

No. 00-10618

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

PETITIONER'S REPLY BRIEF

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THIS IS A DEATH PENALTY CASE

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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?

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PETITIONER'S REPLY BRIEF

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW Petitioner Napoleon Beazley, an indigent death row inmate, by and through his Counsel of Record, David L. Botsford, and Walter C. Long, and pursuant to Rule 15.6, Rules of the Supreme Court of the United States, presents this his Reply Brief to Respondent Gary Johnson's Brief in Opposition, and in support thereof would state the following:

1. Compelling Reasons for Grant of Certiorari

Contrary to Respondent's assertion, Brief in Opposition at 6 [hereinafter "BIO"], Beazley has advanced "compelling reasons" for granting certiorari in regard to each of the questions presented. In particular, he pointed out that, in regard to the first two questions presented, 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." Petition at 10. Beazley additionally established that dissenting judges on various state courts have expressed great anxiety over this situation, and need the guidance of this Court. As one said, "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 (Ala. 2000) (Houston, J., concurring in judgment affirming conviction, reversing as to sentence, and remanding on another issue).

The fact that the United Nations, the European Union (**Appendix A**), the Council of Europe (**Appendix B**), respected human rights organizations (*see Brief of Amici Curiae Human Rights Advocates, Human Rights Watch, Minnesota Advocates for Human Rights, Human Rights Committee, Bar of England and Wales in Support of Petitioner* [filed in this Court on behalf of Beazley]; *see also Appendix C* (letter on behalf of Beazley from Michael Bochenek, Human Rights Watch, to Gerald Garrett, July 17, 2001)), and numerous respected jurists, among many other relevant entities, find the United States to be violating treaty and international customary law by imposing the death penalty on juvenile offenders is a compelling reason to grant certiorari on the Eighth Amendment and ICCPR issues. It is similarly pressing that the United States' practice should now be found to violate an international norm of jus cogens.

Perhaps the most compelling reason for granting certiorari in regard to the first two

questions presented is that a miscarriage of justice will ensue if this Court does not act.¹

Beazley's case is the first published decision in which the Fifth Circuit has addressed the third issue: whether the instructional definition on mitigating evidence prevented the jury from being able to access and give effect to his substantial evidence of good character and community approbation. The issue is compelling because the workings of Texas' latest Special Issue scheme affect scores of Texas death penalty cases and the courts below have resolved the issue in a manner contrary to this Court's rules in *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), among other cases.

2. The Actual Innocence of the Death Penalty Exception to Procedural Default²

The only reasonable reading of the Fifth Circuit's language as cited by Beazley and quoted by Respondent (BIO at 14) is that, but for the failure of the ICCPR issue on the merits (from the Fifth Circuit panel's point of view) and the "Supreme Court precedent" of *Stanford v. Kentucky*, Beazley would meet the "actual innocence of the death penalty" exception to procedural default with regard to his first two questions presented. *See Beazley v. Johnson*, 242 F.3d 248, 265-66 (5th

¹ If, as Beazley asserts, the ICCPR reservation is invalid and void, Beazley's execution would be illegal, whether or not the treaty or the habeas statute grant Beazley a private right of action. The Governor has indicated, through his actions in the recent legislative session, that he has not yet recognized the import of the ICCPR and international human rights law on Texas' practice of executing juvenile offenders. This Court must intervene to protect Beazley's right to life, the rule of law, and the respect of our nation in the eyes of the world.

² Beazley concedes that his statement at the bottom of page 12 of the Petition is poorly worded. *See BIO* at 10-11. The word "through" was somehow omitted in his petition, and the sentence should read, "Beazley maintains that through the Supremacy Clause, the Eighth Amendment and Article 6(5) of the ICCPR individually void section 8.07(d) of the Texas Penal Code"

Respondent mischaracterizes Beazley's argument on appeal regarding procedural default by alleging he made four arguments in order, leaving "miscarriage of justice" until the end. *BIO* at 13-15. To the contrary, Beazley made a straight-up argument for "miscarriage of justice," using Respondent's admission in the district court that *Teague v. Lane* did not apply to his claims in support of his "miscarriage" argument, while footnoting his "cause and prejudice" argument. *See Brief on Appeal* at 15-17. Beazley did not argue, as alleged by Respondent, simply that "the procedural bar should not apply because his case falls under the first exception to *Teague*'s non-retroactivity limitation." *BIO* at 13-14. Beazley made his argument under *Sawyer* with the assistance of the *Teague* exception as a gloss on *Sawyer*. In a separate context, Beazley argued that "cause existed because [of] the ineffectiveness of the state habeas process." *BIO* at 13. Respondent argued on appeal that Beazley had not raised that issue in the district court, even though he had, at length, in his initial petition. *See Beazley's Motion for Panel Rehearing*.

