

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2002

SCOTT ALLEN HAIN,

Petitioner,

v.

**MIKE MULLIN, WARDEN
OF THE OKLAHOMA STATE PENITENTIARY,**

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

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September 14, 2002

CAPITAL CASE

QUESTIONS PRESENTED

1. Have standards of decency evolved amongst the States to the point that putting to death a person for offenses committed when that person was seventeen years of age or younger violates the Eighth Amendment's prohibition against cruel and unusual punishment?
2. Does the International Covenant on Civil and Political Rights prohibit the States from executing juvenile offenders?
3. Does the doctrine of jus cogens prohibit the States from executing juvenile offenders?
4. If the Eighth Amendment does not prohibit the execution of juvenile offenders, does the international law standard expressed in the jus cogens norm conflict with the United States' interpretation of the Eighth Amendment?

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CITATIONS TO OFFICIAL AND UNOFFICIAL REPORTS

The Tenth Circuit's opinion is reported at Hain v. Gibson, 287 F.3d 1224 (10th Cir. 2002). The district court's unpublished opinion is included in the appendix at ex. ___. The citations to the Oklahoma Court of Criminal Appeals Opinions are Hain v. State, 852 P.2d 744 (1993) (direct appeal), Hain v. State, 919 P.2d 1130 (1996) (direct appeal following remand), and Hain v. State, 962 P.2d 649 (1998) (post-conviction appeal).

JURISDICTION

The Tenth Circuit's dispositive opinion was filed February 20, 2002. A petition for rehearing and for rehearing en banc was denied April 18, 2002. The Honorable Associate Justice Stephen Breyer extended the deadline for seeking certiorari to September 14, 2002. The United States District Court's jurisdiction arose under 42 U.S.C. § 2254. This Court's jurisdiction is arises under 28 U.S.C. § Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(Set out in full in Appendix)

United States Constitution, Amends. VIII & XIV.

STATEMENT OF THE CASE

Procedural History

Scott Allen Hain was seventeen years and four months old when he and Robert Wayne Lambert were involved in the October 6, 1987, murder of a young couple in Creek County, Oklahoma. Scott was tried separately from Lambert, but both were convicted and sentenced to death. On appeal, the Oklahoma Court of Criminal Appeals vacated Scott's death sentence and remanded for a new punishment trial on grounds unrelated to the issues here. Hain v. State, 852 P.2d 744 (Okla. Crim. App. 1993). Trial counsel had preserved the issue of whether the Eighth Amendment proscribed capital punishment for juveniles, but the appeal was decided against him. Id. at 747-48.

At the second punishment trial, Scott Hain again was sentenced to death. Trial counsel again preserved the Eighth Amendment juvenile execution issue, and added treaty and international law issues. Federal constitutional grounds were argued in a pre-trial brief filed on these issues. App., ex. _____. The trial court reserved ruling during pre-trial motions, and apparently never made an on-the-record denial; nevertheless, the issues were preserved for appeal and presented to the Oklahoma Court of Criminal Appeals in the Petitioner's direct appeal brief. App., ex. _____, pp. _____. The Oklahoma court affirmed the sentence, citing to federal authorities. Hain v. State, 919 P.2d 1130, 1137-38 (Okla. Crim. App. 1996), citing, *inter alia*, Stanford v. Kentucky, 492 U.S. 361 (1989).

The issues were presented to the federal district court in Scott's action seeking a writ of habeas corpus. The issues of juvenile executions violating a jus cogens standard of international law and the International Covenant on Civil and Political Rights (ICCPR) were briefed thoroughly, and it was alleged that evolving standards of decency made juvenile executions unconstitutional. The district court found the issues had been fairly presented to the state courts, and were therefore exhausted, but denied relief on the merits. App., ex. _____. The district court found that Stanford controlled the Eighth Amendment question, that the doctrine of jus cogens did not operate to prevent Oklahoma from executing Scott Hain, and that the United States Senate had excepted to, and did not ratify, the ICCPR provision against juvenile executions. App., ex. _____. The district court granted a Certificate of Appealability on very few issues, but included those concerning the propriety of executing a juvenile offender. App., ex. _____. On appeal, the Tenth Circuit affirmed the district court's denial of habeas corpus relief for essentially the same reasons given by the district court, without addressing the separate evolving standards of decency claim in detail. Hain v. Gibson, 287 F.3d 1224, 1243-44 (10th Cir. 2002) (citing Stanford in rejecting an evolving standards of decency

argument, and opining that “[i]t is far from certain that abolition of the death penalty for juveniles is a customary norm of international law . . .”).

Fact History

Scott Allen Hain was born June 2, 1970, in Tulsa, Oklahoma, to Don Hain and Aleta Catron Hain. The Hains married in 1966, had a daughter, Shawn, in 1968, and son Scott two years later. Aleta Hain, Scott’s mother, was a ninth-grade dropout who worked as a car hop and various other laborer jobs. A heavy drinker, Aleta Hain was at the time of Scott’s first trial under court-ordered alcoholism treatment, having been arrested for DUI three times in two years. Don Hain, a painter, was also a very heavy drinker, and did not spend much time at home. Aleta would prepare dinner for her husband – when he was home – and after dinner join him at a local bar.¹ Scott and Shawn, left alone at home to fend for themselves, did their homework and put themselves to bed.

¹ In Scott’s juvenile records, almost every mention of his parents refers to them as alcoholic and in great need of treatment. Authorities tried to get the parents into Alcoholics Anonymous, and Scott into AlaTeen or AlAnon. Scott’s sister testified at the remanded sentencing trial that their mother would come home from work and start drinking, continuing until she passed out. Defense

counsel asked her how many days of the week this happened. Scott's sister replied, "Every day." App., ex. ___, trial transcript p. 305 (Sept. 27, 1994).

Scott was held back in the first grade, an early indication of developmental troubles. Problems at home grew, and Scott reports that his father would hit him on the arms and legs with a wooden paddle. About the time Scott was in the third grade, a sixteen-year-old babysitter sexually abused him and his sister. Don Hain walked in on the sitter engaged in a sexually abusive act. After that, he openly talked about sex in front of Scott, and even chided Scott to “be a man.”

Scott was also held back in the fifth grade, another sign of significant developmental difficulty. When Scott was nine or ten, his father introduced him to marijuana. App., ex. ___, trial transcript p. 333 (Sept. 27, 1994). Two or three years later the family moved to Texas in an attempt to escape debts. Scott regularly smoked marijuana, and got into trouble for stealing a bicycle. Texas authorities placed him on probation for theft. Leaving his family in Texas, Scott moved back to Tulsa to live with his “grandmother,” actually a family friend, Lou Mayfield.

While in Tulsa with Mayfield, Scott stayed out of trouble and stayed in school. Mayfield took Scott, for the first time in his life, out to eat and to ballgames. App., ex. ___, trial transcript pp. 336-37 (Sept. 27, 1994). She assisted him with schoolwork, and provided him his own room. Id. (While living with his parents, Scott and his sister shared a bedroom.) Although the various records do not reflect the exact age at which Scott lived with Ms. Mayfield, it appears that he did so after leaving Texas at around age 12-13. Scott’s family moved back to Tulsa about a year later, in

approximately 1984, and Scott started living with them again. Scott then started getting in more serious trouble.²

In May 1984 Scott was charged with grand larceny and knowingly concealing stolen property. He was adjudicated delinquent and placed on probation. During the next year, when Scott was about fourteen to fifteen years old, he was often in juvenile court for various offenses such as trespassing, theft, and unauthorized use of a motor vehicle. Placement in various juvenile facilities was attempted, but Scott often walked away. In September 1985 he was formally placed in Department of Human Services custody, and a month later incarcerated at the Rader Treatment Center in Sand Springs (near Tulsa). But less than a week after he arrived at Rader, Scott ran away, and was involved in another unauthorized use of a motor vehicle charge.

² Scott was a complete failure in school. Records indicate that he repeated not only the first and fifth grades, but also the sixth grade – possibly three times. Scott dropped out of school in the seventh grade. At no time did Scott ever receive special education services.

Returned to Rader, Scott did not do well, moving back and forth on Rader's "level system." During this time Scott's parents, whose involvement with Scott at Rader was minimal, finally divorced. About this time, in February 1987, Scott went absent without leave (AWOL) – he simply walked away. While AWOL, Scott and his father were involved in a burglary.³ Although the burglary charges were dropped, Scott was returned to Rader for "treatment." He went AWOL in March 1987, but was found and returned, and then went AWOL again – for the last time – in July that same year. Scott went with his father to Kansas, where his father found work for Scott in a warehouse. Scott would steal items from the warehouse and give them to his father, who sold them in a bar across the street from where Scott and his father were living. Police questioned them about their activities, and they quickly returned to Oklahoma. App., ex. ___, trial transcript pp. 364-66 (Sept. 27, 1994).

