

NO. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 2001

TORONTO MARKKEY PATTERSON,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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[CAPITAL CASE]
[EXECUTION SCHEDULED AUGUST 28, 2002]

QUESTIONS PRESENTED FOR REVIEW

1. **DOES PETITIONER'S DEATH SENTENCE VIOLATE THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE EXECUTION OF AN OFFENDER FOR ANY CRIME COMMITTED WHEN HE WAS LESS THAN EIGHTEEN YEARS OLD CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT?**

2. **DID THE TEXAS COURT OF CRIMINAL APPEALS' DISMISSAL OF PETITIONER'S SUCCESSIVE POST-CONVICTION APPLICATION FOR WRIT OF HABEAS CORPUS UNDER ARTICLE 11.071, SECTION 5 OF THE TEXAS CODE OF CRIMINAL PROCEDURE CONSTITUTE AN INDEPENDENT AND ADEQUATE STATE LAW GROUND FOR DECISION SO AS TO FORECLOSE THIS COURT'S REVIEW OF THE EIGHTH AMENDMENT ISSUE?**

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

COMES NOW Petitioner TORONTO MARKKEY PATTERSON and prays that a writ of certiorari issue to review the judgment of the Texas Court of Criminal Appeals described hereinbelow.

OPINIONS AND ORDERS IN THE CASE

This cause is on appeal from the denial of a subsequent application for writ of habeas corpus on behalf of a Texas death row inmate brought pursuant to Article 11.071, Section 5 of the Texas Code of Criminal Procedure. The Court of Criminal Appeals dismissed Petitioner's subsequent state

writ application in an unpublished order dated August 20, 2002. *See* Appendix A.

Petitioner was convicted of capital murder and sentenced to death pursuant to a judgment in the state district court that was entered on November 21, 1995. Petitioner's capital murder conviction was affirmed on direct appeal by the Texas Court of Criminal Appeals in an unpublished opinion on January 13, 1999. In an unpublished order entered February 3, 1999, the Texas Court of Criminal Appeals denied Petitioner relief in his initial state post-conviction application for writ of habeas corpus brought pursuant to Article 11.071 of the Texas Code of Criminal Procedure. On May 3, 2000, the Texas Court of Criminal Appeals dismissed Petitioner's first successive state post-conviction application for writ of habeas corpus as an abuse of the writ, again in an unpublished order. Petitioner timely filed his federal petition for writ of habeas corpus, and the district court denied relief on February 26, 2002. Both the district court and the Fifth Circuit Court of Appeals denied Petitioner a certificate of appealability, and on June 28, 2002, this Court denied Petitioner's petition for writ of certiorari.

On June 3, 2002, Petitioner filed a petition with the Inter-American Commission on Human Rights (hereinafter, "IACHR"), alleging violation of a *jus cogens* peremptory norm of international law by the United States. On June 10, 2002, the Commission formally requested the United States to "take precautionary measures to preserve Mr. Patterson's life pending the Commission's investigation of the allegations in the petition." *See* Appendix B. On June 12, 2002, Roger F. Noriega, United States Ambassador to the Organization of American States, forwarded the request for precautionary measures to preserve Petitioner's life pending disposition of his petition with the IACHR. Appendix B, *supra*. To date, no action has been taken to halt Petitioner's impending execution on August 28, 2002.

On July 31, 2002, Petitioner filed a second successive state post-conviction application for writ of habeas corpus, alleging, *inter alia*, that because he was seventeen at the time of the commission of the offense, the Eighth Amendment prohibits the execution of his death sentence. Petitioner argued both that this claim could not have been raised previously because the legal basis for the claim was unavailable, and that but for this violation of the Eighth Amendment, no rational jury could have answered any of the statutory special issues under Article 37.071 of the Texas Code of Criminal Procedure in the State's favor. *See* Article 11.071, Section 5(a)(1) & (3), V.A.C.C.P. The Texas Court of Criminal Appeals dismissed this successive application in an unpublished order dated August 20, 2002, holding that Petitioner failed to satisfy the requirements of Article 11.071, Section 5(a). *See* Appendix A. A clemency petition is pending with the Texas Board of Pardons and Paroles.

JURISDICTION OF THIS COURT

The order of the Texas Court of Criminal Appeals dismissing Petitioner's second successive state post-conviction application for writ of habeas corpus was entered on August 20, 2002. This petition is timely filed within 90 days of that date. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions, treaties, statutes, and rules involved in this case are, verbatim, in pertinent part, as follows:

1. U.S. Const. Amend. VIII:

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

STATEMENT OF THE CASE

For purposes of the present application, there is only one relevant fact: The record shows without contradiction that Petitioner was only seventeen years old on the date of the capital murder for which he was convicted and sentenced to die. (23 RR 3953)

