

BEFORE THE GOVERNOR FOR THE STATE OF TEXAS

AND

THE BOARD OF PARDONS AND PAROLES

In Re

Toronto Markkey Patterson,

Applicant

**APPLICATION FOR REPRIEVE FROM EXECUTION,
AND COMMUTATION OF SENTENCE**

**REQUEST FOR INTERVIEW PURSUANT TO
37 Texas Administrative Code §143.43(d),(e) and
37 Texas Administrative Code §143.57(e),(f)**

**REQUEST FOR HEARING PURSUANT TO
37 Texas Administrative Code §143.43(b)(3) and
Administrative Procedures Act §2001.001 *et seq***

**REQUEST FOR COMPLIANCE WITH
Texas Open Meetings Act
Texas Government Code §551.001 *et seq***

**REQUEST FOR COMPLIANCE WITH
Texas Constitution
Article 4, §11**

A. INTRODUCTION

Toronto Markkey Patterson (hereinafter, "Toronto") is scheduled for execution after 6:00 p.m. on August 28, 2002. Toronto's case presents this Board and the Governor with a request for reprieve and commutation to a sentence less than death. Residual doubt remains whether Toronto even committed this offense, and the most damning evidence that was presented against him was a confession he gave that did not even match the physical and forensic evidence in the case. That confession was given in response to a technique of police interrogation that, a month later in another capital murder investigation, caused another young suspect to confess to a capital crime it was later shown he did not commit. This fact was kept from Toronto's jury during his trial. More importantly, Toronto was only seventeen years old at the time of the offense. Given the Supreme Court's recent prohibition against the execution of mentally retarded offenders, it seems likely that in the near future the execution of seventeen year old offenders will be banned as well, since many of the same considerations apply. It would be a shame and an embarrassment to execute Toronto (or any other juvenile offender) only to have the Supreme Court announce in a year or two that such a practice violates the Eighth Amendment. To spare his life now would also relieve Texas and its citizens from the disapprobation of the rest of the world, which universally considers the execution of offenders younger than eighteen to be on a par with such practices as lynching, slavery, torture, piracy and genocide. Moreover, Toronto's trial attorneys failed to present substantial evidence in mitigation of the death penalty, and failed to educate his jury with respect to the lesser culpability attached to a juvenile offender, who for reasons of simple biology has a lesser capacity for reflective judgment and impulse control than a comparable adult offender. Ordinarily it might be expected that the judicial

system could account for such deficiencies of counsel by offering relief in the habeas corpus context. Unfortunately, Toronto's initial state habeas lawyer failed to challenge the competency of his trial attorneys in any of these respects. Issues not raised in state habeas corpus cannot successfully be raised in federal court, so Toronto's complaints were lost to him in the federal forum as well. At this point only the executive branch can rectify the fact that Toronto was sentenced to death by a jury that never got to examine many of the very best reasons he should have been spared the death penalty. Finally, in light of persuasive evidence that Toronto is no danger in prison and is unlikely to commit criminal acts of violence in the future which will pose a continuing threat to society, it would be contrary to the public policy of Texas to end his life as a punishment for crime. Toronto has demonstrated by his conduct since commission of the offense for which he was convicted that he can be rehabilitated successfully in prison and that there is no need to execute him in order to assure the safety of society.

B. INFORMATION REQUIRED BY 37 TAC §143.42

1. Name of Applicant:

Toronto Markkey Patterson

2. Identification of Agent Presenting Application:

J. Gary Hart, Attorney for Toronto Markkey Patterson

3. Required Copies of Court Documents:

The required court documents are attached as Exhibit A to this application.

Toronto's execution date is set for August 28, 2002.

4. Statement of the Offense:

Toronto Markkey Patterson was convicted of the capital murder of Ollie Brown in Dallas County, Texas and sentenced to death on November 21, 1995.

5. Statement of the Appellate History:

The Texas Court of Criminal Appeals affirmed Toronto's conviction and death sentence in an unpublished opinion on January 13, 1999. *Patterson v. State*, (Tex.Cr.App, No. 72,282, delivered January 13, 1999). The United States Supreme Court denied Toronto's petition for certiorari on October 4, 1999.