³ While Scott was AWOL from Rader, he met his father who told him that he had had some problems with the owner of the bar he formerly frequented. Scott agreed to help, and hid in the bar after closing time. After the bar closed, Scott used a screwdriver to pop open the back door and let his father inside. They took the bar's money, drank some of its beer, and left. They were arrested by police shortly thereafter. App., ex. ___, trial transcript pp. 352-54 (Sept. 27, 1994).

In the three months after Scott's last AWOL, he spent the majority of his time on the Tulsa streets, taking drugs every day. Scott reported increased daily usage of alcohol, crystal, crack, marijuana, and speed. He also admitted that he had used LSD, PCP, and barbiturates. During this time of living on the streets and daily chronic drug use Scott met Robert Lambert, who was four years older than Scott, and accompanied Lambert on the events that lead them both to death row. Until meeting Lambert, Scott had never been involved in an act of violence.⁴

On October 6, 1987, three months after he left Rader for the last time, Scott was with Lambert (whom he had known for a very short time) in a Tulsa bar's parking lot, where they noticed Michael Houghton and Laura Sanders inside a car. Lambert and Scott approached Houghton and Sanders, and with Scott holding a knife and Lambert holding a BB gun, app., ex. ___, trial transcript p. 396 (Sept. 27, 1998), got into the car with Houghton and Sanders, and drove away. Some distance from the bar, Lambert and Scott stopped to rob Houghton of his money, credit cards, and car keys. He resisted the robbery and was placed in the car's trunk. A short time later, Sanders was placed in the trunk with Houghton. Lambert and Scott drove back to the bar parking lot where, with Houghton's keys, they decided to take his truck. Lambert drove Houghton's truck, with Scott following in Sanders's car, away from Tulsa. Stopping on a rural Creek County road, Lambert set fire to Sanders's car and he and Scott left the scene in Houghton's truck. Houghton and Sanders died in the trunk from smoke inhalation.

The facts about Scott's life and upbringing were relevant to the mitigation stage of the case. They are also relevant to the questions before this Court: with the knowledge mankind now holds

⁴ Ironically, Robert Lambert's death sentence may be vacated pursuant to this Court's decision in Atkins v. Virginia, 122 S. Ct. 2242 (2002).

about the developmental delays of the juvenile mind, have this country's evolving standards of decency reached the point where the execution of juvenile offenders is constitutionally proscribed?

ARGUMENT – REASONS TO GRANT THE WRIT

Given the apparent consensus that exists among the States and in the international community against the execution of a capital sentence imposed on a juvenile offender, I think it would be appropriate for the Court to revisit the issue at the earliest opportunity.

Patterson v. Texas, ___ U.S. ___, 2002 WL 1986618, at *1, order denying application for stay of execution and denying petition for writ of habeas corpus (August 28, 2002) Stevens, J., dissenting.

This Court's decision in Atkins v. Virginia, 536 U.S. ___ (2002), made it tenable for a petitioner to urge reconsideration of Stanford v. Kentucky, 492 U.S. 361 (1989) For the reasons stated by Justice Stevens, I think it appropriate to revisit the issue at this time.

Id., Ginsburg and Breyer, JJ., dissenting.

A National Consensus Now Exists to Not Execute Juvenile Offenders

In 1989, this Court held in Stanford v. Kentucky that because no national consensus existed in opposition to the execution of sixteen and seventeen year old offenders, the execution of juveniles for offenses committed at those ages did not offend the Eighth Amendment. 492 U.S. at 373. In arriving at this conclusion, the Court rejected the concept that non-death penalty states could be included in the calculus determining whether a consensus exists. 492 U.S. at 371 n.2.

In Atkins v. Virginia, the Court adopted just this approach in determining whether a national consensus exists against the execution of the mentally retarded. 122 S. Ct. 2242, 2249. Applying the Atkins approach of counting the jurisdictions that do not permit any capital punishment with the jurisdictions that have capital punishment statutes, it is clear that a national consensus exists against the execution of juvenile offenders.

At the heart of the prohibition against cruel and unusual punishment is the idea that the punishment must be proportional to the crime. See Atkins, 122 S. Ct. at 2246-47. The definition of proportionality is found in the standards that currently prevail, not those in force at the time the Eighth Amendment took effect. Id. at 2247. Exactly what standards prevail should be determined by “objective factors to the maximum possible extent.” Id. (citation omitted)

In applying this proportionality review to determine the unconstitutionality of executing the mentally retarded, this Court considered legislation as the “most reliable objective evidence of contemporary values.” Id. (citation omitted) In addition to reviewing the legislative trends, this Court considered the positions of organizations with germane expertise, of religious communities, of the world community, and of the American public. Id. at 2249, n. 21. Finally, this Court considered its own judgment on the issue. Id. at 2247-48. In the end, this Court concluded that the practice of executing the mentally retarded “has become truly unusual, and it is fair to say that a national consensus has developed against it.” Id. at 2249.

Using all of the same objective standards employed in Atkins, it is evident that a national consensus has likewise developed against the execution of juveniles. A comparison of the prevailing views on the issue of executing the mentally retarded with those on the issue of executing juveniles shows that the consensus against the execution of juveniles is equal to if not greater than that against execution of the mentally retarded.

A. Legislation on the Issue of the Juvenile Death Penalty

At the time of Stanford v. Kentucky, 492 U.S. 361 (1989), 12 states established 18 as the minimum age of eligibility for the death penalty, 3 states established 17 as the minimum age, and 22 states had age 16 as the cutoff. Id. at 371. One state, New Hampshire, had conflicting statutes at the time, with one statute setting eligibility at age 17 and one at age 18.⁵ In Stanford, this Court concluded the various legislation did not establish a degree of national consensus sufficient to declare the execution of a 16 or 17 year old to be cruel and unusual punishment.

In comparison, today 16 states have established 18 as the minimum age of death eligibility, 5 states have established 17 as the minimum age, and 17 states still use 16 as the minimum age.⁶ ***Not one state has lowered the age of eligibility*** to either 16 or 17, despite Stanford's “green light” to do so. Instead, state legislatures have moved in precisely the opposite direction.⁷

Since Stanford, five states created new law forbidding the juvenile death penalty. Most recently, Indiana raised its statutory minimum age from 16 to 18 years old.⁸ The Montana Legislature did the same thing in 1999.⁹ When New York reinstated the death penalty in 1995, it rejected it for juveniles, setting the minimum for death eligibility at 18.¹⁰ Kansas' 1994 reenactment of the death penalty likewise rejected a juvenile death penalty.¹¹ Finally, Washington abolished the

⁵ Compare N.H. Rev. Stat. Ann. tit. LXII, § 630:1 (setting death eligibility at 17) with N.H. Rev. Stat. Ann. tit. LXII, § 630:5(xvii) (prohibiting death penalty for minors). New Hampshire has since defined minors as persons under age 18, apparently settling the matter against juvenile executions. N.H. Rev. Stat. Ann. tit. LXII, § 169B:2(vi) (1995).

⁶ Streib, Victor L., The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-June 30, 2002 (July 15, 2002) (unpublished manuscript available at <http://www.law.onu.edu/faculty/streib/juvdeath.pdf>).

⁷ Id.

⁸ S.426, 112th Leg., Reg. Sess., 2002 In. Laws.

⁹ H.B. 374, 1999 Leg., Reg. Sess., 1999 Mt. Laws.

¹⁰ N.Y. Crim. Proc. Law §400.27 (McKinney 2002).

¹¹ Kan. Crime. Code Ann. §21-4622 (Vernon 2001).

juvenile death penalty in a supreme court ruling. State v. Furman, 858 P.2d 1092, 1103 (Wash. 1993). The state legislature did nothing to overturn the court's decision. Furthermore, the District of Columbia, the military courts, and the federal government have rejected the juvenile death penalty.

In addition to the definitive action taken by these five states, legislative efforts in other states show definite trend toward abolition of the juvenile death penalty. In Brennan v. State, 754 So. 2d 1, 7 (Fla. 1999), Florida raised its minimum age for eligibility for the death penalty from 16 to 17 years of age. Ten other states that currently use the death penalty are considering legislation to raise the minimum age for eligibility to 18: Arizona, Arkansas, Florida, Kentucky, Mississippi, Missouri, Nevada, Pennsylvania, South Carolina, and Texas. This is the most legislative attention the issue has received in twenty years.¹²

Paired with the 12 states that do not permit capital punishment for persons of any age, a total of 28 states currently prohibit the execution of juvenile offenders, while 22 states seemingly to allow such executions. This closely parallels the numbers on the mental retardation issue at the time of Atkins, with 30 states prohibiting the execution of the mentally retarded compared to 20 jurisdictions permitting such executions. In Atkins, these numbers prompted this Court to conclude:

The large number of states prohibiting the execution of mentally retarded persons (*and the complete absence of States passing legislation reinstating the power to conduct such executions*) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.

