

No.

IN THE SUPREME COURT OF THE UNITED STATES

NAPOLEON BEAZLEY,
Petitioner

v.

GARY L. JOHNSON, Director, Texas
Department of Criminal Justice, Institutional Division,
Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER THE EIGHTH AMENDMENT CRUEL AND UNUSUAL PUNISHMENT CLAUSE BARS THE STATES FROM IMPOSING THE DEATH SENTENCE FOR OFFENSES COMMITTED BY PERSONS UNDER THE AGE OF 18?

WHETHER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS BARS THE STATES FROM IMPOSING THE DEATH SENTENCE FOR OFFENSES COMMITTED BY PERSONS UNDER THE AGE OF 18?

WHETHER TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 37.071, SECTION 2(F)(4), PREVENTS CONSIDERATION OF GOOD CHARACTER EVIDENCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS?

INTERESTED PARTIES

1. Napoleon Beazley, Petitioner.
2. Honorable John Cornyn, Attorney General, representing the State of Texas.

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JURISDICTION

The Fifth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 1291. This Court has certiorari jurisdiction under 28 U.S.C. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Paragraph 2

This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Code of Criminal Procedure § 37.071

Sec. 2(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

- (1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
- (2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.

Sec. 2(c) The state must prove each issue submitted under Subsection (b) of this article beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted under Subsection (b) of this Article.

Sec. 2(e) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b) of this article, it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Sec. 2(f) (4) The court shall charge the jury that in answering the issue submitted under Subsection (e) of this article, the jury: . . . shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

STATEMENT OF THE CASE

Napoleon Beazley was convicted and sentenced to death for the carjacking/murder of John Luttig, an upper-middle class Tyler, Texas, businessman whose son, the Honorable Michael Luttig, sits on the United States Court of Appeals for the Fourth Circuit.¹ The offense occurred in John Luttig's driveway late at night in the presence of his wife, Bobbie Luttig. Beazley and Donald Coleman confronted Mr. and Mrs. Luttig as they got out of their car. According to Donald Coleman, Mr. Luttig attempted to defend himself and Mrs. Luttig, and Beazley shot him twice in the head. Donald Coleman also testified that Beazley fired once at Bobbie Luttig, missing, and yelled at Coleman to shoot her. Coleman did not shoot Mrs. Luttig, who fled to a neighbor's house after the codefendants hastily left the driveway in the Luttig's Mercedes-Benz, damaging the car in the process.

¹ Judge Luttig clerked for the Honorable Justice Antonin Scalia on the United States Court of Appeals, District of Columbia Circuit, from 1982 until 1983. From 1983 to 1985, Judge Luttig clerked and was a special assistant for the Honorable Justice Warren E. Burger, when he was Chief Justice of this Court. *Nomination of J. Michael Luttig to Be an Assistant Attorney General*, <http://bushlibrary.tamu.edu/papers/1990/90051102.html>.

At the time of the offense, Beazley was a 17-year-old African American youth, an outstanding and very popular high school student from Grapeland, Texas, a promising athlete, a participating member in his family's church, with no arrest record and absolutely no history of assaultive behavior.² Many respectable Grapeland citizens (including the Houston County District Attorney) traveled 80 miles to Smith County (Tyler) to testify on Beazley's behalf at the punishment stage, where they repeatedly affirmed that the crime was a shocking aberration in their estimation of Beazley, and maintained that they continued to believe in his essential goodness and potential for reformation.³

² The State produced no evidence that Beazley ever committed any improper act of physical aggression against anyone or anything prior to (and after) the instant offense.

³ The testimony was as follows:

Stanley Skidmore, Principal of Grapeland High School, testified that he had never "known Mr. Beazley to be a bully or mean to anyone," that Beazley had been elected class president of the senior class, that he was voted runner-up "most athletic," that he was runner-up "Mr. Grapeland," and that Beazley was very popular. 59 S.F. 466-69.

Barry Walker, a previous coach and teacher at Grapeland High School, testified about Beazley's lack of any violent behavior, and on redirect, agreed that he still thought there was good in him, after the offense: "Besides being shocked, yes, sir. I -- I thought highly of Napoleon and consider him -- not a friend, because I didn't form friendships with my players, but I considered him someone that I respected in turn." 59 S.F. 488.

Sandra Dillard, teacher at Grapeland High School, testified that she had known Beazley for at least twelve years and that he had always been a "model" and "kind" student. 59 S.F. 492. She added she never had any discipline problem with him, and that "[w]hat has transpired since then and the person I knew in class is like 180 degrees apart." *Id.* In spite of what she knew of the offense, Dillard agreed that "there is something innately good about Napoleon Beazley." *Id.*

Carl Saxon, Grapeland High School teacher and basketball coach, testified that Beazley was never a discipline problem, was never violent toward other students, was always polite and "always seemed to be a happy young man." 59 S.F. 503. He added that Donald Coleman, one of the codefendants, had lied to him. *Id.* at 513.

Tom Dillard, teacher at Grapeland High School, testified that he had known

Beazley for fifteen years, since he was six or seven years old, and had never seen him being violent, mean, or disrespectful to anyone. 59 S.F. 518. He had treated Beazley like his own son and had that kind of relationship with him. *Id.* at 524. Dillard agreed with the State that the facts of the offense, as alleged by the State, would change his opinion of Beazley, but also agreed that "good people can do some horrible things" and that a horrible thing does not "make that person horrible for the rest of his life." *Id.* at 528.

Patrick Laird, a college-student friend of Beazley's, testified that he saw Beazley daily at school, that he never was mean to anyone, that he was always friendly, and that he always got along well with his teachers. 59 S.F. 531-32. He agreed with the State that Beazley's dealing of crack cocaine probably would change his opinion of Beazley, but that, "based upon [his] relationship with [Beazley] and the way [he knew] him," he still felt there was something good about him. *Id.* at 536-38.

Gary Pinkerton, Lieutenant in the Smith County Sheriff's Department, testified that Beazley was a "model prisoner." 59 S.F. 542.