Cir. 2001). Thus, no question was left presented in regard to whether the "actual innocence of the death penalty" exception would apply in Beazley's case. It would apply but, from the Fifth Circuit panel's point of view, since Beazley failed on the merits, the claims remained procedurally defaulted.

In every situation in which the "actual innocence of the death penalty" exception is applicable, the merits of the substantive constitutional complaint will determine whether the exception has been met. The merits must satisfy this Court's requirement "that some . . . condition of eligibility [for the death penalty] had not been met." *Sawyer v. Whitley*, 505 U.S. 333, 345 & n.12 (1992). The Fifth Circuit panel found that the "condition of eligibility (age) [**had**] been satisfied" because, with a valid reservation (from the panel's point of view) the ICCPR provision barring the death penalty for persons Beazley's age would not conflict with state law. *Beazley*, 242 F.3d at 265-66. Further on, the panel elaborated, "Beazley asserts that the Senate's ICCPR reservation is invalid and must be severed As discussed, the HRC has *not* found the reservation void, and the claim is procedurally barred; however, we address the question of the reservation's validity because it further supports our procedural-bar conclusion." *Beazley*, 242 F.3d at 266. Again, the Court fairly clearly states that, *if the reservation were void*, there would be no procedural default bar. Through the Supremacy Clause, the ICCPR would void the inconsistent Texas statute, rendering Beazley ineligible for the death sentence. By going on to the validity question, the Court took the analysis a step further with the design of closing not only one, but two, doors to relief on the merits of the ICCPR claim and, simultaneously, relief from procedural default.

Beazley is "actually innocent of the death penalty" because the ICCPR and/or Eighth

Amendment render him ineligible.³

3. The International Covenant Issue Is Clearly Meritorious

The Fifth Circuit panel's understanding of the merits was clearly wrong on both issues: validity⁴ and voidness. As noted, the panel's *sui generis* treatment of these issues is shared by no one known to the undersigned. United Nations entities, national governments, respected human rights organizations, and numerous jurists find the reservation invalid and void. See Motion for Stay of Execution at 8-9 (long list of jurists finding the reservation invalid and void); **Appendix C** (Human Rights Watch) ("[T]he U.N. Human Rights Committee . . . has concluded that the U.S. reservation is void because it violates the treaty's object and purpose."). It should be of utmost concern to this Court that the United States' treaty partners consider the reservation invalid and void. Such was the import of the amicus brief filed by the Bar of England and Wales in the Fifth Circuit. The government of Switzerland, for example, very recently interceded on behalf of Beazley with the Governor of Texas, writing, "Although Switzerland is aware of the reservation related to Article 6 of the Covenant made by the United States, [the] Government *fully shares the*

³ *Breard v. Greene*, 523 U.S. 371 (1998), has no relevance to the "miscarriage of justice" exception to procedural default. See *BIO* at 15. The Vienna Convention on Consular Relations issue there had nothing to do with eligibility for the death sentence. When considering the "actual innocence of the death penalty" exception to procedural default this Court looks only to those facts that pertain to eligibility criteria for the death penalty. *Sawyer*, 505 U.S. at 345 & n.12. "Sensible meaning is given to the term 'innocence of the death penalty' by allowing a showing . . . that some . . . condition of eligibility had not been met." *Id.* at 350. Napoleon would have been eligible for the death penalty had he been 18 years old at the time of the offense. Through the Supremacy Clause, the Eighth Amendment and ICCPR independently and jointly rendered Napoleon ineligible.

⁴ Although Respondent quibbles over the language of "validity" (*BIO* at 18), the Fifth Circuit panel understood that a "valid" reservation is one that is permitted, that is "not incompatible with the object and purpose of the treaty." *Beazley*, 242 F.3d at 264-65 (citing and quoting GENERAL COMMENT 24). The panel found that the reservation was compatible by completely ignoring that the HRC's finding of "incompatibility" meant that the reservation was not permitted under treaty law. GENERAL COMMENT 24 at para. 6 (citing Article 19(3) of the Vienna Convention on the Law of Treaties).

