BEFORE THE GOVERNOR OF THE STATE OF TEXAS
AND
THE TEXAS BOARD OF PARDONS AND PAROLES

IN RE

GERALD LEE MITCHELL

PETITIONER

APPLICATION/PETITION FOR 30-DAY REPRIEVE FROM EXECUTION OF DEATH SENTENCE IN CAPITAL CASE AND FOR COMMUTATION OF SENTENCE TO IMPRISONMENT FOR LIFE

Gerald Lee Mitchell was convicted in Harris County, Texas.

He is scheduled to be executed on October 22, 2001.

PUBLIC HEARING REQUESTED

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EXHIBITS

TO THE GOVERNOR AND MEMBERS OF THE BOARD OF PARDONS AND PAROLES:

GERALD LEE MITCHELL presents the following application in support of his request for commutation of his sentence from death to life in prison. This application is submitted on behalf of Gerald Lee Mitchell, in compliance with § 143.57(2) of Title 37 of the Texas Administrative Code. Gerald Lee Mitchell, a 17 year old who had been expelled from the 10th grader, at the time of the commission of the offense for which he was convicted of capital murder and sentenced to death in Harris County, Texas. He is scheduled to be executed on October 22, 2001.

I.

INTRODUCTION

The United States stands alone in the world as a violator of Human Rights by its position that children who commit crimes when they are under the age of 18 can be executed for those crimes.As a State, Texas is the worst offender of the rule in international law that individiuals who are under the age of 18 when an offense is committed can not be executed. Also, Texas stands with a small minority of states that allows for execution of 17 years olds without any sort of pretrial scrutiny of the child's ability to understand the consequences of their actions. Texas has refused to mandate that since 17 year olds can be executed that juries have to consider youth has a mitigating factor against execution.

To date, Texas court have refused to discuss the international law implications or consider the right of our children. The Texas law that allows for the execution of children 17 years of age was adopted in the late 1800's and has not changed with the time. Thus, it falls upon this Board and the Governor of this State to determine where Texas, and in turn the United States, stands on this important issue of Human Rights.

Executive Clemency has provided the fail safe in our criminal justice system. It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible.

Herrara v. Collins, 506 U.S. 390, 415 (1993)(internal citations omitted).

II.

APPLICANT'S REASONS WHY HE SHOULD NO BE EXECUTED

AN ADDRESS TO SOCIETY

AN ADDRESS TO THE TEXAS BOARD OF PARDONS AND PAROLE

AND THE GOVERNOR OF THE STATE OF TEXAS

FROM TEXAS DEATH ROW PRISONER

GERALD LEE MITCHELL

As the countdown continues towards the day of October 22nd, which is the scheduled day of my possible execution, my psychology is running wild with a considerable amount of different thoughts and emotions, what I am right now is an out of control and terrifying emotional roller coaster ride, there is a lot of psychological preparations struggling to be conducted. So much confusion, so many thoughts and emotions scrambling to be sorted out. But there doesn't seem to be enough days within a month to do so properly. I'm finding myself becoming more and more unprepared psychologically to face each tomorrow, hoping that each today will be selfish and stubborn and take it's time moving on and eventually giving way to tomorrow's turn. Though I have been incarcerated now for 16 years, beginning at the age of 17. Now that the treat of death is at its greatest - I am wondering where have all the years gone. It seem now that I have arrived at this point to quickly. Now I find myself reaching back for the years when I often made the comment - man, I've been locked up too long. Now I'm thinking not long enough. At one time I tried to daily busy myself with doing many different things. But now I find myself wanting to do very little. Because the busier you keep yourself, the faster the time passes by, and I'm trying my best to hold on to time, to preserve as much of it as I possibly can, and there's not a lot of time left til that approaching day. Nor is there a lot that my attorney has to work with as he tries desperately and devotedly to win me a stay of execution, as the days count down to the set date. He has been my attorney for the short period of 13 or so years. To his credit - he has put very thoughtful and meaningful time and effort in representing me and on the human level he is my champion, because he has fought/continue to fight so relentlessly for my life. He has shown me that he cares truly. He has put so much passion into his work, thanks MR. SCHNEIDER.

As the days count down to the day of my scheduled execution, other executions are taking place around me. Guys who I have come to know and care a great deal about. Guys who haven't been

locked up long enough - just like myself. Guys who like myself felt/feel that there is so much more to them than what they've presented to life during the point of their arrests. Guys who have over the years made great strides to better themselves. To right their wrongs. To kill off the character that had done so much wrong to so many people in this play called life and replace that character with a different one, a far better one, a favorable one to society.

Just as my attorney and I, these guys had/have little to work with as they attempted/attempt to fight off their date of execution. And in the end their lives were placed in the hands of the Texas Board of Pardons and Parole - under the authority of the Governor of Texas.

On Saturday, August the 4th, 2001, I had an eminently emotional visit with my sister and mother. The visit was the first in what seemed like a century for my mother and I. But actually it has been - I guess - 2 or 3 years less than a decade since her and I last visited. It took only the sight of my sister and mother to enkindle an eminently extensive and heightened pain within me. Their faces bore great pain and suffering, disquietude, helplessness and a quavering of fear. They cried - I cried - we cried 3gether. Throughout the 2 hour visit, there was interstices of silence, each of us were struggling to conjure up things to say. My mother asked me two of very questions in which I myself quietly ask daily, hourly. Her questions being (1) do you think it's really going to happen? and (2) what about the Parole Board, do you think if it comes down to then, they will spare your life, at least until they take look closer at the fact that you were just 17 years old at the time? I was completely honest and straightforward in answering her questions, and in answering the first - I told her that I really don't know, that I hope and pray that ir doesn't, that I am with faith - that everything will work out favorably for me. I was honest and straightforward in telling her that I am not ready to leave this world yet and the yes, I am with fear. In answering the other question I presented my mother and sister with a fact, and then I went on to share with them the consensus concerning the Texas Board of Pardons and Paroles - in relation to death row prisoners who turn to them - after all else fails - for abatement, of course I informed them that this consensus is of the death row community - and those throughout this country and around the world who are fighting for the abolishment of the death penalty. The fact that I presented to them, that holds true to the best of my knowledge - is that there has been but a sole to receive such abatement for the Texas Board of Pardon and Parole. And that from observation of the Parole Board, it is strongly held that they are as punitory as the court of law. That the board members are not in possession of an agreeableness to logical ratiocination that there is a emission of fairness and partiality in the process of deliberation and consideration in terms of possibly granting clemency to a death row prisoner. It's said that the governor of Texas says that he acts on recommendations from the Texas Parole Board, and that the Texas Parole Board says that their higher authority - the governor - is the one with the final decision. That they look for recommendations from the governors office. And if this is true, then it's considered passing the buck, which is shifting responsibility or blame to and fro. So many people are skeptical that the Texas Board of Pardons and Paroles and parole actually assembles in order to review the case - appeals of the death row prisoners seeking abetment - and deliberate and thoughtfully and meaningfully - before they render a decision. It is strongly held that

the two representatives of the Texas Parole Board members - who interviews the death row prisoners - never actually file a report - or recommendation to the board members, that the decision to not grant clemency is made well in advance - even before the interviewing of the prisoner - it is held by many that the decision is made even before death row prisoners are given an execution date, - and the final step of the appeals resting in hands of the Parole Board. That the reason for the representatives bothering at all to conduct the interviews is to merely be in accordance with required rules and procedures. And to also make it appear as if the Parole Board actually do engage in a meaningful and thoughtful process of reviewing all of the evidence and facts, - appeal - before granting or (DENYING) the request for clemency.

That - my answer (turned discussion) to my mother's question proved to be a very tearfully frightening revelation, and the hopelessness and pain that they wore on their faces became even greater, but it all had to be shared with them. Not wanting them to envelope their minds within the state of false hope and reckless anticipation. Psychologically, I am in my au natural. And so I gave to my mother and sister the naked truth, well - I really can't say naked truth - because I am not with any proof of what I have said concerning the Parole Board and it's (their) approach to death row prisoners and the state of appealing for clemency. I'm not in anyway attacking the Parole Board members and their representatives. I've merely put forth the opinions - beliefs and sentiments that many people are with where the Texas Board of Pardons and Paroles - and the governor of Texas is concerned. I'm not being judgmental or condemning, because for all I know it all very well might be the dissemination of propaganda. It could be individuals, groups - acting out/retaliating in detrimental blind rage for what they hold os unfairness, partially and injustice. Speaking for myself, the only thing that I can honestly hold true to - concerning the Texas Parole Board - is that - again - to my knowledge - merely a sole - out of the hundreds of death row prisoners who has cone before the Parole Board, pleading for clemency - has been granted such. It would be unwise of me to try and find fault/and judge with severity. For I would have for my defense merely an exhibit A, Henry Lee Lucas [my he rest in peace] being the sole death row prisoner - to my knowledge - to have been granted clemency. [Not every death row prisoner who was with an execution date met with the representatives of the Parole Board for possible clemency, there were many who turned down the interview - feeling - I guess - that it os pointless to appeal to the Parole Board for clemency, but I really can't speak on their reasons for not doing so, because I do not know really what was going though their minds]. Other than my knowledge of Mr. Lucas being the sole death row prisoner to receive clemency, all I have is - from word of mouth - and from reading - great speculation - abstract reasoning.

Though I strongly desire my life to be prolonged for many years more, I will not beg for my life. Yes, I ask that the Parole Board - and the governor of Texas take my request for clemency under thoughtful and meaningful consideration. I am not all bad, there is so much good within me, many positive and socially winning qualities. I have come so very long a way since the year of that mentally disturbed and unsettled 17 year young person. I have truly matured. I am so knowledgeable of life now. I am with true understanding of the very essence of human

benevolence and just as I have changed in such a great way for the better, I hope and pray that there will soon be a change in many peoples beliefs and opinions and attitude, a less severe judgment of others. Leaving the condemnation of a sole to damnation to our Lord and Savior. Hopefully I will be with the chance to prove my worth and value. To prove the validity of the resurrection of my spirit/sole. That in this day and age, the worse of all the prodical sons can truly return.

It is deeply heartfelt that there are those in society - and around the globe who are embedded within the folds if remission in the deepest recesses of their hearts, people who are offering us a thirst quenching drink form within the psychological cup of their ever youthful love, care, understanding and forgiveness, those people who fight so relentlessly and courageously for the rights of all humanity. Those who's minds are not enslaved within the chains of ignorance of hatred and vengefulness. But resides within the rationalism that our mortal sins are venial.

I am a born again Christian (Glory be to God). Yes, I continue to stumble - I am human - and to err is human, but I do not use this fact for my crutch. I strive to be the very best Christian that I can Humanly be. It's my duty as a Christian to inform you all that JESUS LOVES YOU - and GERALD LEE MITCHELL LOVES YOU AS WELL. It matters not at all who you are - I LOVE YOU. The Texas Governor and the Texas Board of Pardons and Parole as well. As well as all of those who wish me dead. Over the years I have run empty of hate, never will I seek to resupply myself with any. Hate attributes to evil, and evil no longer holds possession of my life.

The time doesn't appear at this point to be promising for me to have the opportunity to prove my worth and value. The day of my scheduled execution is fast approaching, every day brings me nearer to the set date causes the light of hope to become just a little dimmer. But being a Christian, a true believer, believing in and trusting my father in heaven - and applying myself deeply to his teachings - I am with unending and unwavering faith - and so the lamp of the light of hope will continue to shine until my human eyes close in eternal sleep.

LIFE - I never really understood it - never desired to truly and righteously embrace it - never accepted the true meaning of it - until that dark day when I began standing in the very center of the shadows of death.

Peace and love - caring - understanding - prosperity - bountifulness and a long lasting life here on earth be with each and everyone of us, us being the whole of the human race.

III

PROCEDURAL HISTORY OF CASE

Applicant was formally charged by indictment with the offense of capital murder in the State of Texas v. Gerald Lee Mitchell, Cause No. 426,583. The indictment alleged, in pertinent part, that on June 4, 1985, Petitioner did unlawfully, while in the course of committing and attempting to commit the robbery of Charles Angelo Marino, intentionally cause his death by shooting him with a gun. Upon his plea of "not guilty", a jury found Petitioner guilty of capital murder, as charged in the indictment, and answered "yes" to all punishment issues submitted by the Court. Thereafter, the Court assessed Petitioner's punishment at death.

On June 29, 1988, the Texas Court of Criminal Appeals, in accordance with the Supreme Court's decision in Batson v. Kentucky, 476 U.S. 79 (1986), abated Petitioner's appeal (in an unpublished opinion), pending this Court's review of the jury selection process. A hearing was held incident to this opinion and the appeal was returned to the Court of Criminal Appeals.