Karla Ripley, Grapeland High School teacher, described Beazley as "popular, well-respected, liked, friendly" and as getting along with everyone. 59 S.F. 551. She described the community of Grapeland as "shocked" and "disbelieving" in its reaction to the news of the offense. *Id.* at 552. Ripley testified that news of Beazley's dealing in crack cocaine did not affect her feeling about him: "[R]ealistically I know how a very good -- a young person can get involved with the wrong crowd and get into stuff that -- before they really knew what was going on." *Id.* at 553. She agreed that, despite the bad things Beazley had done, there was good in him. *Id.*

Cindy Garner, elected District Attorney of Houston County (where Beazley lived; still in office), testified that she knew Beazley and his family, that his mother worked at the Houston County Courthouse, and that she had known Beazley's father for 20 to 25 years because their families had grown up together. 59 S.F. 558-60. She affirmed that, although law enforcement agents regularly reported to her on drug matters, she never heard of Beazley being involved in drug-related activities until after the offense. *Id.* at 561. Had Beazley been a "big-time" dealer, she alleged law enforcement agents should have known, because of the presence of informants. *Id.* at 562. Prior to the offense, Beazley's reputation for being peaceful and law-abiding was "good." *Id.* He always treated her with the "utmost respect." *Id.* at 563.

Jimmy Moffett, a close Beazley high school friend, testified that he never knew Beazley to be mean, violent, or get in a fight. 59 S.F. 593. He affirmed that Beazley got along "great" with everyone, students and teachers. *Id.* at 594. Moffett described Beazley as having admitted to the shooting, as being depressed after the crime occurred, and as "f[eeeling] very bad about it." *Id.* at 595. Moffett

did not believe Beazley when Beazley told him about the offense. "I couldn't see him doing an act like that." *Id.* at 596. Despite the offense and drug-dealing, Moffett testified there was still good in Beazley. On cross-examination, he stated he had seen Beazley with a gun only twice, once with the .45 Haskell used in the offense and once a few years before, and he had never seen him with a gun at school. *Id.* at 605. Moffett said that he did not go to the police when Beazley made his admission, because he did not believe it. *Id.* at 607. He "condemned" Beazley for what he had done, but still considered him a "good friend." *Id.* at 606.

John Stell, coworker with Beazley's father, Ireland Beazley, testified that he had known Ireland "all his life" and Napoleon "all his life." He saw Napoleon "often" as he was growing up, in part because they attended the same Grapeland church, Mount Zion Baptist. 59 S.F. 612. Napoleon Beazley participated in the church in the "junior brotherhood" (a group of "juniors" who worked for the "progress of the church, spirituality and the upkeep of the church"), as an assistant in Sunday School, and a secretary. *Id.* at 612-13. Beazley was "very courteous" to all members of the church. *Id.*

Corina Taylor, a fellow church member with the Beazley family, described Napoleon Beazley as "excellent . . . just real nice." 59 S.F. 623. "He would always help the elders out of the steps on Sunday morning." *Id.* at 624.

Timothy Howard, an eight-year school board member in Grapeland, testified that Beazley was the same age as his own son and that Beazley frequently visited his house during junior high, freshman, and sophomore years. 59 S.F. 628. Never had he known Beazley to be mean to anyone, or have any kind of physical confrontation whatsoever. *Id.* at 628. He had a good reputation for non-violence. *Id.* at 629. Taking into account the dealing in crack cocaine and carrying of arms that Beazley was alleged to have done, Howard testified that he would still consider "there was something good about Napoleon Beazley" based upon "[his] personal experiences with him in relation to the interaction between my son and Napoleon while he was growing up, in relation to the interaction with Napoleon and the other kids within the same class and the time that I have known him, which has been basically ever since the two of them were old enough to associate in school and so forth." *Id.* at 630. He did admit on cross, however, that the Beazley he knew might not have been the one who really existed, in light of all the bad facts. *Id.* at 638.

Tim Howard, Jr., a friend of Beazley's since kindergarten, testified that Beazley got along with everyone well. 59 S.F. 645. "Everybody knew him, and everybody loved him." *Id.* at 646. He was never mean, never got into fights, and never pushed anybody around. *Id.* Howard was not aware of the drug dealing and never saw Beazley carrying guns. *Id.* at 649. He participated with Beazley in baseball, football, and power-lifting. *Id.* at 645. He attended meets with Beazley, where Beazley once dead lifted almost 600 pounds. *Id.* at 653. Beazley could

Beazley's codefendants, Donald and Cedric Coleman, have signed sworn affidavits that they suppressed a "wink and nod" agreement they reached with the Smith County District Attorney's Office that, in return for their testimony against Beazley, the State would not seek the death penalty in their trials. *See* Evan Moore, *Justice Under Fire*, HOUSTON CHRONICLE, June 11, 2000, at 1 (quoting Assistant District Attorney David Dobbs, who prosecuted Beazley, on Smith County dealmaking: "We don't like to price the groceries before we get to the checkout stand."). The prosecutors used the Colemans to get the death penalty against Beazley: the brothers supplied testimony to the effect that Beazley was involved in small-scale drug dealing, premeditated the killing of John Luttig, and threatened them to "keep quiet" after the offense occurred.⁴

squat lift about 550 pounds and bench press over 300 pounds. *Id.* at 654, 656. Howard testified that the allegations of crack dealing and gun toting did not change his good opinion of Beazley. *Id.* at 657.

Beazley's parents testified. Rena Beazley stated that Beazley had "always been a model person" and that "[w]hen this happened, we were in shock, the community, the county. It's out of character for Napoleon." 60 S.F. 698. Beazley testified: "Napoleon and I have a rapport. I mean, he's my baby. He's my flesh and my blood, and I love him, and he made a mistake, and I know if he could redo it, if he could turn back time, he -- I know that if he had known the consequences of the hurt to us as well as the victims -- I know his heart. I know he's sorry for what he's done." *Id.* at 699-700. She described Beazley as the type of person who always helped others. *Id.* at 700. Beazley did not miss school, and he tutored other kids. *Id.* at 701. Beazley learned to give hair cuts, and quite a few boys would come by for him to cut their hair, because he was good at "doing lettering in the hair" which was popular. *Id.* He readily did his household chores. *Id.* at 702.