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

view of the other Parties to the Covenant that this reservation is contrary to the object and purpose of the Covenant and should therefore, in accordance with the principles of international law, *have no effect* and be withdrawn." Letter from Ambassador Alfred Defago regarding "Execution of Mr. Napoleon Beazley" to Governor Rick Perry, July 16, 2001 (emphasis added) (**Appendix D**).⁵ The Swiss further emphasized that "Article 6 of the Covenant reflects the minimum rules under customary international law for the protection of life regarding juveniles, which cannot be altered through unilateral declarations." *Id.*⁶

None of the state courts cited by the Fifth Circuit panel do more than imply that the reservation is valid merely because the Senate and Executive appended it in light of this Court's decision in *Stanford v. Kentucky*. BIO at 20-21 (citing *Ex parte Pressley*, 770 So. 2d 143 (Ala. 2000); *Domingues v. Nevada*, 961 P.2d 1279 (Nev. 1998), *cert. denied*, 528 U.S. 963 (1999)) (other citations merely rely on *Pressley*)).⁷ These courts failed to recognize that the Senate expressly

⁵ The Swiss government graciously has allowed this letter to be submitted. The letter corroborates the Bar of England and Wales' position, taken in its amicus before the Fifth Circuit, that our European partners to the ICCPR consider the reservation to Article 6 invalid and void (of "no effect"). The letter reveals how weak the Fifth Circuit panel's conclusion is that, because the United Nations Human Rights Committee asked that the reservation be withdrawn, the reservation still is effective.

⁶ In 1980, the United States jointly sponsored a United Nations General Assembly resolution on summary execution, describing without qualification Article 6 of the ICCPR as expressing a "minimum standard" for all member states, not merely ratifying states. G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980).

⁷ Despite the fact that, from the very earliest stages of Beazley's approach to federal court, Beazley has distinguished *White v. Johnson* on the grounds that the validity of the ICCPR reservation to which White refers in dicta was not an issue in that case, Respondent has kept reasserting that Beazley has not provided a rational basis for distinguishing White. BIO at 20 n.24 (citing *White v. Johnson*, 79 F.3d 432, 440 & n.2 (5th Cir.), *cert. denied*, 519 U.S. 911 (1996)). Johnson here (BIO at 20 n.24) mischaracterizes Beazley's argument to the panel, which reads in total: "The Court does not treat the ICCPR as ratified because the relevant facts in White's case precede ratification. *Id.* at 440 n.2. The case refers to a different reservation (to Article 7) not challenged by White as violating the object and purpose of the treaty. The binding character of the treaty as ratified and the validity of that reservation are not even before the Court. Consequently, the unremarkable truism that a treaty provision must be considered in light of an applicable reservation is all that White has in common with Beazley's case, bringing nothing to the discussion." Brief on Appeal at 18 n.6. In light of Beazley's argument to the panel, the panel's finding that "our court has recognized the validity of Senate reservations to the ICCPR" seems unfair. *Beazley*, 242 F.3d at 266. *Austin v. Hopper*, 15 F. Supp. 2d 1210, 1260 n.222 (M.D. Ala. 1998), like *White*, finds itself bound by the United States' reservation to Article 7 in a context in which the reservation's validity was not challenged. *Id.*; BIO at 20.

permitted "changes in U.S. law" on this issue, asserting that they might be "appropriate and necessary" in light of the United States' need for "compliance at the international level." *Id.* at 650. At the same time, the Bush Administration recognized the competence of the Human Rights Committee to contribute to the development of "the international law of human rights." SENATE COMMITTEE ON FOREIGN RELATIONS REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 31 I.L.M. 645, 658 (May 1992) [hereinafter "31 I.L.M. at ___"]. Grant of certiorari by this Court on the ICCPR issue, therefore, would be consonant with the intent of the other branches. The persuasive authority of the United Nations Human Rights Committee's findings regarding United States compliance viewed in the light of its jurisprudence, absent any other reasonable authority, should require this Court to grant Beazley relief on the ICCPR issue. Relief would not simply "void an action by the Senate," given the facts that (1) the Senate itself recognized its action might not be in compliance with the United States' international responsibilities and that (2) the Chair of the Senate Foreign Relations Committee found that ICCPR reservations probably would be non-binding on the judiciary. *Beazley*, 242 F.3d at 267.⁸