Based upon the record before it, the Court of Criminal Appeals determined that the trial court's conclusion, that Petitioner had failed to establish a prima facie case of racial discrimination in jury selection, was clearly erroneous. Once again, the cause was remanded to the trial court for further proceedings.

No further evidence was presented. The trial court adopted the State's proposed findings of fact and conclusions of law.

The Court of Criminal Appeals affirmed Petitioner's conviction on January 27, 1993. Petitioner's motion for rehearing was denied. The United States Supreme Court denied Petitioner's application for writ of certiorari on October 11, 1993.

On September 19, 1994, Petitioner filed his initial state application for writ of habeas corpus. A hearing was held incident to Petitioner's motion to recuse the trial court in regards to the habeas petition

based upon the allegation that the trial court during the trial of the case cried in front of the jury. The recusal motion was denied. The State filed its original answer on September 9, 1996. It filed its second amended answer on January 30, 1998. The trial court entered findings of fact and conclusions of law on February 18, 1998. Petitioner requested permission to amend his writ in the court of criminal appeals. On September 16, 1998, the Court of Criminal Appeals denied permission to amend and denied Petitioner's request for habeas relief without a written order. Petitioner filed a third amended application for writ of habeas corpus on September 23, 1998. The court requested that the amended issues be submitted to the court separately on December 4, 1998. The Court of Criminal Appeals denied relief on December 16, 1999. All requests for relief have been denied by the federal courts.

Aggravating Facts and Mitigating Facts

Mitigating Facts

During the punishment phase of Applicant's trial, the defense introduced extensive mitigating evidence. Trial testimony established that Applicant's IQ at the time of the offense was 75. In addition, the evidence revealed that Applicant had been psychologically tested and diagnosed as functioning at a **borderline** intellectual level with the possibility that he suffered from an organic brain disorder, evidenced by temporal lobe seizures.

The trial counsel examined several witnesses who described and recounted Applicant's extensive history of drug abuse and addiction, as well as his mental and neurological handicaps. The witnesses attested that the combination of Applicant's limited mental function, organic seizure disorder, and extensive history of drug abuse and addiction, would have, most likely produced a neurophysiological propensity in Applicant to have caused him to engage in erratic and harmful behaviors.

The defense counsel also presented evidence of Applicant's distressing and dysfunctional home life. Trial counsel presented testimony of Applicant's anguish upon learning that his mother had been diagnosed with cancer and that his father had been laid off from work. Finally, defense counsel introduced several witnesses who explained the facts and circumstances of Applicant's history of unlawful acts, attested to his capacity for rehabilitation, and refuted the claim that he would be a future threat to society.

Dr. Priscilla Ray testified that she had interviewed Applicant for one hour and had assessed his level of intellectual functioning. Dr. Ray testified that she had discovered that Applicant's level of intellectual functioning, as measured by the IQ test administered by Harris County Forensic Psychiatric Services, was borderline, with a score of 75, much lower than that of persons with normal intellectual function. (S.F.-XXIII-560). Dr. Ray testified that she believed that Applicant may have experienced temporal lobe seizures with resultant black outs, confusion, and episodes of unusual behavior. She stated that "sometimes the behavior can be bizarre, can be harmful to other people or objects around." (S.F.-XXIII-561).

Dr. Ray testified, as well, that the judgement levels as well as levels of self-control and inhibition, respectively, of persons diagnosed with borderline intellectual functions, would be markedly impaired with continued ingestion of unauthorized drugs. Dr. Ray stated that temporal lobe seizures, which often account for individuals' mis-perception of sequential time, could have caused Applicant to perceive events, e.g. two criminal offenses, which had occurred within a 24-hour period, as having occurred weeks apart. Moreover, Dr. Ray testified that a history of drug abuse and experimentation could also have caused or exacerbated Applicant's mis-perception or memory of these events. (S.F.-XXIII-563).

Dr. Ray stated that she had recommended that Applicant be evaluated neurologically at Ben Taub

Hospital for a temporal lobe seizure disorder or other neurological diseases or syndromes. However, Applicant was never evaluated, as recommended, above.

Trial counsel examined many witnesses during Applicant's trial who asserted that Applicant had experienced and had exhibited a history of severe drug abuse. Dr. Ray also noted during her own evaluation of Applicant, her "impression that he ha[d] a severe and long history of drug abuse..." (S.F.-XXIII-560). Dr. Ray reiterated that she had discussed Applicant's extensive history of drug abuse with him, including his use of "amp," a marijuana cigarette lined with embalming fluid or PCP.

While testifying, Dr. Ray expressed that "people under the influence of drugs real heavily may still be able to think and reason and speak . . . but their judgement may be impaired." (S.F.-XXIII-561). Dr. Ray further maintained that such persons do not think as clearly and act more impulsively than they would, if sober. (S.F.-XXIII-561).

Dr. Ray explained that heavy unlawful drug use was not inconsistent with a person's propensity to commit criminal acts. Thus, based upon her examination of Applicant and the contents of their interview, Dr. Ray believed that Applicant's engagement in criminal activities and his perception of these behaviors, respectively, had been greatly influenced by his own extensive use and abuse of drugs.

In her report, Dr. Ray indicated that most of Applicant's criminal activities had been associated with heavy drug usage: Applicant's "prosecution" for theft and robbery at the age of fourteen years had followed the ingestion of amp, liquor, and/or cocaine; Applicant's "prosecution" for possession of a weapon at the age of fifteen years had been induced by the ingestion of amp. Finally, Dr. Ray recounted Applicant's admission that he had free-based cocaine and had ingested both alcohol and amp, respectively, before the commission of the most recent offense of murder.

Dr. Ray declared that Applicant's habit of continued drug abuse was amenable to medical treatment. She pointed out that Applicant had never received any kind of drug therapy or treatment. Moreover, she agreed that medical treatment could preclude any further unlawful acts or behaviors by this Applicant. As stated: "You can't teach borderline intellectual functioning ... but you can treat drug abuse." (S.F.-XXIII-582).

Applicant's mother, Viola Mae Mitchell, also attested to his history of extensive addiction and abuse of drugs. She testified that her son, the youngest of her three children, had been a "good boy" growing up in Corpus Christi. (S.F.-XXII-383). She stated that he had sung in the choir, diligently attended school, and served as an usher at church.

Mrs. Mitchell acknowledged that it was in 1982 that she had first noticed a drastic change in Applicant's behavior. This occurred at the same time that she had been diagnosed with cancer. Applicant was fifteen years-old at that time. (S.F.-XXII-383). Mrs. Mitchell described Applicant as one who had been a "pretty normal child" up until that time. (S.F.-XXII-393).

Mitchell further attested to the change in her son's attitude with the news of her cancer, and described the dramatic drop of his grades in school as well as his ever-present fear that she would soon die. Mrs. Mitchell noted that this time coincided with the beginning of Applicant's criminal activities and drug usage.

Mrs. Mitchell described the numerous hardships and stresses which had plagued her family, beginning in 1982. She told of the family's grief when Lloyd Mitchell, Applicant's father, was laid off from work and noted that this unfortunate occurrence had also affected her son. She detailed the suffering of her family, without any money coming in and her own inability to work as she attempted to overcome her

cancer.

Mrs. Mitchell testified that she had personally witnessed her son's abuse of drugs on two different occasions: each incident had involved the use of marijuana. She admitted that she spoke with Applicant after each episode and knew that "he wasn't the type of person he was at home. I knew he had to have something that gave him that type of attitude with me." (S.F.-XXII-391).

Sandy Kay Means, social worker and health educator, graduate of Texas Women's University, also testified during Applicant's trial. Ms. Means had been employed as a drug education coordinator and director, respectively, of the Gulf Coast Trade Center, an alternative school program in which Applicant had been enrolled after four public schools which he had attended in the Harris County Independent School District (HISD) had failed "to reach him."

Means testified that Applicant had been unable to compete in any of the "regular" HISD schools. She explained that children who could not compete with others in regular school environments usually reacted "by getting into trouble." (S.F.-XXII-415). She stated that Applicant had been a very poor student and had gotten into trouble precisely because of his inability to compete in a normal school environment. (S.F.-XXII-415). She added, however, that with the proper counseling, Applicant could develop coping skills to assist him in overcome his handicaps and in coping with difficult situations.

Ms. Means testified that she had known Applicant and his family very well. She stated that she had tutored Applicant twice a week for four or five months in 1982 and discovered that he had been "very concerned" about his mother's cancer and his father's loss of work. She described Applicant's constantly-changing attitude and behavior as his own home life began to deteriorate and as he began to experiment

with and abuse drugs.

Means explained that on two separate occasions she had observed the marked influence of controlled drugs on Applicant's behavior. She described the change in Applicant's behavior upon his use of marijuana during one incident, and upon the ingestion of an unidentified pill, during another. Means attested that Applicant had exhibited erratic changes in his behavior on both occasions, that he had become "belligerent" and "argumentative". Lastly, Means reiterated that she believed that Applicant could be helped with proper counseling and treatment for drug abuse, as well as emotional and behavioral therapy.

The Court ruled during the course of the trial, that Ms. Means could not discuss Applicant's ingestion of an unidentified pill in the presence of the jury. This ruling was based upon the fact that the pill, at issue, had not been proven to be a controlled substance. However, Applicant asserts that the drug-based behaviors above, observed and described by Means, would have provided essential information corroborating Applicant's long-term problems with drugs as well as their direct influence and association upon his commission of criminal acts. Applicant contends that this testimony constituted mitigation evidence of his moral culpability.

Applicant testified during his trial that he had abused drugs regularly. He admitted his continued use of cocaine and amp, respectively, and stated that he had often combined and ingested angel dust and embalming fluid with marijuana. Finally, Applicant acknowledged that he had been feeling "different" in jail, without the use and influence of drugs.

Several witnesses testified for Applicant during his trial and presented evidence which negated the State's claim that Applicant remained a future threat to society. The defense counsel had subpoenaed Mitchell's fellow inmates and most recent supervisor, respectively, to attest to Applicant's nonviolent

behavior.

Walter Hudson of the Harris County Sheriff's Department, and Applicant's supervisor in the Harris County Jail, testified that Mitchell had been transferred to his floor several months before the trial and had not caused any disciplinary problems. (S.F.-XXIII-586). Several inmates also confirmed Hudson's testimony, including, Lee Irving Tanner, who stated that he had known Mitchell since February and that they "all get along fine." (S.F.-XXIII-536). Tanner testified that Applicant had never beaten or threatened anyone.

Phillip Vandermer, another inmate corroborated Tanner's testimony. When the prosecutor suggested that Applicant had stopped engaging in violent behavior solely because his fellow inmates were physically larger men, Vandermer explained that the inmates on the sixth floor of the Harris County Jail were men with medical problems and that among them were several inmates who were physically smaller than Mitchell. There had been no disciplinary problems reported between these inmates and Mitchell.

Three other inmates, William Cave, Michael Farias, and Dennis Wayne Richardson, respectively, also attested to the fact that Applicant had not caused any problems on their floor in the jail nor had ever threatened or attempted to beat anyone. Thus, evidence of Applicant's improved and peaceful behavior was presented at trial. In fact, it had been proven that without the stimulation of illegal drugs, Applicant was a peaceful, nonviolent individual and did not pose any threat to society's safety.

Applicant thus insists that this evidence would have assisted the jury in its deliberations regarding the issues of his future dangerousness, if any, and mitigation, respectively, had the jury been instructed how it could apply this evidence. Moreover, Applicant asserts that his addiction to unlawful drugs and the effects of extended drug use and abuse was chiefly responsible for his criminal conduct.

As previously stated above, during Applicant's trial, Applicant both admitted and accepted the blame for the crimes he had committed and offered believable alibis for those, of which, he submitted, he had been wrongly accused of having committed. Applicant testified that his alleged disciplinary problems and violent acts in school and in jail, respectively, were often provoked or the result of simple misunderstandings.

While testifying, Applicant accepted the blame for both the murder of Marino and the shooting of Fleming. Of the subsequent capital murder charge for the death of Munguia, Applicant stated that he had only shot Munguia when he saw that the deceased had attempted to stab Applicant's friend.

Applicant further testified that he had not committed an alleged burglary in Corpus Christi. In fact, he reiterated that he had not known that a burglary was occurring as he had been sent around the corner, by Henry Miller, to find change for a fifty dollar bill that the latter had given him. When Applicant had returned to the pawnshop, police officers had questioned and arrested him, and proceeded to take him downtown.

Upon examination regarding eight gold chains in his pocket at the time of his arrest for the burglary of a pawnshop, above, Applicant testified that the chains had belonged to him and that he had removed them from his neck during a basketball game earlier during that day. In fact, the owner of the pawn shop, testified under oath that some of the jewelry taken by the police had not belonged to him.