Toronto applied to the 291st District Court of Dallas County and the Texas Court of Criminal Appeals for a post-conviction writ of habeas corpus on September 8, 1997. On February 3, 1999, the Court of Criminal Appeals denied relief based on the recommended findings of fact and conclusions of law made by the convicting court without an evidentiary hearing.

On October 4, 2000 Toronto filed a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Texas. Judge Joe Fish denied relief on August 17, 2001, based on the findings and recommendation of Magistrate Judge William Sanderson, Jr. The United States Court of Appeals for the Fifth Circuit denied Toronto's Application for Certificate of Appealability on February 26, 2002, in an unpublished opinion.

Toronto filed a Petition for Writ of Certiorari in the United States Supreme Court, which was denied on June 28, 2002.

6. The Legal Issues Raised:

On direct appeal, Toronto raised 23 points of error. Toronto challenged the legal and factual sufficiency both of the evidence adduced to convict him, and of the evidence tendered at the punishment phase to show his future dangerousness. In three points of error he contended that the trial court erred in excluding defense evidence that the detective who took Toronto's confession had extracted a false confession from another capital murder suspect a month later using similar interrogation tactics. In a related point of error, Toronto claimed it was a violation of due process to have denied him access to police records regarding the detective's interrogation of the innocent capital murder suspect. Toronto complained of the admission of an oral statement he made before receiving his constitutional *Miranda* warnings, and of the prosecutorial use of his post-arrest silence once he had been *Mirandized*. In three points of error he complained of the failure of the trial court to instruct the jury at the punishment phase of trial regarding minimum parole ineligibility for a capital life sentence. Toronto argued that his final summation at the punishment phase of trial was illegally restricted, preventing him from arguing he would not be a future danger to anyone if incarcerated on a capital life sentence. He also argued he was prejudiced by the introduction of gruesome autopsy photographs. Finally, Toronto raised certain challenges to the constitutionality of Texas's statutory death penalty which were summarily dismissed as having been raised and rejected before in previous cases.

In his state application for writ of habeas corpus, Toronto's counsel raised only five issues in a six page document. State habeas counsel alleged that Toronto's trial counsel were

constitutionally ineffective for failing to call Toronto to the stand at a pre-trial suppression hearing to establish that his statements to the detective had been a product of coercion. He also alleged ineffectiveness because Toronto's trial counsel had made certain allusions to Toronto's extraneous criminal conduct, and failed to object to evidence suggesting gang affiliation, during the course of the trial. State habeas counsel also complained of trial counsel's failure to object to the State's erroneous jury argument at the punishment phase of trial. Finally, State habeas counsel contended that Toronto's due process and equal protection rights were violated because he was forced by the statutory post-conviction scheme under Article 11.071 of the Texas Code of Criminal Procedure to pursue his state habeas remedies contemporaneously with his direct appeal.

Before proceeding into federal court, represented by a new attorney, Toronto filed a subsequent post-conviction application for writ of habeas corpus under Section 5 of Article 11.071. There he argued that his trial and appellate counsel had rendered constitutionally deficient assistance of counsel in failing to raise the provisions of the International Covenant on Civil and Political Rights in bar of his execution. That treaty, which the United States has signed and ratified, expressly prohibits execution of seventeen year old offenders.

In his federal petition for writ of habeas corpus, Toronto did not re-raise any of the issues that his initial state habeas counsel had raised. Instead, federal habeas counsel once again argued that Toronto's federal constitutional rights were compromised when the trial court prohibited testimony that the same detective who interrogated him extracted a false confession from another youthful suspect, using similar tactics, in another capital murder

investigation a month after Toronto's interrogation. Federal habeas counsel also reiterated Toronto's appellate claim that the jury should have been instructed at the punishment phase about his minimum parole ineligibility if serving a capital life sentence. In addition, federal habeas counsel argued that both his trial and appellate counsel had rendered constitutionally deficient performances in failing to argue that imposing the death sentence would violate international law under the International Covenant on Civil and Political Rights. Finally, Toronto argued that his trial counsel had been ineffective in failing to investigate and present significant mitigating evidence at the punishment phase of his trial.