Respondent merely adopts the Fifth Circuit panel's selective and erroneous definition of "non-self executing." BIO at 22 (citing *Jama v. I.N.S.*, 22 F. Supp. 2d 353, 365 (D. N.J. 1998)). He and the panel recognized neither any complexity in self-execution law nor the Bush Administration's specific purpose for its non-self-execution declaration. *See* Petition at 28 & n.22. As noted in the Petition, the Bush Administration described the specific purpose of the declaration

⁸ As has been noted, the legislative history reveals that the Chair of the Senate Foreign Relations Committee considered the reservation to Article 6 to be separable from the treaty and probably non-binding on the judiciary. *See* Petition at 23 n.17. This Court should not be misled by the panel's citation to *United States v. Duarte-Acero*, 208 F.3d 1282, 1287 (11th Cir. 2000), where the panel seems to imply that an "agreement" between the HRC's interpretation and the Senate's reservation language or legislative history would be necessary for the HRC's interpretation to be respected. *Beazley*, 242 F.3d at 267 (*italicizing "all of which were in agreement"*). The "plain

as to clarify that Articles 1-27 would not "*by themselves*" create private rights enforceable in United States courts. 31 I.L.M. at 657 (emphasis added). As Beazley explained to the panel below at length in his Reply Brief, the Executive's "private right of action" definition adopts a special sense of non-self-execution in relation to the ICCPR:

[T]he intent was merely to clarify that the Covenant would not be used directly to "create a private cause of action." Thus, 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'L L. 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. 1096 (Affidavit of Jordan J. Paust) (**attached as Appendix E**); 4 R. 1060-77 (Carlos Manuel Vazquez, *Treaty Based Rights and Remedies of Individuals*, 92 COLUMBIA L. REV. 1082 (1992).

Unwilling to address Executive intent, Respondent instead merely amplifies upon the panel's misuse of *Duarte-Acero*. As noted in the Petition, the authority (now expansively cited by Respondent) about "clear and unambiguous" language is not apropos to interpretation of a declaration, which is by definition **not** part of a treaty. BIO at 22-23; see, e.g., 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW ' 17, at 137-38 (1970) (a declaration gives notice of a policy or principle "without an intention of derogating from the substantive rights or obligations stipulated in the treaty"). Also as noted, on the other hand, two of the four cases cited by Respondent and the

language and legislative history" in *Duarte-Acero* were the language of the ICCPR and the *Travaux Préparatoires* of the ICCPR itself. 208 F.3d at 1285-86.

panel support the Bush Administration's statement of specific purpose and conclude that a private right of action may be supplied when an ICCPR right is asserted pursuant to an existing jurisdictional statute. Petition at 28 & n.22. The other two cases simply do not address the application of such extant implementing legislation.

Courts that have examined the self-execution issue seem to have been confused by the declaration into denying the obvious: apart from the declaration, the ICCPR is intrinsically self-executing, in line with the purpose of the treaty and the objectives of its creators. A multilateral human rights treaty like the ICCPR, which guarantees individual rights, does not normally require additional legislation for domestic enforcement in the United States' monist scheme. 3 R. 0674; INTERNATIONAL HUMAN RIGHTS TREATIES: HEARINGS BEFORE THE COMM. ON FOREIGN RELATIONS, 96th Cong., 1st Sess. 213 (1979) (David Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63:1 MINN. L. REV. (Nov. 1978)); de la Vega, *supra*, at 220 & nn. 29, 30. The ICCPR -- sans the declaration -- is intrinsically self-executing, affording immediately enforceable rights, "govern[ing] the relationship between the individual and his state, and, not . . . the relationship between sovereigns." *United States v. Duarte-Acero*, 208 F.3d 1282, 1285-86 (11th Cir. 2000); HUMAN RIGHTS TREATIES (Weissbrodt), *supra*, at 213. The Bush Administration's comments that the treaty needed no additional legislation for implementation seal its interpretation of the treaty as providing for **immediate** as opposed to **future** rights. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829); see *People of Saipan v. U.S. Dep't of Interior*, 502 F.2d 90 (9th Cir. 1974) (Trask, J., concurring). A treaty or a provision within a treaty is intrinsically self-executing, having no need of implementing legislation, when "in and of itself [it] create[s] rights which are justiciable between individual litigants." *People of Saipan*, *supra* (Trask, J., concurring); see *Foster*, 27 U.S.

at 314 (describing the alternative kind of treaty requiring the legislature to execute a contract).