⁴ The Coleman brothers supplied the only trial evidence describing the offense and Beazley's state of mind in relation to the offense, alleging that Beazley had asserted prior to the crime that he "wanted to see what it [was] like to kill somebody." They also provided the only harmful testimony about post-offense state of mind, alleging that Beazley threatened to hurt them if they told anyone about the crime. The Fifth Circuit adopted the Court of Criminal Appeals' observation that the Coleman brothers' version of the facts revealed "both forethought in committing this crime and a deliberate execution thereof. Moreover, they reveal not just the intention to commit an offense, but a dangerous self-indulgent drive to kill for the sake of killing; just to see how it felt. [Beazley's] self-indulgent motivation further reveals a wanton disregard and disrespect for human life. His remorseless comments and behavior after the murder further

The prosecutors exercised their peremptory challenges to create an all-white jury and lauded the (very evident) virtues of the white victim, exhorting the jury to realize that the trial was all about the victim, while repeatedly describing the young African American defendant as a lurking animal.⁵ 40 S.F. 43-44, 83; 55 S.F. 6; 61 S.F. 937-47. One of the jurors subsequently told a defense investigator, "The nigger got what he deserved." Another juror who participated in sentencing was a long-time employee of the co-incorporator of John Luttig's principal business venture, Clemco Inc., a fact that the witness did not disclose in voir dire and may have been suppressed by the prosecution.⁶

The State that has condemned Beazley to death has committed one-quarter (7) of all executions of juvenile offenders since 1990, one-half of all such executions in the United States (14). AMNESTY INTERNATIONAL, CHILDREN AND THE DEATH PENALTY, ACT 50/010/2000, December 14, 2000; HUMAN RIGHTS WATCH, WORLD REPORT 2001 ("Children in Conflict with the Law"; www.hrw.org/wr2k1/children/child4.html). Only Iran may have matched that number of documented executions in the same time frame. Texas appears to have tied Pakistan for the number of juvenile offenders it has placed on death row (31), although Pakistan now has enacted legislation barring their execution. *See infra*. Texas' "juvenile" death row is racially imbalanced: 77 percent are from racial minorities (11 African Americans, 12 hispanics, 1 asian, and 7 whites). Texas Department of Criminal Justice, <http://www.tdcj.state.tx.us/stat/offendersondrow.htm>.

show that his desire to kill continued unabated." *Beazley*, 242 F.3d at 254-55. The Colemans' testimony upon which these conclusions are solely based is inherently suspect. *Bruton v. United States*, 391 U.S. 123, 136 (1968).

⁵ Undersigned counsel for Beazley suggested in a letter to counsel for Respondent, Attorney General John Cornyn, that he consider confessing error over the use of race in this case. *See Saldano v. Texas*, 530 U.S. 1212 (2000) (Mem.) (noting judgment vacated and case remanded to Court of Criminal Appeals in light of confession of error by the "Solicitor General of Texas").

⁶ The District Attorney has denied by affidavit that he knew the juror worked for John Luttig's business partner.

Ironically, Texas law protects juveniles in almost every area but criminal responsibility.⁷ Even though the Texas Penal Code allows the death penalty to be imposed upon 17-year-olds, and prosecutors liberally seek the death penalty in such cases, it is not clear that the public accepts it. A state-wide poll in February 2001 revealed only 34 percent of Texas respondents (and only 25 percent of Harris County respondents) favored the death penalty for juvenile offenders. Steve Brewer, *Juvenile Cases: Just 1 in 4 in County Thinks Death Appropriate*, HOUSTON CHRONICLE, February 7, 2001. In the Texas legislative session that ended last month (May 2001), the House of Representatives passed a bill (House Bill 2048, joint authored by Rep. Lon Burnam, Fort Worth, and Reps. Senfronia Thompson, Harold Dutton, and Sylvester Turner, Houston) that would have raised the eligibility age for the death penalty in Texas to 18. The bill subsequently was poised to receive a vote on the floor of the Texas Senate as an amendment to an omnibus juvenile justice bill authored by Rep. Toby Goodman (Republican chair of the House Juvenile Justice Committee) and sponsored in the Senate by Senator Royce West (Dallas). The Governor's office intervened, threatening to veto any bill with House Bill 2048 attached to it.⁸

⁷ See TEX. CIV. PRACTICE & REMEDIES CODE § 129.001; TEX. PROBATE CODE § 57; Texas Attorney General Opinion 1975, No. H-546; TEX. ELECTION CODE § 11.002; TEX. FAMILY CODE § 41.001; *Smith v. Merritt*, 940 S.W.2d 602 (Tex. 1997). Texas law explicitly deems persons under 18 years old to be "legal infants," unable to execute a contract or will, to marry without permission, to vote, to drink, to serve on a jury, or to be held solely liable (apart from parents) for a tort act. The Texas age of eligibility for adult civil responsibility and liability is 18, yet criminal responsibility currently is set at 17, and a child who could not be held fully liable for his tort can be executed for a crime. Even though Texas law does not deem a 17-year-old fully responsible for his own tortious actions, since the 19th Century it has seen fit to kill him for criminal ones. See *Walker v. State*, 13 S.W. 860 (Tex. App. 1890). This statutory arrangement suggests that the nexus between the punishment imposed and the defendant's blameworthiness in Texas is not proportional. See *Stanford v. Kentucky*, 492 U.S. 361, 382 (1989) (O'Connor, J., concurring in part and concurring in judgment).

⁸ Personal conversations between counsel for Beazley and office of a bill sponsor. Undersigned counsel again communicated with Mr. Cornyn regarding the pending legislation, and received a response in which Mr. Cornyn declined to support the bill. See also *Penry v. Johnson (Penry II)*, 2001 WL 589086, at fn* (noting that, as the opinion went to press, Governor Perry was "still in the process of deciding whether to sign" a Texas bill that would bar execution of persons with mental retardation).

Goodman's and West's bill passed the Senate without amendment, and House Bill 2048 died without a Senate vote.

This Court last visited the question of the constitutionality of the juvenile death penalty in 1988 and 1989 in two plurality opinions with Justice O'Connor supplying a pivotal concurrence. *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Stanford v. Kentucky*, 492 U.S. 361 (1989). This Court held that the execution of persons who were 16 or 17 at the time of offense did not constitute cruel and unusual punishment. In *Thompson*, this Court embraced the views of "other nations that share our Anglo-American heritage" and "leading members of the Western European community" as indicators of the evolving standards of decency, noting especially that juvenile executions were prohibited in the Soviet Union. 487 U.S. at 830. In *Stanford*, this Court rejected the sentencing practices of other countries as relevant to interpretation of our "cruel and unusual punishment" clause. 492 U.S. at 370 n.1.; *id.* at 382 (O'Connor, J., concurring in Part II of plurality opinion).

