IN THE HIGH COURT OF MALAWI

SITTING IN ZOMBA

SENTENCE REHEARING CAUSE No. ___ of 2015

(Before Honourable Justice _____)

THE REPUBLIC

-v-

ISHMAIL GOME

AMICUS BRIEF BY PROFESSORS WILLIAM A. SCHABAS, CHRISTOF HEYNS AND SANDRA L. BABCOCK

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Submitted by

THE REPUBLIC *v* ISHMAIL GOME

CRIMINAL CASE NO. __ OF 2015

CONVICT'S SUBMISSION ON SENTENCE

If it may please Your Lordship:

INTRODUCTION

1. The undersigned have prepared this *amicus curiae* brief to assist the Malawi High Courts in determining the guiding principles applicable to the implementation of a discretionary sentencing regime in the wake of *Kafantayeni v. Attorney General*. The following *amicus curiae* brief summarizes the unique sentencing issues that arise in capital cases, drawing from international law, jurisprudence, and social science research. Additionally, this *amicus curiae* brief discusses the phenomenon of wrongful conviction and seeks to explain common risk factors of wrong convictions. It is our hope that this *amicus curiae* brief will provide useful supplementary material for the High Court's consideration as it receives and weighs mitigating evidence in the cases of prisoners entitled to sentence re-hearings.

QUALIFICATIONS AND EXPERIENCE

2. Professors Schabas, Heyns and Babcock are internationally recognized experts in the area of international law and the death penalty. Professor William Schabas is professor of international law at Middlesex University in the United Kingdom, professor of international human law and human rights at Leiden University in the Netherlands, and an internationally respected expert on human rights law, genocide, and the death penalty. He has written over 18 monographs and 200 articles. His seminal treatise on the death penalty, The Abolition of the Death Penalty

under International Law, is now in its third edition. Since 2010, he has prepared the UN Secretary General's quinquennial report on capital punishment. He has authored numerous articles on aspects of the death penalty under international law, including William Schabas, 'International Law, Politics, Diplomacy and the Abolition of the Death Penalty' (2004) 13 (2) *William and Mary Bill of Rights Journal* 417; W Schabas and G Cohen Jonathan (eds), *La peine capitale et le droit international des droits de l'homme* (2003); William Schabas, *The Death Penalty as Cruel Treatment and Torture: Capital Punishment Challenged in the World's Courts* (1996); William Schabas, 'Soering's Legacy: The Human Rights Committee and the Judicial Committee of the Privy Council Take a Walk Down Death Row' (1994) 43 (4) *International and Comparative Law Quarterly* 913; William Schabas, 'International Norms on Execution of the Insane and the Mentally Retarded' (1993) 4 (1) *Criminal Law Forum* 95. Professor Schabas is editor-in-chief of Criminal Law Forum, the quarterly journal of the International Society for the Reform of Criminal Law. He was a member of the Board of Trustees of the United Nations Voluntary Fund for Technical Cooperation in the Field of Human Rights from 2005-2011. Professor Schabas served as one of seven commissioners on the Sierra Leone Truth and Reconciliation Commission, and as one of six commissioners on the Iran Tribunal Truth Commission from 18 to 22 June 2012. Professor Schabas has delivered lectures or conference papers on the death penalty in more than fifty countries. His writings have been cited in judgments, decisions and opinions of: International Court of Justice, International Criminal Court, International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda, Special Court for Sierra Leone, European Court of Human Rights, Inter–American Court of Human Rights,

Supreme Court of Canada, United States Supreme Court, Judicial Committee of the Privy Council, High Court of Tanzania and the Supreme Court of Israel.

3. Professor Christof Heyns is Professor of Human Rights Law and Co-Director of the Institute for International and Comparative Law in Africa at the University of Pretoria. From 2010 – 2016, he was the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, a mandate most recently described in UN Human Rights Council Resolution 26/12. Professor Heyns has also been a long-standing advisor to the African Commission on Human and Peoples' Rights, working closely with the Working Group on Death Penalty and Extrajudicial, Summary or Arbitrary Killings in Africa. He is a former Director of the Centre for Human Rights in the Faculty of Law, University of Pretoria, as well as former Dean of that Faculty. In 2012 he presented a report to the UN General Assembly (A/67/275) on the restrictions of the death penalty under international law.