7. Requested Length of Reprieve:

Toronto seeks a reprieve of at least 120 days.

8. Grounds for Reprieve:

On June 3, 2002, Toronto 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 Exhibit 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 Toronto's life pending disposition of his petition with the IACHR. Exhibit B, *supra*. Toronto now asks that the Texas Board of Pardons

and Paroles (hereinafter, "Board") respond to this request by recommending a reprieve of sufficient length to allow the IACHR to release its report in the case of another juvenile from Nevada who is under a sentence of death, Michael Domingues. Pursuant to the IACHR's procedures, the final Domingues report should be issued no later than December of 2002. The IACHR has already issued a confidential preliminary report in Domingues's case finding that the United States is in violation of international law in the execution of juvenile offenders.

9. Victim Impact

No evidence of the effect of Toronto's crime on the family of the victims was produced at trial. It would, therefore, be presumptuous for undersigned counsel, or for Toronto himself, to speculate about how the family of the deceased children were impacted by their loss. Clearly, the death of Ollie Brown was, as in all cases of this kind, a terrible tragedy, the mental and emotional consequences of which most of us cannot even imagine.

10. Grounds for Commutation:

Some residual doubt remains that Toronto even committed the instant offense. He testified at trial to deny it, and continues to deny it to this day. Evidence was withheld from Toronto's jury that would have shown that the police detective who took his incriminating statement had extracted a false confession from another youthful capital murder suspect, using the same interrogation techniques used against Toronto, just one month after he took Toronto's statement.

Toronto was only seventeen years old at the time of the offense. Like the mentally retarded, juveniles as a class are an inappropriate subject of capital punishment. Juvenile brain development is insufficient to attribute to them the same level of culpability as an adult, and without the requisite degree of culpability, the retributive and deterrent goals of capital punishment simply cannot be met. Execution of juvenile offenders violates international law. Texas is one of the few remaining “rogue” states that continue to execute seventeen year old offenders, a practice that the rest of the world regards to be as morally reprehensible as torture, slavery, piracy, and genocide.

With respect to the appropriateness of the death penalty for Toronto in particular, he received grossly ineffective assistance of counsel at every stage of the proceedings against him. Trial counsel failed to present more than a thumbnail sketch of his abused and rudderless childhood; much more could have been presented at the punishment phase of his trial. Nor did trial counsel attempt to argue that execution of a seventeen year old offender would violate either the Eighth Amendment or international law. Indeed, trial counsel failed even to try to highlight the fact of his youth as a mitigating factor, neglecting to present expert testimony to persuade the jury on an individualized basis that as a juvenile Toronto should not be held as accountable for his actions as would an adult. Toronto’s initial state habeas counsel then failed to raise these deficiencies of trial counsel in Toronto’s initial writ application, thus rendering such claims forever lost for purposes of judicial review.

Although Toronto’s federal habeas counsel attempted to highlight the deficiencies of trial

counsel, because of the operation of the Antiterrorism and Effective Death Penalty Act (hereinafter, "AEDPA"), the federal courts declined to review the merits of his claims.

Evidence not available to the jury at the time of Toronto's sentencing establishes that he is not, or is no longer, likely to commit criminal acts of violence in the future such that he will be a continuing threat to society.

C. WHY A COMMUTATION / REPRIEVE SHOULD BE GRANTED:

1. RESIDUAL DOUBT

a. Toronto has always maintained his innocence

Toronto testified at the guilt phase of his capital murder trial, and denied committing the offense. He admitted being at the scene shortly before the offense occurred, and that he had taken the gold rims from the premises under duress from two Jamaican drug dealers, but testified that his cousin Kimberly and her two daughters were still alive when he and the Jamaicans left the house. Toronto continues to deny he shot and killed anyone.

b. Other Suspects

Significant questions remain about whether Toronto did indeed commit this offense. The Jamaican drug dealers in Toronto's account did, in fact, exist, and were not a figment of his imagination. Kimberly's sister, Valerie Brewer, testified that she knew "Jamaican Clyde" and "Jamaican Dee," and so did Kimberly. (19 RR 3211, 3222)¹ Dallas Police Department offense