This Court should revisit the Eighth Amendment issue in light of dramatic international changes in the practice of the juvenile death penalty that have occurred since 1989. When considering the Eighth Amendment and Covenant claims below, this Court should take into consideration the fact that a few states within the United States are poised to become the only remaining organized political entities in the world that continue to execute juvenile offenders under some claim of legal right. It should note that a fair number of state judges of good will have wished to address this problem and have found their hands tied without this Court's guidance. *Domingues v. State*, 961 P.2d 1279, 1280 (Nev. 1998), *cert. denied*, 120 S. Ct. 396 (Nov. 1, 1999) (Springer, C.J., dissenting) ("[T]he United States, at least with regard to executing children, is a 'party' to the treaty, while at the same time rejecting one of its most vital terms."); *Brennan v. State*, 754 So. 2d 1, 14 n.18 (Fla. 1999) (Anstead, J., specially concurring) (noting that the United States is a party to the Covenant, the Covenant bans the death penalty for offenders under the age of 18, and that "nearly every country in the world" honors that ban); *Ex parte Burgess*, 2000 WL 92254, at *9 (Ala. Jan. 28, 2000) (Houston, J., concurring in result)

(individual judge doubting that the reservation may apply to the states and praying that he is "not committing an unforgivable act" by joining the majority in denying a Covenant claim). Alabama Supreme Court Justice Houston, puzzled by this Court's denial of review in *Domingues*, has queried, "How much more substantial can a question be than whether a person can be executed for a crime committed in his youth, when the ICCPR, a treaty to which the United States is a [Party], makes such an execution facially illegal?" *Ex parte Burgess*, 2000 WL 1006958, at *13 (Houston, J., concurring in judgment affirming conviction, reversing as to sentence, and remanding on another issue).

ARGUMENT/REASONS FOR GRANTING THE PETITION

1. By holding that the Eighth Amendment does not prohibit application of the death penalty to juvenile offenders, the Fifth Circuit has decided an important federal question that should be revisited by this Court.

The Fifth Circuit denied relief on this issue, asserting that it was procedurally defaulted (because not presented to the state courts) and relying on this Court's decision in *Stanford*, 492 U.S. at 370-73. *Beazley*, 242 F.3d at 268-69; *see also* 265-66. The Court appeared to accept Beazley's argument that the "miscarriage of justice" exception to procedural default would apply if age as a condition for eligibility for the death penalty had not been satisfied. *Id.* at 265-66 (citing *Sawyer v. Whitley*, 505 U.S. 333, 345 & n.12 (1992)). Beazley argued to the federal district court and Fifth Circuit that a *Teague* exception provided further support for applying the "miscarriage of justice" exception. *See Beazley*, 242 F.3d at 265 (erroneously finding that the argument had not been made below).⁹ The finality and comity concerns underlying the procedural default doctrine have no force when the constitution or federal law (a treaty for example) "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))

⁹ Beazley pointed out in his Reply Brief that the argument had been made to the district court in his request for COA and another pleading. The Fifth Circuit's review on the legal issue was *de novo*, in any event, and the Court should have fairly considered the issue.

(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").

Federal constitutional, treaty, and statutory law is superior to all conflicting Texas judgments, orders, or statutes. Beazley 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) (1994). He asserts that, through the Supremacy Clause, the Eighth Amendment and Article 6(5) of the International Covenant on Civil and Political Rights individually void § 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).

In a well-known footnote, Justice Scalia wrote for the *Stanford* lead plurality, "We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant" to Eighth Amendment analysis. *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989). Those sentencing practices become relevant, however, when they are considered as producing or reflecting the "law of nations" (customary international law). The Restatement defines customary international law as "result[ing] from a general and consistent practice of states which is followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (2) (1987). Considered in isolation,

the sentencing practices of *other countries* clearly are not our practices nor our law, but our Constitution makes the "law of nations" a part of our law. Where the "consistent practice" of other nations results from and is accompanied by a "sense of legal obligation," as indicated for example by adherence to treaties encoding the practice, it becomes not merely practice but law that the framers intended to bind our courts and undergird our interpretation of our constitution.

The *Stanford* footnote cannot be interpreted as completely rejecting international standards as a component of Eighth Amendment jurisprudence. If it did, it would erroneously reject the original intent of the founders who considered our nation bound to the "law of nations." This intent is reflected in Article I, Section 8, Clause 10, of the Constitution which gives Congress the power to define and punish offenses against the Law of Nations. It is found again in the Supremacy Clause, Article VI, Clause 2, which deems international treaties to be part of the "supreme Law of the Land." This Court's early cases confirmed a purpose to incorporate international laws and standards into our own jurisprudence. Chief Justice Jay asserted, for example, in *Chisholm v. Georgia*, 2 Dall. 419, 474 (1793), that the United States "had, by taking a place among the nations of the earth, become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed." This Court held in 1804 that Congress should never act in a way that violates the law of nations, if an alternative exists. *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804).¹⁰ Our own "evolving standards of decency" likewise should not be construed as at odds with the "law of nations" if they may be viewed as commensurate. Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L. J. 39, 47-48 (1994) ("There can be no question that the law of nations prohibits the execution of juvenile offenders").

Out of deference to the "international standard," when adopting the International

¹⁰ In the 1880s, this Court also articulated the now well-established rule that treaties have the same status as federal law and that, if they conflict, the one enacted more recently controls. *Head Money Cases*, 112 U.S. 580 (1884); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *The Chinese Exclusion Case*, 130 U.S. 581, 600, 602-03 (1889).

Covenant, the Senate Foreign Affairs Committee asserted that, despite the reservation to Article 6, the States should consider raising the eligibility age for the death penalty to 18:

The Committee recognizes the importance of adhering to internationally recognized standards of human rights. Although the U.S. record of adherence has been good, there are some areas in which U.S. law differs from the international standard. For example, the Covenant prohibits the imposition of the death penalty for crimes committed by persons below the age of eighteen but U.S. law allows it for juveniles between the ages of 16 and 18. In areas such as these, **it may be appropriate and necessary to question whether changes in U.S. law should be made to bring the United States into full compliance at the international level.** However, the Committee anticipates that changes in U.S. law in these areas will occur through the normal legislative process.