4. Professor Sandra Babcock is a Clinical Professor at Cornell Law School and Director of the International Human Rights Clinic. She has taught courses on international law and the death penalty at Northwestern and Tulane Law Schools. She is also the Faculty Director of the Cornell Center on the Death Penalty Worldwide, an academic centre engaged in research, advocacy and training on the application of the death penalty around the globe. From 2000 to 2006, Professor Babcock was the founding director of the Mexican Capital Legal Assistance Program, a project funded by the Government of Mexico to assist Mexican nationals facing capital prosecution in the United States. In 2003-04, she was counsel to Mexico before the International Court of Justice in *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 12 I.C.J. 128 (2004), and continues to represent the Government of Mexico in capital cases in U.S. courts. She has argued death penalty cases before the Inter-American Commission and the

Inter-American Court on Human Rights, and has authored nine articles on the application of the death penalty under international law. She has served as an expert in capital cases in the United States and in the United Kingdom on the application of international treaties to capital prosecutions, and has been invited to speak on the topic in twelve countries on four continents. Over the last twenty-five years, she has also served as counsel in numerous death penalty cases, most of which involved foreign nationals facing the death penalty. Professor Babcock has visited Malawi 18 times since 2007, and has served as a consultant for stakeholders on the implementation of the *Kafantayeni* judgment. She has served as a facilitator in six training workshops on human rights and capital punishment in Malawi.

BURDEN OF PROOF

5. Rules regarding the burden of proof at a capital sentencing proceeding derive primarily from three related principles:

6. The first is that **capital punishment should be reserved for the worst, most exceptional cases**.

7. Courts around the world have applied the principle that the death penalty should be imposed only for the "worst of the worst" offences. Before abolishing the death penalty, the South African Constitutional Court reserved the death penalty for "the most exceptional cases." *State v. Makwanyane,* 1995 (3) SA 391 (CC), para. 46 (South Africa, Jun. 6, 1995). This case is also consistent with the holding of the African Commission on Human Rights in *Spilg and Others v Botswana* regarding the application of the death penalty: "Although the African Charter and the African Commission's Resolution on the Death Penalty does not afford a definition of what constitutes 'most serious crimes', the African Commission holds that the phrase 'most serious crimes' should be interpreted in the most restrictive and exceptional manner

possible and that the death penalty should only be considered in cases where the crime is intentional and results in lethal or extremely grave consequences." *Spilg and Others v. Botswana* (2011) AHRLR 3, para. 203 (ACHPR 2011).

8. As an illustration of how narrowly the foregoing principle has been construed, one need only to look to the facts of cases decided by the Indian Supreme Court, the Judicial Committee of the Privy Council, and Caribbean appellate courts. In 1999, the Indian Supreme Court vacated the death sentences of individuals convicted of burning four men to death in front of their parents. *See Manohar Lal & Another v. State*, (1999) Supp (5) SCR 506 (India, Dec. 17, 1999). The Court commuted the sentences to life imprisonment, notwithstanding "the most gruesome nature" of the crime, after finding that actions "triggered only by a demented psyche" did not reach "the narrowest region" of criminality for which the death penalty is reserved. In *Trimmingham v. The Queen*, the Privy Council found that even the brutal murder and decapitation of an elderly victim did not justify the imposition of the death penalty. *Trimmingham v. The Queen*, [2009] UKPC 25, para. 21 (St. Vincent, 2009). Likewise, Caribbean courts have refused to impose the death penalty even in cases where the crime was extremely heinous, so long as at least one mitigating factor existed. For example, in the St. Christopher and Nevis case *R v Fox*, the judge refused to sentence to death a man convicted of intentionally murdering his girlfriend and her mother, because he demonstrated evidence of diminished responsibility. *See R v Fox*, [2002] (High Court of St. Christopher & Nevis, Sept. 27, 2002). In *Harry Wilson v. The Queen*, the Court of Appeal in St. Vincent and the Grenadines commuted to life imprisonment the death sentence of a man who had murdered his two-year-old daughter and had attempted to kill his eldest daughter and their mother, because the offender had: (1) no prior criminal record, (2) behaved well in prison, and

(3) demonstrated capacity for reform. *See Harry Wilson v. The Queen*, paras. 1, 34 (St. Vincent, Nov. 28, 2005).

9. Of course, many homicides that meet the legal definition of murder are not nearly as aggravated as those described above. In those cases, the appropriate range of punishment will range from a term of years to life imprisonment, depending on the strength of the mitigating evidence presented at sentencing.

10. The second principle is that **capital punishment should apply only where reform or rehabilitation of the offender is impossible.**

11. In the words of the Privy Council, the court must find that there is "no reasonable prospect of reform of the offender and that the object of punishment could not be achieved by any means other than the ultimate sentence of death." *Trimmingham,* [2009] UKPC. Indeed, the concept of "the worst of the worst" suggests an individual so irredeemable as to fit no longer within the social fabric. For an individual who demonstrates the potential for reform, however, the penalty of death—and even the penalty of life imprisonment—would be excessive. Accordingly, "the possibility of reform and social readaptation of the offender" is an internationally recognized mitigating circumstance in sentencing. This would seem particularly relevant in Malawi, whose Constitution lists the rehabilitation of prisoners as a specific aim of the penal system. *See* Malawi Const. art. 163.