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From time to time it will be convenient to direct the Board's attention to portions of the appellate record. "RR" denotes the court reporter's record. The citation in the text refers to Volume 19, pages 3211 and 3222 thereof.

reports indicate that Kimberly was arrested in August of 1993 for peddling drugs, and skipped town in January of 1994, not to return until shortly before her death. *See* Exhibit C, Dallas Police Department Offense Reports. It is at least conceivable that the Jamaicans returned to the house to kill Kimberly and her children for some reason relating to their business of selling illicit drugs. Moreover, Ollie Brown, who was Kimberly's sometime boyfriend and the father of her two children, arrived at the scene of the killings simultaneously with the paramedics who were called to the scene. (22 RR 3801) When the police arrived, they tested his hands for the presence of antimony and barium, finding levels that were consistent with someone who had recently discharged a firearm. (22 RR 3756-3758) And though the jury was not allowed to hear it, Ollie Brown's polygraph results when asked whether he murdered his family proved "inconclusive, but were leaning toward deception." (22 RR 3820-3825) *See also* Exhibit C, *supra*. Nevertheless, once the police focused their investigation on Toronto, any investigation of Ollie Brown ceased.

c. Questionable Interrogation

The most damning evidence against Toronto was unquestionably the second statement he made to Homicide Detective K. W. Wiginton, in which he admitted for the first and only time that he in fact shot Kimberly and her two children. But his description of the shootings of the children is at odds with the physical and forensic evidence, and there is good reason to believe the confession was false. Toronto's jury never got to hear evidence that, only a month after his interrogation of Toronto, using interrogation techniques similar to those Toronto told the jury he had used to question him, Wiginton obtained a confession from another youthful capital murder suspect that proved to be utterly false. It is only natural for a jury to doubt that a truly innocent person would ever confess

to a brutal crime under any circumstances short of torture. Toronto's jury was not allowed to hear critical evidence that may have overcome that doubt and persuaded them that his second statement was false. Nor was Toronto's jury privy to an expert evaluation whether the circumstances of the interrogation might have been such as to cause a juvenile of Toronto's particular psychological makeup falsely to confess.

i. Toronto's Account of the Interrogation

Toronto testified that he was taken to a small interrogation room with carpet on the walls and floor sometime between 7:00 and 7:15 p.m. on June 7, 1995, and left waiting there for about a half an hour. (23 RR 4025-4026) The room had a table and two chairs. (23 RR 4026) When Wiginton first entered the room, he was friendly, and Toronto felt he could trust him. (23 RR 4027-4028) But he was also confused, and a little bit afraid of Wiginton, since this was his "first time being in a room and in some trouble like that." (23 RR 4028-4029) He had, in fact, never been interrogated by a police officer before. (22 RR 4038) He gave Wiginton a statement in which he admitted his presence at the crime scene, but not to the murders themselves. (23 RR 4027-4031)

When Wiginton re-entered the room to take a second statement after consulting with Detective Penrod, he began to shout and forced Toronto to sit in the corner. (23 RR 4031) He was red-faced and angry, and close enough to spit in Toronto's face. (23 RR 4031-4032) He accused Toronto of lying in his first statement, and told Toronto (falsely) that police had recovered the gold rims and the murder weapon. (23 RR 4032) Toronto then asked for a lawyer, and repeated the request a number of times. (23 RR 4032, 4042, 4048) Wiginton told Toronto he should not bankrupt his family with a lawyer, and that nobody would "ever want to talk to me, ain't going to be