SENATE COMMITTEE ON FOREIGN RELATIONS REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 31 I.L.M. 645, 650 (May 1992). Congress promptly set the federal death penalty eligibility age at 18. 18 U.S.C. § 3591 (b) (enacted Sept. 13, 1994); 21 U.S.C. § 848(l) (enacted Sept. 13, 1994). A commentator has noted, indeed, that "[i]f the United States were a unitary state, we would likely have no death penalty for juvenile offenders." Peter Spiro, *The States and International Human Rights*, 66 *FORDHAM L. REV.* 567, 575 (1997).

Texas' and other states' failure to follow the Senate Committee's advice has led to the result that a few states within the United States and Iran have become the only ongoing documented executioners of juvenile offenders in the world. When tied to universal adherence to the United Nations Convention on the Rights of the Child, this fact should lead to the inexorable conclusion that a peremptory norm of international law has emerged barring the death penalty for persons under 18 at the time of the offense. "A peremptory norm of general international law 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." *VIENNA CONVENTION ON THE LAW OF TREATIES*, art. 53, 1155 U.N.T.S. 331, 352 ("Treaties Conflicting with a Peremptory Norm of General International Law (*Jus Cogens*)"). The norm is established over dissent from "a very small number" of states. *RESTATEMENT (THIRD) OF THE FOREIGN*

RELATIONS LAW § 102, and reporter's note 6 (1986).

All nations (except the United States and Somalia, which has not had a central national government since 1991)¹¹ have adhered to the Convention on the Rights of the Child without reservation to Article 37(a), which prohibits the death penalty for "offenses committed by persons below 18 years of age." REPORT OF THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS, MISSION TO THE UNITED STATES OF AMERICA, Jan. 22, 1998, E/CN.4/1998/68/Add.3, para. 25; CONVENTION ON THE RIGHTS OF THE CHILD, U.N. Doc. A/4354 (1959), at art. 37(a). Since 1990, out of the 193 nations in the world, only seven have executed juvenile offenders: the United States (14), the Democratic Republic of the Congo (1 in 2000; military), Iran (4: 1 in 1990, 2 in 1992, 1 in 1999; possible execution in 2001), Nigeria (1 in 1997), Pakistan (1 in 1992, 1 in 1997), Saudi Arabia (1 in 1992), and Yemen (1 in 1993). AMNESTY INTERNATIONAL, CHILDREN AND THE DEATH PENALTY, ACT 50/010/2000, December 14, 2000; HUMAN RIGHTS WATCH, WORLD REPORT 2001 ("Children in Conflict with the Law"; www.hrw.org/wr2k1/children/child4.html). **Seven** were carried out by Texas. CHILDREN AND THE DEATH PENALTY, *supra*. Except for Iran, apparently, these offenders of the international norm have all instituted reforms:

In July 2000, Pakistan abolished the death penalty for persons under 18 at the time of offense. *Id.*; WORLD REPORT 2001, *supra*.

Yemen also abolished the death penalty for juvenile offenders in 1994. WORLD REPORT 2001, *supra*.

In its initial report to the Committee on the Rights of the Child, Saudi Arabia stated that "capital punishment cannot be imposed on children who have not attained the age of majority in accordance with Islamic law." CHILDREN AND THE DEATH PENALTY, *supra*. Saudi Arabia subsequently has asserted that it has no juvenile death penalty. Summary Record of the Human Rts. Comm., 56th Sess., paras. 88, 90, UN Doc. E/CN.4/2000/SR.53 (June 29, 2000).

¹¹ Somalia has not had a central government since 1991. Oral Statement by Mona Rishmawi, Independent Expert Appointed by the Secretary General on the Situation of Human Rights in Somalia, April 22, 1999, U.N. Commission on Human Rights, Fifty-Fifth Session, OHCHR/99/04/22, E/CN.4/1999/103, E/CN.4/1999/103.Add.1.

Nigeria has reported that national legislation now prohibits the death penalty for offenses committed by persons under age 18. Summary Record of the 6th Mtg. of the Sub-Comm. on the Promotion and Protection of Human Rights, 56th Sess., paras. 39-40, UN Doc. E/CN.4/Sub.2/2000/SR.6 (Sept. 5, 2000).

The 2000 Congo military execution took place under circumstances without appeal and with immediate execution. WORLD REPORT 2001, *supra*. The Congo President had pardoned a 13-year-old child soldier in 1998. *Id.* Human Rights Watch recently intervened to stop the execution of 4 other death sentenced child soldiers in the Congo. <http://www.hrw.org/press/2001/05/congo-ltr-0502.htm>.

Iran has adopted the Convention on the Rights of the Child. Iran also represented to the United Nations Commission on Human Rights on April 11, 2001, that it no longer executed juvenile offenders. United Nations Commission on Human Rights, 57th Session, 11 April 2001, Evening and Night. However, the Iran News Agency recently reported that on May 29, 2001, an 18-year-old was hung for a crime he committed when 16. *Iran Hangs 18-Year-Old for 1999 Killing*, WASHINGTON TIMES, May 30, 2001, at A10.

Peremptory norms are recognized regarding systematic racial discrimination and gross violation of human rights. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702. At present, of the 31 persons on Texas' death row who were under 18 at the time of offense, 11 are African American, 12 are hispanic, 1 is asian, and 7 are white (a 77 percent minority population). *See* Texas Department of Criminal Justice (<http://www.tdcj.state.tx.us/stat/offendersondrow.htm>). The *size* of Texas' **juvenile** death row may be a gross violation. About twenty-two juveniles have been added to Texas' death row since January 1995. *Id.* Madeline Albright signed the Child Convention with no reservation to Article 37(a) in February 1995, binding Texas to respect Article 37(a). VIENNA CONVENTION ON THE LAW OF TREATIES para. 18 (signatory is bound to refrain from acts defeating the object and purpose of treaty). Texas has been prolific in its rather solitary divergence from the norm.

The world-wide trends culminating in steady progress toward a peremptory norm (*jus cogens*), without a true competing norm, point to the need that *Stanford* be revisited. By steadfastly insulating ourselves from the universal norm, we have dismayed our allies and invited the calumny of prolific human rights abusers. Embassy of the People's Republic of China, Human Rights Records in the United States, March 1, 1999, www.china-

embassy.org/eng/7073.html ("The United States is one of only six remaining countries in the world that imposes the death penalty on juveniles, with 25 states violating the International Human Rights Convention and maintaining the death penalty for minors.").