Id. at 2249 (emphasis added).

1. Consistency of the Trend Away From Executing Juveniles

The importance of the legislative movement, this Court said in Atkins, is that “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.”

Id. at 2249. The significant number of states banning executions of the mentally retarded “carries even greater force” when the overwhelming support such legislation received is considered. Id.

¹² Streib, Victor L., The Juvenile Death Penalty Today, p. 7.

A similarly significant level of support is found in recent legislative efforts to abolish the juvenile death penalty. The Arkansas legislature considered legislation to end the juvenile death penalty. SB 78, 83rd General Assembly. The bill passed the Senate 18-15, but never reached a vote in the House. *Id.* The Indiana legislation was passed by a vote of 44-3 in the Senate and 83-10 in the Assembly.¹³ The Montana legislation passed by a margin of 44-5 in the Senate and 85-15 in the Assembly.¹⁴ In Washington, the Washington Supreme Court, was unanimous in abolishing the juvenile death penalty. *State v. Furman*, 858 P.2d 1092 (Wash. 1993).

In Florida, the bill¹⁵ passed the Senate 34-0, but the House of Representatives did not vote on the measure by the end of the session. Even in Texas, the only jurisdiction in the world that executes juvenile offenders with any regularity, the bill¹⁶ passed the House 72-42 before becoming stalled in the Senate without a vote. In New Hampshire, the legislature voted to abolish the death penalty completely in 2000, thereby necessarily including juveniles.¹⁷

¹³ Indiana State Legislature Archive (2002), 7/16/2002 SB 0426.

¹⁴ Montana Legislative Archive (1999) Detailed Bill Information HB 374.

¹⁵ SB 1212 (2002).

¹⁶ H.J. of Tex., 77th Leg., R.S. page 3098 (2001).

¹⁷ HB 1548.

Like the trend away from executing the mentally retarded, the efforts to end the executions of juveniles are receiving near unanimous support. This fact strengthens the impact of the position already taken by over half of the states outlawing the juvenile death penalty.

2. The Practice of Executing Juveniles Has Become “Unusual”

This Court in Atkins also observed that executing the mentally retarded was “uncommon.” Id. at 2249. There have been 24 mental retardation executions since 1976. App., ex. __ (American Bar Association, Juvenile Justice Center, comparison chart, September 2002). Nine states executed a mentally retarded person, five of them executing three or more persons. Id. Juvenile executions are more uncommon, there having been just 21. Id. Of the 22 states retaining a death penalty for juveniles, **only two** have used this punishment with any frequency – Texas and Virginia. They have carried out 16 of the 21 juvenile executions in the United States since 1976. Virginia carried out 3 of the juvenile executions, while Texas is responsible for 13 – 62% of the total. Id.¹⁸

Only 5 other states have carried out a juvenile execution – Georgia, Louisiana, Missouri, Oklahoma, and South Carolina, with one each.¹⁹ Clearly, these states do not rely on this punishment. Before these modern day singular executions, Louisiana last executed a juvenile in 1948, Georgia in 1957, Missouri in 1921, and South Carolina in 1948. Oklahoma had never executed a juvenile offender prior to 1999.²⁰

This leaves 15 “juvenile death states” that have not executed even one juvenile. Of these, 7 have no juvenile offenders on death row, 4 states have 1 such offender, and 2 states have 2 each.²¹

¹⁸ See also, Streib, Victor L., The Juvenile Death Penalty Today, pp. 4-5 (Table 1).

¹⁹ Streib, Victor L., The Juvenile Death Penalty Today, pp. 4-5 (Table 1).

²⁰ Streib, Victor L., Death Penalty for Juveniles (Indiana University Press 1987).

²¹ Fact Sheet: The Juvenile Death Penalty in the United States (The American Bar Association 2002). App., exs. __ & __.

As evidence of the growing trend away from juvenile executions, in the last year Virginia overturned the death sentence of its only condemned juvenile.²² Furthermore, the reversal rate for death sentences imposed on juvenile offenders is 86%,²³ and juvenile death sentences have dropped in 2001 to only 1.8% of the total number of death sentences imposed in the United States since 1973.²⁴

These statistics show that in juvenile death penalty states, there is no perceived need to pursue legislation barring the executions because it is not an issue. This Court recognized this fact in Atkins, and after noting the execution of the mentally retarded is uncommon, observed “there is little need to pursue legislation barring the execution of the mentally retarded in those States [that do allow such executions].” Atkins, 122 S. Ct. at 2249. Likewise, there is little need for concerned organizations and members of the public to demand change, although support for such change may be high, and public opposition to executing the mentally retarded and juveniles may be high.

²² Washington Post, 9/25/01. From the Death Penalty Information Center at www.deathpenaltyinfo.org.

²³ Streib, Victor L., The Juvenile Death Penalty Today, p. 9.

²⁴ Id., p. 14.

B. Other Objective Factors Support the Legislative Trends Away From Sanctioning Use of the Juvenile Death Penalty

In Atkins, after considering legislative support for abolishing the death penalty for mentally retarded offenders, this Court looked at “[a]dditional evidence [that] makes it clear that this legislative judgment reflects a much broader social and professional consensus.” Atkins, 122 S. Ct. at 2249, n.21. Examining the same additional evidence as it relates to the juvenile death penalty reveals a similar consensus against the use of this punishment.

1. Organizations With Germane Expertise Have Adopted Official Positions Opposing the Imposition of the Death Penalty Upon a Juvenile Offender.

Opposition to the juvenile death penalty by informed organizations has been longstanding; many filed amicus briefs in Stanford urging an end to juvenile executions:

American Bar Association, Child Welfare League of America, National Parents and Teachers Association, National Council on Crime and Delinquency, Children’s Defense Fund, National Association of Social Workers, National Black Child Development Institute, National Network of Runaway and Youth Services, National Youth Advocate Program, American Youth Work Center, American Society for Adolescent Psychiatry, American Orthopsychiatric Association, Defense for Children International - USA, National Legal Aid and Defender Association, National Association of Criminal Defense Lawyers, Office of Capital Collateral Representation for the State of Florida, International Human Rights Law Group, and Amnesty International.

Stanford, 492 U.S. at 389, n.4 (Brennan, J., dissenting).

Since Stanford, numerous other organizations opposing juvenile execution have come forward. The Constitution Project, a bipartisan nonprofit organization that seeks consensus on controversial legal and constitutional issues, formed a blue-ribbon committee to develop reforms to address wrongful convictions in death penalty cases.²⁵ Its report, Mandatory Justice, Eighteen

²⁵ The 30-member Death Penalty Initiative committee describes itself in its mission statement: “We are supporters and opponents of the death penalty, Democrats and Republicans,

Reforms to the Death Penalty, strongly recommends ending juvenile executions, thus reducing the risk of wrongful execution, ensuring the death penalty is reserved for the most culpable offenders, and effectuating deterrent and retributive purposes of the death penalty.²⁶ The American Psychological Association, The American Academy of Child and Adolescent Psychiatry, The National Mental Health Association, The National Center For Youth Law, The Coalition for Juvenile Justice, and The American Humane Association have all joined this position and support the abolition of the juvenile death penalty.

2. Widely Diverse Religious Communities Oppose the Juvenile Death Penalty

This Court commented on the number of different religions that filed amicus briefs in support of stopping executions of the mentally retarded. Atkins, 122 S. Ct. at 2249, n.21. Religious

conservatives and liberals. We are former judges, prosecutors, and other public officials, as well as journalists, scholars, and other concerned Americans. We may disagree on much. However, we are united in our profound concern that, in recent years, and around the country, procedural safeguards and other assurances of fundamental fairness in the administration of capital punishment have been significantly diminished.”

²⁶ The Constitution Project, Mandatory Justice, Eighteen Reforms to the Death Penalty, p.11 (2001), accessible on line at www.constitutionproject.org.

opposition to the juvenile death penalty dates back at least to the time of Stanford, where the following groups filed amicus briefs advocating an end to executing juveniles:

American Baptist Church, American Friends Service Committee, American Jewish Committee, American Jewish Congress, Christian Church (Disciples of Christ), Mennonite Central Committee, General Conference Mennonite Church, National Council of Churches, General Assembly of the Presbyterian Church, Southern Christian Leadership Conference, Union of American Hebrew Congregations, United Church of Christ Commission for Racial Justice, United Methodist Church General Board of Church and Society, United States Catholic Conference, and West Virginia Council of Churches.

Stanford, 492 U.S. at 389, n.4.