Applicant openly admitted, while being questioned regarding a juvenile record of criminal acts, that he had taken the purse of Debra Dimicelli, but denied that he had ever robbed a savings and loan institution. Applicant further described an incident in which he had remorsefully confronted an individual, James Cooper, and had taken his watch and ring. These items were subsequently returned to Cooper.

Of the incidents of alleged incidents of violence that had occurred at Applicant's school, Applicant claimed that he had only gotten into a fight with another male student when the latter demanded to fight him and only after Applicant had admitted that he had "touched" the latter's girlfriend. Applicant emphatically denied that he had ever possessed or exhibited a knife during this incident.

Applicant's mother also testified that her son had often been provoked into such fights. She testified that several white male students from Jersey Village School had passed the Mitchell home on two separate occasions during April, 1984 and had shouted: "black niggers, why don't you move away from the neighborhood!" (S.F.-XXII-398).

Applicant admitted that he did not get along with his instructors at the Gulf Coast Trade Center, however, he denied any disciplinary problems. Applicant asserted that many alleged problems had been mere misunderstandings and testified that he had never struck an instructor.

Of the allegations that Applicant had engaged in violent conduct while incarcerated in the Harris County Jail, Applicant described the alleged incidents as "horsing around". He noted that the game called "chest boxing" had often been played, but that he had never taken part in a real fight. Lastly, Applicant denied that he had ever threatened to rape anybody.

Texas as violator of International Human Rights

Recently, in *Rocha v. State,* 16 S.W.3d 1 (Tex. Crim. App. 2000), this Court held that a specific treaty, the Vienna Convention on Consular Relations is not a "law of the United States" within the meaning of TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon Supp. 2000). This Court, as the highest court in Texas with criminal jurisdiction, TEX. CONST. art. V, § 5, unquestionably has the authority to construe Article 38.23 in such a way.

However, *Rocha* also contains *dicta* that treaties are simply agreements between sovereigns and do not provide any enforceable rights to individuals. 16 S.W.3d at 15-16. This view of the application of international law, whatever its applicability when Hamilton wrote the Federalist Papers, is incorrect in the year 2001[1] and was not universally shared by Hamilton's colleagues to the Constitutional Convention. James Madison, often called the Father of the Constitution, in 1806 wrote that evidence of international law is found in the implied consent of states to customary practices. He further wrote that treaties constitute express consent of the states. "Can *express* consent be inferior evidence?" Madison wrote. JAMES MADISON, EXAMINATION OF THE BRITISH DOCTRINE, *reprinted in* 1 MADISON, LETTERS AND OTHER WRITINGS 262 (1867).

Even before Madison penned the letter quoted above, the Executive Branch of the United States took the position that private persons could be liable for at least some violations of the law of nations, that is international law. *See Breach of Neutrality,* 1 Op. Att'y Gen. 57, 59 (1795) (Where Attorney General Bradford opined that individuals could be liable for acts aiding the French in plundering British property off the cost of Sierra Leone.). Piracy is another early example of the imposition of sanctions against individuals – not states or state actors – for violation of international law. *See United States v. Smith,* 18 U.S. (5 Wheat.) 153, 161 (1820).

Clearly, international agreements and customary international law give individuals rights and responsibilities. One need only look to the Nuremberg trials and the current war crimes trials before the

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[1]It was specifically rejected by the International Court of Justice in 2001. This Court's view also is wrong as a matter of international law. *See Germany v. United States (The LaGrand Case),* [2001] I.C.J. Reports 104, rejecting this argument when put forward by the United States and holding that the Vienna Convention vests individuals with enforceable rights.

war crimes tribunals for the former Yugoslavia and Rwanda to see that international law places responsibilities on individuals which may be enforced with criminal sanctions. The International Court of Justice, in *Nicaragua v. United States, supra.,* found customary international law protecting individuals in international armed conflicts, a right being enforced by criminal sanctions by the International Criminal Tribunal for the Former Yugoslavia [ICTY]. *See* U.N. Doc. S/25704 (8 May 1993) (report of the Secretary General including the Statute of the ICTY). *See also The Prosecutor v. Tadic,* No. IT-94-1-AR72 (ICTY Appeals Chamber 2 October 1995), in which the Tribunal's Appeals Chamber held that customary international law could be enforced with criminal sanctions by the Tribunal.

United States courts share this view that international law confers specific rights to individuals which are enforceable by those individuals. As early as 1801, the Supreme Court recognized that treaties can provide remedies for private individuals because they are the supreme law of the land. *United States v. Schooner Peggy,* 5 U.S. (1 Cranch.) 103 (1801). Chief Justice Marshall wrote for the Court:

> The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence its obligation on the courts of the United States must be admitted. It is certainly true that the execution of a contract between nations is to be demanded from, and in the general, superintended by the executive of each nation, and therefore, whatever the decision of this court may be relative to the rights of parties litigating before it, the claim upon the nation is unsatisfied, may still be asserted. But yet, where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is much to be regarded by the court as an act of congress; and although restoration may be an executive, when viewed as a substantive, act independent of, and unconnected with, other circumstances, yet to condemn a vessel, the restoration of which is directed by the law of the land would be a direct infraction of that law, and of consequence, improper.

5 U.S. (1 Cranch.) 109-10.

See also United States v. Noriega, 808 F. Supp. 791 (S.D. Fla. 1992) (holding that the Geneva

Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 U.N.T.S. 135, applies to the detention of an officer of the Panamanian military captured by the United States during an armed conflict and that the officer can enforce his rights as a prisoner of war under that convention in federal court).

Congress also has recognized that international law vests individuals with enforceable rights. It has adopted the Torture Victim Protection Act of 1991, which vests federal courts with original jurisdiction

> of any civil action by an alien for a tort, only committed in violation of the law of nations or of the United States.

28 U.S.C. § 1350.

It would be absurd for Congress to vest the federal courts with jurisdiction if the potential plaintiffs had no remedy. If individuals had no remedy under international law, § 1350 would violate the case and controversy requirement in U.S. CONST. art. III. Yet, there are numerous recent examples of entry of judgments under that statute. *See Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); David Rohde, *Jury in New York Orders Bosnian Serb to Pay Billions*, N.Y. TIMES, September 26, 2000, at A8; Christine Haughney and Bill Miller, *Karadzic Told to Pay $754 Million; Civil Trial in N.Y. Ends With Judgment for 12 Women Who Survived Rape, Torture*, WASH. POST, Aug. 11, 2000, at A13.

Even *The Paquete Habana* belies this Court's *dicta* that international law gives no rights to individuals and only regulates the intercourse of sovereigns. In *The Paquete Habana*, the owners of two small fishing vessels seized by the U.S. Navy during the Spanish-American War successfully sued for their return under an exemption to the normal rules of war which allowed belligerents to seize all property of their

enemies. The claimed exemption was for fishing vessels. 175 U.S., at 678-79.

4. *Ius Cogens* Limits the Power of Governments to Engage in Certain Acts

Regardless of whether an individual has an enforceable right under international law, the proposition of law put forward by Applicant is that international law deprives the United States and the states from engaging in certain actions, regardless of the law of the United States or any of the states. International law rising to the level of *ius cogens* forbids all nations, including the United States, to legalize slavery, genocide, crimes against humanity or torture. As the Seventh Circuit stated:

> A *jus cogens* norm is a special type of customary international law. A *jus cogens* norm "is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only be a subsequent norm of general international law having the same character.'" *See Siderman de Blake v. Republic of Argentina,* 965 F.2d 699, 714 (9th Cir. 1992) (*quoting* Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679). Most famously, *jus cogens* norms supported the prosecutions in the Nuremberg trials. *See Siderman,* 965 F.2d at 715 (9th Cir. 1992) ("The universal and fundamental rights of human beings identified by Nuremberg--rights against genocide, enslavement, and other inhumane acts . . . --are the direct ancestors of the universal and fundamental norms recognized as *jus cogens.*").
>
> Courts seeking to determine whether a norm of customary international law has attained the status of jus cogens look to the same sources [as for customary international law], but must also determine whether the international community recognizes the norm as one 'from which no derogation is permitted.'" See *id.*, 965 F.2d at 715 (quoting *Committee of U.S. Citizens Living in Nicaragua v. Reagan ("CUSCLUN"),* 859 F.2d 929, 940 (D.C. Cir. 1988)). "While jus cogens and customary international law are related, they differ in one important respect. Customary international law, like international law defined by treaties and other international agreements, rests on the consent of states." *Id.* In contrast, a state is bound by *jus cogens* norms even if it does not consent to their application.
>
> International law does not recognize an act that violates *jus cogens* as a sovereign act." *Siderman,* 965 F.2d at 718. Thus, a violation of *jus cogens* norms "would not be entitled to the immunity afforded by international law." *See id.*

Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1149-50 (7th Cir. 2001).

Treaties and customary international law constitute the supreme law of the land and as such are binding on the federal courts and the courts of the states. Just as a federal statute can limit the authority of a state legislature to adopt inconsistent state laws, so treaties and customary international law can limit the power of a state to enact inconsistent legislation. A *ius cogens* norm can deprive both Congress and the state legislatures from adopting contrary or inconsistent legislation. To hold otherwise would be an unreasonable application of federal constitutional law as determined by the Supreme Court of the United States. The remedy for a violation of internationally-recognized human rights is simple: United States courts should take whatever action is necessary to prevent those violations. This is especially easy when the international law binding on the United States acts to deprive a state of the power to do an act or prescribe a punishment. Since customary international law has the same force as a treaty or a statute passed by Congress, the Supremacy Clause simply takes the power to do an act or prescribe a punishment out of the hands of the states.[2] Any act of a state government which is inconsistent with international law is forbidden by the Supremacy Clause.

B. Customary International Law Rising to *Ius Cogens* Forbids the Execution of Persons for Crimes Committed While Less Than 18 Years Old

A clear international consensus has developed that customary international law prohibits the execution of persons under 18 years of age at the time of the offense. The most recent evidence is a report

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[2]Given the Supreme Court's holding in *Paquete Habana*, a flat holding by this Court that international law gives individuals no rights would be contrary to a holding of the Supreme Court. *See Williams v. Taylor*, _ U.S. _, 120 S. Ct. 1495 (2000).

released on September 28, 2000, by the International Commission of Jurists (ICJ) condemning execution of juveniles as contrary to customary international law.[3] On August 14, 2000, the United Nations Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights adopted a resolution re-affirming its position that the imposition of the death penalty on persons under 18 at the time of the offense violates customary international law.[4]

The International Convention on Rights of the Child and the American Convention on Human Rights either codify customary international law as to the execution of persons under 18 years of age or they have risen to the status of customary international law themselves. *See e.g.* UN Doc E/CN.4/RES/2000/65 (27 April 2000)[5], a resolution by the United Nations Commission on Human Rights affirming that the International Convention on Rights of the Child prohibits execution of persons for crimes committed while younger than 18. Mary Robinson, the UN High Commissioner for Human Rights, has taken the position that the widespread adoption of the International Convention on the Rights of the Child constitutes customary international law.[6] It is impossible to ignore this widespread recognition by applicable international bodies and officials.

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[3]The Commission said that only the United States and such paragons of human rights as Nigeria, Saudi Arabia and Iran still allow the execution of persons who were under 18 at the time of the offense. *See* http://www.icj.org/press/press00/english/dps.htm. The Commission takes the position that the ban on imposition of the death penalty for a crime committed before a person is 18 is ius cogens and like the peremptory norms of international law forbidding crimes against humanity, genocide, slavery and piracy cannot be abrogated by any nation.

[4]UN Doc. E/CN.4/Sub.2/2000/L.29. A copy is attached hereto as Exhibit A.

[5]A copy is attached hereto as Exhibit B.

[6]*See* Message from Mary Robinson, United Nations High Commissioner for Human Rights, October 12, 1999. A copy is attached hereto as Exhibit C.

Customary international law and the new *ius cogens* norm prohibiting the execution of persons for crimes committed while younger than 18 began forming in the immediate post World War II period. As early as 1949, the United States entered into an international agreement forbidding the execution of some persons who were convicted of offenses which occurred before they were 18. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, 75 U.N.T.S. 287, art. 68(4). The authoritative commentaries of the International Committee of the Red Cross say that the provision was proposed by the International Union for Child Welfare. The commentaries continue:

> The clause corresponds to similar provisions in the penal codes of many countries, and is based on the idea that a person who has not reached the age of 18 years is not fully capable of sound judgment, does not always realize the significance of his actions and often acts under the influence of others, if not under constraint.

JEAN S. PICTET, ED, COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (ICRC 1958) at 347.[7]

Both of the 1977 Protocols to the Geneva Convention forbid the imposition of the death penalty on persons under 18 at the time of the offense. *See* Protocol I, Article 77(5),[8] and Protocol II, Article 6(4).[9]

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[7]The Senate ratified the four 1949 Geneva Conventions in 1955 without a reservation related to Article 68. *See* 101 CONG. REC. 9962 (1955).