Our Eighth Amendment jurisprudence must be interpreted consistently with our treaty obligations. *See e.g., Stanford*, 492 U.S. at 390 (Brennan, J., dissenting) (considering "three leading human rights treaties ratified or signed by the United States explicitly prohibit[ing] juvenile death penalties"); Justice Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L. J. 39, 48-49 (1994) ("Under the principles set forth in the Paquete Habana, interpretation of the Eighth Amendment, no less than interpretations of treaties and statutes, should be informed by a decent respect for the global opinions of mankind."). We must take into account the binding effect of our country's *signatures* to the Convention on the Rights of the Child and the American Convention on Human Rights¹² without reservation to their bar on the death penalty for juvenile offenders. *Stanford* also should be revisited if this Court agrees that the United States' reservation to Article 6(5) of the International Covenant, *infra*, is invalid and void, but also determines that the Senate's declaration on non-self-execution prevents individuals from accessing the courts to lay claim to their Covenant rights.

2. By holding that the United States' reservation to Article 6, Paragraph 5, of the International Covenant on Civil and Political Rights is valid and that Beazley has no private right of action, the Fifth Circuit has decided important federal questions that have not been, but should be, settled by this Court.

a. The reservation to Article 6, Paragraph 5 is invalid and void. The Fifth Circuit suggested that this issue might meet the "actual innocence of the death penalty" exception for procedural default, *Beazley*, 242 F.3d at 265-66, but refused to grant COA by undertaking a novel and unsustainable merits construction of statements made by the United Nations Human Rights Committee [HRC], the monitor of treaty compliance set up under the terms of the

¹² AMERICAN CONVENTION ON HUMAN RIGHTS, Nov. 22, 1969, art. 4(5), I.L.M. 673, 676.

International Covenant on Civil and Political Rights.¹³ INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS arts. 40, 41 (1966), 6 I.L.M. 368, 370 (entered into force Mar. 23, 1976) (signed by U.S. in 1977; ratified by U.S. in 1992).

This Court has seen this issue in *Domingues v. Nevada*, 120 S. Ct. 396 (1999) (Mem.), and received a brief on it from the Solicitor General. *Domingues v. Nevada*, 119 S. Ct. 2044 (1999) (Mem.); see *Domingues v. State*, 961 P.2d 1279 (Nev. 1998). The Solicitor General's misinterpretation of international treaty law as it has evolved in regard to reservations in multilateral human rights treaties may have been a cause for this Court's denial of review in *Domingues*. This point will be developed *infra*.

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."

¹³ This construction had not been argued at any time by Respondent, nor raised by the district court. In fact, Respondent had conceded that the Human Rights Committee interpreted treaty law to hold that the United States was bound to Article 6(5) despite the invalid reservation. Respondent's Brief at 27. Respondent also did not challenge the Committee's authority to decide whether parties' clarifications and reservations had any effect. *Id.* at 28.

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 6.¹⁴

In its first report on United States compliance, the HRC found the United States' reservation to Article 6(5) of the ICCPR 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*]. Contrary to the Fifth Circuit opinion, it cannot be doubted that the HRC found the reservation invalid, for the HRC added 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

¹⁴ Neither Respondent nor the courts below have offered any substantive justification. The Senate justified the reservation on the grounds that prompt ratification would not be obtained if the non-complying states had to raise their eligibility ages first. 31 I.L.M. 645, 650 (1992). This does not approach a remotely acceptable justification for derogation (e.g., national emergency). In fact, the United States jointly sponsored a General Assembly resolution in 1980 that Article 6 established a "minimum standard" for all member states, whether or not they had adopted the ICCPR. G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980).

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 Beazley 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. Slip Op. at 33. The 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. 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." Slip Op. at 35. 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 Texas Penal Code 8.07(d) (1994) 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.¹⁵

2. The panel's finding that the reservation is valid and non-severable is diametrically opposed to the United Nations Special Rapporteur's interpretation.¹⁶

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.¹⁷

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.¹⁸

¹⁵ Eleven have expressly opined that the reservation is 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 panel completely avoided addressing their opinions. Italy, for one, has declared that the "reservation is **null and void** since it is incompatible with the object and purpose of art. 6 of the Covenant." *Id*; see also Amicus Brief by Bar of England and Wales filed in Fifth Circuit.

¹⁶ 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).

¹⁷ 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[ving] 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. Pell's and the Eleventh Circuit's understanding, an *invalid* reservation would not be binding upon the courts through the Supremacy Clause.

¹⁸ 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.

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 Solicitor General argued in *Domingues* that the reservation was "valid as a matter of treaty law" based upon "state practice." "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." Brief for the United States as Amicus Curiae, *Domingues v. Nevada*, No. 98-8327, at 9. 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

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

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 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) (**Appendix C**). 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

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.

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.").

b. The non-self-execution declaration is no bar to relief. The Bush Administration stated that "for reasons of prudence" it would "recommend including a 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 ignored Beazley's argument that a private right of action could be found

for ICCPR claims in extant implementing statutes.²² *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

²² 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). The Court also relied upon two opinions that endorse finding a private right of action for ICCPR claims in an enabling statute. *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 do not consider existing implementing legislation. The Court caricatures *Beazley's* argument as "the Senate, in ratifying the treaty, voided its own attached declaration," and then calls it "nonsensical." *Id.* Instead, *Beazley* developed a much more worthy argument, especially in his Reply Brief at pages 10-17, which started out with the informed observation that the doctrine of self-execution "masks a variety of issues." Reply at 11 n.7; 4 R. 1034 (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, 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").

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 the Fifth Circuit opinion in this case were to stand, denying 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. § 1350.²³

c. Reasonable jurists should rely upon the HRC's 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 holds 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 adds that courts have only "looked to the HRC for guidance, not to void an action by the Senate." *Id.* This is true, but the Court'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

²³ In addition, the Fifth Circuit panel ignored *Beazley's* assertion that the Covenant could be used as a defense, even if it were not self-executing, because a treaty always nullifies inconsistent state law. *Kolovrat v. Oregon*, 366 U.S. 187, 197 (1961) (defense to escheatment of property); *Patson 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."). If this Court were to find the reservation valid, but the declaration to bar review, it should still send a message to Texas, perhaps through the Eighth Amendment, that its juvenile death penalty violates the ICCPR.