Respondent mistakenly assumes that the declaration covers the entire treaty and thereby totally and permanently blocks its domestic implementation in a context in which the Government has promised no future implementing legislation will be enacted. If it did, the declaration would violate the Supremacy Clause, which mandates that all treaties "shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2:

Certainly a mere declaration of a President, even with full consent of the Senate, cannot alter a constitutional command. Thus, a declaration of non-self-execution, even if not void under international law, is unconstitutional and void under the Supremacy Clause.

Paust, *Human Rights Treaties, supra*, at 324.⁹

4. The Eighth Amendment and Covenant Claims are Supported by a Rule of Jus Cogens.¹⁰

Respondent makes an inadequate response to Beazley's claim that his death sentence violates a jus cogens norm, as it applies through the ICCPR and/or the Eighth Amendment. He admits that Beazley argued below that the jus cogens rule supplied grounds for this Court to find that "greater protection" than that afforded in *Stanford* is now required. BIO at 30.¹¹ Respondent fails to answer Beazley's contention that "vast and significant changes have taken place since [this] Court issued its 1989 opinions." BIO at 29 ("Even if true . . ."). He does not counter any specific facts demonstrating the arrival of a jus cogens norm, merely relying instead on the panel's citation

⁹ See *Brief of Amici Curiae Human Rights Advocates et al.* at 18 (noting that declaration covering entire treaty would violate the object and purpose of the treaty).

¹⁰ See *Brief of Amicus Curiae Human Rights Advocates et al.* (developing in some depth the application of the jus cogens norm to Beazley's first two questions presented).

¹¹ Respondent subsequently asserts that Beazley should not be allowed to "transmute" his Eighth Amendment argument to include the jus cogens component. BIO at 30. A quick review of pages 38 to 51 of Beazley's *Brief on Appeal* demonstrates that no such "transmutation" is to be found. Beazley indeed closed his Eighth Amendment argument with the following: "The prohibition on juvenile execution in Article 6(5), the other treaties, and *the law of nations* must be enforced through the Constitution." (emphasis added)

to the district court's unsupported assertion that the "norms Beazley referenced were *not* shown to be either valid or reliable." *Id.* (misplacing the emphasis in the quotation). The Fifth Circuit panel did not determine that the jus cogens norm was invalid as incorporated within the ICCPR or Eighth Amendment issues. The panel did not reach the norm's reliability, which it should have done in order to adequately assess the ICCPR and Eighth Amendment issues. *Beazley*, 242 F.3d at 268. Had the panel reached reliability, it would have had to explain why the full adoption by every organized government in the world (except the United States) of the Convention on the Rights of the Child, without reservation to its provision barring the death penalty for juvenile offenders, would not be a reliable indicator of the emergence of a jus cogens norm. It would have had to explain how the unchallenged, almost universal rejection *in domestic law and practice* of the death penalty for juvenile offenders also would not be a reliable indicator.

5. Respondent's Procedural Defenses on the First Two Questions Presented.

Respondent attempts to rely upon this Court's "not pressed or passed upon below" rule to deny Beazley the opportunity to make several arguments to this Court. *See* BIO at 28, 30. The cases cited all pertain to the rule as it developed in regard to lower *state* court decisions and is based upon federalism and comity concerns. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 218-19, 221-22 (1983) (noting that questions not pressed or passed upon by the courts below may be considered when coming from federal courts and that the need for state court factual development and deference to the state courts are bases for the rule). The rule is inapplicable in any case in which the alleged new "question [is] only an enlargement of the one mentioned in the assignment of errors, or if it [is] so connected with it in substance as to form but another ground or reason for alleging the

invalidity of the [lower court's] judgment."¹² *Gates*, 462 U.S. at 219-20 (quoting *Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899)). The alternative rule is clear: "Parties are not confined [in this Court] to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Id.* (quoting *Dewey*). Beazley's *Teague* argument (which was presented to the court below) obviously does not present a new "question," and is a mere enlargement upon his basic argument, made to all the federal courts, that he meets the "actual innocence of the death penalty" exception to procedural default. Although not presented in as much detail, Beazley's "law of nations" argument also does not raise any new "question," and very clearly was made to the courts below to explicate why the jus cogens rule is binding upon our nation's courts. See Brief on Appeal at 38 (Inter alia, "Our Constitution was designed to effectuate the law of nations in a way that the Articles of Confederation had failed to do: to empower the central, federal government to "cause infractions of treaties or of the law of nations, to be punished.") (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 886 (2d Cir. 1980) (quoting FARRAND, RECORDS OF THE FEDERAL CONVENTION 19 (Rev. ed. 1937)); "Federal courts must interpret the law of nations on any given issue as the law has evolved to the present." *Id.* (citing *The Paquete Habana*, 175 U.S. 677, 694 (1900)).

6. The Mitigating Evidence Definition.

Respondent fails to recognize the novelty of the statute under criticism by Beazley and the naturally preclusive result of the trial court's specific instructions on mitigating evidence. See

¹² *The Fifth Circuit actually holds the general appellate rule inapplicable if the alleged new issue is purely legal and refusal to consider it would result in a miscarriage of justice.* *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1144 (5th Cir. 1981) (holding that "when a pure question of law is involved [on appellate review] and a refusal to consider it would result in a miscarriage of justice" . . . "the general rule [against considering issues not raised in the "trial court"] will not bar a consideration of the new issue.") (emphasis added) (citations omitted); see also *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (allowing new questions on appeal where "injustice might otherwise

Appendix F (Charge of the Court). This Court should take note that the Court of Criminal Appeals has recognized that the instruction pursuant to Section 2(f)(4) of Article 37.071 limits the range of mitigating evidence a jury may consider. *E.g.*, *Prystash v. State*, 3 S.W.3d 522, 534 (Tex. Crim. App. 1999) (noting that Section 2(e) "provide[s] the jury with a vehicle to respond to a broader range of mitigating evidence [than Section 2(f)(4)]").

It is likely that the jury applied the limiting definition in its deliberation on evidence that might mitigate future dangerousness, because it was told to consider mitigating evidence in relation to the dangerousness Special Issue and it was given only one definition of mitigating evidence. Beazley's "moral blameworthiness" instruction cannot be construed as referring to general "deathworthiness." *See Graham v. Collins*, 950 F.2d 1009, 1034 (5th Cir. 1992) (en banc) (Reavley, J., dissenting) ("`Culpability' at the punishment phase is not simply a question of guilt or blameworthiness, but rather a question of `deathworthiness'"). The instruction's unconstitutional narrowing is only exacerbated by the prosecutors' argument.¹³

7. A Stay of Execution is Appropriate and Necessary.

Beazley respectfully submits that he has presented meritorious issues for certiorari demonstrating a significant possibility of reversal of the court below and an absolute likelihood of irreparable harm if the Texas trial court's execution date is not stayed. *Barefoot v. Estelle*, 463 U.S.

result") (citing *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)). This makes sense, because the comity basis for the rule evaporates when a miscarriage of justice is involved.

¹³ *E.g.*, 61 S.F. 950 ("[Y]ou'll see where Judge Kent tells you, `The jury is instructed to consider mitigating evidence, evidence that a juror might regard as reducing the Defendant's moral blameworthiness.' Tell me where there's a shred of mitigating evidence in this case that reduces this Defendant's moral blameworthiness for what he did in that driveway. . . ."). Although Beazley's evidence of prior good character was very relevant to his deathworthiness, it positively harmed him where the jury was locked into looking for some sort of diminished capacity mitigation, and found only the opposite. As the prosecution reiterated, Beazley "didn't have organic brain damage. He didn't have some kind of a head injury. Doesn't have any kind of a mitigating circumstance." 61 S.F. 899. Beazley's instruction, designed to cure the problem identified by this Court in *Penry I*, was hostile to the kind of evidence he offered in mitigation.

880, 895-96 (1983). He, therefore, re-urges his motion for stay of execution.

Conclusion and Prayer

PREMISES CONSIDERED, Beazley respectfully moves this Court to grant him a stay of execution, presently scheduled for August 15, 2001, and certiorari review on the three issues presented in his certiorari petition.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this the 23rd day of July 2001, three copies of the above and foregoing Reply Brief were mailed via United States Mail, first class postage prepaid, to counsel of record for Respondent, the Honorable John Cornyn, Attorney General of Texas, at P.O. Box 12548, Austin, Texas 78711-2548.

Walter C. Long