REASONS FOR ALLOWANCE OF THE WRIT

EXCESSIVE / CRUEL AND UNUSUAL PUNISHMENT

Whether a particular punishment is excessive for purposes of the Eighth Amendment is a question of whether it is disproportionate in relation to the crime, according to the “evolving standards of decency that mark the progress of a maturing society.” *Atkins v. Virginia*, 122 S.Ct. 2242, at 2247 (2002), quoting *Trop v. Dulles*, 356 U.S. 86, at 100-101 (1958). The clearest and most reliable indicium of the evolution of society’s standards of decency is the action of the legislatures of the various states. *Id.* But legislative enactment does not “wholly determine” the proportionality issue. *Id.* Also relevant are the actual punishments imposed by juries. *Id.*, at 2249. *See also*, *Thompson v. Oklahoma*, 487 U.S. 815, at 831 (1988) (plurality opinion). This Court also looks further to the views of relevant professional organizations, religious organizations, the world community, and the general American public as reflected in polling data. *Atkins v. Virginia*, *supra*, at 2249, n. 21; *Thompson v. Oklahoma*, *supra*, at 830-831. Moreover, in the end, this Court will bring its own judgment to bear on the question, inquiring further “whether there is reason to disagree with the judgment reached by the citizenry and its legislators.” *Atkins v. Virginia*, *supra*, at 2247-2248. In making this latter judgment in the context of juveniles, as in *Atkins* with the mentally retarded, the Court will first ask whether the relative culpability of the category of offender at issue should be measured differently than the general run of offenders, and second, whether application of

the death penalty to that category of offender measurably contributes to the social purposes the death penalty is thought to serve. *Id.*, at 2250-2251; *Thompson v. Oklahoma*, *supra*, at 833.

Bringing these criteria to bear on the question whether the Eighth Amendment currently prohibits the execution of a seventeen year old offender, it is clear what the result must be. The number of states which have outlawed the execution of an offender younger than eighteen is roughly equivalent to the number that ban executing the retarded. In only fifteen states have juries returned death sentences for juvenile offenders in the last thirteen years (and only three states have actually executed a juvenile in the past nine). Every relevant professional organization condemns the practice, as do many religious organizations. The American public generally disapproves. And the world community uniformly condemns the execution of juvenile offenders, including seventeen year olds. The relative culpability of a seventeen year old offender is low in comparison with a fully formed adult, for reasons similar to those adduced to establish the relative lack of culpability for the mentally retarded. Because of this relative lack of culpability, it cannot reasonably be said that the death penalty measurably serves either the retributive or the deterrent function that normally justifies imposition of the death penalty. In short, all the relevant indicators demonstrate that Texas's practice of executing seventeen year old offenders presently violates the Eighth Amendment.

A. The Legislative Judgment

At the present time, 28 states, plus the District of Columbia and the federal government, do not authorize the execution of a seventeen year old offender at all, under any circumstances.¹ This is

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Twelve states have no death penalty. Sixteen states now bar the execution of juvenile offenders by statute: California (California Penal Code § 190.5); Colorado (Col. Stat. 16-11-103); Connecticut (Conn. Gen. Stat. 53a-46a (h)); Illinois (Ill. Stat. Ch. 720 § 5/9-1 (b)); Indiana (Senate Bill 426 signed by the Governor March 26, 2002, effective July 1, 2002); Kansas (Kansas Stat. 21-4622) Maryland (Md. Code 1957, art. 27 § 412 (g)); Montana (law passed 1999); Nebraska (Neb. Stat. § 28-105.01 (a)); New Jersey (N.J. Stat. §§ 2A:4A-22(a) & 2C:11-3(g)); New Mexico (New Mex.

roughly equivalent to the number of states (30) that currently ban execution of the mentally retarded. *Atkins v. Virginia*, supra, at 2248. Of those states whose statutes speak explicitly to the issue of executing juveniles, roughly the same number of states that expressly ban execution of the mentally retarded (18) also ban execution of offenders younger than eighteen (16). *Id.* At least six other states have recently considered legislation that would raise the age of eligibility to eighteen.² This Court found such pending legislation relevant in *Atkins. Id.*, at 2248-2249. No state has acted to *reduce* its age of eligibility for the death penalty. This Court found this fact significant in *Atkins* as well. *Id.*, at 2249. Thus, there currently exists practically the same societal will to abolish the death penalty for sixteen and seventeen year old offenders as for the mentally retarded.

Nor is there any less “consistency in the direction of change” with respect to banning the execution of juvenile offenders than this Court found with respect to the mentally retarded. *Id.*

Stat. 31-18-14); New York (N.Y. Penal Code § 125.27); Ohio (Oh. Stat. 2929.023 & 2929.03); Oregon (Or. Stat. 137.707); Tennessee (Tenn. Stat. 39-13-204); and Washington (by court decision, *State v. Furman*, 858 P.2d 1092 (Wash. 1993)). The District of Columbia likewise bars execution of juvenile offenders. (D.C. Code 22-2104) So does the federal government. 18 U.S.C. § 3591.