[8]Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), of 8 June 1977, 1125 U.N.T.S. 3. The United States has not ratified Protocol I. However, the United States agrees that most of the Protocol, including the ban on execution of juveniles, constitutes customary international law.

[9]Protocol Additional to the Geneva Conventions of 12 August 19 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977, 1125 U.N.T.S. 609. The United States has not ratified Protocol II.

In 1985, the United Nations General Assembly adopted the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, U.N. Doc. A/40/53,[10] which includes § 17.2, which reads in full:

> Capital punishment shall not be imposed for any crime committed by juveniles.

The previous year, the United Nations Economic and Social Council adopted Resolution 1984/50 (25 May 1984),[11] entitled "Safeguards guaranteeing protection of the rights of those facing the death penalty." It includes the following as paragraph 3:

> 3. Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.

Additional evidence of the customary international law status of the ban on imposition of capital punishment on persons younger than 18 at the time of the crime include the American Convention of Human Rights and the African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990),[12] article 2 and article 5(3).

The American Convention on Human Rights, along with serving as proof of world-wide customary international law, constitutes regional customary law binding on the United States. Article 4 § 5 of the Convention provides:

> 5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

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[10]A copy is attached hereto as Exhibit D.

[11]A copy is attached hereto as Exhibit E.

[12]A copy of the Convention is attached hereto as Exhibit F.

These authorities show that there is a virtually unanimous acceptance throughout the world by states and international organizations that imposition of the death penalty on persons under 18 at the time of the crime violates international law. This custom has developed in the half century since the 1949 Geneva Conventions were drafted and has won virtually universal acceptance. The vast majority of the nations in the world follow this ban, either by abolishing the death penalty altogether or by limiting its imposition to persons 18 or older at the time of the offense.

The International Convention on the Rights of the Child's ban on the death penalty for crimes committed by 17-year-olds constitutes customary international law binding on the United States. Furthermore, as shown, *supra.*, there is independent international law binding on the United States, with the Convention simply being part of the proof of that customary international law. Even if this rule has not achieved *ius cogens status,* absent an Act of Congress limiting the application of customary international law, the ban on execution of persons for crimes committed before they are 18 is the Supreme Law of the United States under the Supremacy Clause and binding on the states, regardless of state law or constitution. Additionally, the Judges of every state are bound by the Supremacy Clause in the Constitution to give effect to the laws of the United States.

1. The Convention on Rights of the Child and The Vienna Convention on the Laws of Treaties

The United States has signed but not ratified the Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf 39/28, 8 ILM 679.[13] The treaty went into force on January 27, 1980. The United States has conceded that the Convention constitutes customary international law. The Supreme Court and other

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[13]A copy is attached hereto as Exhibit G.

courts treat it as a form of customary international law in interpretation of treaties. *See e.g. Sales v. Hatian Centers Council,* 509 U.S. 155, 191 (1993); *Weinberger v. Rossi,* 456 U.S. 25, n. 5 29 (1982); *Fujitsu Ltd. v. Federal Express Corp.,* 247 F.3d 423, 433 (2nd Cir. 2001).

Because the United States has signed, but not ratified, the International Convention on the Rights of the Child, it has an obligation not to take any action to defeat the object and purpose of the Convention until it has made its intentions clear not to ratify the treaty. *See* Vienna Convention on the Law of Treaties, Article 18(a). Thus, the United States has an international law obligation not to defeat the purpose of the Convention, including its protection of children from the death penalty. This international law obligation is independent of the status of the Convention on the Rights of the Child as customary international law.

The President can inform the Secretary General of the United Nations that the United States is withdrawing its signature from the Convention on Rights of the Child and will not ratify the treaty. Or, the Senate can refuse its advice and consent, thereby preventing the President from ratifying the treaty and effectively making clear the intentions of the United States *not* to ratify the Convention. The President and the Senate have chosen to do neither.

The United States has an independent obligation under the Vienna Convention on the Law of Treaties to "refrain from acts which would defeat the object and purpose" of the International Convention on the Rights of the Child pending ratification. One of the objects and purposes of the Convention is to create conventional international law and codify customary international law prohibiting the execution of persons for crimes committed before they were 18 years old.

Imposing the death penalty on Applicant has the effect of defeating the object of the International Convention on the Rights of the Child. Thus, assessing the death penalty against him violates the United

States' obligation under the Vienna Convention on the Law of Treaties. Therefore, until such time as the United States makes clear its intention not to become a party to the Convention, both the United States government and the states must refrain from any actions which would defeat the objects and purposes of the Convention.

2. The *Ius Cogens* Norm Developed Since Applicant's First Habeas Petition and This Application is Proper Pursuant to Article 11.071 § 5

As shown above, the international law prohibition on the imposition of the death penalty on persons for crimes committed before they are 18 years old has developed slowly over a period of years beginning at the end of World War II. It is difficult to say exactly when it became customary international law or when the custom attained *ius cogens* status. However, it clearly was after the filing of Applicant's first application for writ of habeas corpus.

3. Conclusion as to Customary International Law

Attached to this application as Exhibit H is the affidavit of Professor Anthony D'Amato of Northwestern University law school as well as Professor D'Amato's curriculum vitae. Professor D'Amato is a well respected scholar in international law, exactly the type of expert the Supreme Court in *The Paquete Habana* as "commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat." His affidavit is that the statement of the law set forth herein is a correct statement of customary international law. Professor D'Amato's opinion as to what constitutes customary international law is clear and unambiguous. *Customary international law forbids the imposition of the death penalty on any person for an offense committed before that person's 18th birthday.*

The ban on execution of persons for crimes committed before their 18th birthday is customary international law and a *ius cogens* norm of customary international law. As such, it is federal law which is binding on the states through the Supremacy Clause. This customary international law preempts the power of the states to impose the death penalty just like any federal law can preempt state law.

Because Texas lacks the authority to impose the death penalty on Applicant due to international law as applied through the Supremacy Clause, this Court should reform his sentence to life in prison.

C. The ICCPR Forbids the Execution of Persons Less than 18 Years Old at the Time of the Crime

Article 6, Paragraph 5, of the International Covenant on Civil and Political Rights, through the Supremacy Clause of the federal constitution, voids Section 8.07(d) [now (c)] of the Texas Penal Code, rendering Applicant ***ineligible*** for the death penalty. U.S. CONST. art. VI, cl. 2 (all treaties "shall be the supreme Law of the Land"); INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS art. 6(5) (1966), 6 I.L.M. 368 (entered into force Mar. 23, 1976) (signed by U.S. in 1977; ratified by U.S. in 1992) [hereinafter "ICCPR"]. Article 6(5) prohibits the death sentence for "crimes committed by persons below eighteen years of age." ICCPR, at art. 6, para. 5. Upon ratification of the treaty in 1992, the United States attached a reservation to Article 6, reserving "the right, subject to its Constitutional constraints, to impose capital punishment on any person, including such punishment for crimes committed by persons below 18 years of age." SENATE COMM. ON FOREIGN RELATIONS REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 31 I.L.M. 645, 653-54 (1992) [hereinafter 31 I.L.M. 645]. As shall be demonstrated below, the reservation violates the object and purpose of the treaty. It also is invalid because it violates a non-derogable provision of the treaty and a *ius cogens* norm of

international law. Under treaty law, the invalid reservation is void and of no effect. By clear and convincing evidence, therefore, based upon the merits of the ICCPR issue, no rational juror could have possibly answered any special issue in the State's favor, because **the jury never should have been presented with the special issues**. Upon conviction, Applicant should have been sentenced to life in prison.

Article 11.071 §§ 5(a)(2) and 5(a)(3) were clearly designed after the federal "miscarriage of justice" exception that also is described in terms of the "actual innocence" or "actual innocence of the death penalty" exceptions. In every situation in which the "actual innocence of the death penalty" exception is applicable, the merits of the substantive constitutional complaint will have some bearing on whether the exception has been met. The merits must satisfy the United States Supreme Court's requirement "that some . . . condition of eligibility [for the death penalty] had not been met." *Sawyer v. Whitley*, 505 U.S. 333, 345 & n.12 (1992). When considering the "actual innocence of the death penalty" exception to procedural default the Court looks only to those facts that pertain to eligibility criteria for the death penalty. *Sawyer*, 505 U.S. at 345 & n.12. "Sensible meaning is given to the term `innocence of the death penalty' by allowing a showing . . . that some . . . condition of eligibility had not been met." *Id.* at 350. Applicant would have been eligible for the death penalty had he been 18 years old at the time of the offense. He was only 17. The Supremacy Clause, bearing Article 6(5) of the ICCPR against any inconsistent state law or practice, renders Applicant ineligible.

The finality concern underlying the Court of Criminal Appeals' restrictive doctrine on successor state petitions for habeas corpus has no force when the constitution (and treaty) "deprives the State of the power to impose a certain penalty." *Penry v. Lynaugh (Penry I)*, 492 U.S. 302, 300 (1989) (citing *Thompson v. Oklahoma*, 487 U.S. 815 (1988)) (showing that a new blanket rule protecting persons

under 18 at the time of offense from the death penalty would fall into the first *Teague* exception); *see McKenzie v. Day*, 57 F.3d 1461, 1470, 1479 (9th Cir. 1995) (Norris, C.J., dissenting from panel decision) (noting that justifications underlying the relevant *Teague* exception and those for miscarriage of justice exception are indistinguishable) (citing *Prihoda v. McCaughtry*, 910 F.2d 1379, 1385-86 (7th Cir. 1990); *Sawyer v. Butler*, 881 F.2d 1273, 1293-94 (5th Cir. 1989) (en banc), *aff'd*, 497 U.S. 227 (1990)). The Seventh Circuit noted in *Prihoda* that the "exceptions in *Teague* deal with changes so substantial, or so strongly suggesting factual innocence, that they would allow collateral relief under the "fundamental miscarriage of justice exception." 910 F.2d at 1386 (opinion by Easterbrook, C.J.). The Fifth Circuit itself recognized the same in *Butler*. 881 F.2d at 1292-93 (describing *Teague* as a "radical extension of the procedural default rule").

Section 5(a)(3) of Article 11.071 obviously adapts the *Sawyer v. Whitley* standard and, thus, the Fifth Circuit's interpretation of "miscarriage of justice" in *Sawyer v. Butler, supra*, and in *Beazley, supra*, sheds light on whether Applicant should be deemed to have met the requirements of that provision.

1. Argument on the Merits

Federal constitutional, treaty, and statutory law is superior to all conflicting Texas judgments, orders, or statutes. Applicant was indicted under Section 8.07(d) [now (c)] of the Texas Penal Code, setting the age of eligibility for the death penalty at seventeen. TEX. PENAL CODE § 8.07(d) (Vernon 1994). He asserts that, through the Supremacy Clause, Article 6(5) of the International Covenant on Civil and Political Rights voids § 8.07(d). *Hauenstein v. Lynham*, 100 U.S. 483, 488-89 (1879); *Ware v. Hylton*, 3 U.S. 199, 236-37 (1796) (Chase, J., opinion); *id.* (Iredell, J., opinion); *Galveston, Harrisburg & San Antonio Railway Co. v. State*, 34 S.W. 746 (Tex. 1896) (concession by Texas Attorney General

that a treaty voids an inconsistent state statute).

2. The reservation to Article 6, Paragraph 5 is invalid and void.

Article 6(5) of the ICCPR prohibits the death sentence for "crimes committed by persons below eighteen years of age." ICCPR, at art. 6, para. 5. Upon ratification of the treaty in 1992, the United States attached a reservation to Article 6, reserving "the right, subject to its Constitutional constraints, to impose capital punishment on any person, including such punishment for crimes committed by persons below 18 years of age." SENATE COMM. ON FOREIGN RELATIONS REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 31 I.L.M. 645, 653-54 (1992) [hereinafter 31 I.L.M. 645].

The HRC issued a General Comment in April 1994 that set the requirements for reservations to the ICCPR:

> 1. "[W]here a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty."
>
> 2. "Reservations that offend **peremptory norms** would not be compatible with the object and purpose of the Covenant. . . . Accordingly, a State may not reserve the right . . . to execute . . . children."
>
> 3. "While there is no automatic correlation between reservations to **non-derogable provisions**, and reservations which offend against the object and purpose of the Covenant, a State has a **heavy onus** to justify such a reservation." (The Fifth Circuit failed to recognize this requirement.)
>
> 4. "The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that **the Covenant will be operative for the reserving party without benefit of the reservation**."

GENERAL COMMENT 24,, U.N. GAOR Human Rights Comm., 52d Sess., paras. 5, 6, 8, 10, 18, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 1994) [GENERAL COMMENT] (emphasis added).