3. The World Community Overwhelmingly Opposes the Execution of Juveniles

The execution of juvenile offenders has all but ended in every nation but the United States. Amnesty International, “Fact Sheet” (2002). Although domestic differences are small between the statutory bars on executing mentally retarded and juvenile offenders, the juvenile bar has so much more universal, codified support that it has achieved customary international law and, indeed, jus cogens status. The International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights, and the U.N. Convention on the Rights of the Child (CRC) expressly prohibit the death penalty for juvenile offenders. The United States is the only country in the world who has not ratified the CRC, as Somalia, the only other “holdout”, recently signed the CRC. See www.unicef.org/crc/crc.htm. One hundred and ninety-two nations have adopted the fundamental standards articulated in this treaty. Amnesty International, The Death Penalty Worldwide (2002).

In the last decade, the United States has executed more juvenile offenders than all other nations combined. Since 1990, only seven countries are reported to have executed juveniles – The Democratic Republic of Congo, Iran, Nigeria, Pakistan, Yemen, Saudi Arabia, and the United States.

Pakistan (after a recent execution) and Yemen have since abolished the juvenile death penalty, while Saudi Arabia and Nigeria deny they have executed juvenile offenders.

In the last three years, the number of nations to execute juvenile offenders has dropped significantly, to a mere four: Iran, Democratic Republic of Congo, Pakistan, and the United States. Moreover, just this past year, Iran stated that it no longer executes juvenile offenders, and the leader of the Democratic Republic of Congo commuted the death sentences of four juvenile offenders.

Continued juvenile executions violate international law, thus isolating the United States from the international community. The near unanimous position of the world community supports the legislative and other trends in this country showing an overwhelming consensus against the execution of juveniles.

4. Public Opinion Reveals an American Consensus Against Executing Juveniles.

Scientific studies confirm the majority of Americans believe the death penalty should not apply to juveniles.²⁷ In one study, only 35% of death-qualified mock jurors were willing to sentence 17-year-old defendants to execution.²⁸ More recent studies confirm this trend. A 2001 study showed that “while 62% back the death penalty in general, just 34% favor it for those committing murder when under the age of 18.”²⁹ The same study cites a 2001 survey by the Princeton Survey Research Associates, which showed that 72% favored the death penalty for at least the most serious murders, but only 38% wanted it applied to offenders under eighteen.³⁰ Similarly, a May 2002 Gallup poll showed that more than two-thirds of Americans, 69%, oppose the practice of executing juveniles.³¹

²⁷ See, e.g., Skovron, Sandra Evans, Joseph E. Scott, and Francis T. Cullen. Crime and Delinquency, October 1989 v.35 n.4 pp.546-561.

²⁸ Finkel, N.J., Hughes, K.C., Smith, S.F., & Hurabiell, M.L., “Killing kids: The juvenile death penalty and community sentiment.” Behavioral Sciences and the Law, 12, 5-20 (1994).

²⁹ Smith, Tom W., Public Opinion of the Death Penalty for Youths, National Opinion

Public opinion is also revealed by the actions of juries. The rate of juvenile death sentencing fluctuated greatly in the years following reinstatement of the death penalty, and slowed to an average of about 2% of the total death sentences in the mid-1980s. In the mid to late 1990s, the rate ranged from about 2% to 6%. In the last few years, however, the juvenile death penalty sentencing rate has declined significantly to an average of 1.7% per year. Thus far in 2002, one juvenile death sentence have been verified, in Virginia.³² These statistics demonstrate that not only is the public opposed in theory to the execution of juveniles, but in practice.

It is clear, through the number of states that do not have the death penalty, the number of states who have the death penalty but who do not allow its imposition on juveniles, the number of states who have not conducted a juvenile execution, the number of states who have no juveniles on their death rows, the number of states to have legislatively or judicially raised the death penalty minimum age (despite the invitation in Stanford to lower it), and consistent public polls that there is a national consensus against the execution of juvenile offenders. Therefore, a juvenile execution

Research Center, University of Chicago, prepared for the Joyce Foundation, p. 2 (December 2001).

³⁰ Id.

³¹ Gallup News Service, "Slim Majority of Americans Say Death Penalty Applied Fairly," (May 20, 2002).

violates evolving standards of decency, and thus the Eighth Amendment. Trop v. Dulles, 356 U.S. 86, 101 (1958) (“evolving standards of decency . . . mark the progress of a maturing society”).

Adolescent Brain Development Reinforces the View Against Juvenile Executions

Well-Established Research on Adolescent Brain Development Reinforces the Eighth Amendment’s Evolving Standards of Decency Which Now Forbid the Death Penalty for 17-Year-Olds.

A. The Human Brain, Particularly for Males, Continues to Evolve into the Late Teens and Early Twenties, With the Mental Ability to Control Impulses Developing Last.

In an original habeas corpus petition now pending in this Court in Stanford v. Parker, No. 01-10009, Stanford refers to scientific research on adolescent brain development. Stanford’s brief at 23-25. Earlier stages of this research were relied upon by this Court in Thompson v. Oklahoma, 487 U.S. 815, 833-838 (1988) (Stevens, J., plurality opinion). During the ensuing years since Thompson and Stanford, this research has continued and has reenforced the earlier findings.

The new research findings come chiefly from magnetic resonance imaging (MRI) of both the structural and functional varieties. Numerous news articles describe recent MRI studies comparing adolescent brains to adult brains and suggest a connection between teen behavior and brain development. See e.g., Matt Crenson, Brain Changes Shed Light on Teen Behavior, The Times-Picayune, December 31, 2000, p. A-18; Daniel R. Weinberger, Teen Brain Lacks Impulse Control,

³² Streib, Victor L., The Juvenile Death Penalty Today, p. 14.

Seattle Post-Intelligencer, March 13, 2001, ed.; Shankar Vedantam, Are Teens Just Wired That Way?, The Washington Post, June 3, 2001, sec. A.

Structural MRI scans have been “mapping” the brain as it matures, and have found that the most dramatic change takes place as an adolescent grows into adulthood, approximately at ages 12-22. See, e.g., E.R. Sowell, P.M. Thompson, C.J. Holmes, T.L. Jernigen, & A.W. Toga, In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions, 2 Nature Neuroscience 859 (1999). Functional MRI uses similar techniques to observe changes in brain activity and has found that changes in those areas indicative of maturation continue to take place during late adolescence and into early adulthood.

A copy of an affidavit from Dr. Ruben C. Gur, Professor and Director of Neuropsychology in the Department of Psychiatry of the University of Pennsylvania Health System, was submitted to this Court in the matter, and is included in the appendix to this petition. Dr. Gur’s summary of the evidence from the recent MRI research reveals:

Increase in white matter continues well into late adolescence, and the frontal lobes are the last to myelinate. The behavioral significance of this neuroanatomical finding is that the very brain system necessary for inhibition and goal-directed behavior comes “on board” last and is not fully operational until early adulthood (about 18-22 years).

Affidavit of Dr. Ruben C. Gur, app., ex. ___.

The prefrontal cortex is most important for “executive functioning,” including planning, using judgment, and controlling impulsiveness. There is now an objective basis for the common knowledge that teenagers tend to have a lot less of these qualities than adults, both in terms of the

structure of the brain (which is manifestly more immature in the prefrontal area in adolescents than adults) and function of the brain.

Scientific research shows that adolescents actually do think differently than adults. D. Keating, Adolescent Thinking, in “At the Threshold,” 54-89 (S. Feldman et al. Eds., 1990); W. Overton, Competence and Procedures, in “Reasoning, Necessity and Logic,” 1-32 (W. Overton ed. 1990). These recent neurological studies conclude the adolescent brain is not fully developed and, among other things, undergoes major reorganization in the area associated with social behavior and impulse control. See Physical Changes in Adolescent Brains May Account for Turbulent Teen Years, McClean Hospital Study Reveals, <http://www.mclean.harvard.edu/PublicAffairs/TurbulentTeens.htm>; National Institute of Mental Health, Teenage Brain: A Work in Progress, 2/6/01, <http://www.nimh.nih.gov/publicat/teenbrain.cfm>.

To a certain degree, this latest research simply confirms what has long been known or suspected about the brain development of 17-year-olds. While they often appear to be “fully-grown” physically and may seem to be functioning as adults, their judgment and impulse-control are simply not that of adults. While they may know “right from wrong” under an infancy defense or an insanity test, they nonetheless are lacking in fully adult-level functioning of their brains. They may make horrible decisions, and they act on impulse, without thinking clearly about the consequences.

B. Legitimate Objectives of Punishment Are Not Served by Imposing Adult Capital Punishment Upon Offenders Who Do Not Have Adult Mental Abilities.

Adolescents such as Scott Hain, with his storied failure in school and socially, typically do not meet the “standards” of their 17-year-old peers. Other factors in their lives often hold back their mental development even further, making them even less culpable mentally than others their age.