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In the 2002 legislative year, Florida (CS-SB 1212; HB 1615), Kentucky (HB 447; SB 127), Mississippi (HB 167), Missouri (SB 819; HB 1836), Arizona (SB 1457; HB 2302), and Pennsylvania (SB 27). In legislative sessions last year (2001) bills were introduced in South Carolina (Bill 236), Arkansas (SB 78), and Texas (HB 2048). A bill will be filed in the Texas Legislature in the 2003 session. Moreover, Indiana recently considered *and passed* legislation raising the age of eligibility for the death penalty to 18. (Senate Bill 426 signed by the Governor March 26, 2002, effective July 1, 2002)

Though the absolute number of states that reject capital punishment for a seventeen year old is similar to the number that reject execution of the mentally retarded, it may be argued that the trend is less recent and less pronounced, and therefore insufficient to overcome this Court's 1989 determination that, at least as of that time, a consensus against executing seventeen year olds had not yet emerged. *Id.*, at 2249, n. 18. But this would be a mistake. For while fewer states have banned juvenile executions in the thirteen years since *Stanford v. Kentucky*, 492 U.S. 361 (1989), than have banned execution of the mentally retarded since *Penry v. Lynaugh*, 492 U.S. 302 (1989), that is only because the states had farther to go in outlawing executions of the mentally retarded. The *direction* of change against executing seventeen year old offenders has remained constant. Recent pending legislation, *see ante* n. 2, demonstrates that the pace of change is picking up, and consistently in the same direction, toward abolition of capital punishment for any offender younger than eighteen. Considering the dwindling number of actual executions of juveniles that have occurred since *Stanford*, even among those states that explicitly permit the execution of juveniles, the execution of a seventeen year old must be regarded as just as "unusual" for Eighth Amendment purposes as the *Atkins* Court found execution of the mentally retarded to be.

B. Jury Verdicts and Actual Executions

Over the last decade, only fifteen states have actually sent a juvenile offender to death row. Amnesty International, *On the Wrong Side of History: Children and the Death Penalty in the USA*, AMR 51/058/1998, October 1, 1998 (Table 2); *see also* Juvenile Offenders on Death Row (Washington College of Law, American University) (www.wcl.american.edu/humright/deathpenalty/ juvstat.html) (visited 7/01/02). Six states that provide statutorily for the death penalty for sixteen and/or seventeen year old offenders have no

juveniles on death row.³ Since *Stanford*, only six states [Texas (most recently, 2002), Louisiana (1990), Missouri (1993), Georgia (1993), Virginia (most recently, 2000), and Oklahoma (1999)] have *actually executed* a juvenile offender. See *Juvenile Offenders on Death Row*, supra. This compares with five states to conduct actual executions, since *Penry*, of offenders who were at least arguably mentally retarded. *Atkins v. Virginia*, supra, at 2249. Moreover, in the last nine years, only *three* states, Texas, Virginia, and Oklahoma, have actually executed an offender who had not attained his eighteenth birthday at the time of his offense. The percentage of the total population represented by those three states is only 11 percent. *U.S. Bureau of the Census, 2000 Census* (Total U.S. population, 281,421,906; Texas, 20,851,820; Virginia, 7,078,515; Oklahoma, 3,450,654).

In very recent years juries across the nation have shown even less of a tendency than before to assess the death penalty for offenders younger than eighteen. The percentage of offenders sentenced to death who were juveniles at the time of the offense has declined dramatically over the last three years, from 5.1 % in 1999, to 1.8 % in 2001; and as of June 30 of this year no juvenile offenders have been sentenced to death. See Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973 - June 30, 2002 (Preliminary Compilation)*, at 8, Table 3, & 9 (<http://www.law.onu.edu/faculty/streib/juvdeath.htm>). Thus, as with execution of the mentally retarded in *Atkins*, “the practice” of sentencing juveniles to death and actually executing them “has become truly unusual,” and, just as this Court found in the context of the mentally retarded, here “it is fair to say that a national consensus has developed against it.” *Id.*, at 2249. Moreover, there is “[a]dditional evidence [that] makes it clear that [the] legislative

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Although Idaho, Utah, Wyoming, South Dakota, New Hampshire and Delaware all expressly allow for juvenile executions by statute, none have even placed a sixteen or seventeen year old on its death row, much less executed one. See *Juvenile Offenders on Death Row*, Supra.

judgment reflects a much broader social and professional consensus.” *Id.*, n. 21.

C. Relevant Professional Organizations

As was true for mental retardation, “several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon” juvenile offenders. *Id.* They include the American Bar Association, the American Psychiatric Association, the American Academy of Child and Adolescent Psychiatry, the American Society for Adolescent Psychiatry, the National Mental Health Association, The Children’s Defense Fund, The Center on Juvenile and Criminal Justice, The Coalition for Juvenile Justice, The Child Welfare League of America, The Juvenile Law Center, The Mid-Atlantic Juvenile Defender Center, The Youth Law Center, The Urban League, the Constitution Project, and Southwest Key Program, Inc. The American Law Institute’s Model Penal Code contains a prohibition against the death penalty for offenders younger than 18. ALI Model Penal Code, § 210.6, Commentary at 133 (Official Draft and Comments, 1980).