The reservation to Article 6 is invalid because it is incompatible with the object and purpose of the treaty, offends a peremptory norm against the execution of persons under 18 at the time of offense, and attempts to reserve a non-derogable provision. The non-derogation clause of the ICCPR prohibits "derogation from Article[] 6." ICCPR, art. 4, para. 2. The United States has not come close to meeting the "heavy onus" of justification for its reservation to Article 6.

In its first report on United States compliance, the HRC found the United States' reservation to Article 6(5) of the ICCPR contrary to the "object and purpose" of the treaty, that is, invalid:

> Para. 279. The Committee is . . . particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant.

Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40*, U.N. DOC. A/50/40 (October 3, 1995), para. 279 [hereinafter *Official Records*].

The leading federal case on the validity of the reservations, *Beazley v. Johnson,* 242 F.3d 248 (5th Cir. 2001), is both not binding on the Court of Criminal Appeals and hopelessly flawed. Contrary to the Fifth Circuit panel opinion in Beazley's case, it cannot be doubted that the HRC found the reservation invalid, for the HRC added at the same time that it "**deplore[d]** provisions in the legislation of a number of states which allow[ed] the death penalty to be pronounced for crimes committed by persons under 18 and the actual instances where such sentences have been pronounced and executed." *Id.* at para. 281 (emphasis added).

An invalid reservation to a multilateral human rights treaty, and to the Covenant in particular, "generally" is void. GENERAL COMMENT at para. 18 ("[I]t will not be in effect at all for the reserving party"). "Invalidity, in the contemplation of the law, is nothing else than inherent incapacity to produce legal

results." *The Interhandel Case*, 1959 I.C.J. 6, 95, 104 (Lauterpacht, J., dissenting). The Fifth Circuit accurately assessed that Applicant must rely upon the HRC's jurisprudence, rather than a direct statement by the HRC, to establish his position that the particular invalid reservation to Article 6 is void. *Beazley v. Johnson*, 242 F.3d 248, 264 (5th Cir. 2001). The *Beazley* Panel unfairly described this process of interpretation as "piggyback[ing] several HRC statements," when it really is a matter of appropriately evaluating the HRC's findings about United States' compliance with the ICCPR in light of the HRC's norms, tracing the legal sources of those norms, and applying those norms in light of the Senate's expressions of intent regarding the reservation to Article 6. *Id.* The proper question is, what is the consequence of the United States' invalid reservation in light of the HRC's and the international courts' jurisprudence?

The Fifth Circuit decided to resolve that question by asserting that, "by simply `suggest[ing] and recommend[ing]' that the Senate withdraw the reservation, the HRC declined to attempt either to void or to sever the reservation." *Beazley*, 242 F.3d at 265. Failing to recognize that the HRC has no enforcement powers, such that it could *order* the United States to deem the reservation void or severed, the panel manipulated the HRC's "recommendation" to insulate the HRC's finding of invalidity ("incompatible with the object and purpose") and the HRC's condemnation ("deplore") of state statutes like § 8.07(d) from the consequence of these comments within the HRC's jurisprudence (severance). By resorting to this strained construction, the panel also avoided placing the HRC's findings and jurisprudence within the proper legal and factual context:

1. The panel's finding that the reservation is valid and non-severable is diametrically

opposed to the united position of numerous treaty partners.[14]

2. The panel's finding that the reservation is valid and non-severable is diametrically opposed to the United Nations Special Rapporteur's interpretation.[15]

3. The panel's finding that the "valid" reservation is binding through the Supremacy Clause as a constituent part of the treaty is contrary to the Senate's intent as expressed in the hearings record.[16]

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[14]Eleven immediately and expressly opined that the reservation was invalid (Belgium, Denmark, Germany, Finland, Sweden, Spain, Portugal, Norway, the Netherlands, Italy, and France). *Multilateral Treaties Deposited With the Secretary General, Status as at 31 December 1994*, U.N. Doc. ST/LEG/SER.E/13 (1995). The Fifth Circuit panel completely avoided addressing their opinions. Italy, for one, has adeclared that the "reservation is **null and void** since it is incompatible with the object nd purpose of art. 6 of the Covenant." *Id.*

The government of Switzerland very recently interceded on behalf of Beazley with the Governor of Texas, writing, "Although Switzerland is aware of the reservation related to Article 6 of the Covenant made by the United States, [the] Government ***fully shares the view of the other Parties to the Covenant*** that this reservation is contrary to the object and purpose of the Covenant and should therefore, in accordance with the principles of international law, ***have no effect*** and be withdrawn." Letter from Ambassador Alfred Defago regarding "Execution of Mr. Napoleon Beazley" to Governor Rick Perry, July 16, 2001 (emphasis added) The Swiss further emphasized that "Article 6 of the Covenant reflects the minimum rules under customary international law for the protection of life regarding juveniles, which cannot be altered through unilateral declarations." *Id.*

[15]In 1998, the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions made the same "suggestion" as the HRC, that the United States "lift the reservations, particularly on Article 6." However, he made this "suggestion" based upon his assessment that the reservation was invalid ("incompatible with the object and purpose) and "**therefore . . . void.**" SPECIAL RAPPORTEUR, *supra*, at paras. 140, 156(k).

[16]The Chair of the Senate Foreign Relations Committee, Sen. Claiborne Pell, held that the Covenant reservations were "purely domestic statement[s] . . . not part of the treaty contract and therefore ha[ing] no international effect." INTERNATIONAL HUMAN RIGHTS TREATIES: HEARINGS BEFORE THE COMM. ON FOREIGN RELATIONS, 96th Cong., 1st Sess. 79 (1979); *accord United States v. Duarte-Acero*, 208 F.3d 1282, 1285-86 (11th Cir. 2000) (finding that the Covenant's provisions themselves do "not purport to regulate affairs between nations"). Senator Pell concluded that, since the reservations were not integral to the Covenant, they probably would not bind the judiciary. *Id* (relying, in part, upon *Power Authority v. Federal Power Commission*, 247 F.2d 538 (D.C. 1957)). Certainly, according to Sen.

4. The panel's finding that the "valid" reservation is binding through the Supremacy Clause as a part of the treaty is contrary to the Senate's intent as expressed upon ratification.[17]

The Fifth Circuit panel's understanding of the merits was clearly wrong on both issues: validity[18] and voidness. The Fifth Circuit panel's *sui generis* treatment of these issues is shared by no one known to the undersigned. In addition to the United Nations entities and national governments mentioned above, respected human rights organizations and numerous jurists find the reservation invalid and void. Letter from Human Rights Watch (Michael Bochenek) to Gerald Garrett, dated July 17, 2001 ("Although the United States ratified the Covenant with the reservation . . . the UN Human Rights Committee, the body charged with interpreting the treaty, has concluded that the US reservation is void because it violates the treaty's object and purpose."); Letter from Alfred Defago (Ambassador of Switzerland) to Governor Rick Perry,

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Pell's and the Eleventh Circuit's understanding, an *invalid* reservation would not be binding upon the courts through the Supremacy Clause.

[17]The non-binding character of the reservation to Article 6 finds expression in the Senate Foreign Relations Committee's comments upon adoption of the Covenant recognizing that the necessity to remove the reservation might arise. The Committee "recognize[d] the importance of adhering to internationally recognized standards of human rights," and observed that, because Article 6 represented an "internationally recognized standard of human rights," change in domestic law might be "appropriate and necessary." 31 I.L.M. 645, 650 (1992). The Bush Administration, in turn, promised our treaty partners that "**judicial means**" would be used to guarantee full domestic compliance with the Covenant. *Id.* at 657.

[18]The Fifth Circuit panel understood that a "valid" reservation is one that is permitted, that is "*not* incompatible with the object and purpose of the treaty." *Beazley*, 242 F.3d at 264-65 (citing and quoting GENERAL COMMENT 24). The panel found that the reservation was compatible by completely ignoring that the HRC's finding of "incompatibility" meant that the reservation was not permitted under treaty law. GENERAL COMMENT 24 at para. 6 (citing Article 19(3) of the Vienna Convention on the Law of Treaties).

"Invalidity" is the term used by jurists writing on this issue to describe an unauthorized or impermissible reservation. *See* WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 89 (Cambridge U. Press 1997) ("The [United Nations Human Rights] Committee considers that the reservation to Article 6§5 . . . and to article 7 should be held to be *invalid*.") (emphasis added).

July 16, 2001 (reservation is contrary to the object and purpose of the treaty and of no effect); Erica Templeton, Note, *Killing Kids: The Impact of Domingues v. Nevada on the Juvenile Death Penalty as a Violation of International Law*, 41 BOSTON COLL. L. REV. 1175 (2000); Connie de la Vega and Jennifer Fiore, *The Supreme Court of the United States has been Called upon to Determine the Legality of the Juvenile Death Penalty in Michael Domingues v. State of Nevada*, 21 WHITTIER L. REV. 215, 217-18 (1999); Cathleen E. Hull, *"Enlightened by a Humane Justice": An International Law Argument against the Juvenile Death Penalty*, 47 KAN. L. REV. 1079, 1090 (1999); Warren Allmand et al., *Human Rights and Human Wrongs: Is the United States Death Penalty System Consistent with International Human Rights Law?*, 67 FORDHAM L. REV. 2793, 2812 (1999); William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797, 814 (1998); Connie de la Vega, *Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?*, 32 U.S.F. L. REV. 735, 754 (1998); Sanford J. Fox, *Beyond the American Legal System for the Protection of Children's Rights*, 31 FAM. L. Q. 237, 263 (1997); Sherri Jackson, Note, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 391, 410 (1996); William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOKLYN J. INT'L LAW 277, 324 (1995); William A. Schabas, *International Law and the Death Penalty*, 22 AM. J. CRIM. L. 250, 253 (1994); Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311, 1331 (1993); *see also* Kha Q. Nguyen, Note, *In Defense of the Child: A Jus Cogens Approach to the Capital Punishment of Juveniles in the United States*, 28 GEO. WASH. J. INT'L L. & ECON. 401, 443 (1995) (finding *ius cogens*

norm informing this Court's Eighth Amendment determination of what constitutes cruel and unusual punishment); *see also* WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 125 (Cambridge 1997) (finding that the United States is the "principal, if not the sole, offender of the prohibition on juvenile executions" found in Article 6(5) of the International Covenant); AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: TOO YOUNG TO VOTE, OLD ENOUGH TO BE EXECUTED: TEXAS SET TO KILL ANOTHER CHILD OFFENDER (long report on Beazley case).

Given that treaty law fundamentally rests upon consent, a reservation to a multilateral human rights treaty should be deemed void if: (1) the reserving Party recognizes the competence of the treaty monitor to judge Parties' compliance (*see* 31 I.L.M. 645, 649-50, 658-59 (1992); GENERAL COMMENT at para. 11; *Duarte-Acero*, 208 F.3d at 1287); (2) the competent authority declares the reservation invalid (*Official Records*, *supra*, at para. 279); and (3) the Party was aware or merely *should have been* aware that its reservation might be deemed invalid (31 I.L.M. 645, 650 (1992); the Senate **was** aware). *Loizidou v. Turkey*, (1995) 20 E.H.R.R. 99, at paras. 94-95 (allowing severance of invalid restrictions where "respondent Government *must have been aware* . . . that the impugned restrictive clauses were of questionable validity under the Convention system and might be deemed impermissible by the Convention organs"); *Belilos v. Switzerland*, (1988) 10 E.H.R.R. 466, at para. 60 (allowing severance of invalid declaration where it was "beyond doubt that Switzerland [was], and regard[ed] itself as, bound by the Convention irrespective of the validity of the [challenged] declaration [and] the Swiss Government recognized the Court's competence to determine the . . . issue"); *Power Authority v. Federal Power Comm'n*, 247 F.2d 538, 541 (D.C. Cir. 1957) (holding that federal court could determine validity of and sever a "reservation" that was "merely an expression of domestic policy which the Senate attached to its

consent").

The United States Solicitor General argued in *Domingues v. Nevada* that the reservation was "valid as a matter of treaty law" based upon "state practice." Brief for the United States as Amicus Curiae, *Domingues v. Nevada*, No. 98-8327, at 9 (*Domingues v. Nevada*, 961 P.2d 1279 (Nev. 1998), *cert. denied*, 528 U.S. 963 (1999)). "Not one of the states that lodged an objection stated that, because of the United States' reservation, it does not recognize the ICCPR as being in force between itself and the United States." *Id.* The Solicitor General incorrectly assumed that a dispute over a reservation between parties to the ICCPR could affect their bilateral treaty status. Modern treaty law and HRC jurisprudence on the Covenant now holds the opposite.