12. If the death penalty ought to be reserved only for those incapable of reform, then an offender's past behaviour is essential to assess properly the likelihood of rehabilitation or the depth of an offender's danger to society. This is especially significant in light of other factors, such as remorse and good post-crime behaviour, which may demonstrate, when viewed together, that an offender is unlikely to pose a danger to society and that his crime was out of character. The fact that an offender has

little or no criminal record, was a productive member of society, is remorseful, or has been a model prisoner, among other factors, tends to show that he is not inclined toward criminality and can be reintegrated into the social fabric. The presence of these factors strongly suggests that a capital sentence would be inappropriate.

13. Foreign jurisprudence comports with this reasoning. The U.S. Supreme Court has held that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." *Jurek v. Texas*, 428 U.S. 262, 275 (1975). Moreover, any aspect of an offender's character or record may serve as a mitigating factor. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978). The South African Constitutional Court noted in *State v. Makwanyane* that "[e]very relevant consideration should receive the most scrupulous care and reasoned attention" when determining whether to impose a death sentence. *State v. Makwanyane*, 1995 (3) SA 391 (CC), para. 46 (South Africa, Jun. 6, 1995). It follows that a court may take into account a defendant's past when assessing the likelihood of future criminality or future reform.

14. An offender's character and reputation in the community may be considered as mitigating evidence. In the Botswana case *State v. Mpelegang*, for example, the High Court explicitly held that the character of the accused is a mitigating factor: "A first offender and/or an accused person who is shown to have been previously of good character can expect to have these facts influence his sentence to his benefit." *State v. Mpelegang*, 2007 (3) BLR 706 (HC) (Botswana, Oct. 26, 2007). Likewise in *Reyes*, the Supreme Court of Belize considered evidence of the offender's good character and reputation within the community as mitigating evidence. Relying on testimony from the defendant's community, the Court noted that "the prisoner's good character [and] good standing in his community and reputation for help and kindness" were factors

that mitigated the sentence. *See Queen v. Reyes*, [2002] A.D. 2002, para. 34 (Belize, Oct. 25, 2002).

15. Foreign courts have also invoked the absence of a criminal past to mitigate offenders' sentences. The Supreme Court of India, for example, considered the defendants' lack of a criminal history in declining to impose the death penalty in a case involving the murder of five individuals. *See Mulla & Another v. State of U.P.* (2010) 3 SCC 508, para. 49 (India, Feb. 8, 2010). Again, *Reyes v. The Queen* describes this principle. In that case, the Supreme Court of Belize concluded that a "remarkable picture of a hard-working, religious and family-centred and non-violent person without any previous brush with the law emerges." *See Queen v. Reyes*, [2002] A.D. 2002, para. 30 (Belize, Oct. 25, 2002). The defendant's generally amiable and favourable character, in tandem with his lack of past criminality, compelled the Court to mitigate the sentence.

16. The third principle is that **courts must consider the full range of mitigating factors in the capital sentencing process.**

17. The personal, cultural, psychological, and social circumstances of each individual offender will vary intensely; any attempt at an exhaustive list would necessarily leave out other relevant possibilities. For this reason, the Supreme Court of Belize in *Reyes v. The Queen* stated that "[t]he need to have regard in the exercise of discretion whether to sentence an offender to death or life imprisonment would . . . preclude a list of predetermined special extenuating circumstances." *Queen v. Reyes*, [2002] A.D. 2002, para. 19 (Belize, Oct. 25, 2002). In one case, the sentencing court may be presented with a brutal crime committed by a severely mentally ill offender. In another case, the court may be required to weigh the appropriate sentence for an offender who committed his offence without significant premeditation and in a state

of intoxication. In yet another case, the court may receive evidence that the offender committed a robbery at a time when his mother was in dire need of medicine that her family could ill afford. Each of these circumstances presents a different set of mitigating factors that will need to be weighed by the sentencing court.

18. In general, however, sentencing authorities must consider the personal character and record of the offender, the circumstances that shaped the offender's conduct, the particular manner of the offense in question, and the possibility of reform or rehabilitation of the offender. *Downer and Tracey v. Jamaica*, Inter-Am. Comm'n H.R., Report No. 41/00, OEA/Ser.L/V/II.111, doc. 20 rev. para. 212 (2000). As the Inter-American Commission on Human Rights has stated, this is the "*sine qua non* to the rational, humane, and fair imposition of capital punishment."