D. The Views of Religious Organizations

In *Atkins* a majority of this Court also looked to “widely diverse religious communities in the United States” in ascertaining the status of society’s attitude toward executing the mentally retarded. 122 S.Ct. 2249, n. 21. A similar approach with respect to executing juveniles reveals a similarly widespread rejection of capital punishment for offenders younger than eighteen within diverse religious communities. *See Stanford v. Kentucky*, *supra*, at 388, n. 4 (Brennan, J., dissenting) (listing *amici curiae*).

Just by way of example, after *Stanford* was decided, the National Council of the Churches of Christ in the U.S.A., representing 140,000 congregations of many of the most prominent Protestant denominations in the country, and over 50 million churchgoers, adopted a resolution to voice its

specific opposition to the execution of offenders younger than eighteen, and calling upon state legislative bodies to ban the practice. See Appendix C, A Resolution of the National Council of the Churches of Christ in the U.S.A. The United States Conference of Catholic Bishops filed an amicus brief in *Stanford*, opposing the execution of juvenile offenders, and it has never retreated from the views expressed in that brief – which is not surprising, given its general opposition to the death penalty. See A Good Friday Appeal to End the Death Penalty: A Statement of the Administrative Board of the United States Conference of Catholic Bishops, April 2, 1999 (<http://www.usccb.org/sdwp/national/criminal/appeal.htm>) In joining the amicus brief that the *Atkins* Court relied upon, the American Jewish Committee, with 100,000 members and supporters, expressly alluded to the fact that it has earlier joined other such amicus briefs in opposition to the execution of offenders not yet eighteen years old. See Brief of *Amici Curiae* of the United States Catholic Conference, et al. in *McCarver v. North Carolina*, October Term 2001, No. 00-8727, at *Appendix* (List of *Amici*) (<http://www.usccb.org/ogc/amicuscuriae3.htm>) The Commission on Social Action of Reform Judaism has likewise taken a stand against the death penalty in general, and against executing juveniles in particular. Representing the Union of American Hebrew Congregations, with 900 congregations encompassing 1.5 million Reform Jews, as well as the Central Conference of American Rabbis, the Commission on Social Action of Reform Judaism also joined the amicus brief in *McCarver*, and similarly opposes the execution of offenders younger than eighteen. See Religious Action Center of Reform Judaism: Issues: Death Penalty (www.rac.org/issues/issuedp.html); Press Release: Largest Jewish Organization Calls on Okla. Governor to Grant Clemency for Crimes Prisoner Committed as a Boy (www.rac.org/news/020299.html).

E. Consensus of the World Community

Worldwide condemnation of execution of juvenile offenders is not simply “overwhelming,” as this Court found international opposition to the execution of the mentally retarded to be in *Atkins*. *Id.*, at 2249, n. 21. The opposition around the world to executing juveniles is practically *universal*. Every government in the world *except* the United States and Somalia has ratified the United Nations Convention on the Rights of the Child, without reservation to the provision that bars the execution of offenders younger than eighteen. Somalia has now signed the Convention, and promises soon to ratify it. Execution of juveniles is also prohibited by the International Covenant on Civil and Political Rights. Although the United States ratified this treaty in 1992, the United States Senate purported to enter a reservation exempting the United States from this prohibition. No other signatory-nation to the ICCPR filed any reservation to Article 6, paragraph 5. Moreover, the governments of Belgium, Denmark, Finland, France, Germany, Italy, Netherlands, Norway, Portugal, Spain, and Sweden all registered objections to the Senate’s reservation as incompatible with the object and purpose of the ICCPR. *See Multilateral Treaties Deposited with the Secretary-General, Status as of 31 December, 1994*, U.N. Doc. ST/LEG/SER.E/13, at 127-130 (1995).

Only three countries in the world have continued actually to conduct juvenile executions (Iran, Pakistan, and the United States), and only the United States does so under color and sanction of domestic law (actually, only a small number of states within the United States, excluding the federal government). And the number may have dwindled even further, because on July 25, 2002, the Pakistan News Service reported that “[w]ith the enforcement of the Juvenile Justice System Ordinance 2002 in Punjab the death sentence of 74 juvenile delinquents has been converted into life imprisonment[.]” (<http://www.paknews.com/flash.php?id=5&date1=2000-07-25>) It has become clear that the ban against executing seventeen year old offenders is so universally accepted in the

world community that it has reached that status of a *jus cogens* peremptory norm of international law. *See* Appendix D, Excerpt from Successive State Post-Conviction Application for Writ of Habeas Corpus. Accordingly, Petitioner has filed a petition with the IACHR alleging that his execution would violate this peremptory norm, and the IACHR has requested that the United States take precautionary measures to preserve his life until it can investigate the petition. Appendix B, *supra*.

F. Public Opinion Polling Data

A national Gallup poll on May 20, 2002, found that 69 percent of Americans, or more than two-thirds, oppose imposition of the death penalty upon juveniles. *See* Death Penalty Information Center, Summaries of Recent Poll Findings, at p. 3. (<http://www.deathpenaltyinfo.org/Polls.html>). Thus, both legislative judgment and actual practice are merely reflective of the attitude of the general public.

G. Relative Culpability of Juvenile Offenders: Retribution & Deterrence

At least a plurality of this Court “has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.” *Thompson v. Oklahoma*, *supra*, at 835. The Court found it “obvious” that “[i]nexperience, 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.” *Id.* What was “obvious” to judicial intuition about fifteen year olds in 1988 has since been borne out in the scientific research and literature; and not only with respect to fifteen year olds, but with respect to seventeen year olds as well.

Dr. Ruben C. Gur is a neuropsychologist and tenured professor at the University of

Pennsylvania, with a primary appointment in Psychiatry, and secondary appointments in Neurology and Radiology. He is currently Chief of the Brain Behavior Laboratory and Director of Neuropsychology, Department of Psychiatry at the Hospital of the University of Pennsylvania. In June of 2002, Dr. Gur conducted a detailed review of the published literature on the topic of brain maturation in humans. *See* Appendix E, Declaration of Ruben C. Gur (verified), at 1-3. From that review Dr. Gur has concluded:

- “u. Summary and conclusions: The review of neuroanatomic studies across methods and approaches, and the few neurophysiologic studies in humans, indicates considerable convergence of findings with respect to brain maturation during childhood, adolescence and early adulthood. The overwhelming weight of the evidence supports the early post mortem studies indicating that the main index of maturation, which is the process called ‘myelination,’ is not complete until sometime in the beginning of the third decade of life (probably at around age 20-22). Other maturational processes, such as the increase in subsequent elimination (‘pruning’) in cell number and connectivity, may be completed by late adolescence, perhaps by age 15-17. More data are needed to pinpoint the age at which these latter maturational processes are complete.

- “v. These results have rather profound implications for understanding behavioral development. The cortical regions that are last to mature, particularly those prefrontal areas, are involved in behavioral facets germane to many aspects of criminal culpability. Perhaps most relevant is the involvement of these brain regions in the control of aggression and other impulses, the process of planning for long-range goals, organization of sequential behavior, the process of abstraction and mental flexibility, and aspects of memory including ‘working memory.’ If the neural substrates of these behaviors have not reached maturity before adulthood, it is unreasonable to expect the behaviors themselves to reflect mature thought processes.”

- “w. The brain scan techniques have demonstrated conclusively that he [sic] phenomena observed by mental health professionals in persons under 18 that would render them less morally blameworthy for offenses have a scientific grounding 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. This is similar to other physical characteristics such as height. While we know in detail the age at which the average adults reach their maximal height, predictions for individuals are not easy to make. Thus, although 18 is an arbitrary cutoff, given the ongoing development of the brain in most individuals, it must be preferred over 17 as assuring that only the most culpable are punished for capital crimes. Indeed, age 21 or 22 would be closer to the ‘biological’ age of maturity.”

Id., 11-13.

Indeed, recent research involving MRI techniques has shown that teenagers actually respond to stimuli with a different part of the brain than adults. Asked to identify the emotion displayed in a series of images of faces, the adult subjects uniformly and correctly identified “fear,” using the prefrontal cortex of the brain, which is the part of the brain associated with “executive” functions such a planning, goal-directed behavior, judgment and insight. Teenagers more often than not misidentified the emotion as “shock,” “surprise,” or “anger,” perhaps because the MRI revealed they were using a different, “lower” part of the brain called the amygdala, associated with instinctual “gut” reactions to stimuli. This difference may well explain the characteristic impulsiveness of adolescents. See Sarah Spinks, *One Reason Teens Respond Differently to the World: Immature Brain Circuitry* (<http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/onereason.html>); see also Interview with Psychologist Deborah Yurgelun-Todd (<http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/todd.html>). As Dr. Daniel R. Weinberger, a psychiatrist and Director of the Clinical Brain Disorders Laboratory at the National Institute of Health, has so succinctly and alliteratively put it: “It takes at least two decades to form a

fully functional prefrontal cortex.” See Appendix F, Daniel R Weinberger, *Editorial: Teen Brains Lack Impulse Control*, Seattle Post-Intelligencer, Tuesday, March 13, 2001.

Thus, since *Stanford* was decided in 1989, research confirms that the adult brain is not fully developed until an individual is in his early twenties. As a result, the brain of a seventeen year old has a greater tendency toward impulsiveness, lesser reasoning skills, and less awareness of the consequences of his decisions or actions. He is, in short, developmentally unable to problem-solve and control his actions as a mature adult would. Accordingly, he cannot be considered among the “worst of the worst” for Eighth Amendment purposes, in service of the retributive function of capital punishment, and he is unable to respond to the prospect of the death penalty as a deterrent in the way an adult would. See D. Keating, *Adolescent Thinking*, in “At the Threshold,” 54-89 (S. Feldman et al. eds., 1990); W. Overton, *Competence and Procedures*, in “Reasoning, Necessity and Logic,” 1-32 (W. Overton ed. 1990); National Institute of Mental Health, *Teenage Brain: A Work in Progress*, 2/6/01, (<http://www.nimh.nih.gov/publicat/teenbrain.cfm>). The lack of higher cognitive processing abilities that regulate impulse control and decision making in the seventeen year old reduces the degree of culpability that can be attributed to him relative to a normal adult engaging in the same criminal behavior. Studies have shown that an adolescent typically does not plan and often gets caught up in unanticipated events, reacting in the moment, and regarding as “accidental” what most adults would have foreseen as likely consequences. Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, Criminal Justice (Summer 2000), at p. 27. And when under stress, even the more cognitively developed adolescents are typically unable effectively to use their most advanced judgment and decision-making skills. *Id.*

The retributive purpose of the death penalty is a function of the relative culpability of the

offender. *Atkins v. Virginia*, supra, at 2251. A seventeen year old's brain development – or more precisely, the lack thereof – necessarily reduces his culpability, much as the diminished capacity of the mentally retarded offender reduces his. Indeed, as Dr. Gur has expressed it, “literally, it can be stated that any juvenile is retarded relative to that juvenile as an adult.” See Appendix E, at 13. Because a seventeen year old's ability to control his impulses or foresee the logical consequences of his conduct are not appreciably better than that of a fifteen year old, and only marginally better than that of the mentally retarded, the retributive purpose of the death penalty “is simply inapplicable” to him. *Thompson v. Oklahoma*, supra, at 835-837; *Atkins v. Virginia*, supra, at 2251. Likewise, the seventeen year old's relative inability to deliberate on the consequences of his conduct nullifies the deterrent function of the death penalty. What is true of the fifteen year old essentially holds true for the seventeen year old offender as well: “The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.” *Thompson v. Oklahoma*, supra, at 837. Moreover, what this Court said of the mentally retarded with respect to the deterrent function applies with equal force to a seventeen year old, viz: “[I]t is the same cognitive and behavioral impairments that make these defendants less morally culpable – for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses – that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.” *Atkins v. Virginia*, supra, at 2251. Thus, execution of a seventeen year old offender makes no measurable contribution to the purposes capital punishment is meant to serve, and must be considered “excessive.”

In *Atkins* this Court identified yet one more reason why capital punishment was peculiarly

inappropriate for the mentally retarded that has application to the class of juvenile offenders as well. The Court found that the “reduced capacity” of the mentally retarded increased the risk of imposition of the death penalty despite factors that might call for a less severe punishment. *Id.*, at 2251-2252. The same is true for juveniles. Like the mentally retarded, juvenile defendants in capital cases may be peculiarly susceptible to the danger of false confessions. *Id.* Indeed, in Petitioner’s own case, he gave an inculpatory statement that not only failed to match the physical evidence in the case, but may also have been the product of an interrogation technique that caused another youthful suspect, Michael Martinez, a month later, to give a demonstrably false confession. (21 RR 3601, 3610, 3650, 3691-3694; 22 RR 3734, 3915-3932; 23 RR 4025-4047) Moreover, a seventeen year old offender, like a mentally retarded one, might be less able to give meaningful assistance to counsel, may make a poor witness in his own defense (as Petitioner undoubtedly did), and may display a demeanor at trial that creates an unwarranted impression of a lack of remorse, all to the detriment of his ability to persuade the jury that sufficient mitigation exists to justify a life sentence. *Id.*, at 2252. For these reasons, like the mentally retarded, juvenile capital offenders “in the aggregate face a special risk of wrongful execution.” *Id.*

There exists, therefore, no justification to buck the legislative trend to abolish the death penalty for offenders under eighteen years of age, or to disagree with the view of professionals, religious communities, the American public, and the entire rest of the world that such executions are categorically inappropriate. Execution of a seventeen year old does not facilitate the retributive or deterrent functions that otherwise justify such an extreme sanction, and juveniles as a class face an intolerably disproportionate risk of wrongful execution. Construing the Eighth Amendment in accordance with “evolving standards of decency,” this Court should hold that Petitioner’s death

sentence is excessive, and vacate it.

INDEPENDENT AND ADEQUATE STATE LAW GROUND?

An Eighth Amendment claim that a certain class of offender is simply categorically ineligible for the death penalty would prove, if borne out, to be fully retroactive because “analogous to a new rule placing certain conduct beyond the State’s power to punish at all.” *Penry v. Lynaugh*, 492 U.S. 302, at 328-330 (1989). To execute Petitioner in the face of such a claim would amount to a fundamental miscarriage of justice because, given the categorical ban against execution that it would entail, no reasonable juror in Texas (or anywhere else) would (or even could) have found him eligible for the death penalty. *Cf. Sawyer v. Whitley*, 505 U.S. 333, at 348 (1992). Applying the *Atkins* criteria in the context of juvenile executions, including the execution of a seventeen year old offender, the conclusion is practically foregone that Petitioner’s execution would violate a categorical Eighth Amendment prohibition, resulting in a clear and fundamental miscarriage of justice.

Nevertheless, the Texas Court of Criminal Appeals rejected Petitioner’s *Atkins* argument because it was raised for the first time in a successive state post-conviction application for writ of habeas corpus which the Court found failed to satisfy the statutory predicate which must be met in order for a successive applicant to proceed, under Article 11.071, Section 5 of the Texas Code of Criminal Procedure. *See* Appendix A, *supra*. Respondent will no doubt assert that the Court of Criminal Appeals’ decision rested not on the merits of the Eighth Amendment issue, but on the basis of a procedural default that represents a state law ground, independent of the federal question, and adequate to support its judgment. *See Moore & Davis v. Texas*, 122 S.Ct. 2350, 2352 (2002) (Scalia, J., dissenting to granting of applications for stay of execution pending disposition of *Atkins*), citing

Coleman v. Thompson, 501 U.S. 722, 729 (1991). Indeed, because this is a direct appeal of the Court of Criminal Appeals’ order, rather than an appeal from a federal collateral attack, Respondent will argue, the impediment to this Court’s review is jurisdictional. *Id.*

But in fact this Court found no such impediment to its granting of stays of execution pending its resolution of the issue presented in *Atkins* in either Moore’s or Davis’s case. *See Moore v. Texas*, 122 S.Ct. 1814 (2002); *Davis v. Texas*, 122 S.Ct. 1815 (2002). A little over a month later, the Court also stayed the execution of Willie Mack Modden while it considered his petition for writ of certiorari in light of its impending decision in *Atkins*. *Modden v. Texas*, 122 S.Ct. 2387 (2002). Moreover, once the Court had issued its opinion in *Atkins*, it granted Modden’s petition for writ of certiorari, vacated the judgment of the Court of Criminal Appeals, and remanded the cause to that court for “further consideration in light of *Atkins* . . .” *Modden v. Texas*, 122 S.Ct. 2654 (2002). This Court took these many steps *despite* the fact that the Court of Criminal Appeals in *Modden* had clearly dismissed the state writ application from which he was appealing as an abuse of the writ under Section 5 of Article 11.071. *See* Appendix G, Order of the Texas Court of Criminal Appeals in *Ex parte Modden*, No. 11,364-03, delivered June 6, 2002.

Perhaps this Court did not regard such a dismissal as an adequate and independent state law basis for the Court of Criminal Appeals’ decision in either *Moore*, *Davis*, or *Modden*. The Court of Criminal Appeals has never construed Section 5 of Article 11.071 in a published opinion, so the capital bench and bar in Texas have had no guidance in gauging how the Court reaches its decisions with respect to abuse of the writ in successive capital habeas applications. However, the Court of Criminal Appeals has at least minimally construed a comparable abuse-of-the-writ provision under Section 4 of Article 11.07 of the Texas Code of Criminal Procedure, our non-capital post-conviction

habeas corpus statute, promulgated at the same time and in the same bill as Article 11.071, Section 5. *See* Acts, 1995, 74th Leg., ch. 319, §§ 1 & 5, respectively, effective Sept. 1, 1995. In *Ex parte Torres*, 943 S.W.2d 469, at 473 (Tex.Cr.App. 1997), the Court of Criminal Appeals declared that this comparable statutory abuse-of-the-writ provision was intended to adopt federal abuse-of-the-writ practice. In view of this declaration, this Court might have interpreted the Court of Criminal Appeals' determinations that Moore, Davis, and Modden failed to satisfy Section 5 of Article 11.071 as a question of state law that was, however, "interwoven with the federal law," and thus not an entirely independent basis for decision. *See Coleman v. Thompson*, supra, at 733, quoting *Michigan v. Long*, 463 U.S. 1032, at 1040-1041 (1983). *Cf. Ake v. Oklahoma*, 470 U.S. 68, at 74-75 (1985) (when question whether state contemporaneous objection rule would apply depends upon whether asserted error is of federal constitutional dimension, that rule is not "independent" of federal question). The same would *perforce* be true of the Court of Criminal Appeals' abuse-of-the-writ order presently under review in Petitioner's case.

Alternatively, this Court may have determined that application of Section 5 of Article 11.071 was not an "adequate" state law basis for the Court of Criminal Appeals' decision not to review the successive state petitions in *Moore*, *Davis*, and *Modden*. The abuse-of-the-writ doctrine codified in Section 5 of Article 11.071 has unquestionable utility in the general run of successive habeas cases. Ordinarily its application to bar successive habeas applicants would constitute an "adequate" basis for state court decision, so as jurisdictionally to bar direct review of this Court of any underlying federal claim. However, even rules of such general utility may sometimes, in application to a particular set of circumstances, "disserve" rather than serve any legitimate state purpose; and, under those circumstances, application of the rule will not constitute an "adequate" basis for the state

court's decision. *Lee v. Kemna*, 122 S.Ct. 877, at 887 (2002). There are, in short, “exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question.” *Id.*, at 885. Whether a state procedural bar is adequate to foreclose this Court's review of a federal question is itself a federal question. *Id.*, citing *Douglas v. Alabama*, 380 U.S. 415, 422 (1965).

Should Moore, Davis, and Modden in fact prove to be mentally retarded, *Atkins* establishes that their executions would violate the Eighth Amendment. They would be “actually innocent of the death penalty.” *Sawyer v. Whitley*, *supra*. The prohibition against their executions would be fully retroactive, barring application of the death penalty even though their convictions were final before *Atkins* was decided. *Penry v. Lynaugh*, *supra*. The State could have no “perceivable interest” in putting them to death. *Lee v. Kemna*, *supra*, at 886, 887. Indeed, the State could not even persuasively assert its usual interest in the finality of convictions, since fundamental miscarriages of justice, especially where the death penalty is concerned, trump finality interests. Under these circumstances, to allow slavish adherence to Section 5 of Article 11.071 to permit the executions of Moore, Davis, and Modden would serve no legitimate governmental purpose – it would be, rather, an abomination. Application of abuse-of-the-writ principles embodied in the statute would be, this Court might have reasoned, even *worse* than simply “an arid ritual of meaningless form.” *James v. Kentucky*, 466 U.S. 341, 349 (1984), quoting *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958). Thus, this Court may have concluded that the Court of Criminal Appeals' dismissal of the successive state writ applications of Moore, Davis, and Modden did not stand on a state law basis that was “adequate” to shield the Eighth Amendment question from its review. Again, what was true of the Court of Criminal Appeals' orders dismissing those successive state writ applications would be true

of its order dismissing Petitioner's successive application as well.

There is, conceivably, yet a third alternative to explain this Court's actions in *Moore*, *Davis*, and *Modden*. Given the dire circumstances of those cases (the impending executions of arguably mentally retarded inmates when a decision on the constitutionality of such executions was looming), perhaps this Court was simply unwilling to permit even an acknowledged jurisdictional impediment to result in a fundamental miscarriage of justice. Petitioner's predicament is comparable to Willie Mack Modden's, if not more dire. He has a legitimate Eighth Amendment claim that has become compelling since this Court's decision in *Atkins* was handed down.⁴ There is no question he was only seventeen at the time of his offense. A decision in his favor could be announced by this Court (hypothetically speaking) at any time, with full retroactive applicability to Petitioner's case. *Penry v. Lynaugh*, supra. Such a decision would mean Petitioner was "actually innocent of the death penalty." *Sawyer v. Whitley*, supra. Even so, the Texas Court of Criminal Appeals was unwilling to recognize that the condition of Eighth Amendment jurisprudence is sufficiently different now, after *Atkins*, than when Petitioner last attempted a state post-conviction collateral attack, as to justify a fresh review of the issue with an eye toward avoiding a fundamental miscarriage of justice. See Article 11.071, Section 5(a)(1), supra. Nor was the Court of Criminal Appeals willing to say that, but for the Eighth Amendment error, rational jurors would not have answered the statutory capital punishment special issues in the State's favor. See Article 11.071, Section 5(a)(3), supra. But this Court has never construed its own abuse-of-the-writ doctrine so narrowly as to tolerate *even a*

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Prior to *Atkins*, this Court denied a petition for certiorari on this Eighth Amendment issue in *Beazley v. Texas*, 122 S.Ct. 2287 (2002). But that would have been a particularly poor choice of a case in which to resolve the issue, given that three Justices were obliged to recuse themselves from consideration of the case. See also *In re Beazley*, 122 S.Ct. 2322 (2002).

fundamental miscarriage of justice. Sawyer v. Whitley, supra. It is apparently unwilling to tolerate it in the Court of Criminal Appeals either, judging by the actions it took in *Moore*, *Davis*, and *Modden* – jurisdiction or no jurisdiction!

One way or the other, whatever the rationale, this Court should stay Petitioner’s execution, just as it stayed the executions in *Moore*, *Davis*, and *Modden*, pending resolution of a critical Eighth Amendment issue, and grant Petitioner’s petition for certiorari to decide the constitutionality of executing a seventeen year old offender, rather than to allow the fundamental miscarriage of justice that would surely occur should Petitioner’s execution be carried out as scheduled on August 28th.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner’s motion for stay of execution and his petition for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals described hereinabove.

Respectfully submitted,

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