The eleven European nations that objected to the United States' reservation found that, although the United States had violated the non-derogation provision in Article 4, Paragraph 2, and had introduced a reservation contrary to the object and purpose of the treaty, this did not preclude entry into force of the treaty between them and the United States. *Multilateral Treaties Deposited With the Secretary General, Status as at 31 December 1994*, U.N. Doc. ST/LEG/SER.E/13 (1995). The Solicitor General implied that, since none of the European objectors deemed the reservation to have caused the treaty not to enter into force between them and the United States, they must not have really considered the reservation invalid.

To the contrary, the European objectors were holding the United States accountable by rejecting the traditional reciprocity model reflected in the Genocide Convention Case and the Vienna Convention. *See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 1, 21 (May 28) (holding that, if Party objects to another Party's reservation, the relation

between the two Parties alone is affected, allowing objecting Party to consider the reserving state not to be a Party in relation to itself); VIENNA CONVENTION arts. 19-21 (modifying the I.C.J. opinion). The well-established jurisprudence of European courts and commissions interpreting the European Convention on Human Rights (the first international human rights treaty, completed in 1950, and a model for the Covenant) holds that multilateral human rights treaties create "objective obligations" rather than a network of mutual, bilateral undertakings. *Ireland v. United Kingdom*, (1979-80) 2 E.H.R.R. 25 at para. 239;[19] App.No. 788/60 *Austria v. Italy*, 4 Yearbook 116 at 140;[20] *France (et al.) v. Turkey*, (1984) 6 E.H.R.R. 241.[21] The Inter-American Court of Human Rights also has rejected the I.C.J./Vienna Convention model as "reflect[ing] the needs of traditional multilateral international instruments which have as their object the

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[19]The European Court of Human Rights stated at para. 239:

> [T]he Irish Government's argument prompts the Court to clarify the nature of the engagements placed under its supervision. Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement". By virtue of Article 24, the Convention allows Contracting States to require the observance of those obligations without having to justify an interest deriving, for example, from the fact that a measure they complain of has prejudiced one of their own nationals.

[20]In 1961, the European Commission on Human Rights found that the obligations undertaken by the Parties to the European Convention were "essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves."

[21]At paragraph 39, the European Court of Human Rights holds that the principle of reciprocity found in international law and the rule stated in Article 21 of the Vienna Convention on the Law of Treaties does not apply to human rights treaties.

reciprocal exchange, for the mutual benefit of the States Parties, of bargained for rights and obligations." *The Effect of Reservations on the Entry into Force of the American Convention (Arts. 74 and 75)*, Advisory Opinion OC-282, 2 Inter-Am. Ct. H.R. (ser. A) (1982), at 15-16.

The Human Rights Committee rejects the reciprocity model for Covenant practice and interpretation. 3 R. 0777-0778 (GENERAL COMMENT 24 at paras. 16-17). The Covenant is not a "web of inter-State exchanges of mutual obligations [but rather concerns] the endowment of individuals with rights." *Id.* at para. 17. "The principle of inter-State reciprocity [and bargaining] has no place [in relation to the ICCPR], save perhaps in the limited context of reservations to declarations on the Committee's competence under article 41." *Id.* Indeed, according to the HRC, absence of any objection to a reservation is no indicator of the validity of the reservation. The HRC warns that "because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations.... [I]t is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable." *Id.* Objections that are raised do "lend convincing support" to arguments that a reserving State should have known the reservation was dubious. *Id.*; *Loizidou*, *supra*, at para. 95.

The Solicitor General was simply mistaken in assuming that the entry into force of the Covenant between the United States and European objectors reflected upon the reservation's validity. The ICCPR "is concerned with conduct that takes place within a state party its provisions do `not purport to regulate affairs between nations.'" *United States v. Duarte-Acero*, 208 F.3d 1282, 1285 (11th Cir. 2000) (citing *United States v. Benitez*, 28 F. Supp. 2d 1361, 1363 (S.D. Fla. 1998), and Articles 2(1), 12, 13, 23(1), 27, and 50 of the ICCPR). The European nations' assurance that the treaty remained in force reinforced

their position that the United States could not negotiate away the objective right to life that the Covenant guarantees to 16 and 17-year-olds. *E.g.*, Letter from Jan Eliasson, Ambassador of Sweden, et al. (representing the European Union) to Governor Bob Holden, Feb. 21, 2001 (on behalf of juvenile offender Antonio Richardson, stating, "While recognizing that the United States has made a reservation to Article 6 of this Covenant, the EU believes that this article enshrines the minimum rules for the protection of the right to life and is the generally accepted norm in this area.").

None of the state courts cited by the Fifth Circuit panel do more than imply that the reservation is valid merely because the Senate and Executive appended it in light of the Supreme Court's decision in *Stanford v. Kentucky*. *Beazley*, 242 F.3d 266 (5th Cir. 2001) (citing *Ex parte Pressley*, 770 So. 2d 143 (Ala. 2000); *Domingues v. Nevada*, 961 P.2d 1279 (Nev. 1998), *cert. denied*, 528 U.S. 963 (1999)) (other citations merely rely on *Pressley*)).[22] These courts failed to recognize that the Senate expressly permitted "changes in U.S. law" on this issue, asserting that they might be "appropriate and

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[22]Despite the fact that, from the very earliest stages of Beazley's approach to federal court, Beazley clearly and decisively distinguished *White v. Johnson* on the grounds that *the validity of the ICCPR reservation to which White refers in dicta was not an issue in that case*, the Texas Attorney General kept reasserting that Beazley had not provided a rational basis for distinguishing *White v. Johnson*, 79 F.3d 432, 440 & n.2 (5th Cir.), *cert. denied*, 519 U.S. 911 (1996). In *Johnson*, the Fifth Circuit did not treat the ICCPR as ratified because the relevant facts in White's case precede ratification. *Id.* at 440 n.2. The case referred to a different reservation (to Article 7) not challenged by White as violating the object and purpose of the treaty. The binding character of the treaty as ratified and the validity of that reservation were not even before the Court. Consequently, the unremarkable truism that a treaty provision must be considered in light of an applicable reservation is all that *White* has in common with Beazley's case, bringing nothing to the discussion. These points were raised with the panel. Thus, the panel's finding that "our court has recognized the validity of Senate reservations to the ICCPR" seems unfair. *Beazley*, 242 F.3d at 266. The Court in *Austin v. Hopper*, 15 F. Supp. 2d 1210, 1260 n.222 (M.D. Ala. 1998), like *White*, found itself bound by the United States' reservation to Article 7 in a context in which the reservation's validity was not challenged. *Id.*

necessary" in light of the United States' need for "compliance at the international level." *Id.* at 650. At the same time, the Bush Administration recognized the competence of the Human Rights Committee to contribute to the development of "the international law of human rights." SENATE COMMITTEE ON FOREIGN RELATIONS REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 31 I.L.M. 645, 658 (May 1992) [hereinafter "31 I.L.M. at _"]. Grant of review by the Court of Criminal Appeals on the ICCPR issue, therefore, would be consonant with the intent of the United States Executive and Senate. The persuasive authority of the United Nations Human Rights Committee's findings regarding United States compliance viewed in the light of its jurisprudence, absent any other reasonable authority, should require the Court to grant Beazley relief on the ICCPR issue. Relief would not simply "void an action by the Senate," given the facts that (1) the Senate itself recognized its action might not be in compliance with the United States' international responsibilities and that (2) the Chair of the Senate Foreign Relations Committee found that ICCPR reservations probably would be non-binding on the judiciary. *Beazley*, 242 F.3d at 267.[23]

3. The non-self-execution declaration is no bar to relief.

The Bush Administration stated that "for reasons of prudence" it would "recommend including a

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[23] As has been noted, the legislative history reveals that the Chair of the Senate Foreign Relations Committee considered the reservation to Article 6 to be separable from the treaty and probably non-binding on the judiciary. *See supra* (remarks of Sen. Claiborne Pell). The Court of Criminal Appeals should not be misled by the Fifth Circuit panel's citation to *United States v. Duarte-Acero*, 208 F.3d 1282, 1287 (11th Cir. 2000), where the panel seems to imply that an "agreement" between the HRC's interpretation and the Senate's reservation language or legislative history would be necessary for the HRC's interpretation to be respected. *Beazley*, 242 F.3d at 267 (italicizing "all of which were in agreement"). The "plain language and legislative history" in *Duarte-Acero* were the language of the ICCPR and the *Travaux Preparatoires* of the ICCPR itself. 208 F.3d at 1285-86.

declaration that the substantive provisions of the Covenant are not self-executing." 31 I.L.M. 645, 657 (1992). The Bush Administration explained that it did not modify Article 50 ("The provisions of the Covenant shall extend to all parts of federal States without any limitations or exceptions.") so as to signal to treaty partners that the United States would "implement its obligations under the Covenant by appropriate legislative, executive and **judicial** means, federal or state as appropriate, and that the Federal Government w[ould] remove any federal inhibition to the states' abilities to meet their obligations." 31 I.L.M. at 657 (emphasis added). The Administration further explained that the purpose of the declaration was to clarify that Articles 1-27 would not ***by themselves*** create private rights enforceable in U.S. courts. *Id.*; *see Maria v. McElroy*, 68 F. Supp. 2d 206, 234 (E.D. N.Y. 1999) ("The fact that the Covenant creates no private right of action does not eliminate the obligations of the United States and all of its branches of government.").

The Fifth Circuit panel in *Beaszley* ignored Beazley's argument that a private right of action could be found for ICCPR claims in extant implementing statutes. *E.g.*, *Abebe-Jira v. Negewo*, 72 F.3d 844, 846-47 (11th Cir. 1996) (noting that, since *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), a majority of courts have interpreted the Alien Tort Claims Act [ATCA], 28 U.S.C. § 1350, to provide a private right of action for international law violations.) Finding a private right of action in the ATCA for ICCPR claims, the Eleventh Circuit recently commented that it was "not granting new rights to aliens, but simply opening the federal courts for adjudication of rights already recognized by international law." *Abebe-Jira*, 72 F.3d at 846-47 (relying on treatment of ICCPR in *Abebe-Jira v. Negewo*, 1993 WL 814304, *4 (N.D. Ga. 1993)). Relying upon the language of the ATCA, the Court held that the ATCA would provide a private right of action for any alien plaintiff claiming "violation of the law of nations." *Id.*

at 847. Following the Eleventh Circuit's analysis, a private right of action should be available in 28 U.S.C. § 2254(a), whenever "violation of the . . . treaties of the United States" is alleged, no matter whether the treaty is inherently self-executing. *See* Paust, *supra* at n.22; De la Vega, *supra* at n.22. It would be no small irony if it were permissible to deny a ***citizen*** a private right of action for ICCPR claims under 28 U.S.C. § 2254(a), while the Eleventh Circuit recognizes such a right for ***aliens*** under 28 U.S.C. § 1350.

The Texas Code of Criminal Procedure provides a private right of action to state prisoners alleging illegal confinement and restraint. Articles 11.01 and 11.04 clearly describe provision of a private right of action that cannot be denied an applicant for relief under the chapter:

> The writ of habeas corpus is the remedy to be used when any person is restrained in his liberty. It is an order issued by a court or judge of competent jurisdiction, directed to anyone having a person in his custody, or under his restraint, commanding him to produce such person, at a time and place named in the writ, and show why he is held in custody or under restraint. (11.01)
>
> Every provision relating to the writ of habeas corpus shall be most favorably construed ***in order to give effect to the remedy and protect the rights of the person seeking relief under it***. (11.04) (emphasis added)

Article 11.23 provides that no limits may be placed upon relief in cases in which custody is unlawful:

> The writ of habeas corpus is intended to be applicable to **all such cases** of confinement and restraint, where there is no lawful right in the person exercising the power, or where, though the power in fact exists, it is exercised in a manner or degree not sanctioned by law.

TEX. CODE CRIM. PROC. art. 11.23 (2000). In effect, much more strongly than the federal habeas statute (28 U.S.C. § 2254), the state statute demands that anyone who can show by any claim, based upon any kind of substantive ground, that his or her custody is illegal must be afforded a private right of action and a remedy. Like the Eleventh Circuit, the Court of Criminal Appeals must "open[] the [state] courts for adjudication of rights already recognized by international law" where those rights are asserted in a state

habeas petition and the particular treaty at issue is intrinsically self-executing.

The Fifth Circuit panel also totally ignored Beazley's presentation that the Covenant might be used as a defense, even if it were not intrinsically self-executing, because a treaty always nullifies inconsistent state law. *Kolovrat v. Oregon*, 366 U.S. 187, 197 (1961) (defense to escheatment of property); *Patsone v. Pennsylvania*, 232 U.S. 138, 145 (1914) (defense permitted, but nothing conflicted with state law); *Cook v. United States*, 288 U.S. 102 (1933) (defense to personal jurisdiction over defendant); *Ford v. United States*, 273 U.S. 593 (1927) (same); *United States v. Rauscher*, 119 U.S. 407 (1886) (government violated treaty by trying defendant on charge differing from that forming basis of extradition grant); *see United States v. Pink*, 315 U.S. 203, 230-31 (1942) ("[S]tate law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty.").