19. **Taken together, these three principles establish a presumption in favour of life.** *See Queen v. Reyes*, [2002] A.D. 2002, para. 20 (Belize, Oct. 25, 2002) ("it is the imposition of the death penalty rather than its non-imposition . . . that requires special justification"). The Eastern Caribbean Court of Appeal elaborated further on this principle: "The death penalty can only be imposed if the judge is satisfied beyond reasonable doubt that the offense calls for no other sentence but the ultimate sentence of death." *Trimmingham v. The Queen,* (St. Vincent, Oct. 13, 2005).

20. In *State v. Makwanyane*, the Constitutional Court of South Africa stated unequivocally that "the onus is on the State to prove beyond reasonable doubt the existence of aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating factors relied on by the accused." *State v. Makwanyane*, 1995 (3) SA 391 (CC), para. 46 (South Africa, Jun. 6, 1995). Moreover, the death sentence could only be applied "where there [was] no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any

other sentence." *Id.* The effect of this is to impose on the prosecutor not only an exacting substantive standard—that the offense was exceptionally odious—but also a demanding procedural and evidentiary standard. Furthermore, the prosecutor will also have to prove in the negative, beyond a reasonable doubt, that mitigating factors do *not* exist. *See Moise v. The Queen*, [2005] Crim. App. No. 8 of 2003 (St. Lucia, Nov. 12, 2003). If the defendant has succeeded in positing the reasonable possibility that a single mitigating factor exists, the prosecutor will not have met that burden. *See State v. Nkwanyana*, 1990 (4) SA 735 (AD), para. 27 (South Africa, Sep. 18, 1990). This rigorous burden of proof for the prosecutor at the sentencing stage follows from the concern of ensuring that the death penalty truly is reserved only for the most exceptional cases.

PRE-TRIAL AND APPELATE DELAY

21. Both pre-trial and appellate delays have been cited by numerous courts in Africa and in the Caribbean as mitigating factors justifying a more lenient sentence. In particular, courts have recognized that a reduction in sentence is sometimes the only appropriate remedy for pre-trial delays. The High Court of St. Lucia concluded in *Coecillia St. Romaine v. Attorney General* that "if at trial there is a conviction then the trial judge should *always* consider a reduction in the severity of the sentence in light of the delay." *Coecillia St. Romaine v. Attorney General*, [2010] Claim No. SLUHCV 2010/1100 (St. Lucia, May 30, 2012) (quoting *Gibson v. Attorney General*, [2010] CCJ 3 (AJ) (St. Vincent, Aug. 16, 2010) (emphasis added). In a judgment of the Privy Council in *Procurator Fiscal v. Watson*, Lord Millet observed that:

> The European Court has repeatedly held that unreasonable delay does not automatically render the trial or sentence liable to be set aside because of the delay (assuming that there is no other breach of the accused's Convention rights),

> provided that the breach is acknowledged and the accused is provided with an adequate remedy for the delay in bringing him to trial (though not for the fact that he was brought to trial), for example by a reduction in sentence." *Procurator Fiscal v. Watson*, [2002] UKPC D1, para. 129 (Jan. 21, 2002).

22. Lord Millet's statements in *Fiscal* were reiterated in *Paul v. Attorney General*, when the High Court of Malawi explained that it "agree[d] with the observations of Lord Millet" and encouraged the trial court to consider the defendant's sentence in light of the pre-trial delay. *Paul v. Attorney General*, [2011] MWHC 10 (Malawi, Oct. 25, 2011). Similarly, courts in Kenya and Uganda have acknowledged that pre-trial delays should be considered during sentencing. *See Republic v. Milton Kabulit*, [2012] Crim. Case No. 115 of 2008 (Kenya, Jan. 26, 2012); *Muhwezi Jackson v. Uganda* [2014] UGCA 52 (Uganda, Dec. 18, 2014).

23. In addition to pre-trial delays, any significant delay during the appellate process may also justify the reduction of an offender's sentence. *See S v. Michele* [2009] ZASCA 116 (South Africa, Sep. 25, 2009). This will be an important factor to consider in Malawi, given the delay between the issuance of the *Kafantayeni* judgment and its implementation. In *S v. Karolia*, the Supreme Court of Appeal of South Africa explained that a court may consider, in substituting a sentence for the one originally imposed, whether a delay between sentencing and a hearing of the defendant's appeal may justify a lighter sentence. *See S v. Karolia*, [2006] SACR 75 (South Africa, Mar. 27, 2014). In *Malgas v. S*, the Court reiterated its holding in *Karolia* that a delay in the hearing of a defendant's appeal may be remedied by a reduced sentence. *See Malgas v. S*, [2013] ZASCA 90 (South Africa, May 31, 2013). *See also Vivian Rodrick v. State of West Bengal*, 1971 AIR 1584 (India, Jan. 27, 1971) ("[I]nordinate delay in the disposal of the defendant's appeal" may, by itself, "be sufficient for imposing a lesser sentence of imprisonment for life.").