See, e.g., ABA Task Force on Youth in the Criminal Justice System, Youth in the Criminal Justice System 39-46 (Chicago: American Bar Association) (2001).

If the objective is general deterrence of similarly homicidal behavior by other 17-year-olds in the future, executing Stanford or Scott Hain simply will not have that effect. The delayed brain development described above negatively impacts impulse control. The theory of deterrence, in direct contrast, assumes a person's ability to conduct an on-the-spot cost/benefit analysis and to control or redirect impulses. Not surprisingly, Thompson rejected the deterrence rationale as simply unacceptable for young offenders. Thompson v. Oklahoma, 487 U.S. 815, 837-838 (Stevens, J., plurality opinion).

The other prong of the general deterrence theory is that the execution of any one offender deters the behavior of all other potential offenders, including those older than age seventeen. If juvenile executions were to end, the national reduction in executions would be only 2%. See Streib, The Juvenile Death Penalty Today, p. 4. Ninety-eight percent of executions would continue, and would have whatever highly questionable impact they might have on older potential offenders.

Given the extensive research findings on capital punishment during the past several decades, the only legitimate objective that retains any credibility is retribution. However, this Court also has noted that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." Thompson v. Oklahoma, 487 U.S. at 835 (footnote omitted). With much more known about adolescent brain development than was known in 1989, this conclusion from Thompson is even more persuasive. Retribution should be commensurate with the offender's personal culpability. Enmund v. Florida, 458 U.S. 782, 798-800 (1982). Juveniles simply do not and cannot own a level of personal culpability that deserves the maximum punishment known.

C. Informed by Recent Research on Adolescent Brain Development, the Juvenile Death Penalty Offends Contemporary Standards of Decency.

It is impossible to separate the legal analysis of the death penalty for the mentally retarded, see Atkins, from the juvenile death penalty. Both classes of individuals are physically able to commit terrible crimes, but neither has a level of mental development to be held fully responsible and receive the maximum punishment for those crimes. Both juvenile and mentally retarded offenders have “the mind of a child,” albeit often in the body of an adult. There exists a national consensus opposing the death penalty for each class, as recognized for the mentally retarded in Atkins. Neither children, nor those with the minds of children, should receive the maximum adult punishment. See American Bar Association, The Juvenile Death Penalty in the United States, app., ex. ___.

This Court has been split in the past over the importance of comparative and international law in examining our national consensus concerning the death penalty. In Atkins, the views of the international community were taken into account. Atkins, 122 S. Ct. at 2249 n.21. The United States, represented in the juvenile execution issue almost exclusively by Texas, and to a much, much lesser degree by Virginia, is essentially alone in the world in imposing the juvenile death penalty.

D. Conclusion of this Issue.

Brain development continues typically through the teenage years and into the early twenties, with impulse control commonly developing last. Juveniles, particularly those with the atypical problems experienced by Scott Hain, simply cannot be held to an adult standard for the punishment of his conduct. General deterrence theories are simply inapplicable to 16 and 17-year-olds, since their stage of brain development does not lend itself to rational, cost/benefit analyses. American

standards of decency, informed by the international community, now reject the imposition of the death penalty upon those with such immature brain development.

The ICCPR and the Doctrine of Jus Cogens Prohibit Juvenile Executions³³

I. The Prohibition Against Executing Juvenile Offenders is a Jus cogens Norm

³³ The following section was adapted, with permission, from de la Vega, C., Amici Curiae Urge the U.S. Supreme Court to Consider International Human Rights Law in Juvenile Death Penalty Case, 42 Santa Clara L.R. 1041 (2002); copyright 2002 Santa Clara University School of Law.

Under Article 53 of the Vienna Convention on the Law of Treaties, a jus cogens peremptory 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 by a subsequent norm of general international law having the same character.”³⁴ The Restatement (Third) of the Foreign Relations Law agrees with this standard and provides that the norm is established where there is acceptance and recognition by a “large majority” of states, even if over dissent by “a very small number of states.”³⁵ Hence, a norm must meet four requirements in order to attain the status of a peremptory norm: 1) it is general international law; 2) it is accepted by a large majority of states; 3) it is immune from derogation; and 4) it has not been modified by a new norm of the same status.

³⁴ See Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 53, 1155 U.N.T.S. 331, 352, 8 I.L.M. 679, 698.

³⁵ Restatement (Third) of the Foreign Relations Law § 102 & reporter’s note 6 (1986) (citing Report of the Proceedings of the Committee of the Whole, May 21, 1968, U.N. Doc. A/Conf. 39/11 at 471-72).

The prohibition against the execution of offenders who were under eighteen at the time they committed their offense clearly meets those requirements.

Incredibly, the Tenth Circuit rejected the jus cogens issue on its belief that the countries which have “abolished the death penalty [for juveniles] have done so for “moral” or “political” reasons (as opposed to any “sense of legal obligation”).” Hain, 287 F.3d at 1243-44. The reasoning is patently wrong.

A. The Prohibition is General International Law

First, the prohibition against the execution of persons who were under eighteen at the time they committed their crime (“juvenile offenders”) is general international law. Numerous treaties, declarations, and pronouncements by international bodies, as well as the laws of the vast majority of nations are evidence of that law. Among the treaties that prohibit the death penalty for juvenile offenders are the ICCPR,³⁶ the Convention on the Rights of the Child (“CRC”),³⁷ the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (“Fourth Geneva Convention”),³⁸ and the American Convention on Human Rights (“American Convention”).³⁹

³⁶ International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, art. 6(5), 999 U.N.T.S. 171 [hereinafter ICCPR], at art. 6(5).

³⁷ Convention on the Rights of the Child, adopted Nov. 20, 1989, art. 37, 1577 U.N.T.S. 3, 28 I.L.M. 1448, 1469-70 (entered into force Sept. 2, 1990). This convention was adopted by G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/736 (1989).

³⁸ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 68, 75 U.N.T.S. 286 [hereinafter Fourth Geneva Convention].

³⁹ American Convention on Human Rights, opened for signature Nov. 22, 1969, art. 4(5), 1144 U.N.T.S. 143, 146 [hereinafter American Convention].

A resolution by the United Nations Economic and Social Council also opposed the imposition of the death penalty for juvenile offenders.⁴⁰ In 1985, the United Nations General Assembly adopted by consensus the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), which also oppose capital punishment for juveniles.⁴¹ Since 1997, the United Nations Commission on Human Rights has passed resolutions calling on states to abolish the death penalty generally, but has specifically asked countries not to impose it for crimes committed by persons below eighteen years of age.⁴² The Commission resolutions passed with a number of dissenting votes. The dissenting votes can be attributed to the fact that they also called for a general moratorium on the death penalty, that a number of countries still have the death penalty which is not prohibited by the ICCPR, and that the prohibition is not as widely accepted. This view is supported by the fact that Commission resolutions mentioning only the prohibition against the juvenile death penalty have passed by consensus without a vote.⁴³

⁴⁰ See Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty, E.S.C. Res. 1984/50, U.N. ESCOR, Annex, Supp. No. 1, at 33, U.N. Doc. E/1984/84 (1984).

⁴¹ G.A. Res. 40/33, U.N. GAOR, 40th Sess., Annex, Supp. No. 53, at 207, U.N. Doc. A/40/53 (1985).

⁴² See The Question of the Death Penalty, U.N. Commission on Human Rights, 58th Sess., Res. 2002/77, U.N. Doc. E/CN.4/RES/2002/22 (2002); The Question of the Death Penalty, U.N. Commission on Human Rights, 57th Sess., Res. 2001/68, U.N. Doc. E/CN.4/RES/2001/68 (2001); The Question of the Death Penalty, U.N. Commission on Human Rights, 56th Sess., Res. 2000/65, U.N. Doc. E/CN.4/RES/2000/65 (2000); The Question of the Death Penalty, U.N. Commission on Human Rights, 55th Sess., Res. 1999/61, U.N. Doc. E/CN.4/RES/1999/61 (1999); The Question of the Death Penalty, U.N. Commission on Human Rights, 54th Sess., Res. 1998/8, U.N. Doc. E/CN.4/RES/1998/8 (1998); The Question of the Death Penalty, U.N. Commission on Human Rights, 53d Sess., Res. 1997/12, U.N. Doc. E/CN.4/RES/1997/12 (1997).

⁴³ See, e.g., Rights of the Child, U.N. Commission on Human Rights, 58th Sess., Res. 2002/92, U.N. Doc. E/CN.4/RES/2002/92 P 31 (2002); Human Rights in the Administration of

Justice, in Particular Juvenile Justice, U.N. Commission on Human Rights, 58th Sess., Res. 2002/47, U.N. Doc. E/CN.4/RES/2002/47 (2002); Rights of the Child, U.N. Commission on Human Rights, 57th Sess., Res. 2001/75, U.N. Doc. E/CN.4/RES/2001/75 P 28(a) (2001).