able to get no lawyer unless I sign this paper.” (23 RR 4033, 4034) Wiginton then described the murder scene to Toronto, which was the first Toronto heard of the details of the shootings. (23 RR 4034) Wiginton accused Toronto of killing Kimberley, Jennifer, and Ollie, in order to obtain the rims. (23 RR 4034) He yelled at Toronto, and poked and pushed him with his finger in various places to illustrate where the victims had been shot, causing his head to move to the side. (23 RR 4036, 4038, 4047) The accusations persisted for a half an hour before Wiginton began to write out the second statement. (23 RR 4043) Toronto was upset, and cried the whole time Wiginton wrote out the second statement. (23 RR 4034-4035, 4038) Toronto had never asked to make a second statement, but once Wiginton began to write, Toronto asked that the statement be electronically recorded. (23 RR 4039, 4043) Wiginton refused, claiming the room lacked electrical outlets. (23 RR 4039-4040) At one point Wiginton's beeper went off, and after looking at the display, he informed Toronto (falsely) that Toronto's fingerprints had been found on the murder weapon. (23 RR 4045) Toronto only signed the second statement because he had been held incommunicado in the room for over four hours, scared and confused. (23 RR 4047)

ii. Michael Martinez's Interrogation

Earlier Michael Martinez had testified, outside the jury's presence. (22 RR 3915) A twenty-one year old man, Martinez was arrested and charged with capital murder in July of 1995. (22 RR 3916) He was placed in a small interrogation room with two chairs and a table, and carpet on the walls, and made to wait for fifteen minutes. (22 RR 3918-3919) Martinez had never been in trouble with the law before, and never subjected to police interrogation. (22 RR 3921) At first Wiginton was friendly with Martinez, but he turned “rude” and forced him to sit in the corner when Martinez

told him where he had been on the night of the murders. (22 RR 3926-3927) Wiginton sat up very close to Martinez and looked at him “straight in the eyes.” (22 RR 3926) Wiginton assured Martinez that he knew Martinez was guilty, and that Martinez was “going to go down for these crimes.” (22 RR 3921) After taking one statement from Martinez, Wiginton told Martinez that he knew he was a liar. (22 RR 3924) He yelled at Martinez and intimidated him, telling him he would “get the needle.” (22 RR 3925-3927) He told Martinez he had witnesses “that can say you did it.” (22 RR 3926) Wiginton then wrote out a second statement, telling Martinez that the first was “bullshit.” (22 RR 3925) He told Martinez to “sign right here and you can go home.” (22 RR 3928) He threatened to lock up Martinez’s girlfriend and take her children away from her if he did not sign. (22 RR 3928) This continued “all night.” (22 RR 3928) Martinez continually denied Wiginton’s accusations, but he ultimately signed all three statements because he was “confused.” (22 RR 3929-3932) He was eventually exonerated of the offense. (22 RR 3916)

iii. The Judicial Response

The trial court would not allow the jury to hear Martinez’s testimony. When Toronto complained on appeal that Martinez’s testimony should have been admitted as relevant to both the voluntariness and the truthfulness of Toronto’s second statement, the Texas Court of Criminal Appeals upheld the trial court. The Court of Criminal Appeals reasoned that admitting Martinez’s testimony might lead the jury to believe that Detective Wiginton was of questionable character and credibility with respect to “the topic of interrogation of capital murder suspects.” *Patterson v. State*, (Tex.Cr.App., No. 72,282, delivered January 13, 1999) (unpublished slip op. at 20). When Toronto attempted to raise the issue again in his federal habeas corpus proceedings, the federal courts were

constrained to defer to the Court of Criminal Appeals's holding, under the provisions of the Antiterrorism and Effective Death Penalty Act (hereinafter, "AEDPA"). Thus, the courts have proven to be much more solicitous of the reputation of a Dallas police detective than of the rights of a juvenile offender standing trial for his life.

The Board of Pardons and Paroles need not make the same choice. Toronto's jury might have believed that, even if Toronto's testimony about the circumstances of the confession were true, Wiginton's coercive tactics were simply not of such a character as to induce an innocent man to falsely confess. Martinez's testimony shows that, while investigating another brutal capital crime, the same interrogator, using substantially the same method of interrogation on another young man who had never submitted to police interrogation before, had in fact extracted a false confession. This would serve to support the inference that Wiginton's particular method of interrogation could have caused Toronto to sign a statement that was not true, and would tend to deflate the jury's natural and entrenched presumption that an innocent man would not have confessed under the circumstances. Martinez did. It is more than conceivable that Toronto did too. The Board should take Martinez's testimony into account in considering the weight of residual doubt that Toronto committed the crime for which the jury convicted him.

d. False Confessions

There are other reasons to doubt the reliability of Toronto's second, and most incriminating statement; reasons that the jury also did not hear. Toronto's jury heard nothing of the recent developments in the psychology of false confessions. While these developments do not definitively

show that Toronto's second statement was false, they are relevant to the issue. The Board should take them into account as well.