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.

d. COA and certiorari review should be granted on the ICCPR issue. COA should issue for further development of this issue, which certainly merits encouragement to proceed further. *Slack v. McDaniel*, 120 S. Ct. 1595, 1603-04 (2000). As Alabama Supreme Court Justice Houston, puzzled by this Court's denial of review in *Domingues*, has queried, "How much more substantial can a question be than whether a person can be executed for a crime committed in his youth, when the ICCPR, a treaty to which the United States is a [Party], makes such an execution facially illegal?" *Ex parte Burgess, supra*.

3. By holding that the definition of "mitigating evidence" in the jury charge does not preclude a Texas capital jury from considering a defendant's good character and community approbation evidence, the Fifth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court.

One informed witness after another testified at Beazley's punishment phase about his prior good character. The jury could not consider this copious evidence as grounds for a lesser sentence, however, because it was not relevant to Beazley's "moral blameworthiness" for the offense.

Beazley's good character evidence was blocked from the jury by the statutory instruction defining "mitigating evidence" as evidence that tends to reduce the defendant's "moral blameworthiness" for the crime. This violated Beazley's constitutional right to have his jury consider all evidence relevant to mitigation of the death sentence. *Lockett v. Ohio*, 438 U.S. 586, 604, 608 (1978) (holding that the "Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record **and** any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.") (emphasis added).

In accord with Sections 2(b)(1), 2(b)(2), and 2(e) of Article 37.071 of the Texas Code of Criminal Procedure, Beazley's jury was charged with making findings on the three special issues pertaining, in order, to future dangerousness, parties liability, and "mitigating circumstances." Trans. at 555 ff. The court instructed the jurors that "[i]n deliberating on Special Issue No. 1 and Special Issue No. 2" (future dangerousness and parties), they were to "consider all the evidence . . . including evidence of the defendant's background or character or the circumstances of the offense that militates for or militates against the imposition of the death penalty." *Id.* The jury was instructed that "mitigating circumstances" (those "militating" against the death penalty) were limited to "evidence that a juror might regard as reducing the defendant's moral blameworthiness" for the offense. Trans. at 560 (TEX. CODE CRIM. PROC. ART. 37.071 § (F)(4) (1995)).

Good character evidence is relevant to mitigation of punishment. *Franklin v. Lynaugh*, 487 U.S. 164 (1988). The good character of the defendant, however relevant to mitigation of punishment, cannot make the defendant less "morally blameworthy" for the offense. Beazley's prosecutors insisted, in fact, that the jury could only consider his good character evidence as **confirming** and **increasing** his "moral blameworthiness" for the offense (61 S.F. 889; 950).²⁴ The statutory definitional instruction precludes jurors from considering matters that may be relevant to punishment but are not relevant to the defendant's moral blameworthiness as grounds for answering "no" to either of the first Two Special Issues. This Court reversed Sandra Lockett's death sentence under similar circumstances. *Lockett*, 438 U.S. at 608.

The unconstitutional *Lockett* statute matches Beazley's, instructing the sentencer that (once the defendant has been found death-eligible) "the death penalty must be imposed unless, considering "the nature and circumstances of the offense and the history, character, and condition of the offender,"²⁵ the sentencer finds (one of three statutory) mitigating circumstances that **bear only on blameworthiness for the offense**. *Lockett*, 438 U.S. at 607. The Ohio statute operated in the same way as the Texas statute to render much of the defendant's character and background evidence irrelevant to her punishment. *Lockett*, 438 U.S. at 608. The current Texas instructions prevented consideration of Beazley's good character and community approbation evidence. The mitigating evidence instruction that restricts such evidence to facts that lessen the defendant's moral blameworthiness for the offense automatically renders good character evidence irrelevant to the future dangerousness special issue. When the jury is instructed that it cannot consider mitigating evidence unless it is deemed to lessen the defendant's moral culpability for the offense

²⁴ The argument by the prosecution highlights how the Section 2(f) instruction on moral blameworthiness for the offense put the good character evidence beyond the jury's reach. In order to have considered the mitigating effect of the good character evidence as it pertained to future dangerousness, the jury would have had to ignore the § 2(f) definitional instruction, thus providing a "false answer." *Penry II*, 2001 WL 589086, at *13.

²⁵ This language parallels Texas Special Issue Three. TEX. CODE CRIM. PROC. ART. 37.071, SEC. 2(E) (1995).

(which the evidence at issue does not), the jury cannot believe it may apply the mitigating evidence to the future dangerousness issue any more than any other punishment issue.

"Broad interpretation" by the Texas Court of Criminal Appeals of the **current Texas statute** -- unlike the **old** statute upheld in *Jurek v. Texas*, 428 U.S. 262 (1976) -- cannot save it from constitutional infirmity. *Lockett*, 438 U.S. at 607. The Texas statute was altered pursuant to this Court's determination in *Penry I* that the *Jurek* statute could not always provide the sentencer a reliable means to give mitigating effect to the defendant's evidence. Ironically, the current statute, like the statute in *Lockett*, **guarantees** consideration of a very limited range of mitigating circumstances, while precluding consideration of others such as good character and community approbation evidence. The Texas statutory sentencing instructions now practically limit "mitigating evidence" to matters that might affect mental capacity at the time of the offense. *See Lockett*, 438 U.S. at 607-08 (OHIO REV. CODE ANN. § 2929.-04(B)(3) (1975)).

The **new** punishment statute includes the Mitigation Special Issue and an added "definition" of "mitigating evidence" to address *Penry I*. TEX. CODE CRIM. PROC. art. 37.071, § 2 (e) & (f)(4). These **new** elements create a fundamentally different problem than that encountered under the old statute and, thus, precedent regarding the old statute does not control. *E.g. Crank v. Collins*, 19 F.3d 172, 175 (5th Cir. 1994); *Nethery v. Johnson*, 993 F.2d 1154, 1161 (5th Cir. 1993). The issue is not whether the evidence of Beazley's good character was beyond the scope of the statutory issues requiring an **additional instruction**, but whether the jury would have understood **the existing statutory instruction** to *preclude any* consideration of a certain kind of relevant mitigating evidence offered by the petitioner. *Boyde v. California*, 494 U.S. 370, 386 (1990). A merits holding under this latter issue would not create a "new rule," but would merely apply the time-worn rules of *Lockett* and *Boyde*.