The United Nations Sub-Commission on the Promotion and Protection of Human Rights has passed similar resolutions. In the 1999 resolution, the United States is identified as one of the six countries that had executed juveniles since 1990. In fact, it accounted for ten of the nineteen executions during that time period.⁴⁴ One year later, the Sub-Commission affirmed “that the imposition of the death penalty on those aged under eighteen at the time of the commission of the offence is contrary to customary international law.”⁴⁵ The resolution was adopted without a vote.

⁴⁴ See The Death Penalty, Particularly in Relation to Juvenile Offenders, U.N. Sub-Commission on the Promotion and Protection of Human Rights, 52d Sess., Res. 1999/4, U.N. Doc. E/CN.4/ Sub.2/RES/1999/4 (1999).

⁴⁵ The Death Penalty in Relation to Juvenile Offenders, U.N. Sub- Commission on the Promotion and Protection of Human Rights, 53d Sess., Res. 2000/17, U.N. Doc. E/CN.4/Sub.2/RES/2000/17 (2000).

The Inter-American Commission on Human Rights, the body responsible for the protection of fundamental freedoms in the Organization of American States (“OAS”), found there is a jus cogens norm in 1987 proscribing the execution of children among OAS member states.⁴⁶ While at that time it could not decide what the age limit would be for such a norm, it is now clear that in the OAS system it is eighteen years of age for several reasons. The American Convention on Human Rights expressly limits the death penalty to persons who were under eighteen years of age at “the time the crime was committed.”⁴⁷ The United States is one of only two member states of the OAS that has not ratified the American Convention.⁴⁸ Of the twenty-four member states to ratify the American Convention, only Barbados made a reservation to Article 4(5), providing that “age is a consideration of the Privy Council, under Barbadian law 16 was the minimum age for execution.”⁴⁹ According to the report of the Secretary General for the United Nations, however, Barbados “brought themselves into line” in 1994 with the norm that eighteen is the minimum age.⁵⁰ That report also notes that all but fourteen countries party to the CRC had national laws prohibiting the

⁴⁶ See Case 9647, Inter-Am. C.H.R. 147, OEA/ser. L/V/II.71, doc. 9 rev. 1 (1987).

⁴⁷ See American Convention, *supra* n.38, art. 4(5).

⁴⁸ The Organization of American States maintains a list of signatories and ratifications to the American Convention that can be accessed through its Web site address at <http://www.oas.org>.

⁴⁹ See *id.*

⁵⁰ Crime Prevention and Criminal Justice: Capital Punishment and the Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty: Report of the Secretary General, U.N. ESCOR, Subst. Sess., PP 21, 90, U.N. Doc. E/2000/3 (2000) [hereinafter Crime Prevention and Criminal Justice].

imposition of the death penalty on persons who committed capital offense when under eighteen years of age.⁵¹

B. The Prohibition is Accepted by All States Except One

The second requirement for a jus cogens norm is that the norm is accepted “by ‘a very large majority of’ States, even if over dissent by ‘a very small number’ of states.”⁵² The United States is the only country in the world that has not accepted the international norm against the execution of juvenile offenders. The only other countries known to have executed juvenile offenders in the last ten years have since abolished the practice, have acknowledged that such executions were contrary to their laws, or have denied that they have taken place.

⁵¹ See id.

⁵² Restatement (Third) of Foreign Relations Law § 102 reporter’s note 6 (1986) (interpreting the Vienna Convention and citing to Report of the Proceedings of the Committee of the Whole, May 21, 1968, U.N. Doc. A/Conf. 39/11 at 471-72).

As noted above, every nation in the world but one has ratified the CRC.⁵³ The only nation not to ratify it is the United States.⁵⁴ Indeed, the CRC has been the catalyst that has prompted many countries in the past ten years to change their laws raising the eligibility age of the death penalty to eighteen. The United Nations reports that, with Barbados, Yemen and Zimbabwe changed their laws in 1994.⁵⁵ China changed its age to eighteen in 1997.⁵⁶ Indeed, by the time of that report, only fourteen countries that had ratified the CRC had not changed their laws to adhere to the prohibition.⁵⁷ None of those countries filed a reservation to Article 37 of the CRC, however, and only six executed juvenile offenders since 1990: Democratic Republic of the Congo (1 in 2000), Iran (5: 1 in 1990, 3 in 1992, 1 in 1999), Nigeria (1 in 1997), Pakistan (2: 1 in 1992, 1 in 1997); Saudi Arabia (1 in 1992), and Yemen (1 in 1993).⁵⁸ In addition, an execution was documented in Iran in

⁵³ See Status of the Convention on the Rights of the Child: Report of the Secretary General, U.N. ESCOR, Commission on Human Rights, 54th Sess., Agenda Item 20, at 2, U.N. Doc. E/CN.4/1998/99 (1997).

⁵⁴ See Rights of the Child: Status of the Convention on the Rights of the Child, U.N. ESCOR, Commission on Human Rights, 57th Sess., Agenda Item 13, at 2, Annex I, U.N. Doc. E/CN.4/2001/74 (2000).

⁵⁵ See Crime Prevention and Criminal Justice, supra n.50, PP 21, 90.

⁵⁶ See id.

⁵⁷ See id. The countries were Afghanistan, Burundi, Bangladesh, the Democratic Republic of the Congo, India, Iran, Iraq, Malaysia, Morocco, Myanmar, Nigeria (excepting Federal Law), Pakistan, the Republic of Korea, Saudi Arabia, and the United Arab Emirates. See id. at 21 & 48 n.36.

⁵⁸ See Amnesty International, The Death Penalty Worldwide: Developments in 1999 27 tbl. 1 (2000) (AI Index: ACT 50/04/2000); Amnesty International, Democratic Republic of Congo: Killing Human Decency 12 (2000) (AI Index: AFR 62/007/2000) [hereinafter Killing Human Decency].

2000,⁵⁹ and one was recently reported in 2001.⁶⁰ Further, despite the change in law discussed below, Amnesty International reports that there was an execution in Pakistan in November 2001.⁶¹ Even in the United States, there was only one execution of a juvenile offender in 2001 – Gerald Mitchell in Texas, seventeen at the time of his offense.

⁵⁹ See Amnesty International, Children and the Death Penalty: Executions Worldwide Since 1990 (2000) (AI Index: ACT 50/010/2000).

⁶⁰ See United Press International, May 29, 2001 (AI Index: ACT 53/003/2001).

⁶¹ See Amnesty International, Report 2002 (May 28, 2002) (AI Index: POL 10/001/02).

In the six countries besides the United States where juveniles have been executed since 1990, the laws have been changed or the governments have denied that executions of juvenile offenders have taken place. The laws changed in Yemen, as noted above, and Pakistan, where the Juvenile Justice System Ordinance was promulgated in July 2000, banning the death penalty for anyone under eighteen.⁶² Pakistan's President Musharraf, at the end of 2001, therefore commuted to imprisonment the death sentences of 100 young offenders.⁶³ Nigeria, as noted by the United Nations report, has national legislation setting the minimum age for executions to eighteen. With respect to the execution in 1997, the Nigerian government insisted last year to the Sub-Commission on the Promotion and Protection of Human Rights that the offender was well over eighteen at the time of the offense and reiterated that all juveniles convicted of capital offenses have their sentences commuted.⁶⁴ Saudi Arabia adamantly insisted at the Commission on Human Rights that the allegations regarding the execution of a juvenile in 1992 are untrue.⁶⁵ While there is documented evidence that executions took place in Nigeria and Saudi Arabia,⁶⁶ they appear to be isolated

⁶² See Amnesty International, Report 2001 186 (2001) (AI Index: POL 10/001/2001); Juvenile Justice Systems Ordinance 2000, available at http://lhrla.sdnpk.org/link/jul_oct00/juvenile_ordinance.html.

⁶³ Press Release, Amnesty International Irish Section, Pakistan: Young Offenders Taken Off Death Row (Dec. 13, 2001), available at <http://www.amnesty.ie/news/2001/pakistan4.shtml>. This took place after an execution in November, presumably because the 2000 ordinance was not retroactive.

⁶⁴ See Summary Record of the 6th Meeting, U.N. ESCOR, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 52d Sess., 6th mtg. P 39, U.N. Doc. E/CN.4/Sub.2/2000/SR.6 (2000).

⁶⁵ See Summary Record of the 53rd Meeting, U.N. ESCOR, Commission on Human Rights, 56th Sess., 53d mtg. PP 88, 92, U.N. Doc. E/CN.4/2000/SR.53 (2000).

incidents, and the denials by the governments indicate those countries have, in fact, accepted the norm. While executions of juvenile offenders seem to have taken place with more frequency in Iran, that government recently told the Commission on Human Rights that they do not take place.⁶⁷

⁶⁶ See Amnesty International, supra n.58.