In his ground-breaking 1992 book, *The Psychology of Interrogations, Confessions, and Testimony*, Dr. Gisli Gudjonsson identifies three types of false confession. One of those he calls the "coerced-compliant false confession." He describes this type of false confession thus:

"The coerced-compliant type of false confession results from the pressures of coerciveness of the interrogation process. The suspect does not confess voluntarily, but comes to give in to the demands and pressures of the interrogators for some immediate instrumental gain. * * * The perceived instrumental gain may include the following:

1. Being allowed to go home after confessing;
2. Bringing the interview to an end;
3. A means of coping with the demand characteristics, including the perceived pressure, of the situation;
4. Avoidance of being locked up in police custody.

"The suspect's perceived immediate instrumental gain of confessing has to do with an escape from a stressful or an intolerable situation. The suspect may be vaguely or fully aware of the potential consequences of making the self-incriminating confession, but the perceived immediate gains outweigh the perceived and uncertain long-term consequences. In addition, making a false self-incriminating admission or confession is perceived as more desirable in the short term than the perceived 'punishment' of continued silence or denial.

"Suspects may naively believe that somehow the truth will come out later, or that their solicitor will be able to rectify their false confession."

Pp. 227-228.

It is not just physical coercion that can result in this type of false confession. "Observational studies have shown that the use of physical force has given way to more psychologically oriented methods, such as feigned sympathy and friendship, appeals to God and religion, the use of

informants, the presentation of false evidence, and other forms of trickery and deception.” Richard P. Conti, *The Psychology of False Confessions*, 2 *The Journal of Credibility Assessment and Witness Psychology* 14, at 26 (1999). (Attached as Exhibit D) The length of the interrogation is also a factor, as is isolation. *Id.*, at 27, 28. So are the particular character traits of the suspect being interrogated, with children at particular risk, since they are suggestible and relatively easily conditioned. *Id.*, at 25. “Perhaps a certain amount of stress applied to a normal person may get the truth out of him or her; but if a lot of stress is applied to the psychologically inadequate, the result could likely be a false confession.” *Id.*

Applying these factors to Wiginton’s interrogation of Toronto, it is not hard to imagine he might well have confessed falsely to shooting Kimberly and her children. He was taken to an isolated room and held there incommunicado for more than four hours, which is a long time for a seventeen year old to sit still. Never having submitted to police interrogation before, Toronto had no idea what to expect. Wiginton was friendly at first, but when he did not immediately get the results he wanted, he ratcheted up the pressure until Toronto was crying, and no doubt would have said anything just to escape the room. Wiginton presented Toronto with an informant’s story and false evidence against him, making it clear that he rejected Toronto’s initial story (the one he has steadfastly reiterated ever since), that he believed Toronto was guilty, and that Toronto would go nowhere until he confirmed Wiginton’s belief. That the confession Toronto eventually did make does not even comport with the forensic facts of the shooting bolsters the likelihood that, by that time, he was willing to say anything that would relieve the pressure of the immediate situation, with either little thought for future consequences (a trait that is typical of teenagers, and especially

teenagers of disadvantaged backgrounds), or the perception that his immediate escape was more desirable even than the trouble such a confession would surely bring down upon him.