The Court of Criminal Appeals decision regarding the instant claim was contrary to and unreasonably applied U.S. Supreme Court precedent. *Lawton v. State*, 913 S.W.2d 542, 555-56 (Tex. Crim. App. 1995) (cited by *Beazley, supra*, at 15 n.7). Interpreting *Penry* as holding that "[u]nderlying *Lockett* and *Eddings* is the principle that punishment should be directly related to

the personal culpability of the criminal defendant," the Court held that "our statutory definition of mitigating evidence is congruent with that of the United States Supreme Court." *Lawton*, 913 S.W.2d at 555-56. The Court failed, first of all, to recognize that *Penry* was analyzing the way in which a **superceded** Texas punishment phase special issue restricted jurors' ability to fully consider certain mitigating evidence. See Carol S. Steiker and Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 393, 395 (1995). Second, the Court misconstrued *Penry* as announcing a broad rule, when it really was concerned with the Texas jury's ability to give effect to mitigating evidence which, in the particular case, was relevant to the "personal culpability of the defendant." *Penry* cannot reasonably be read as having overturned *Woodson*, *Lockett*, *Eddings*, *Hitchcock*, or *Skipper*, by restricting the jury's ability to consider mitigating evidence only to evidence relevant to moral blameworthiness. That, however, is precisely what the Texas Legislature did when it incorporated the definition of "mitigating circumstances" in an attempt to meet the requirements of *Penry*. The Texas Court of Criminal Appeals perpetuates this unreasonable interpretation in *Beazley*'s case.

The Court of Criminal Appeals essentially applies the wrong rule to reach an unreasonable result. *Williams v. Taylor*, 120 S. Ct. 1515 (2000). In *Graham v. Collins*, 506 U.S. 461 (1993), and *Johnson v. Texas*, 509 U.S. 350 (1993), this Court significantly distinguished the *Lockett/Boyde* line of cases from the analysis of Texas' old death penalty statute conducted in *Penry*:

In [the *Lockett/Eddings* line of] cases, the constitutional defect lay in the fact that relevant mitigating evidence was placed beyond the effective reach of the sentencer. In *Lockett*, *Eddings*, *Skipper*, and *Hitchcock*, the sentencer was precluded from even considering certain types of mitigating evidence. In *Penry*, the defendant's evidence was placed before the sentencer but the sentencer had no reliable means of giving mitigating effect to that evidence.

Johnson v. Texas, 509 U.S. 350, 366 (1993).

Texas' new statutory instructions on mitigating circumstances, like those recently

evaluated by this Court in *Penry II*, undermine the jury's ability to follow its oath. *Penry v. Johnson (Penry II)*, 2001 WL 589086 (June 4, 2001), at *12. Beazley's good character evidence, unlike the evidence at issue in *Penry*, "fit within the scope of" the future dangerousness special issue. *Id.* However, allowing consideration of that evidence through the future dangerousness issue would have required the jury to "ignor[e] the command of" its "mitigating circumstances" definitional instruction. *Id.* Concomitantly, "answering the [future dangerousness] special issue[] in the mode prescribed by the [definitional] instruction necessarily meant ignoring the [evidence of good character]." *Id.* One of Beazley's jurors who wanted to answer the future dangerousness issue "falsely" to give effect to his mitigating evidence, despite the definitional instruction, would have had to violate their oath to render a "true verdict." *Id.* (citing TEX. CODE CRIM. PROC. art. 35.22).

The Fifth Circuit adopts the Texas Court of Criminal Appeals' position that there are **two** competing statutory definitions of "mitigating circumstances" given capital jurors in their sentencing instructions and that, somehow, one will cure any unconstitutional effect of the other: [T]he Texas court has repeatedly stated that *all* mitigating evidence can be given effect under the broad definition of mitigating evidence found in Texas Code of Criminal Procedure article 37.071 § 2(e).

Beazley, 242 F.3d at 260 (citing *Prystash v. State*, 3 S.W.3d 522, 534 (Tex. Crim. App. 1999); *Cantu v. State*, 939 S.W.2d 627, 648-49 (Tex. Crim. App.), *cert. denied*, 522 U.S. 994 (1997) ("by requiring the jury to take into account all evidence, § 2(e) supports interpretation that § 2(f)(4) does *not* unconstitutionally narrow definition"). Repeated pronouncement by the Court of Criminal Appeals does not make the instructions any less confusing or more constitutional. The courts' competing "definitions" certainly **would** make it all the more confusing for the jurors to follow their instructions. Section 2(e), however, is not a "definition" as the Fifth Circuit asserts. The instruction commanded by 2(e) merely directs the jurors to search through all of the evidence to see if they can cull "sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." Section 2(e) does

not define a mitigating circumstance, but merely directs the jurors to look for it. Section 2(f) defines it and restricts its application in Section 2(e).

Beazley has no quarrel with the Fifth Circuit's extended point that the future dangerousness special issue provides a vehicle for consideration of good character evidence. *Beazley*, 242 F.3d at 260 (citing several cases). Of course it does. The problem is that, no juror could utilize the future dangerousness issue (or party issue) in Beazley's case to consider his good character evidence, because the jurors were instructed to consider as mitigating only that evidence which lessened Beazley's moral blameworthiness for the offense.

There is more than a "reasonable likelihood" that the jurors in Beazley's case applied the trial court's instructions in such a way that prevented their consideration of his constitutionally relevant evidence of "good character" and "community approbation" in mitigation. *Penry v. Johnson (Penry II)*, 2001 WL 589086 (June 4, 2001) (citing *Boyde*, 494 U.S. at 380). Such error arguably is structural, not subject to harm analysis. Louis D. Bilonis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 313 (1991). Given the large quantity of good character and community approbation evidence barred by the statute from the jury's consideration, and the paucity of aggravating evidence relevant to sentencing (beyond the crime itself and the codefendants' inherently unreliable testimony), the error undoubtedly "had substantial and injurious effect" on the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). If, on the basis of the record, a Court entertains such doubt about the influence of the error on the jury's verdict as to find itself in "equipoise as to the harmlessness of the error," relief is required. *O'Neil v. McAninch*, 115 S. Ct. 992, 994, 997 (1995). Accordingly, review should be granted, COA should be granted, and Beazley's death sentence should be vacated.

CONCLUSION

Petitioner Beazley respectfully requests that this Court grant his petition for writ of certiorari.

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