⁶⁷ See Press Release, United Nations, Commission on Human Rights Starts Debate on Specific Groups and Individuals (Apr. 11, 2001) (Right of Reply by Representative of Iran).

The Democratic Republic of the Congo (DRC), which is in a civil war, reportedly executed a juvenile offender in 2000 despite an execution moratorium in the country.⁶⁸ The execution was carried out by Military Order Court rather than judicial process.⁶⁹ This year when four juveniles were sentenced to death by Military Order Court, the executions were stayed and the sentences were commuted following appeals from the international community.⁷⁰ Thus, it appears that even during wartime, the DRC military intends to comply with the international norm.

Hence, only the United States has not accepted the norm against the execution of juvenile offenders. Even if the reports were true that executions of juveniles took place not only in the United States but also in Iran and the DRC the adherence to the norm is similar to those noted in the Restatement (Third) as having had attained peremptory status such as rules prohibiting genocide, slave trade and slavery, apartheid and other gross violations of human rights.⁷¹ And while United States courts have found the prohibition against torture to have attained the status of a jus cogens norm,⁷² Amnesty International found that 125 countries violated that norm in 2000 alone.⁷³ In stark contrast, only three countries violated the norm prohibiting juvenile executions in the past year.⁷⁴

⁶⁸ See Killing Human Decency, *supra* n.57 at 12.

⁶⁹ See *id.*

⁷⁰ See World Organization Against Torture, Democratic Republic of Congo: Death Sentences of Five Children Commuted to Life Imprisonment, OMCT Appeals Case COD 270401.1.CC (May 31, 2001).

⁷¹ See Restatement (Third) of the Foreign Relations Law § 102 reporter's note 6 (1986).

⁷² See, e.g., Siderman de Blake v. Republic of Arg., 965 F.2d 699 (9th Cir. 1992); Filartiga v. Pea-Irala, 630 F.2d 876 (2d Cir. 1980); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987).

C. The Norm is Non-Derogable

⁷³ See Amnesty International, supra n.61.

⁷⁴ These countries are the United States, Pakistan and Iran. See supra notes 59-60.

The prohibition against executing juvenile offenders is non-derogable. The ICCPR expressly provides there shall be *no* derogation from Article 6, which prohibits the imposition of the death penalty on juvenile offenders.⁷⁵ The express prohibition, coupled with wide acceptance, as evidenced by treaties, resolutions, national laws, and practice, support the conclusion that the norm is non-derogable.

D. There is No Emerging Norm Modifying this Norm

As to the fourth and final requirement, there is no emerging norm that contradicts the current norm. The prohibition of the juvenile death penalty has been universally accepted by all but one country.⁷⁶ Thus, there is no question that the prohibition against the execution of persons who were under eighteen at the time they committed their crime has attained the status of a jus cogens norm.

II. The Jus Cogens Norm Applies to the Eighth Amendment and Treaty Claims

Not only should this Court consider the jus cogens norm in determining whether the Eighth Amendment proscribes juvenile executions, but also whether the Supremacy Clause applies. U.S. Const. art. VI. Importantly, the peremptory norm is relevant to concluding whether the reservation to

⁷⁵ See ICCPR, art. 4(2).

⁷⁶ See supra Part I.B, p. 27.

Article 6(5) of the ICCPR is void. If it is void, then the treaty provision applies and can be directly enforced by the courts because it is self-executing.

A. Jus cogens Norms are Binding in the United States

As this Court has noted, customary international law is “part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction.”⁷⁷ In this regard, the Restatement (Third) provides that “[i]nternational law and international agreements of the United States are the law of the United States and supreme over the law of the several States” and “[c]ourts in the United States are bound to give effect to international law and to international agreements of the United States.”⁷⁸ A noted commentator has also recognized that “as in the case of treaties, American courts will give effect to the obligations of the United States under customary law; at the behest of affected private parties, courts will prevent violations of international law by the States”⁷⁹ Indeed, less than ten years ago, Justice Blackmun noted,

The early architects of our nation were experienced diplomats who appreciated that the law of nations was binding on the United States. John Jay, the first Chief Justice of the United States, observed . . . that the United States “had, by taking a place among the nations of the earth, become amenable to the laws of nations.” Although the Constitution, by Art. I, § 8, cl. 10, gives Congress the power to “define and punish . . . [o]ffenses against the Law of Nations,” and by Art. VI, cl. 2, identifies

⁷⁷ The Paquete Habana, 175 U.S. 677, 700 (1900); see also Lea Brilmayer, International Law in American Courts: A Modest Proposal, 100 Yale L.J. 2277, 2284 (1991); Richard B. Lillich, The United States Constitution and International Human Rights Law, 3 Harv. Hum. Rts. J. 53, 69-70 (1990); Louis Henkin, International Law as Law in the United States, 82 Mich. L. Rev. 1555, 1561 (1984); Harold Hongju Koh, Is International Law Really State Law?, 111 Harv. L. Rev. 1824 (1998); Jordan J. Paust, Customary International Law and Human Rights Treaties are Law of the United States, 20 Mich. J. Int’l L. 301 (1999).

⁷⁸ Restatement (Third) of Foreign Relations Law § 102 (1986).

⁷⁹ Louis Henkin, Foreign Affairs and the Constitution 223 (1972).

treaties as the supreme Law of the Land,” the task of further defining the role of international law in the nation’s legal fabric has fallen to the courts

As we approach the 100th anniversary of the Paquete Habana, then, it perhaps is appropriate to remind ourselves that now, more than ever, “international law is part of our law” and is entitled to respect of our domestic courts I look forward to the day when the Supreme Court, too, will inform its opinions almost all the time with a decent respect to the opinions of mankind.⁸⁰

⁸⁰ Frank Newman & David Weissbrodt, International Human Rights: Law, Policy, and Process 555 (2d ed. 1996) (citing Justice Harry A. Blackmun, The Supreme Court and the Law of Nations: Owing a Decent Respect to the Opinions of Mankind, Am. Soc’y of Int’l L. Newsl. (Am. Soc’y of Int’l Law, D.C.), Mar.-May 1994, at 1, 6-9).

The principle that customary international law is part of United States law applies with greater force when considering a peremptory norm.⁸¹ As the court in Siderman de Blake v. Argentina, 965 F.2d 699, 715-16 (9th Cir. 1992), noted, courts are obligated to enforce jus cogens norms. The court observed that “[b]ecause jus cogens norms do not depend solely on the consent of states for their binding force, they ‘enjoy the highest status within the international law.’ For example, a treaty that contravenes jus cogens is considered . . . to be void” Id. at 715 (citing the Vienna Convention). Certainly if a treaty is void for violating a jus cogens norm, a reservation is void if it does likewise. Not only should this Court consider the jus cogens norm in determining the parameters of evolving standards under the Eighth Amendment,⁸² it should also be used to assess the validity of the United States reservation.

⁸¹ See, e.g., United States v. Matta-Ballesteros, 71 F.3d 754 (9th Cir. 1995); Hilao v. Estate of Marcos (In re Estate of Marcos, Human Rights Litigation), 25 F.3d 1467 (9th Cir. 1994); Trajano v. Marcos (In re Estate of Marcos, Human Rights Litigation), 978 F.2d 493 (9th Cir. 1992); White v. Paulson, 997 F. Supp. 1380 (E.D. Wash. 1998).

⁸² While the Court in The Paquete Habana noted that customary international law is looked to “where there is no treaty, and no controlling executive or legislative act or judicial decision,” The Paquete Habana, 175 U.S. 677, 700 (1900), that does not preclude courts from considering customary international law or jus cogens norms to determine whether evolving standards of

There is no question, when the reservation is considered in light of the jus cogens norm, and considering that the reservation to the ICCPR was contrary to the express purpose of the treaty, that the reservation is void. The Court must therefore now consider whether the treaty can be applied directly in the United States.

B. Article 6(5) Can Be Enforced by Courts in the United States

decency under the Eighth Amendment include, in the words of the first Chief Justice, “the law of nations.”

If the reservation is void, the question is whether Article 6(5) of the ICCPR can be enforced directly by the courts. The answer requires an analysis of whether the United States is a party to the treaty without the reservation and whether the provision is self-executing. Further, while the Senate declared that the ICCPR was not self-executing, that declaration does not apply in this case where the treaty is being used defensively.⁸³

1. The United States is Still Party to the ICCPR

If the reservation is not valid, the Court must determine whether the United States is bound by Article 6(5). Under the view of the Human Rights Committee, the United States is bound by the provision if the reservation is void.⁸⁴ Furthermore, there is a growing international consensus that an

⁸³ See infra notes 94-97 and accompanying text; 138 Cong. Rec. S4784 & §111(1) (1992).