The Fifth Circuit refused to seriously examine the meaning of "self-executing" (*Beazley*, 242 F.3d at 267) (mistakenly applying dicta from *Duarte-Acero* to a declaration which is, by definition, not part of a treaty). Contrary to its own position, the Court also relied upon two opinions that endorse finding a private right of action for ICCPR claims in enabling statutes like Articles 11.01, 11.04, 11.071, and 11.23. *Id.* (*Ralk v. Lincoln County*, 81 F. Supp. 2d 1372, 1380 (S.D. Ga. 2000); *Jama v. INS*, 22 F. Supp. 2d 323, 362-63, 364-65 (D.N.J. 1998) (noting "many courts" that have used the ATCA to provide "jurisdiction and a cause of action" for claims under customary international law and rejecting ICCPR claim because U.S. did not expressly waive sovereign immunity). The other two opinions mentioned by the Fifth Circuit do not consider existing enabling legislation like the Texas habeas statutes.

The doctrine of self-execution "masks a variety of issues." Carlos Manuel Vazquez, *Treaty Based Rights and Remedies of Individuals*, 92 COLUMBIA L. REV. 1082 (1992). The ICCPR itself is inherently

self-executing, because it "in and of itself create[s] rights which are justiciable between individual litigants." *People of Saipan v. U.S. Dep't of Interior*, 502 F.2d 90 (9th Cir. 1974) (Trask, J., concurring); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (the alternative treaty form requires legislature to execute a contract). Senate testimony, which cannot be reproduced here for its volume, largely supports this interpretation. The presence of the declaration suggests that the Senators concluded the ICCPR likely *was* intrinsically self-executing. Contrary to the Court, the Executive's express intent ("private right of action") is more commensurate with Prof. Paust's observation that "in view of the limited nature of the declaration (e.g., that it does not inhibit the reach of Article 50) and its special meaning (i.e., that it merely not be used directly to create a cause of action), the Covenant can be self-executing for every other purpose." Jordan Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 MICH. J. INT. LAW 301, 326 (1999); *see* Connie de la Vega, *The Supreme Court of the United States has been Called upon to Determine the Legality of the Juvenile Death Penalty*, 21 WHITTIER L. REV. 215, 220 (1999); 4 R. 1060-77 (Vazquez, *supra*, elaborating on special category of self-execution as "private right of action").

The Senate's declaration on self execution is questionable for another, more basic reason. Courts, not the Senate, have the duty to construe laws and treaties.[24] To allow the Senate and the Executive to interpret law violates the doctrine of separation of powers. *See e.g.* TEX. CONST. art. II, § 1.

Since *Marbury v. Madison,* 5 U.S. (1 Cranch.) 137 (1803), it has been recognized in the United

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[24]While the President has the authority to determine the interpretation of a treaty to be asserted by the United States in its relationship with other nations, courts in the United States have the authority to interpret an international agreement for purposes of applying it as a law of the United States. Third Restatement, § 326.

States that the judiciary has the duty to interpret the Constitution and laws of the United States. Neither the executive nor the legislative branches can interfere with the judiciary's inherent authority to interpret the law. Furthermore, this Court has the jurisdiction to construe and apply federal law, the federal Constitution and treaties within its Article V jurisdiction without interference from Congress. While Congress can vest exclusive jurisdiction in the federal courts on some issues, so long as this Court has the jurisdiction to interpret and apply federal law, Congress cannot constitutionally interfere with that jurisdiction.

4. This Court should follow the HRC's authoritative interpretation.

Reasonable jurists should rely upon the HRC's persuasive authority in determining the validity and severance of reservations, especially where no real controverting authority is presented. *Duarte-Acero*, 208 F.3d at 1287 (the HRC's guidance is the "most important" component in interpreting an ICCPR claim); *United States v. Benitez*, 28 F. Supp. 2d 1361, 1364 (S.D. Fla. 1998) (same); *Maria*, 68 F. Supp. 2d at 234 ("authoritative" HRC); *United States v. Bakeas*, 987 F. Supp. 44, 46 n.4 (D. Mass. 1997) (HRC is "ultimate authority" regarding validity of reservations).

The Fifth Circuit held that the Senate's acknowledgment of the HRC's "competence" does not bind the United States to its interpretations. *Beazley*, 242 F.3d at 267. The Court added that courts have only "looked to the HRC for guidance, not to void an action by the Senate." *Id.* This much is true, but the Fifth Circuit's rejection of the persuasive authority of the HRC violates Executive intent and abandons the proper task of the federal courts. The Bush Administration recognized the competence of the HRC "not the least because it [was] hoped that the work of the Committee w[ould] contribute to the development of a generally accepted international law of human rights." 31 I.L.M. at 658. The appointed task of the courts is to determine what the law is, especially in the area of "individual rights." *Marbury v. Madison*, 5 U.S.

137, 163, 166 (1803). The determination whether treaties contain articles that may be "void" also is the peculiar province of the judiciary. *Jones v. Walker*, 13 F. Cas. 1059, 1062, 2 Paine 688 (C.C.D. Va., no date reported); *Jones v. Meehan*, 175 U.S. 1, 32 (1899). The HRC's jurisprudence and reports provide authoritative guidance into the validity and severability of conditions attached to the ICCPR. Where there is no contrary authority to the HRC's interpretation (or an interpretation based upon the HRC's jurisprudence), that interpretation should prevail.

The Court of Criminal Appeals should grant review of this issue and ultimately hold that Article 6(5) of the International Covenant voids Texas Penal Code § 8.07(d) [now (c)], rendering Applicant's death sentence void. Relief should be granted accordingly and Applicant's death sentence reformed to life in prison.

D. Conclusion

Both customary international law and treaty law to which the United States is a party forbid the execution of persons who were less than 18 years old at the time of the offense. This international law, which is binding on the United States and through the Supremacy Clause on the State of Texas, is *ius cogens,* meaning that the United States must follow that international norm regardless of whether it consents and regardless of municipal law.

The applicable international law deprives the State of Texas of the power to engage in the forbidden act – imposition of the death penalty on persons who were less than 18 years of age at the time of the offense for which they were sentenced.

Texas Law regarding the execution of 17 years olds

In Texas, a 17-year old cannot vote. A 17-year old cannot serve on a jury. A 17-year old cannot

view certain movies. A 17-year old cannot enter into a contract. A 17-year old cannot buy cigarettes or beer. A 17-year old cannot serve in the military.

However, a 17-year old can be executed. In fact, 17-year-old offenders are automatically adjudicated as adults in Texas. TEX.PEN.CODE § 8.07(c) (Vernon 1994). No one under the age of 17 is subject to the death penalty. TEX.PEN.CODE § 8.07(c) (Vernon 1994). Offenders under the age of 17 are adjudicated in the juvenile courts, but some may be "transferred" to criminal court if they are found to be unusually mature in a certification proceeding.

The Texas juvenile transfer statute compels consideration of "the sophistication and maturity of the child"; "the record and previous history of the child"; and "the prospects of adequate protection of the public and the likelihood of rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court." TEX. FAM. CODE ANN. § 54.02(f) (Vernon 1996). Transfer to criminal court is available only "after a full investigation and a hearing" on, among other things, "the background of the child." TEX. FAM. CODE ANN. § 54.02(a) (Vernon 1996).

The implicit rationale behind transfer proceedings is that there is a "gray area" in late adolescence, between childhood and adulthood, in which some adolescents have acquired adult-like maturity, sophistication, and responsibility, while some have not. A flexible system allowing for a transfer proceeding acknowledges this transitional period of late adolescence, which varies from minor to minor.

Perversely, Texas has afforded this flexibility for all criminal charges **except capital murder.** Whereas **no** 16-year-old is eligible for the death penalty, **every** 17-year-old charged with capital murder is automatically subject to the ultimate punishment, without the benefit of a transfer proceeding. Thus, precisely where the additional accuracy and reliability of an investigation and judicial determination of

maturity would seem most necessary, Texas has totally omitted the inquiry.Further, the crucial difference between Texas and those other states scrutinized by the Supreme Court in Stanford v. Kentucky, 492 U.S. 361 (1989), is that the other states have juvenile transfer statutes that mandate that juvenile court waiver decisions be based in part on what is in the best interest of the child. Texas law, however, allows for the execution of children for crimes committed when they are 17 years old without a prior determination of what is in the best interest of the child.

Constitutional Mandates Regarding
Capital Procedures for Offenders Under 18

The United States Supreme Court has recognized that less culpability should attach to a crime committed by a juvenile:

> [A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.

Eddings v. Oklahoma, 455 U.S. 104, 115 n.11 (1982) (quoting a passage from the 1978 Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders); Thompson v. Oklahoma, 487 U.S. 815, 834 (1988).

The Supreme Court has also recognized that maturity and moral responsibility may vary from minor to minor. In a case involving "an emotionally disturbed youth with a disturbed child's maturity," the Court acknowledged:

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person

> may be most susceptible to influence and to psychological damage . . . just as the chronological age of a minor itself is a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.

Eddings v. Oklahoma, 455 U.S. at 115-117.

In light of these considerations, the Court has categorically prohibited the execution of an offender who was 15 years old at the time of the offense, Thompson v. Oklahoma, 487 U.S. 815 (1988) (plurality opinion; O'Connor, J., concurring), but has tolerated the application of the death penalty to 16- and 17-year-old offenders on the assumption that state juvenile transfer statutes and death penalty statutes would ensure that only unusually mature juveniles would be subject to capital punishment. In affirming the sentences of a 16- and 17-year-old, the Supreme Court in Stanford v. Kentucky, 492 U.S. 361 (1989), an opinion written by Justice Scalia, recognized that the states of Kentucky and Missouri provided certain safeguards to these juveniles:

> In the realm of capital punishment . . . "individualized consideration [is] a constitutional requirement," . . . and one of the individualized mitigating factors that sentencers must be permitted to consider is the defendant's age . . . Twenty-nine states, including Kentucky and Missouri, have codified this constitutional requirement in laws specifically designating the defendant's age as a mitigating factor in capital cases. Moreover, the determinations required by juvenile transfer statutes to certify a juvenile for trial as an adult ensure individualized consideration of the maturity and moral responsibility of 16- and 17-year old offenders before they are even held to stand trial as adults.

Id. at 375 (internal citations and footnote omitted).

The Supreme Court's holding in Stanford, that execution of 16- and 17-year-old offenders is not categorically cruel and unusual under the Eighth Amendment, was made in the context of state statutes that (1) codified age as a mitigating factor in capital cases and; (2) had juvenile transfer statutes that provided for the individualized consideration of the maturity and moral responsibility of their 16- and 17-year old

offenders.[25] Id. at 375-376. The Court's holding, therefore, relied on these laws as establishing a national consensus that capital punishment is appropriate for 16- and 17- year old offenders only with certain safeguards in place. The Court did not address those death penalty states, such as Texas, where 17-year-old offenders are automatically adjudicated as adults, where age is not codified as a mitigating factor, where the death penalty statute concededly fails to allow full consideration of youth, and where these offenders do not receive "individualized consideration of the[ir] maturity and moral responsibility" pursuant to a juvenile transfer statute.

Requiring these safeguards is consistent with the Supreme Court's demand for heightened reliability in the determination that death is the appropriate punishment in a specific case, which has become firmly established in Eighth Amendment jurisprudence. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); Gardner v. Florida, 430 U.S. 352, 359 (1977); Beck v. Alabama, 447 U.S. 625, 638 (1980); Barefoot v. Estelle, 463 U.S. 880, 913 (1983) (Marshall, J., dissenting); California v. Ramos, 463 U.S. 992, 998-999 (1983); Sumner v. Shuman, 483 U.S. 66, 72 (1987).

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[25] In Johnson v. Texas, 509 U.S. 350 (1993), the Supreme Court recognized the fluid concept of youth and that it is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury. It held that the Texas death penalty statute in effect did not unconstitutionally preclude a sentencing jury from considering the relevance of youth because the "narrow factual inquiry" of the future dangerousness special punishment issue provided a sufficient "meaningful basis to consider the relevant mitigating qualities of petitioner's youth." Id. at 368-370 However, the Court did **not** address the Stanford issue. In fact, with regard to the petitioner's claim that youth was relevant to culpability in ways unrelated to the prediction of future behavior, the Court conceded that the Texas scheme would not allow **full consideration** of a defendant's youth. Id. at 372 (Emphasis added). Texas has **not** codified age as a mitigating factor and, as the Supreme Court has notes, does not allow for its full consideration. In fact, capital defendants are not even entitled to a special punishment instruction on age as a mitigating factor.