24. The severity of the crime has not deterred courts from remedying pre-trial or appellate delay with a reduction in sentence. In *Queen v. Lance Blades*, the defendant was convicted of murder but was nevertheless "afforded an appropriate reduction in sentence" after the Eastern Caribbean Supreme Court found there had been an "inordinate delay . . . in bringing the matter from the Preliminary Inquiry stage before the High Court for disposal." *Queen v. Lance Blades*, [2013] Crim. Case Nos. SLUHCR 2011/0041, 0042 (St. Lucia, May 29, 2013). This principle was reinforced by *Muhwezi v. Uganda*, in which the Court of Appeal of Uganda found "delaying to bring [a defendant charged with murder] to trial, may itself mitigate against the imposition of a death penalty." *Muhwezi Jackson v. Uganda*, [2014] UGCA 52, para. 15 (Uganda, Dec. 18, 2014). In setting aside the defendant's death sentence, the Court analogized the defendant's pre-trial delay to a delay in executing a death sentence. *See id.*

DEATH ROW PHENOMEMON

25. The concerns that animate the jurisprudence discussed above are closely related to those discussed in judicial opinions condemning lengthy incarceration on death row as cruel, inhuman, or degrading treatment or punishment. "Death row phenomenon" refers to the psychological consequences of extended periods spent on death row, often in harsh conditions, compounded with the uniquely stressful experience of living with a death sentence. Many studies have documented that the stress associated with living for a prolonged period of time under a sentence of death results in significant mental trauma: "The observable result of mental suffering inflicted on the condemned prisoner is destruction of spirit, undermining of sanity, and mental trauma." *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814, 829 (1972). Other factors potentially contributing

to this mental trauma include cramped environments, extreme deprivation, arbitrary or severe rules, harassment, and isolation from others. *See* Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 BEHAVIORAL SCIENCES AND THE LAW 19 (2002). Manifestations of death row syndrome vary but may involve overwhelming senses of fear and helplessness, fluctuating moods, recurrent depression, and deterioration of mental capabilities, similar to senility. Additionally, death row phenomenon appears to exacerbate existing psychological or mental disorders. *See id.*

26. There is now a significant body of jurisprudence from international tribunals and national courts recognizing the dehumanizing nature of prolonged incarceration on death row. *See generally* Richard B. Lillich, *Harmonizing Human Rights Law Nationally and Internationally: The Death Row Phenomenon as a Case Study*, 40 ST. LOUIS U. L.J. 699 (1996). In the 1989 case of *Soering v. United Kingdom*, the European Court of Human Rights recognized the legitimacy of death row phenomenon, declining to extradite a person facing the death penalty to the United States. *See Soering v. United Kingdom*, 11 Eur. H. R. Rep. 439 (1989). In doing so, the Court distinguished the death penalty itself from the impermissible delay between the imposition of sentence and the prisoner's execution, causing the prisoner to suffer the "mental anguish of anticipating the violence he is to have inflicted on him." *Id.* Since then, both international tribunals and national courts—including Malawian courts—have followed the European Court's reasoning. *See, e.g., The Republic v. Michael Khonje* [2016] MWHC (Malawi, Oct. 7, 2016); U.N. Human Rights Committee *Francis v. Jamaica*, Communication No. 606/1994, U.N. Doc. CCPR/C/54/D/606/1994, Aug. 3, 1995 (continued death row incarceration of a prisoner whose mental health had "seriously deteriorated" violated Article 7 of the

International Covenant on Civil and Political Rights); U.N. Human Rights Committee, *Sahadath v. Trinidad and Tobago*, Communication No. 684/1996, CCPR/C/74/D/684/1996, Apr. 15, 2002 (finding that the issuance of a death warrant of a mentally ill prisoner also violated the Covenant); *Pratt & Morgan v. Attorney General of Jamaica*, 2 AC 1 (Privy Council 1993); *Shatrughan Chauhan & Anr. V. Union of India & Ors*., (India 2014) 3 SCC 1 (Supreme Court of India determining that a prolonged delay in execution of death sentence is relevant factor in deciding whether an execution should be carried out). The courts have reached varying conclusions regarding the length of time that a prisoner must spend on death row to render his death sentence cruel, inhuman, or degrading treatment or punishment.