The jurors in Toronto's trial heard nothing about the psychological factors that go into the "coerced-compliant" type of false confession. Perhaps the reason is that at that time, in 1995, the psychological study of the dynamics behind false confessions was in its infancy. If they had, they may have begun to harbor doubts about the verity of his second statement – particularly had they also been allowed to learn that Wiginton had in fact extracted a false confession a month later from Michael Martinez using the same psychologically coercive interrogation tactics. Unlike Toronto's jury, the Board may take these factors into account in its consideration of the possibility that Toronto may be innocent of this crime.

e. Residual Doubt

Nothing that has been said up to this point establishes what the courts would call evidence of "actual innocence." *See Elizondo v. State*, 947 S.W.2d 202 (Tex.Cr.App. 1997). Nor does Toronto have any such evidence to offer. For, although "actual innocence" is a claim that can be raised in a state post-conviction application for writ of habeas corpus, Toronto's initial state habeas counsel conducted no investigation into his innocence -- or for that matter, any investigation at all. *See Exhibit E, Affidavit of Attorney Barry Bryant*. Instead, state habeas counsel raised nothing but record based claims, in a six page pleading citing only one case. *See Exhibit F, State Post-Conviction Application for Writ of Habeas Corpus*. Although undersigned counsel was later able to secure limited funds from the federal courts for investigation, he felt it more imperative to investigate trial counsel's performance at the punishment phase of trial in an effort to save Toronto's

life than to attempt a more wide-ranging and undoubtedly cost-prohibitive investigation into actual innocence. *See* note 6, *post*.

For this reason Toronto is unable to present evidence of his “actual innocence” to justify a commutation of his sentence from death to life. He would ask the Board instead, however, to take into account the significant questions about his guilt that linger even after the jury’s verdict in this case. The Board should keep those lingering questions in mind as it considers the remaining grounds Toronto asserts *do* justify a commutation to a life sentence. It is always a terrible prospect that an innocent man might be executed at the hands of the State. It is all the more terrible a prospect that an innocent *juvenile* could be put to death.

2. EXECUTION OF JUVENILES VIOLATES THE EIGHTH AMENDMENT

The United States Supreme Court recently declared that the execution of mentally retarded offenders violates the Eighth Amendment to the Constitution, in *Atkins v. Virginia*, 122 S.Ct. 2242 (2002). Practically every consideration that went into the Court’s conclusion that executing the mentally retarded is “excessive” punishment would apply with equal or greater force to the question whether executing offenders who are younger than eighteen also constitutes “excessive” punishment for Eighth Amendment purposes. There is reason to believe, therefore, that before very long the issue will go to the Supreme Court, and that the Court will categorically prohibit application of the death penalty to seventeen year old offenders like Toronto. Surely it would be preferable to commute the sentence of an offender like Toronto to a term of life imprisonment rather than risk executing him, only to be told within the next year or two that his execution violated the Eighth Amendment to the United States Constitution.

a. The Eighth Amendment Standard

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*, supra, at 2247, 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). The Supreme Court looks further to the views of relevant professional 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, the Supreme 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. 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.

b. 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.² This

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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. 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

is 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.³

The Supreme 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. The Supreme 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.

c. Jury Verdicts and Actual Executions

(Wash. 1993)). The District of Columbia likewise bar execution of juvenile offenders. (D.C. Code 22-2104) So does the federal government. 18 U.S.C. § 3591.

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.

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/death penalty/juvstat.html](http://www.wcl.american.edu/humright/death%20penalty/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.⁴ Since 1989, 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 over the same period of time to conduct actual executions 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. 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

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

% 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 executing juvenile offenders “has become truly unusual,” and, just as the Supreme 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 judgment reflects a much broader social and professional consensus.” *Id.*, n. 21.

d. 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 Psychological Association, the American Academy of Child and 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, 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).

e. The Views of Religious Organizations

In *Atkins* a majority of the Supreme 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*, 492 U.S. 361, at 388, n. 4 (Brennan, J., dissenting) (listing amicus 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 in 1992 to voice its specific opposition to the execution of offenders younger than eighteen, and calling upon state legislative bodies to ban the practice. The United States Conference of Catholic Bishops filed an amicus brief in *Stanford*, opposing the execution of juvenile offenders, and given its general opposition to the death penalty, there is no reason to believe the it does not persist in that view. 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 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).

f. Consensus of the World Community

Worldwide condemnation of execution of juvenile offenders is not simply “overwhelming,” as the Supreme 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. The United States has signed and ratified the International Covenant on Civil and Political Rights, another international human rights treaty that categorically prohibits the execution of offenders not yet eighteen years old. