

No. 38,095-03

**IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS**

AND

**IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS
291ST JUDICIAL DISTRICT**

***Ex parte* TORONTO MARKKEY PATTERSON, Applicant**

**BRIEF OF AMICI CURIAE
TEXAS CATHOLIC CONFERENCE
TEXAS IMPACT
IN SUPPORT OF TORONTO MARKKEY PATTERSON**

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TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW the Texas Catholic Conference and Texas Impact, pursuant to Rule 11 of the Texas Rules of Appellate Procedure, and respectfully submit this brief as amici curiae in support of Toronto Markkey Patterson, whose cause is pending before this Court on submission pursuant to Article 11.071, Texas Code of Criminal Procedure.

Barring a stay from this Court or the United States Supreme Court, Toronto Patterson is scheduled to be executed by the State of Texas on August 28, 2002. On July 31, 2002, Patterson filed his second subsequent application for writ of habeas corpus in the district court alleging, inter alia, that his death sentence violates the Eighth Amendment of the United States Constitution and Article I, Section 13, of the Texas Constitution, because he was less than 18 years of age at the time of the offense. He also alleges that his death sentence violates Article 6(5) of the International

Covenant on Civil and Political Rights and an international law norm of *jus cogens*, which also prohibit the death penalty for juvenile offenders.

Amici understand that it is unusual to file a brief in support of a petitioner at this stage, wherein this Court is making a preliminary finding regarding the procedural status of the application. However, that finding of necessity will be based upon this Court's perception of the merits of the issues presented. Amici believe the issues to be legally meritorious and of grave importance not only for Patterson but for our society's self-definition. Responding to the Supreme Court's recent recognition in *Atkins v. Virginia*, 122 S. Ct. 2242, 2249 n.21 (June 20, 2002), that the views of religious organizations should be considered by courts as evidence of the evolving standards of decency in our society, we believe ourselves duty bound to inform this Court of our position on the death penalty, especially as it is applied to a 17-year-old offender in this case.

Amici listed and described below are Texas religious bodies, which include judicatories and organizations of the Catholic and Protestant faiths. Amici believe that whatever one may think of the imposition of capital punishment generally, and we oppose it, the notion of executing children shocks the conscience. 17-year-olds are children. Our Texas civil and criminal statutes provide special protection and deference to 17-year-olds, because they are children. However, our laws are inadequate to meet the international standard or good conscience when assigning criminal responsibility to children. We commit a most egregious error by assessing the death penalty to juvenile offenders like Toronto Patterson.

INTEREST OF AMICI CURIAE

While Amici endorse many of the arguments presented in Patterson's application, we present herein additional arguments distinctive to our own interests. Amici are interested in the issues before the Court because of:

- (1) a conviction that children are uniquely redeemable and rehabilitatable, they are capable of rapid and profound positive change, and their capacity for growth is the primary factor to be considered by society in assessing punishment for their antisocial acts;
- (2) a conviction that since 17-year-olds demonstratively have not fully achieved that degree of maturation (*social and physiological/anatomical*) which society should require of them before designating them "adults," and since their actions involve a lesser culpability than similar actions by adults, a lesser degree of punishment should be imposed for them than for adults who commit similar acts;
- (3) a fundamental conviction that the more important task appropriately chosen by those responsible for children's care is protection, nurture, education, moral development, and preparation of children for responsible adulthood;
- (4) a fundamental conviction that, because children are members of a family, the more important task appropriately chosen by those responsible for children's care is protection and nurture *of the family unit*, not its destruction through inadequate social services and subsequent implementation of retributive punishment;
- (5) a common and traditional calling to be intimately involved with society in positive ways so as to discover and advance the "evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958), and to help ensure that the criminal justice system reflects those standards;
- (6) a recognition that it is Amici's responsibility when this Court explores the national or Texas consensus regarding the legal and moral decency of executing children, to provide the Court with the religious community's collective experiences with adolescents, which counsels against their execution;
- (7) a recognition that it is Amici's responsibility when this Court explores the question of the authority of international legal principles for Texas practice, to carry out what is every citizen's post-Nuremburg responsibility by speaking out when a fundamental and mandatory international human rights norm is being breached;
- (8) a recognition that it is Amici's responsibility to inform this Court that our State

now has more than adequate bloodless means to incapacitate the most violent of our society's offenders;

(9) united support for the principle that restorative justice should be a primary aim of criminal punishment, including some measure of restitution made by the offenders to the victims and survivors of violent crime wherever possible;

(10) united opposition to the imposition of capital punishment because it is cruel and unusual and because capital punishment as it is applied in Texas is contrary to the highest – and even the simplest – moral teachings of our traditions;

(11) Amici's remorse that Texas' execution of child offenders – the casting out of those most dependent upon society's care – ignores, distorts, and corrupts our domestic law's basic inclinations toward protection of the vulnerable and justice; and

(12) Amici's remorse that Texas' execution of child offenders since 1990 – unmatched in number by any *nation* in the world and, now, practiced in virtual *solitude* among nations and states – has caused us to become recognized, world over, as the major violator of a fundamental and mandatory human rights norm.

Amici are:

1. THE TEXAS CATHOLIC CONFERENCE is the statewide association of the fifteen Roman Catholic Dioceses of Texas. It is the public policy arm of the Catholic Bishops of Texas. The Conference is concerned about a wide variety of public policy issues including the sanctity of life, health and human services, education, and the environment. All issues concerning the death penalty, including the execution of juvenile offenders, fall within the Conference's concern for the sanctity of life. The Bishops' position is that all life is sacred and a gift from God from the point of conception until natural death. The Conference was established by the Bishops of Texas in 1964. The Bishops of Texas have stated their opposition to the death penalty on several occasions, beginning in 1979 and most recently in 2001. The Texas Catholic Conference participated in legislative advocacy in the last session, going on record in favor of all legislation that would restrict the death penalty, including House Bill 2048, which was designed to modify Texas Penal Code Section 8.07(c) to raise the eligibility age for the death sentence in Texas to 18.

2. TEXAS IMPACT was established in 1973 by the Bishops of a number of Texas Christian denominations to be a voice for social justice in the Texas Legislature. It is an interfaith non-partisan statewide social justice advocacy group whose members are the regional governing bodies (judicatories) of mainline Christian denominations, as well as regional Jewish social action groups and local interfaith organizations. The board consists of representatives from the various judicatories and other organizations, as well as representatives from colleague organizations – the Texas Baptist Christian Life Commission, the Texas Conference of Catholic Bishops, Austin Presbyterian Theological Seminary, Episcopal Theological Seminary of the Southwest, and the Texas Conference of Churches. Texas Impact's positions on social policy issues, including policies related to capital punishment, reflect consensus positions of mainline Christian and Jewish organizations and are established by a unanimous vote of the Texas Impact board. Texas Impact has opposed the death penalty and the execution of juvenile offenders since its inception. The organizational members include the following: American Jewish Committee, American Jewish Congress, Arlington Ministerial Association, Austin Metropolitan Ministries, Christian Church (Disciples of Christ) in the Southwest Region, Church Women United in Texas, Episcopal Church Dioceses in Texas (Diocese of Rio Grande, Diocese of West Texas), Greater Dallas Community of Churches, Greek Orthodox Church, Interfaith Ministries of Greater Houston, Port Arthur Board of Missions, Presbyterian Church (U.S.A.) Presbyteries in Texas, San Antonio Community of Churches, Texas Conference of Churches, United Church of Christ in Texas, and United Methodist Church Conferences in Texas.

DISCLOSURE OF FEES

No compensation has been received, nor will any be received, for preparing this brief.

ARGUMENT

Minors “have a very special place in life,” *May v. Anderson*, 345 U.S. 520, 536 (1953), which the law reflects and respects. “Legislatures recognize the relative immaturity of adolescents and . . . define age-based classes that take account of this qualitative difference between juveniles and adults.” *Thompson v. Oklahoma*, 487 U.S. 815, 853-54 (1988) (O’Connor, J., concurring). Accordingly, our Texas law makers and enforcers appropriately have set the age of majority in Texas at 18 for most purposes. TEX. CIV. PRAC. & REM. CODE § 129.001 (“The age of majority in this state is 18 years.”); Tex. Att’y Gen. Op. 1975, No. H-546 (describing a person under 18 as a “legal infant”); Tex. Att’y Gen. Op. 1973, No. H-85 (finding that after the effective date of § 129.001 persons at least 18 years old would not be “legal infants”); Tex. Att’y Gen. Op. 1973, No. H-82 (finding that § 129.001 emancipated all persons aged 18 or more from “disabilities of infancy”). In 1988, the United States Supreme Court summarized the historically recognized empirical grounds for this special treatment under the law as follows:

Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.

Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (plurality opinion). Over the course of the last decade these empirical observations have been reinforced by advanced scientific techniques that have proven that – precisely in those areas that affect logical reasoning, impulsiveness, and the ability to foresee the consequences of one’s actions – the human brain is not fully developed until

the early to mid-20s. *See Ex parte Toronto Markkey Patterson*, Subsequent Application for Writ of Habeas Corpus, Exhibit E, Declaration of Ruben C. Gur, PhD. Furthermore, since 1989, recognition of the need to respect the disabilities and rights of children has undergone a vast territorial expansion, as indicated by almost universal ratification of the United Nations Convention on the Rights of the Child.¹

¹ Only two countries have not ratified the Convention, the United States and Somalia, although Somalia recently signed the Convention expressing its intent to quickly ratify the instrument. *See* <http://www.unicef.org/crc/crc.htm>. In Article 37(a), the Convention conveys what now has become a fundamental human rights norm from which there should be no dissent:

No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

The mandatory character of the norm presented in Article 37(a) of the Convention (barring the death penalty for 17-year-olds) is reflected in the reforming actions taken over the last decade by the nations formerly offending the norm. *See* Patterson Petition (subsection entitled “The Prohibition is Accepted by All States Except One”). The seriousness of the norm, as protecting the *right to life*, and the almost total lack of dissent, world wide, convincingly demonstrate that the norm has attained the status of *jus cogens*, and must be respected by Texas. Dramatic steps in conformance with the norm were taken over the last several weeks by the governments of Pakistan and the Philippines. Pakistan amended its domestic law to conform with the norm and on July 25, 2002, the Pakistan News Service reported that, in accord with the Juvenile Justice System Ordinance of 2002, the government had commuted the death sentences of 74 juvenile offenders. *74 Get Relief Against Death Sentence, Pakistan News Service, <http://paknews.org/flash.php?id=5&date1=2002-07-25>*. On August 1, 2002, the Supreme Court of the Philippines commuted the death sentences of the country’s 12 juvenile offenders in response to a petition filed by a Roman Catholic church-run prison welfare group.² *Agence France Presse, Supreme Court Orders Removal of Twelve Minors from Death Row, Aug. 1, 2002*. The Philippines Supreme Court held that “minority” was a “privileged mitigating circumstance which prevents imposition of the death penalty” and asserted that “[d]eath row is no place for youthful offenders.” *Philippines Sun Star, Supreme Court Orders 12 Convicts Removed From Death Row, August 1, 2002*. The Philippines otherwise is *reinstating* the death penalty after a three-year moratorium that also had been set in place largely under the influence of the Catholic church. In the face of such

² The Philippines case arose when the Program Director of the Philippine Jesuit Prison Service, Ma. Victoria S. Diaz, notified the authorities of the existence of juvenile offenders on death row. Source: Amnesty International.

dramatic and unilateral advances around the world in the protection of juvenile offenders, Texas' vast expansion of its juvenile death row since 1995 is a public shame. No *nation* (and certainly no other state) compares to Texas in the number of documented *executions* of juvenile offenders over the last twelve years.

Religious communities reserve a very special place for children, *see Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), for many of the same policy reasons that underlie domestic and international law protection of children. This common ground gives the religious community an unusual opportunity and unique duty to provide this Court with "evidence of societal standards of decency," that mark the progress of a maturing society with respect to the treatment of juvenile offenders. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The Supreme Court recently recognized in *Atkins* that the direction of change in society and the law is an important component of Eighth Amendment scrutiny. Although many of the component religious communities represented by Amici have long had official statements expressing general opposition to capital punishment, development against the death penalty (and the death penalty for juvenile offenders) continuously has been taking place on all institutional levels.

As early as January 1992, the Texas Catholic Bishops issued a statement rejecting the death penalty for a Texas juvenile offender, Johnny Frank Garrett. The Bishops objected to Garrett's execution in part because "Garrett [would] be the third individual suffering the death penalty in Texas for a crime committed while a juvenile." Now there have been *12 executions of juvenile offenders* in Texas since the reinstatement of the death penalty in 1973. In 1995, when Pope John Paul II issued his important encyclical, *Evangelium Vitae*, he noted "evidence of a growing public opposition to the death penalty, even when such a penalty is seen as a kind of 'legitimate defence' on

the part of society” and found that “[m]odern society in fact has the means of effectively suppressing crime by rendering criminals harmless without definitively denying them the chance to reform.” Pope John Paul II, *Evangelium Vitae* at para. 27. The Pope defined the problem of the death penalty in terms of evolving standards comporting with human dignity (and *therefore* “with God’s plan for man and society”) and asserted that society has reached the point where the goals of defending public order and ensuring people’s safety can be achieved without the “extreme of executing the offender.” *Id.* at para. 56. In 1997, the Catholic Bishops of Texas issued a statement endorsing the Pope’s views and rejecting the death penalty as an impediment to the common good, the dignity of the human person, and rehabilitation and redemption of the offender. Statement by Catholic Bishops of Texas on Capital Punishment, Oct. 20, 1997. The Catholic Church’s specific concern for the rehabilitation of the offender, shared with all of the religious organizations involved with this appeal, is particularly relevant to juvenile offenders, who have always been recognized to have a greater capacity to reform.

The General Assembly of the Texas Conference of Churches unanimously adopted a Resolution Opposing the Death Penalty on February 24, 1998. The resolution drew upon language in the Texas Catholic Bishops’ 1997 statement and reaffirmed its own prior resolutions in 1973 and 1977 in opposition to the death penalty. Texas Impact serves as the legislative policy arm of the Texas Conference of Churches. Some of its member organizations have not only adopted a general position against the death penalty but have specifically advocated abolition of the death penalty for juvenile offenders. The South Central Yearly Meeting of Friends (Quakers), a judicatory of the Texas Conference of Churches, adopted minutes on April 14, 2001, at its yearly session reaffirming opposition to the death penalty and “affirm[ing] its support of all legislation that would end the

execution of death row inmates who were convicted for crimes committed before the age of 18 or who suffer from diminished mental capacity.” The Yearly Meeting’s minute responded to a declaration of “sanctuary” on behalf of juvenile offenders on Texas’ death row made by the Friends Meeting of Austin (Quaker), the Progressive Missionary Baptist Church (Crockett), and the Mt. Zion Missionary Baptist Church (Grapeland). The sanctuary declaration, endorsed in 2000, urges “the State of Texas – through its Executive, Courts, and Legislature – to abide by the law by ceasing to seek the death penalty against juveniles, by commuting the sentences of all Texas juveniles currently sentenced to death to life or a term of years, and by amending Section 8.07(c) of the Texas Penal Code to set the age of eligibility for the death sentence at 18 years old.” The practice of sanctuary has an ancient lineage in the Jewish and Christian religions and constitutes, most fundamentally, intercession on behalf of persons fleeing harsh punishment.³ James Corbett, a Quaker philosopher, redefined “sanctuary” for modern times as “protective community with people whose basic human rights are being violated by government officials.” “As a declared practice,” he said, “it incorporates prophetic witness into protective community; that is, in addition to protecting the violated from the state, the public practice of sanctuary holds the state accountable for its violations of human rights.”

Jim Corbett, *The Sanctuary Church*, Pendle Hill Pamphlet No. 270 (1986), at 5-6. Corbett tied the religio-legal concept of sanctuary to the individual citizen’s responsibility, made explicit in the

³ The “cities of refuge” in the Old Testament are an early form of sanctuary. Ignatius Bau, *This Ground is Holy: Church Sanctuary and Central American Refugees* 125 (Paulist Press 1985). The first explicit reference to sanctuary exercised by the Christian churches is in the Theodosian Code of 392 A.D. *Id.* at 131. Eligibility for sanctuary depended on the nature of the crime and the character of the accused. *Id.* The Council of Mayence in 813 issued this decree: "Let no one dare to remove a wrongdoer who is a fugitive to a church, nor give him up from there to punishment or death, that the honor of the churches may be preserved; but let the rectors be diligent in securing his life and limb. Nevertheless he must lawfully compound for what he had wrongfully done." *Id.* at 132.

Nuremburg Tribunals and the Universal Declaration of Human Rights, to protect human rights: a responsibility “entrust[ed] to but never forfeit[ed] to the State.” *Id.* at 17.

The United Church of Christ, one of Texas Impact’s organizational members, adopted a resolution in 1999 calling for the abolition of the death penalty, with an immediate focus on ending the execution of juvenile offenders. The denomination publishes an issues briefing book on justice and peace ministry that is designed to provide “background information, a legislative outlook for the year, and ideas for advocacy and education for individuals and congregations.” United Church of Christ, Justice and Witness Ministries, 2002 Briefing Book; <http://www.ucc.org/justice/book02.htm>.

Several findings in the Briefing Book are of particular concern to Amici: (1) the racial characteristics of incarcerated juvenile offenders (as these relate to the Texas death penalty); (2) mandatory waivers of juveniles into the adult system (as this relates to the Texas death penalty); and (3) the unbalanced approach of politicians and prosecutors to the problem of juvenile crime.

Race Bias in the Texas Juvenile Death Penalty

The national Briefing Book reflects that on the national level, “incarceration rates for juveniles are disproportionate by race, with the rate for non-Hispanic blacks five times that for non-Hispanic whites and, for Hispanics, two and one half times that for non-Hispanic whites. Although minority youth are one third of the youth population nationwide, they represent two thirds of all youth in detention and correctional facilities.” *Id.* at 72. Disturbingly, these figures translate to Texas’ death row. In 2001, Amnesty International reported that, although the Texas general population was 71 percent white and 11.5 percent African American, Texas’ death row was 34.4 percent white and 41.6 percent African American. Fifty percent of 17-year-old males in Texas’ population were white and 13 percent black, whereas only 23 percent of juvenile offenders on death

row were white and 36 percent were black. Amnesty International, *United States of America: Too Young to Vote, Old Enough to Be Executed, Texas Set to Kill Another Child Offender*, AMR 51/105/2001, July 31, 2001. Amnesty International further stated:

Some 249 people had been executed in Texas by 11 July 2001. In 202 cases (81 per cent), the crimes involved white victims. In 57 cases (23 per cent) the defendant was a black convicted of killing a white. None of the 249 people executed have been whites convicted of killing blacks. . . . Of the nine juvenile offenders executed in Texas since 1977, seven (78 per cent) were for crimes involving white victims and two for Latino victims. Three of the nine (33 per cent) were black defendants convicted of killing white victims.

Id. The executions of Napoleon Beazley (May 28, 2002) and T.J. Jones (August 8, 2002) now have increased the bottom figures to reflect that, **of all Texas executions of juvenile offenders since 1977, 6 out of 12 (50 percent) have been black defendants convicted of killing white victims.**⁴ The last 5 juvenile offenders executed have all been African Americans (since 1998). 77 percent of the 31 juvenile offenders on Texas' death row in July 2001 were of minority background. *Id.* These figures reflect an intolerable racial disparity in the imposition of the death penalty on juvenile offenders in Texas.

Mandatory Waiver of Juvenile Status

Texas Penal Code Section 8.07(c) constitutes a mandatory waiver of juveniles into the adult system for capital offenses. However, the United Church of Christ briefing book reports that sixty-nine percent of juvenile court justices across the country oppose mandatory waivers of juveniles into the adult system, even for violent offenses. Briefing Book at 72. Not only do such mandatory waivers

⁴ These are Curtis Harris, Glen McGinnis, Gary Graham, Gerald Mitchell, Napoleon Beazley, and T.J. Jones (Black on White offenses). The others executed are: Charles Rumbaugh, Jay Pinkerton, Johnny Garrett, Ruben Cantu, Joseph Cannon, and Robert Carter.

frustrate the system's ability to address the unique capacity of juvenile offenders to be rehabilitated, but they reinforce the opposite trend. The briefing book reports that studies have shown that "young offenders who move through the adult system, especially those incarcerated with adults, become more alienated and destructive as a result of their experience." *Id.* With some irony, juvenile offenders on Texas' death row tend to do well in comparison to the adult population and comment about "growing up together" on the row. Napoleon Beazley, for example, had a spotless disciplinary record and, early on, attained the rare status of "Support Service Inmate" (SSI). As an SSI orderly, Napoleon worked every day at Ellis I, "without any days off, distributing food to the other inmates, picking up the other inmates' trash which they tossed from their cells, and cleaning the row, adjacent rooms, and the recreation yard." Clemency Petition for Napoleon Beazley (2001); see www.abanet.org/crimjust/juvjus/beazley.html (American Bar Association, Juvenile Justice Section). Toronto Patterson also has a very clean record with only the most minor of infractions. Clemency Petition for Toronto Patterson (2002); see www.abanet.org/crimjust/juvjus/patterson.html (American Bar Association, Juvenile Justice Section).

Politicians' and Prosecutors' Treatment of the Juvenile Death Penalty

Despite evidence that the rate of homicides by juveniles is at the lowest level since 1966, Briefing Book at 72, Texas political officials uniquely⁵ seem committed to advance the use of the death penalty against juvenile offenders at all costs. Texas juvenile offenders executed since 1977 come from a limited number of counties: Potter (3), Harris (3), Bexar (2), Montgomery (1), Brazos (1), Smith (1), Gregg (1). Three of the last six executions of juvenile offenders have been from Harris County. Of

⁵ In other states, such as Arizona, the Executive Department has supported raising the eligibility age to 18. See Janet Napolitano, Capital Case Commission Interim Report (recommending that the death penalty not apply to defendants who were under 18 at the time of the crime); http://www.attorney_general.state.az.us/CCC/section4.PDF.

the 29 surviving Texas juvenile offenders sentenced to death, *ten* were prosecuted by Harris County. Ironically, a 2001 Houston Chronicle poll found that *only 25 percent* of Harris County residents supported the death penalty for juvenile offenders. Steve Brewer, *Juvenile Cases: Just 1 in 4 in County Thinks Death Appropriate*, Houston Chronicle, February 7, 2001. Texas prosecutors seem to be ahead of the public in pressing the juvenile death penalty. They often justify this in the press by incorrectly asserting that a 17-year-old is an “adult” under Texas law. E.g., Lee Hancock, *Beazley is Put to Death*, Dallas Morning News, May 29, 2002 (noting Smith County prosecutors’ claim that Beazley was an “adult” under Texas law). As this Court is aware, some take openly hostile positions toward the international law prohibition on the juvenile death penalty. For example, in pleadings before this Court, the Smith County prosecutors chided Napoleon Beazley for resting some of his claims on international law, asserting, “He assumes there is something called international law,” and accusing Beazley of trying to make this Court into an “instrument of social engineering” to further his own “neo-socialist designs.”

Based upon their basic respect for the sanctity of life, Amici believe that the burden should be on those who would take life to justify their actions. Therefore, Amici would profoundly oppose any effort on the part of proponents of the juvenile death penalty to continue to nurture its practice without providing justification (rather than excuses) for its ongoing viability. The State should be required to answer why the juvenile death penalty is a preferable policy over the alternative, rather than simply allowed to assert, without strong justification, that it is “permitted” by the Eighth Amendment or the Texas Constitution’s cruel or unusual punishment clause. In light of events surrounding the two recent executions of Napoleon Beazley and T.J. Jones, Amici have great concern that Texas officials’ manner of settling the immensely important policy question of the propriety of the death penalty for juvenile offenders is to simply go on killing such offenders, misunderstanding their burden to justify their

actions (especially in light of the international law bar) and the doubts of the public on this issue.

The crimes attributed to Beazley, Jones, and Patterson, and others, are senseless and without any justification, but they are not indicative of the existence of a brutalization trend among young men that, from any perspective, could form the basis for the harsher punishment policy reflected in prosecutors' choices. Amici believe that a misconception may be held among advocates for the juvenile death penalty that there exist "superpredator" teenaged killers for whom only the death penalty is appropriate. This theory, prevalent in the mid-1990s, postulated the existence of a monster that has been debunked: a fast-rising generation of "radically impulsive, brutally remorseless youngsters, including ever more preteenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs and create serious communal disorders." John Dilulio, *Body Count* (Simon & Schuster 1996). This predicted trend never materialized. In fact, juvenile crime dropped by more than half, completely discrediting the theory. <http://loper.org/~george/archives/2001/Feb/76.html>. Human Rights Watch nevertheless attributed a rash of U.S. legislative initiatives in the 1990s moving juveniles more easily in to the adult criminal system to the "superpredator" theory:

Driven by tragic, high-profile cases of school shootings and by modern-day legends of juvenile "superpredators," U.S. lawmakers increasingly abandoned efforts to rehabilitate child offenders. Instead, the increasingly common response to a perceived outbreak of juvenile violent crime was to move juveniles into the adult criminal system. Between 1992 and 1998, at least forty U.S. states adopted legislation making it easier for children to be tried as adults. Forty-two U.S. states detained juveniles in adult jails while they awaited trial, in violation of international standards.

Human Rights Watch, *World Report 1999* (section on "Juvenile Justice"); <http://www.hrw.org/worldreport99/children/child3.html>. Amici join Human Rights Watch in lamenting the damage done by the well-meaning but misguided efforts at crime control of the juvenile population in the 1990s. Amici are particularly disturbed by the abandonment of rehabilitative

strategies for a population historically known to be so capable of reformation and positive change.

Rehabilitation and the Development of Juveniles

Our religious traditions, Jewish and Christian, historically have pressed for the rehabilitation of the offender. In the Hebrew Scriptures, the prophet Ezekiel conveys the principles of mercy, forgiveness, and unconditional love that characterize the best of our practice: “As I live, says the Lord God, I swear that I take no pleasure in the death of the wicked one, but rather in the wicked one’s conversion, that he may live. Turn, turn from your evil way!” Ezek. 33:11. Morality and spirituality in the Jewish and Christian faiths center on turning, repentance and truthfulness, as an ongoing discipline on personal and social levels. Amici now place an extra premium on rehabilitation and restorative justice over retributive values. Restorative justice views “crime [as] a violation of people and relationships. It creates obligations to make things right. Justice involves the victims, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.” Howard Zehr, *Changing Lenses* 181 (1990); see Loren Walker, *Conferencing - A New Approach for Juvenile Justice in Honolulu*, 66 *Federal Probation* 38 (June 2002).⁶

⁶ In a letter written on behalf of Napoleon Beazley, Archbishop Desmond Tutu described restorative justice within the context of the new South African Constitutional framework:

Our new South African Constitution is premised upon the assumption that South Africa will be a constitutional state that respects fundamental human rights. The Constitution concludes with a provision on National Unity and Reconciliation which states that the document lays the foundation for South Africa to transcend its "legacy of hatred, fear, guilt, and revenge." It continues, "[T]here is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimization." "Ubuntu" is a central feature of the African world view. It is difficult to translate into English, but it means the very essence of being human. It means that my humanity is bound up in yours. Rather than viewing society as a collection of isolated individuals or groups, ubuntu visualizes it as a place of belonging, participating, sharing. Ubuntu views social

harmony as the greatest good. Describing it, I have written elsewhere that "anger, resentment, lust for revenge, even success through aggressive competitiveness, are corrosive of this good. To forgive is not just to be altruistic. It is the best form of self-interest. What dehumanizes you inexorably dehumanizes me. It gives people resilience, enabling them to survive and emerge still human despite all efforts to dehumanize them."

Letter, Archbishop Desmond Tutu to Gerald Garrett, Chair, Texas Board of Pardons and Paroles, dated May 16, 2002; <http://www.abanet.org/crimjust/juvjus/beazleytutu102.html>.

The history of the juvenile justice system in this country reveals that the special treatment for juveniles was prompted, and has been sustained, by the efforts of religious leaders who recognized that juveniles were more rehabilitatable than adults. The movement began, interestingly enough, as a variant of sanctuary, in the Quaker House of Refuge projects that “offer[ed] food, shelter, and education to the homeless and destitute youth of New York, and . . . remov[ed] juvenile offenders from the prison company of adult convicts.” *Juvenile Justice Reform: An Historical Perspective*, 22 Stan. L. Rev. 1107, 1188-89 (1970). The courts took hold of this religiously inspired movement and gave birth to the juvenile court system. *Kent v. United States*, 303 U.S. 541, 554-55 (1966) (“The objectives [of the juvenile court] are to provide resources of guidance and rehabilitation. . . .”). Juveniles have fewer rights but greater protection than adults because the religious community, and then the legal community, recognized and protected that all-defining characteristic of the young – their ability to reform, mature, be rehabilitated: in short, their “capacity for growth.” *Thompson*, 487 U.S. at 834. At the same time, the same communities recognized juveniles’ unique vulnerability. In 1840, Jeremy Bentham remarked, “The feebleness of infancy demands a continual protection. Everything must be done for an imperfect being, which as yet does nothing for itself. The complete development of its physical powers takes many years, that of its intellectual faculties is still slower. At a certain age, it has already strength and passions, without experience enough to regulate them.” Jeremy Bentham, *Theory of Legislation* (Boston: Weeks, Jordan, 1840, Vol. I, page 248).

Modern science, over the last decade since *Thompson v. Oklahoma*, 487 U.S. 815 (1988), and *Stanford v. Kentucky*, 492 U.S. 361 (1989), were issued, has verified what had been empirically observed in juveniles as the basis for their special treatment under the law. Amici endorse the summary and findings of Dr. Ruben Gur in his affidavit attached to Patterson’s successor petition:

The brain scan techniques have demonstrated conclusively that the phenomena observed by mental health professionals in persons under 18 that would render them less morally blameworthy for offenses have a scientific ground in neural substrates. The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable. Therefore, a presumption arises that someone under 20 should be considered to have an underdeveloped brain. Additionally, since brain development in the relevant areas goes in phases that vary in rate and is usually not complete before the early to mid-20s, there is no way to state with any scientific reliability that an individual 17-year-old has a fully matured brain (and should be eligible for the most severe punishment), no matter how many otherwise accurate tests and measures might be applied to him at the time of his trial for capital murder.

Because of our understanding of the vulnerability of children and their capacity for rehabilitation, Amici strongly support the kinds of efforts that otherwise have been endorsed and pushed by the Governor and certain Texas legislators to create positive intervention programs for children at risk. *E.g.*, Osler McCarthy, *Perry Promotes Gang-Busting Bills; Package of Legislation Would Set Up State Database and Outlaw Recruiting*, Austin American-Statesman, March 17, 1999. In 1999, the (then Lieutenant) Governor supported legislation that would create a prevention service division in the Texas Department of Protective and Regulatory Services, aimed at addressing the factors that lead to juvenile crime. Perry pressed these prevention proposals, education, and after-school centers as the “single best crime- and gang - fighting tool.” “By keeping our kids off the street, hopefully, we can give them an alternative to joining these gangs.” *Id.*

The Vulnerability of T.J. Jones and Toronto Patterson

It is certainly plausible that, had sufficient intervention occurred in the lives of T.J. Jones and Toronto Patterson, their lives and destinies might have been radically different. *See* Alberta Phillips, *The Life of T.J. Jones was Over Long Before His Execution*, Austin American-Statesman, August 14, 2002; Clemency Petition /Toronto Patterson (www.abanet.org/crimjust/juvjus/patterson.html).

T.J. Jones was raised by an itinerant poor mother who attracted abusive boyfriends. Phillips,

supra. He never knew his own father, who beat his mother with an extension cord when she was pregnant with T.J. Under the burden of poverty, T.J.’s mother tried to hold down multiple jobs and was unavailable to her only child. At 14, T.J. began drinking alcohol and then graduated to “Whack,” a street form of marijuana laced with other more harmful substances. He abandoned home and fell in with “local punks” who influenced him to commit the offenses that led to his ultimate execution. *Id.* T.J.’s trial psychologist noted that, if there had been prompt and proper intervention when he broke into a middle school or showed other signs of distress, he might have been rescued. *Id.* Otherwise, he described T.J. as “a boy that may look 17, but on the inside, psychologically, he is probably more like a 10- or 12-year -old. . . a very poorly socialized immature adolescent – a boy who is mostly puzzled by how the world works, who bluffs his way through.” *Id.*

Toronto Patterson similarly was raised by a young, poor, single mother who was overwhelmed with the ordinary tasks of life. She admitted to beating Toronto with sticks, extension cords, and whatever she could get her hands on, when he misbehaved as a child. She once hit Toronto so hard with a thick stick that he believed his ankle was broken. Toronto’s mother and his uncles openly drank and used drugs in his presence. He was faced with the following scenario as a child according to a friend of the family:

[H]e spent a lot of his childhood staying in a neighborhood we refer to as “Dixon.” Dixon was a place where the people who stayed there were constantly exposed to drug use; people would smoke weed and crack on the streets. Drug sales took place in front of you. There was gambling, fights, and partying everywhere you turned in this neighborhood. Many of the homes in Dixon were run by single mothers. There were few good male role models for the boys growing up there. . . . In fact, I cannot think of any boy who grew up in Dixon who did not get involved in drugs or a gang lifestyle.

Commutation Petition at 38-39 (quoting family friend Floria Rider). Despite all this, Toronto did not become ensnared taking drugs or drinking and did not join any gangs. Toronto’s mother left him

with sole care of a sister born with a birth defect who died at a very young age. She made him lend her money for bills. She took on an abusive boyfriend. She ultimately drove Toronto out of her house in preference to the boyfriend. Toronto ultimately was lured into selling drugs by a cousin with whom he came to live. A psychologist who recently evaluated Toronto concluded that this was not surprising, given his background. Toronto has continuously protested his innocence of the offense for which he has been given the death sentence, and it is no small concern of Amici that, as a juvenile, he was placed in an interrogation session with a detective who, one month after securing a confession from Toronto, secured another from a capital murder suspect later proven to be innocent.

Id.

The State has responded to the alleged offenses of these juvenile offenders by carrying on, to quote Albert Camus, “as though [it] were virtue itself Like an honorable man killing his wayward son and remarking: ‘Really, I didn’t know what to do with him.’” Albert Camus, *Resistance, Rebellion, and Death* 173, 225-26 (Justin O’Brien, trans. 1960). At best, the State can try to justify its actions in contravention of international law on the ground that it is attempting to deter youthful violent criminals through the terror of the death sentence. The State is attempting to scare some youths out of joining gangs and becoming involved in violent crime by making an example of others and killing them. Amici are opposed to the death penalty because it, perforce, must be sustained by this sort of policy analysis on a broad scale, and such policy runs exactly counter to their own religious traditions and moral thought and experience. Quite apart from the dubious factual basis upon which the policy lies – that the death penalty would deter a population that *physiologically* lives in the present without sufficient appreciation of consequences and does not perceive, as adults do, the finality of death – the policy of killing some to save others is morally

unacceptable for religious traditions (Jewish and Christian) whose greatest commandment is to love one's neighbor as oneself.

Where incarceration is available as a means to incapacitate the most violent criminals, the State otherwise should not be about terrorizing its citizens but rather, in the words of John Paul II, the State should be going about sustaining the concrete conditions of the common good. Amici -- with vast experience in attending to the issues of children and families -- speak from the realm of the "concrete." When the Texas death penalty was reinstated in 1973, one of the sponsors of the legislation used a lighthouse metaphor to describe it. He said that once capital punishment was again in place, no one would be able to accurately tell how many ships would have been saved from the shoals by its light. As long as death penalty proponents remain attached to deterrence as a rationale, they will have to rest their proof of its efficacy on such speculation. We, on the other hand, do not find the death penalty to be a matter of light and we do not wish to speculate. We speak from the experience of the various branches of our ministries that have entered into the harsh world of unemployment, failed educational institutions, inadequate law enforcement, broken families, failed social services, inadequate legal assistance, widespread drug use, and hopelessness within which a large number of our children live. We cannot accept the juvenile death penalty as a means to protect children from these things. Neither do we see it as an appropriate means to protect others in society. Many of our religious and lay persons are involved in ministries to crime victims and we are aware that the greatest needs of crime victims are for safety, and then for accountability of the offender (an apology), *understanding* of the crime, and restitution, a setting aright of the moral order as best and as soon as possible. These needs are not met by strap-down confessions from juvenile offenders who, due to their disabilities as children (and often as abused children), were

unable to fully understand *why* they committed an offense. The needs are better met by a justice system that promotes dialogue, that punishes always with an eye toward restoration of all persons involved and provides an opportunity for some transformation of the harm caused by the crime. Such a system also would not inflict, as the current policy allows, unjustifiable suffering on the innocent bystanders of the drama: the parents, siblings, spouses, and children of the juvenile offenders.

Innocent Bystanders of the Juvenile Death Penalty

Amici are only now becoming aware of the deep suffering engendered by the death penalty on the families of death row inmates, the most marginalized persons in the process. A Huntsville news reporter, who has witnessed more than 50 executions, has observed, “You’ll never hear another sound like a mother wailing when she’s watching her son being executed. There’s no other sound like it. It is just this horrendous wail. You can’t get away from it. That wail surrounds the room. It’s definitely something you won’t ever forget.” Amnesty International, United States of America: State Cruelty Against Families, AMR 51/132/2001, Sept. 4, 2001. In a report suggesting that the death penalty is a violation by the State of its legal duty to protect families, Amnesty International compared the experience of offenders’ families to those who have suffered “disappearances”:

Family members of the judicially condemned know the whereabouts of their loved one, but do not know their fate. All they know is that the government has said that it intends to kill their brother, or mother, or sister, or father. As with “disappearances”, the rest is left to the imagination. In 1988, parents of those on South Africa’s death row wrote in a petition to the country’s president: “To be a mother or father and watch your child going through this living hell is a torment more painful than anyone can imagine”. South Africa, along with 108 other countries, no longer pursues this shameful policy, having recognized its futility and incompatibility with human dignity.

Id. Amici believe that the executions of T.J. Jones, and Toronto Patterson constitute a hideous

punishment of the mothers for their serious lapses as parents. It is one thing for society to consider that it must incarcerate their children for its own protection. It also is understandable that, in the best interests of children, sometimes society has to remove children from poorly performing parents. It is quite different for society – which should be responsible to support such parents in the rearing of their children – to send a message to a mother that her poor job as a parent is irredeemable by taking the produce of her womb and the object of her affection and killing it.

Conclusion and Prayer for Relief

When *protection of children* is at issue, the Texas Penal Code and Code of Criminal Procedure treat as a "child" someone younger than 18 years of age. TEX. PENAL CODE § 71.02 (Engaging in Organized Criminal Activity); § 46.06 (Unlawful Transfer of Certain Weapons); § 43.26 (Possession of Child Pornography); § 43.25 (Sexual Performance of a Child); § 43.251 (Employment Harmful to Children); § 25.08 (Sale or Purchase of Child); § 25.06 (Harboring Runaway Child); § 25.05 (Criminal Nonsupport); § 25.04 (Enticing a Child); § 25.03 (Interference with Child Custody); § 25.031 (Agreement to Abduct from Custody); § 9.61(a) ("*The use of force, but not deadly force, against a child younger than 18 years is justified . . . [under certain conditions]*"); TEX. CODE CRIM. PROC. art. 63.001 (defining "child" as a person under 18 years of age in the context of missing persons or missing child actions); art. 56.32 (defining "child" as an individual younger than 18 years of age for purposes of crime victim compensation law); art. 24.011 (subpoenaing the person having custody of a witness that is younger than 18 years old); art. 19.25 (excusing from grand jury service a "person responsible for the care of a child younger than 18").

Undoubtedly, when the first Penal Code was issued in 1875, the Texas Legislature paid heed to the recognition of the vulnerability and rehabilitative potential of children observed by juvenile justice reformers. The eligibility age for the death penalty (17 years old) established in the first Code was a vast improvement over the English common law, which prevailed in Texas on any subject not covered by statute. This Court now should stay Toronto Patterson's execution date, currently set for August 28, 2002, and ask the State to justify executing Toronto in the face of (1) the new *international* consensus opposed to the execution of 17-year-old offenders that was not fully formed at the time of *Thompson* and *Stanford*; (2) the new scientific evidence, also unavailable at the

time of *Thompson* and *Stanford*, that verifies our religious communities' intuitive appraisal of juveniles and their incapacity to be held as morally blameworthy as adults (despite how competent they may appear); (3) the religious communities' (Amici's) ongoing moral and spiritual objection to the practice; and, inter alia, (4) the ongoing objection to the practice by such respected professional organizations as the American Bar Association; the American Academy of Child and Adolescent Psychiatry; the Child Welfare League and *countless* organizations dedicated to the welfare of children. The gravity of this issue as it relates to Toronto Patterson's *eligibility* for the death sentence, and the doors now firmly opened for this Court's inspection of the issue by a clear majority of the Justices in *Atkins* – specifically, proportionality review in light of the punishment goals; and, the opinions of professional organizations, diverse *religious communities*, the world community [including, of course, international law], and polling respondents (*Atkins*, 122 S. Ct. at 2247, 2249 n. 21) – should allow this Court to grant review when the legislative indicia also are so strong in comparison to the same in *Atkins*.

Amici curiae respectfully pray that this Court shall find the requirements of Subsection (a) of Section 5 of Article 11.071 to be satisfied upon observing that the foregoing mixed legal and factual elements were not clearly available to Patterson when he filed either one of his prior applications for writ of habeas corpus. Tex. Code Crim. Proc. art. 11.071 § 5(d) & (e). The *Stanford* lead plurality held them to be irrelevant. *Stanford*, 492 U.S. at 374-80. In particular, this Court should find world opinion a compelling ground for granting a stay, review, and further development, because a *majority* of the Justices in *Stanford* (the lead plurality plus Justice O'Connor) had made it totally unavailable and a *clear majority* of Justices in *Atkins* restored it. *Stanford*, 492 U.S. at 369 n.1, 382; *Atkins*, 122 S. Ct. at 2249 n.21.

Furthermore, the evidence that a *jus cogens* norm now exists against the execution of juvenile

offenders is compelling. Such a norm might fairly be described as a principle “implicit in the concept of ordered liberty” that, in fact, should be recognized as having a place in our Constitution. *Stanford*, 492 U.S. at 369 n.1. Put another way, a practice so universally abhorred cannot be accepted by the American people. *Id.*

Respectfully submitted,

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Certificate of Service

This is to certify that on August 15, 2002, one copy of the instant brief of amici curae was

sent via United States Mail to, respectively, Ms. Libby Lange, Assistant Criminal District Attorney, 133 N. Industrial Blvd. LB19, Dallas, Texas 75207, and Mr. Gary Hart, 2906 Skylark Drive, Austin, Texas 78757.

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