⁸⁴ See General Comment No. 24, U.N. GAOR, Hum. Rts. Comm., 52d Sess., 1382 mtg. at 11, 12, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).

invalid reservation is severed from the document of ratification.⁸⁵ Moreover, broad general reservations are not favored, particularly in human rights multilateral treaties. Id.

⁸⁵ See Henry J. Bourguignon, The Belilos Case: New Light on Reservations to Multilateral Treaties, 29 Va. J. Int'l L. 347 (1989).

In Belilos Case, 132 Eur. Ct. H.R. (ser. A) (1988), reprinted in 10 Eur. H.R. Rep. 466 (1988), the European Court of Human Rights held that if a non-essential reservation is invalid, it is severed and the country submitting the reservation is still a party to the treaty, bound by the provision without reservation. Id. Whether a reservation is non-essential depends on whether the country's overriding intent was to accept the treaty obligations.⁸⁶ There is nothing to indicate the United States did not have an overriding intention to accept the ICCPR. Because the reservation to Article 6(5) is invalid, its requirements must be applied in the United States as the Supreme Law of the Land.

2. Article 6(5) is Self-Executing and the Non-Self-Executing Declaration Does Not Apply

The Courts have developed the doctrine of “self-executing” treaties to limit the Constitutional rule that treaties are the law of the land. See Foster v. Neilsen, 27 U.S. (2 Pet.) 253, 314 (1829). Under that doctrine, only clauses of treaties that specify duties which directly confer rights may be enforced directly by the courts.⁸⁷ Courts have applied various theories when discussing that doctrine.⁸⁸ Under one test, a self-executing clause is “equivalent to an act of the legislature whenever it operates by itself without the aid of any legislative provision.” Foster, 27

⁸⁶ See Bourguignon, *supra* n.85, at 382.

⁸⁷ The holding in Foster was not in complete conformity with prior decisions upholding the application of treaties. See Stefan A. Riesenfeld & Frederick M. Abbott, The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties, 67 Chi.-Kent L. Rev. 571, 577 (1991). Furthermore, Foster must be read in conjunction with United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833), where this Court admitted error in its first analysis of the treaty in question. Nonetheless, the basic rule remains, that only clauses of treaties that specify duties that directly confer rights may be enforced directly with the courts.

⁸⁸ See Carlos Manuel Vázquez, The Four Doctrines of Self-Executing Treaties, 89 Am. J. Int'l L. 695 (1995).

U.S. (2 Pet.) at 314. Another test looks for the “intent of the parties” reflected in the treaty’s words and, when the words are unclear, in circumstances surrounding the treaty’s execution.⁸⁹

⁸⁹ See Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 937 (D.C. Cir. 1988); Cook v. United States, 288 U.S. 102, 119 (1933); Jones v. Meehan, 175 U.S. 1, 10-23 (1899); Chew Heong v. United States, 112 U.S. 536, 539-43 (1884); Percheman, 32 U.S. (7 Pet.) at 65-68; Foster, 27 U.S. (2 Pet.) at 310-16.

The intent of the parties may be difficult to ascertain when multilateral treaties such as the ICCPR are involved, and it is questionable that the intent of only one of the parties would determine the effect of a particular clause. Multilateral treaties rarely make clear the process by which parties are to incorporate its provisions into national law.⁹⁰ Many countries, such as the United States, incorporate treaties without separate action by the legislature.⁹¹ Indeed, the original purpose of the Supremacy Clause was to alter the British rule that all treaties are “non-self-executing” in order to require the state courts as well as the federal courts to enforce treaties directly.⁹²

Some courts have listed factors they consider in ascertaining intent. Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir. 1985); People of Saipan v. United States Dep’t of Interior, 502 F.2d 90, 97 (9th Cir. 1974). In Frolova, the court fashioned the following factors: the language and purposes of the agreement as a whole, the circumstances surrounding its execution, the nature of the obligations imposed by the agreement, the availability and feasibility of alternative enforcement mechanisms, the implications of permitting a private cause of action, and the capability of the judiciary to resolve the dispute. 761 F.2d at 373.

⁹⁰ See Newman & Weissbrodt, supra n.80, at 586.

⁹¹ See Riesenfeld & Abbott, supra n.87, at 575.

⁹² See Vázquez, supra n.88, at 698-700.

Under the Frolova factors, Article 6(5) of the ICCPR is self-executing. First, the language and purpose of the treaty are clear – to protect the human rights of individuals. Second, Article 3 of the ICCPR imposes an obligation to State parties to provide effective remedies. It provides:

Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

Id.

Third, because the United States has not ratified the Optional Protocol to the ICCPR,⁹³ which provides for an individual right to petition the Human Rights Committee, there are no enforcement mechanisms available. Fourth, since the treaty provides rights to individuals, there is no reason to believe that individuals should not have a private cause of enforcement action. Finally, the judiciary is the most capable institution to address whether the treaty has been violated, as it has traditionally been the means whereby individuals in the United States enforce their constitutional rights.

Furthermore, the prohibitory language of Article 6(5) is clear: “Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age” IPPCR, art. 6(5). Hence, in considering all relevant factors, the provisions of the article must be self-executing.

⁹³ G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 59, U.N. Doc. A/6316 (1966),

Despite the clarity of many of the provisions in the ICCPR, the Senate ratified it with a declaration that it was *not* self-executing. 138 Cong. Rec. S4784, § 111(1) (1992). It is questionable whether the Senate, rather than a court, can make that determination.⁹⁴ Further, such a declaration should not be given effect because it runs counter to the express object and purpose of the treaty.⁹⁵ This Court, however, need not address those points since the legislative history indicates the Senate merely intended to prohibit private and independent causes of action. See 138 Cong. Rec. S4784. In the instant case, Scott Hain is not using the treaty to assert a private cause of action. He is using it defensively, and thus is not invoking a *separate* cause of action.⁹⁶

⁹⁴ See Connie de la Vega & 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, 220 n.33 (1999).

⁹⁵ See Riesenfeld & Abbott, supra n.87, at 608.

⁹⁶ See Quigley, J, Human Rights Defenses in U.S. Courts, 20 Hum. Rts. Q. 555, 581-82 (1998).

The defensive use of a treaty is a judicially accepted means by which litigants have been successful in enforcing treaty provisions without having courts make a determination regarding whether the provisions are self-executing.⁹⁷ Hence, this Court need not address the non-self-executing declaration and can apply Article 6(5) to this case.

C. At a Minimum, Article 6(5) is Helpful for Interpreting United States Standards

⁹⁷ See, e.g., Kolovrat v. Oregon, 366 U.S. 187 (1961) (allowing defensive use of a treaty to escheat proceeding under Oregon law); Ford v. United States, 273 U.S. 593 (1927) (allowing use of a treaty as a defense to personal jurisdiction); Patson v. Pennsylvania, 232 U.S. 138 (1914) (recognizing the defensive use of a treaty in a criminal case, but ultimately holding that there was no conflict between the treaty and state law).

As the United States has ratified the ICCPR, its provisions should help construe the scope of the Eighth Amendment's final clause. International human rights standards have often been useful tools for interpreting laws in the United States.⁹⁸ Indeed, the United States government told the Human Rights Committee that "the courts could refer to the Covenant and take guidance from it."⁹⁹

In conclusion, there is no clearer precept in international law than the prohibition of the death penalty for juvenile offenders. This Court should grant the Petition for Writ of Certiorari to address the very important issues related to faithful compliance to United States treaty obligations as well as international law.

CONCLUSION

This petition should be granted to consider whether the Eighth Amendment prohibits the execution of juvenile offenders. The Court should also address whether the states are bound by the International Covenant on Civil and Political Rights, and whether the doctrine of jus cogens provides independent or further support for a ban on juvenile executions. It is respectfully prayed that this Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be granted.

Respectfully submitted,

⁹⁸ See, e.g., Atkins, 122 S. Ct. at 2249 n.21 (noting the "world community" view against execution of the mentally retarded; Lareau v. Manson, 507 F. Supp. 1177 (D. Conn. 1980); see generally Gordon A. Christenson, Using Human Rights Law to Inform Due Process and Equal Protection Analyses, 52 U. Cin. L. Rev. 3 (1993); Ruth Bader Ginsburg & Deborah Jones Merritt, Affirmative Action: An International Human Rights Dialogue, 1 Rutgers Race & L. Rev. 193 (1999).

⁹⁹ U.N. GAOR, Hum. Rts. Comm., 53d Sess., 1405th mtg., U.N. Doc. HR/CT/404 (1995) (statement of Conrad Harper, Legal Advisor, U.S. Dep't of State).

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