27. In *Pratt and Morgan v. The Attorney General of Jamaica*, for example, the Judicial Committee of the Privy Council recommended commuting the sentences of 105 death row inmates to life imprisonment after finding that a five year delay between sentencing and execution would constitute "inhuman and degrading punishment or other treatment," in contravention of Section 17(1) of the Jamaican Constitution. *Pratt and Morgan v. The Attorney General of Jamaica*, 2 AC 1 (Privy Council 1993) (en banc). Similarly, in *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General and Others*, the Supreme Court of Zimbabwe set aside the death sentences of four men who had each served between four and six years on death row because carrying out the sentence after such prolonged delays and the appalling conditions on death row in Zimbabwe would constitute inhuman or degrading treatment, violating the Zimbabwean Constitution. *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General and Others*, Zimbabwe: Supreme Court, 24 June 1993, available at: http://www.refworld.org/docid/3ae6b6c0f.html [accessed 10 February 2015]. The Ugandan Supreme Court has found even shorter delays to be

impermissible, holding a delay of more than three years between appellate confirmation of a prisoner's death sentence and his execution to be "cruel, inhuman or degrading treatment or punishment." *Kigula and Others v. The Attorney General*, 2006 S. Ct. Const. App. No. 03, at 56-57 (Uganda 2009). Finally, the European Court of Human Rights determined in *Al–Saadoon and Mufdhi v. United Kingdom*, that subjecting two prisoners to a "well-founded fear of being executed by the Iraqi authorities" for a period of two years and two months "must have given rise to a significant degree of mental suffering and that to subject them to such suffering constituted inhuman treatment." Significantly, in *Al-Saadoon*, the European Court of Human Rights for the first time extended its jurisprudence on death row phenomenon to *pre-trial* delays, where the accused had not yet been subjected to a capital murder prosecution but where the risk of such a prosecution was high.

28. The Eastern Caribbean Court of Appeal took a similar approach in *Moise v. The Queen*, where the court addressed the sentencing appeal of a man who had been re-sentenced to death following the demise of the mandatory death penalty in St. Lucia. The Court of Appeal took into account the delay that the offender had endured (1) prior to trial; (2) while on death row; and (3) waiting for his sentence rehearing. The court found it particularly relevant that "*the Appellant has laboured under a mandatory death sentence for 3 years and 10 months after this Court held in April 2001 that it was unconstitutional and unlawful.*" [2005] Crim. App. No. 8 of 2003, para. 52 (St. Lucia, Nov. 12, 2003). The court accordingly quashed his death sentence, even though he had only spent four years on death row.

29. It is our understanding that thirteen of the prisoners who are entitled to be resentenced under the *Kafantayeni* judgment remain on death row. Most were sentenced to death in 2005 and have already spent more than eleven years on death

row—more than twice the amount of time found to be presumptively cruel, inhuman, or degrading by the Judicial Committee of the Privy Council in *Pratt*. We are informed that two or more prisoners may have been sentenced in 2007; they have spent nearly ten years on death row, which is twice as long as the prisoner whose death sentence was vacated in *Moise*. The fact of their lengthy incarceration is for the Malawi courts to consider in the course of the resentencing process, but we would note that the precedents cited above provide strong support for a finding that their sentences must, at a minimum, be commuted to a lesser sentence.

THE RISK OF WRONGFUL CONVICTION

30. Wrongful convictions exist around the world, but the most extensive research on the causes of wrongful convictions comes from the United States. Though it is difficult to estimate the number of wrongful convictions, current research shows that the number of wrongful convictions likely far exceeds the number of people who have been exonerated. One research team reviewed multiple studies in the United States and estimated that 3-5% of all people convicted of crimes are likely innocent.[1]

31. Research demonstrates that the risk of wrongful convictions in the United States is exacerbated by certain key factors. Our research and experience indicates that these risk factors are also present in many other criminal justice systems throughout the world. Here we highlight three of those factors that may be of particular relevance to the cases of Malawian prisoners condemned to death.

32. First, **innocent persons are often convicted on the basis of false confessions that result from psychological and physical coercion.**

33. The rate of false confessions is difficult to estimate, but researchers posit that 14-25%

[1] With 2.2 million people currently incarcerated in the United States, it is likely that 66,000-110,00 of them are factually innocent. Earl Smith & Angela J. Hattery, *Race, Wrongful Conviction & Exoneration,* 15 JOURNAL OF AFRICAN AMERICAN STUDIES 74, 76 (2011). In sharp contrast, the Innocence Project, one of the world's most well-known efforts to bring wrongful convictions to light, has helped exonerate only 344 people since 1992.

of wrongful convictions involve false confessions. One study in the United States demonstrated that 66% of defendants who were convicted of homicide and later exonerated through DNA evidence confessed to crimes they did not commit. Jon B. Gould & Richard A. Leo*, One Hundred Years Later: Wrongful Convictions after a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 844 (2010). In many cases, these exonerations came about years after the prisoner was convicted and sentenced to death.

34. When presented at trial, false confessions are likely to lead to a conviction, because confessions influence a juror's decision more than other kinds of evidence. Gould & Leo, *supra,* at 844. Research shows that even when jurors believe that a confession is coerced or involuntary, they are unable to appropriately weigh the confession's evidentiary value. Richard A. Leo & Brittany Liu, *What Do Potential Jurors Know About Police Interrogation Techniques and False Confessions,* 27 BEHAV. SCI. LAW, 381, 383 (2009). Jurors themselves have a hard time imagining how a false confession would occur: in one study, 92% of jurors did not believe that they would falsely confess to a crime if interrogated by the police. Mark Costanzo, Netta Shaked-Schroer, & Katherine Vinson, *Juror Beliefs About Police Interrogations, False Confessions, and Expert Testimony*, 7 J. of EMPIRICAL LEGAL STUDIES, 231, 243 (2010).

35. Scholars as early as the Enlightenment have concluded that torture (and other forms of brutality) are likely to give rise to false confessions. CESARE BECCARIA, OF CRIMES AND PUNISHMENT, XVI (2nd American Ed., Nicklin, 1819). In fact, even interrogation manuals warn that: "Intense pain is quite likely to produce false confessions, concocted as a means of escaping from distress." Central Intelligence Agency, KUBARK Counterintelligence Manual, 94 (1963). Courts around the world

have recognized this threat and ruled that confessions obtained under torture are inadmissible. Brown v. Mississippi 297 U.S. 278 (1936).

36. Many scientific studies explain how torture can cause false confessions. The intense stress from torture may not only cause the defendant to retell the facts fed to him by interrogators but may also cause damage to the prefrontal cortex via an overload of cortisol. This type of damage can cause a person to lose the ability to distinguish between truth and falsehood, increasing the possibility that he will not remember which facts were suggested by interrogators, and which are based on actual events. *Neuroscience: Torture Doesn't Work and Here's Why*, NEWSWEEK, (Sept. 20, 2009).

37. The American Psychological Association has commented that judges and juries have difficulty assessing whether a confession is false. Because of this, the American Psychological Association has argued that psychological experts should be allowed to testify on this counterintuitive phenomenon at trial. Saul M. Kassin, *Why Confessions Trump Innocence Confessions: Causes, Consequences, and Implications for Reform*, 67 AMERICAN PSYCHOLOGIST 431, 435 (2012). Research shows that laypeople are only, on average, 54% accurate at distinguishing truth and deception. When police officers, judges, customs inspectors, and other professionals are trained in identifying false confessions, they perform only marginally better. Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 17 CURRENT DIRECTIONS IN PSYCH. SCIENCE 249, 250 (2008). The difficulty of discerning a false confession may explain why false confessions are present in many exonerations.

38. Second, **when prosecutors offer incentives (such as a reduced sentence) to co-defendants for testimony against their alleged accomplices, this increases the likelihood that they will testify falsely.**

39. When prosecutors offer leniency to co-defendants in exchange for testimony, they heighten the risk of a wrongful conviction. In this situation, the co-defendants have an incentive to testify in a way that aids the prosecution, which increases the risk that they will testify falsely. J. Arthur L. Alcaron, *Suspect Evidence: Admissibility of Co-Conspirator Statements and Uncorroborated Accomplice Testimony*, 25 LOYOLA OF LOS ANGELES L. REV., 953, 960 (1992).[2]

40. The National Registry of Exonerations, a project of the University of Michigan Law School, has documented many cases of wrongful convictions that involved co-defendant testimony.[3] Analysis of these cases revealed that many co-defendants who gave false or misleading testimony received a benefit in exchange for their testimony. Shana Knizhnik, *Failed Snitches and Sentencing Stitches: Substantial Assistance and the Cooperator's Dilemma,* 90 N. Y. UNIV. L. REV. 1722, 1746, n. 154 (2015).

41. Moreover, when a co-defendant testifies against the defendant, the testimony has a strong prejudicial effect on the jury. In these cases, the co-defendant tends to minimize his role and exaggerate the defendant's role. This information is difficult to rebut, and the jury often readily believes the co-defendant's testimony. J. Arthur L. Alcaron, *Suspect Evidence: Admissibility of Co-Conspirator Statements and Uncorroborated Accomplice Testimony*, 25 LOYOLA OF LOS ANGELES L. REV., 953, 960 (1992).

42. Legislatures in the United States have proposed several solutions to address the risk of wrongful convictions attributable to false co-defendant testimony. Some jurisdictions

[2] During interviews, prosecutors can increase the risk that the co-defendant will falsely testify by subliminally signalling what a witness must say to obtain the offered benefits. Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors,* 89 B. U. L. Rev., 1, 9 (2009).