The Court has consistently invalidated procedural rules at all stages of the capital trial that have tended to diminish the reliability of the outcome, even where such procedural rules are proper in a non-capital case. See, e.g., Woodson, supra (invalidating statute providing for mandatory death sentences for specified offenses with no individualized consideration of the offender); Gardner, supra (finding unconstitutional a death sentence based in part on confidential presentence report); Beck, supra (holding that death sentence may not be imposed after a jury verdict of guilty in a capital offense where jury was not permitted to consider a verdict of guilty of a lesser-included offense); Bullington v. Missouri, 451 U.S. 430 (1981) (finding that capital sentencing procedure resembling a trial on the issue of guilt or innocence implicated double jeopardy); Green v. Georgia, 442 U.S. 95 (1979) (per curiam) (holding that hearsay rule may not be applied mechanistically to defeat the ends of justice in the punishment phase of a capital trial); Caldwell v. Mississippi, 472 U.S. 320 (1985) (holding that death sentence may not constitutionally rest on a determination made by the sentencer who has been led by a prosecutor's argument to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere).

The Court has also aspired to a heightened standard of reliability in non-trial capital proceedings. Ford v. Wainwright, 477 U.S. 399, 411 (1986) (holding that prisoners facing execution are constitutionally entitled to an adjudication of competency to be executed).

The Eighth Amendment's demand for heightened reliability is based on the acknowledgment that the death penalty is unique in its severity and finality and that the need for procedural safeguards is particularly great where life is at stake. Woodson, 428 U.S. at 305. Thus, the Court has required that "capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and

for the accuracy of fact-finding." Strickland v. Washington, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part).

The requirement of individualized sentencing is derived from the concern for heightened reliability in seeking to ensure that capital defendants are treated as "uniquely individual human beings," rather than "members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." Woodson, 428 U.S. at 304; Lockett v. Ohio, 438 U.S. 586, 605 (1978) (opinion of Burger, C.J.). The safeguards relied on in Stanford were dictated by the constitutional requirement of individualized consideration. Stanford, 492 U.S. at 375 (citing Lockett).[26] These safeguards insure the reliability of the determination that death is an appropriate sentence in a particular case and underscore the Supreme Court's opinion in Standford that the Kentucky and Missouri transfer statutes and death penalty statutes guaranteed this individualized consideration of 16- and 17- year old children's maturity and moral responsibility before being subjected to the death penalty.

The Texas system, however, treats 17-year-olds as "members of a faceless, undifferentiated mass." Where no 16-year-old (that is, a child just one second under the age of 17) may ever be subjected to the death penalty in Texas, a child who has just turned 17 at the moment of the commission of the capital murder is automatically eligible for the ultimate penalty, without any inquiry into the individual 17-year-old's maturity or moral responsibility.

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[26]Because the Court relied on safeguards mandated by the existing "individualized sentencing" requirement in finding that the Kentucky and Missouri capital procedures were constitutional as applied to the 16- and 17-year-old offenders at issue in that case, Stanford does not announce a new rule. Teague v. Lane, 489 U.S. 288, 301 (1989) (plurality opinion) (instructing that a holding constitutes a new rule if it breaks new ground, imposes a new obligation on the States or the Federal Government, or was dictated by precedent existing at the time the defendant's conviction became final).

Unlike the Missouri and Kentucky systems which afford 16- and 17-year-old offenders the benefit of an initial determination of maturity, the Texas system relies exclusively on chronological age. Effectively, the difference of one 24-hour period could be determinate in whether a teenager charged with capital murder will be automatically eligible for the death penalty, or automatically ineligible (subject only to the prosecutor's discretion). This "blind infliction of the death penalty" directly contravenes the need for heightened reliability and disregards the unique considerations that the Supreme Court has recognized with regard to offenders under the age of 18.

None of the protections relied on by the Court in Stanford are available under Texas law. Moreover, the Texas death penalty statute under which Applicant was sentenced has been repeatedly attacked for failing to allow full consideration of a capital defendant's youth. See, e.g., Graham v. Collins, 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Johnson v. Texas, 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993).

Although the Supreme Court in Johnson held that the statute in effect did not unconstitutionally preclude a sentencing jury from considering the relevance of youth because youth could be considered in evaluating the second special issue of the defendant's future dangerousness, Id. at 368-370 (holding that the "narrow factual inquiry" of future dangerousness provided a sufficient "meaningful basis to consider the relevant mitigating qualities of petitioner's youth"), it did **not** address the Stanford issue. In fact, with regard to the petitioner's claim that youth was relevant to culpability in ways unrelated to the prediction of future behavior, the Court conceded that the Texas scheme would not allow full consideration of a defendant's

youth.[27] Id. at 372. Thus, it is clear, and the Supreme Court has recognized, that the Texas statute fails to meet the rigors of Stanford in providing individualized consideration of the maturity and moral responsibility of 17-year-old capital offenders before determining whether society and the juvenile would best be served by seeking the death penalty in such cases.

The Texas System Failed Applicant

Based upon Applicant's adolescence (age) and mitigation evidence, Applicant did not stand a chance under Texas law.

Studies of homicidal adolescents reveal that they are frequently subjected to intense emotional deprivation and physical violence in their homes and suffer from neurological impairment.[28] Juvenile murderers share remarkably similar early childhood experiences and family composition.[29] They have disintegrated family relationships, suffer severe emotional deprivation, and experience much violence. In many instances, these children are subjected to severe and repeated physical abuse, often at the hands of a particular parent.[30] Either one or both parents are substance abusers.[31]

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[27] Justice O'Connor wrote the dissent, joined by Justices Blackmun, Stevens, and Souter, criticizing the Court's "highly selective version of stare decisis" and concluding that the Texas scheme would not allow consideration of "the most relevant mitigating aspect of youth: its relation to a defendant's `culpability for the crime he committed.'" Johnson, 509 U.S. at 374-377 (O'Connor, J., dissenting).

[28] Adams, The Child Who Murders: A Review of Theory and Research, 1 CRIM. JUST. BEHAV. 51, 51 (1974).

[29] Solway, Richardson, Hays & Elion, Adolescent Murderers: Literature Review and Preliminary Research Findings, in VIOLENCE AND THE VIOLENT INDIVIDUAL 193 (Hays, Roberts, Solway eds., 1981).

[30] King, The Ego and the Integration of Violence in Homicidal Youth, 45(1) AM. J. ORTHOPSYCHIATRY 134, 135 (1975).

[31] Id. at 135.

Homicidal adolescents fail to get the proper "modeling" from their parents, which would allow them to learn to control their impulses.[32] In many cases, a violent parent actually provides the model of violent behavior for the child. When these children suffer violence at the hands of one or more parent, they lose their self-worth and do not perceive themselves as human beings with appreciable feelings. As a result, they treat others in a similar manner.[33]

Homicidal children are generally educationally deprived and have a concomitant lack of judgment.[34] Limited reading and language skills materially influence not only their intellectual development but also their psychological, emotional, and social development. These are significant factors in their perception of people -- and the environment in general -- as hostile and unpredictable.[35] These children are profoundly hampered by their inadequate verbal and written communication skills -- often the consequence of no or an unsatisfactory educational experience, both in and out of school. In the end, they respond to people and the environment with untempered emotion.[36] Their lack of cognitive skills, which prevent them from interacting with society, cause these children to feel isolated and develop a "raw-edged sensitivity to abuse of feeling."[37] Consequently, they avoid talking and resist the challenge to reason.

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[32] Sorrells, Kids Who Kill, 23 CRIME & DELINQUENCY 312 (1977).

[33] Miller & Looney, The Prediction of Adolescent Homicide: Episodic Dyscontrol and Dehumanization, 34 AM. J. PSYCHOANALYSIS 187, 189 (1974).

[34] See King, supra note 5, at 136.

[35] Id.

[36] Id.

[37] Id. at 138, 140.

Juvenile homicide acts may be viewed as a "last desperate effort to survive."[38] All of the tension and frustration in and around their lives culminate into murder. These children actually perceive the act of murder as preserving their sense of self by focusing their aggression, frustration, and rage on someone else.[39] These desperate children generally direct the horror of their lives in two ways: outward, where the frequent result is murder, and inward, where the likely result is suicide.[40]

One must also factor into the incomprehensible world of extreme physical and mental abuse, the possibility of neurological impairment. In fact, a study of 15 adult inmates on death row indicated that many inmates awaiting execution suffered from unrecognized psychiatric and neurological disorders. All of the subjects of the study had suffered head injuries -- most during their early childhood and adolescence.[41]

Another study evaluated nine boys between the ages of 12 and 18 who were later charged with murder. They were compared to a control group of 24 incarcerated juvenile offenders who had not been charged with murder. This study also detected severe neurological impairment in the juveniles charged with murder. The researchers found that the psychotic symptoms and neurological disorders were the most significant differences between those nine adolescents and the 24 incarcerated juveniles in the control

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[38] Malmquist, Premonitory Signs of Homicidal Aggression in Juveniles, 128:4 AM. J. PSYCHIATRY 461, 465 (1971).

[39] Id. at 465.

40 Lewis, Shanok, Grant & Ritvo, Homicidally Aggressive Young Children: Neuropsychiatric and Experiential Correlates, 140:2 AM. J. PSYCHIATRY 148, 152 (1983).

[41] Lewis, Pincus, Feldman, Jackson & Bard, Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States, 143:7 AM. J. PSYCHIATRY 838 (1986). These inmates were selected because of the imminence of their executions, not because of their psychopathology. This article is attached as Exhibit I.

group.[42] Six of the nine juveniles in this study had suffered severe head injuries as children.[43]

Applicant's life is characterized by **all** of these deprivations and deficiencies. One mental health expert noted that Applicant's life evidenced great deprivation and psychosocial trauma. He suffered emotional brutality and sexual abuse and was deprived of the fundamental and basic needs that a human being requires to survive and function in society.

The system that was designed to protect juveniles and society failed miserably in the life of Applicant and his victims, Charles Angelo Marino, and his family. It serves to reflect the unconstitutionality of the Texas death penalty system.

The United States Supreme Court has expressly identified factors that exist in Applicant's life -- inexperience, less education, and less intelligence -- as reasons young people are less culpable for their actions. Thompson v. Oklahoma, 108 S.Ct. 2687, 2699 (1988). Under the Court's rationale, it seems unthinkable to categorize Applicant -- an immature, uneducated, 17-year-old offender of borderline intelligence -- as an unusually mature adolescent, deserving of the punishment reserved for the most blameworthy and reprehensible criminals.

Given the infirmity of the Texas death penalty statute with respect to any consideration of youth and to the lack of an applicable juvenile transfer proceeding inquiring into the relative maturity, mental capacity, or background of the offender, it is keenly apparent that the laws of Texas fall grievously short of providing

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[42] Lewis, Moy, Jackson, Aaronson, Restifo, Serra & Simos, Biopsychosocial Characteristics of Children Who Later Murder": A Prospective Study, 142:10 AM. J. PSYCHIATRY 1161, 1165 (1985). The subjects ranged from ages 17 to 26 when they committed the murderous acts. This article is attached as Exhibit J.

[43] Id. at 1165.

the safeguards required by Stanford. Because of Texas law, Applicant never received the "individualized consideration of [his] maturity and moral responsibility."

CONCLUSION

The United States Supreme Court has tolerated the application of the death penalty to 16- and 17-year-old offenders on the assumption that determinations made pursuant to juvenile transfer statutes and death penalty statutes would ensure that only unusually mature juveniles will be subject to the death penalty. However, Texas draws a bright line at the age of 17 to delineate criminal responsibility for juvenile behavior without any of these safeguards.[44]

When a juvenile offender turns 17, there are no specific protections or considerations given to his or her individual mental status, sophistication, or maturity prior to trial -- even if the 17-year old is charged with committing capital murder. Because of this, the application of the Texas death penalty procedure to Applicant violated his rights as guaranteed by the Eighth Amendment to the United States Constitution.

The idea and pending reality of Applicant's death sentence represents everything that is wrong with our death penalty system as it is applied to 17-year-old youthful offenders. Without exception, the Texas criminal justice system treats 17-year-old youthful offenders as adults, without any consideration of their maturity or sophistication, if any.

Applicant deserves mercy. Clearly the facts surrounding the offense which resulted in Applicant's death sentence, Applicant's age, background and psychosocial history, as well as his conduct in prison

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[44] TEX. PENAL CODE ANN. § 8.07(c) (Vernon Supp. 1998) provides, without any reservations or limitations, that "no person, in any case, be punished for an offense committed while he was younger than 17 years." TEX. FAM. CODE ANN. § 54.02 (Vernon 1996), the juvenile transfer statute, applies only to offenders under the age of 17.

demand that this Court grant him his requested habeas relief.

Respectfully submitted,

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