, call upon the remaining death penalty states to sharply curtail its use, and formulate international agreements which express a strong preference for an end to all executions." Richard C. Dieter, *International Perspectives on the Death Penalty: A costly isolation for the U.S.*, 1999. In 1986, only 46 countries had abolished the death penalty for traditional crimes. By 1998 the number of countries had almost doubled to 82. Amnesty International, *United States of America: The Death Penalty* 228 (Appendix 12), 1987 and Amnesty International, *Facts and Figures on the Death Penalty*, April, 1999. Since the United States reinstated the death penalty in 1976, over 70 countries have abolished the death penalty for all crimes, or for ordinary crimes. They include:

- 1976 Portugal
- 1978 Denmark
- 1979 Luxembourg, Nicaragua, Norway, Brazil, Fiji, and Peru
- 1981 France and Cape Verde
- 1982 The Netherlands
- 1983 Cyprus and El Salvador
- 1984 Argentina
- 1985 Australia
- 1987 Haiti, Liechtenstein, and the German Democratic Republic
- 1989 Cambodia, New Zealand, Romania, and Slovenia
- 1990 Andorra, Croatia, the Czech and Clovak Federal Republic, Hungary, Ireland, Mozambique, Nambia, and Sao Tome and Principe
- 1992 Angola, Paraguay and Switzerland
- 1993 Guinea-Bissau, Hong Kong, and Seychelles
- 1994 Italy
- 1995 Djibouti, Mauritius, Moldova, and Spain
- 1996 Belgium
- 1997 Georgia, Nepal, Poland, and South Africa
- 1998 Azerbaijan, Bulgaria, Canada, Estonia, Lithuania, and the United Kingdom
- 1999 East Timor, Turkmenistan, Ukraine, and Latvia
- 2000 Cote D'ivoire, Malta, and Albania
- 2001 Bosnia-Herzegovina and Chile
- 2002 Cyprus and Yugoslavia (later Serbia and Montenegro)

- 2003 Armenia
- 2004 Bhutan, Greece, Samoa, Senegal, and Turkey
- 2005 Liberia and Mexico
- 2006 The Philippines
- 2007 Albania, Cook Islands, Kyrgyzstan, Rwanda and Kazakhstan
- 2008 Uzbekistan and Argentina
- 2009 Bolivia, Burundi and Togo
- 2010 Gabon
- 2012 Latvia

As of December 2013, 98 countries have abolished the death penalty for all crimes and more than two thirds of the countries in the world have abolished the death penalty in law or in practice. See Amnesty International, Facts and Figures on the Death Penalty (15 December 2014).

“The increasing use of the death penalty in the United States and in a number of other states is a matter of serious concern and runs counter to the international community’s expressed desire for the abolition of the death penalty.” Mary Robinson, U.N. High Commissioner for Human Rights, *Human Rights Magazine*, Summer 1998, at 10 (American Bar Assoc.). In explaining the reason for abolishing the death penalty in their countries, the international community has spoken forcefully as to the reason for abolition.

- Daimar Liiv, head of the Estonia Parliament’s legal committee noted when his country abolished the death penalty, “This is not 1956 and the evil empire, its 1998 and we are striving to become one of the cultural nations of the world.” Reuters, *Estonia Takes Step to Scrap Death Penalty*, March 18, 1998.
- In announcing a moratorium on all executions and the commutation of all death sentences, the President of Malawi stated, “Life is sacred, I believe a person can reform . . . I invite all heads of state in Africa, our common home, to abolish the death sentence . . .” Amnesty International,

Death Penalty News: March 1998.

- In 1995, Spain abolished the death penalty stating “that the death penalty has no place in the general penal system of advanced, civilized societies What more degrading or afflictive punishment can be imagined than to deprive a person of his life . . . ?” R. Hood, *The Death Penalty: A World-wide Perspective* note 112, at 15 (2nd Ed, 1996)

- Switzerland abolished the death penalty because it constitutes “a flagrant violation of the right to life and dignity” R. Hood, *The Death Penalty: A World-wide Perspective* at 14.

In total there are approximately 140 countries that have now abolished the death penalty in law or in practice with only 58 countries still retaining the death penalty. The international trend, since 1976, has been for an average of three countries each year to abolish the death penalty in law or in practice.

In April, 1999 the U.N. Commission on Human Rights voted overwhelmingly in favor of a moratorium on the death penalty. This resolution was introduced by the European Union. *U.N. Panel Votes For Ban On The Death Penalty*, N.Y. Times, April 29, 1999. The resolution specifically calls upon all States that still maintain the death penalty “to establish a moratorium on executions, with a view to completely abolishing the death penalty.” U.N. Human Rights Commission, April 28, 1999.

Clearly, the evolving standard of decency of the maturing world society is for the abolition of the death penalty. Accordingly, this Court must find that the death penalty violates Mr. Flack’s Eighth Amendment right against “cruel and unusual” punishment and his right under the Kansas Constitution to also be free from “cruel or unusual” punishment and prohibit the state from seeking a death sentence in this matter.

WHEREFORE, Mr. Flack moves this Court to prohibit the state from seeking the death penalty, to order this matter to proceed as a non-death penalty case, and for such other and further relief as the

Court deems just and equitable.

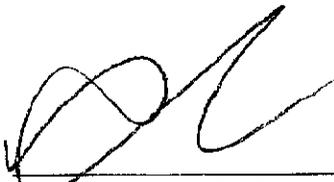
Respectfully submitted,



Tim Frieden, #12022
Death Penalty Defense Unit
266 N. Main, Ste 210
Wichita, Kansas 67202
(316) 267-1845
tfrieden@sbids.org

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January, 2015 a true and correct copy of the foregoing motion was faxed to the office of the Attorney General, the Franklin County Attorney and a bench copy to Judge Eric Godderz.



Tim Frieden, #12022

NOTICE OF HEARING

The above motion shall come on for hearing on the 6th day of February 2015 at 9:00 a.m. before Judge Godderz