[3] Out of eighty-three federal criminal prosecutions resulting in exonerations, fourteen involved a co-defendant (or a person who could have been charged as one) who testified against the exoneree. See Exoneration Detail List, THE NATIONAL REGISTRY OF EXONERATIONS, (2015), http://www.law.umich.edu/special/exoneration/Pages/ detaillist.aspx (click on "Tags"; then select "FED" as a filter).

require other evidence to corroborate the co-defendant's testimony. Depending on the jurisdiction, if there is no corroborating evidence, the judge may, or sometimes must, caution the jury about the risk of relying solely on the co-defendant's testimony. Paul C. Gianelli, Brady *and Jailhouse Snitches,* 57 CASE W. L. REV., 593, 610-611 (2007). Some scholars propose that capital cases must have adequate safeguards against false testimony by co-defendants, such as pre-trial witness reliability hearings, cautionary instructions, or even categorically banning testimony by co-defendants. Steven Clarke, *Procedural Reforms in Capital Cases Applied to Perjury,* 34 J. MARSHALL L. REV. 453, 458-463 (2001).

43. Third, **poor legal representation and a lack of resources for the defence increase the risk of wrongful conviction.**

44. A good lawyer is the best defence against wrongful conviction. In order for lawyers to represent their clients effectively, however, they need to have sufficient financial support and time to conduct their investigations and prepare their defence. This support is particularly important for indigent defendants, who are constantly at risk of wrongful conviction. American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice,* 38 (Dec. 2004).

45. Institutional pressures, such as inadequate compensation or insufficient resources to investigate and develop a defense, exacerbate the effects of poor lawyering and create a situation where even good lawyers cannot provide quality representation. The lack of funding for indigent defence work decreases the availability of critical resources essential for an effective defence, such as proper training, resources for research, basic technology, investigators, experts, and administrative staff. Poor working conditions discourage lawyers from starting, or continuing to work, in legal aid. The

shortage of lawyers representing indigent defendants leads to increased caseloads, which makes the legal aid lawyers' working conditions even more intolerable. When overwhelmed with cases, legal aid lawyers cannot dedicate the time and effort needed to provide a competent defence. American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice,* 4-10 (Dec. 2004).

46. Malawian Legal Aid lawyers face similar problems—but the demands placed on their time and resources are even more overwhelming. As of March 2012, only 18 legal aid lawyers served the whole country. The starting salary is approximately $300 per month, which leads many lawyers to leave for private practice within one or two years. Legal aid lawyers typically do not meet their client until the day of the trial, which does not allow them to adequately prepare a defence. Even if legal aid lawyers were able to meet with clients for an adequate amount of time before trial, a lack funds would prohibit proper investigations or transportation of witnesses. Sandra Babcock & Ellen Wight McLaughlin, *Reconciling Human Rights and the Application of the Death Penalty in Malawi: The Unfulfilled Promise of* Kafantayeni *v. Attorney General* in CAPITAL PUNISHMENT: NEW PERSPECTIVES (Ashgate Publishing Ltd., 2013).

47. The Constitution of Malawi provides for free legal aid to indigent defendants in cases 'where the interests of justice so require.' This has been interpreted to require legal representation at state expense in homicide cases. On March 21, 2016, however, the Director of the Legal Aid Bureau informed the court registry that legal aid lawyers no longer had the capacity to represent homicide defendants because of funding difficulties. Letter from Masauko E. Chamkakala, Director Legal Aid Bureau to His Honor Chigona (Mar. 21, 2016).

48. These are just some of the risk factors that increase the likelihood of wrongful conviction. Others include prosecutorial or police misconduct, corruption, mistaken eye-witness testimony, and faulty forensic evidence. The greater the number of factors present in a case, the stronger the likelihood that an innocent person will be wrongly convicted. In death penalty cases, the consequences of a wrongful conviction are irreversible, which is one reason why international human rights bodies mandate heightened scrutiny of alleged errors in death penalty cases. *See Rocha Díaz v. United States*, Report No. 11/15, OEA/Ser.L/V/II.154, ¶54, INTER-AM. COMM. HUM. RTS. (March 23, 2015).

CONCLUSION

49. This *amicus* brief highlights several factors that should be considered in any capital sentencing process. What emerges from our survey is a clear consensus that the death penalty is an exceptional punishment that should rarely be applied. Where the court is considering the imposition of a capital sentence, it should consider a wide range of mitigating factors and apply a presumption in favour of life, with the burden on the prosecution to prove the existence of aggravating factors and disprove the existence of mitigating factors. In addition, courts should apply a heightened standard of review in capital cases to guard against wrongful conviction and ensure the rigorous application of due process safeguards, given the irrevocable nature of a death sentence.

Dated the 10th day of January 2017

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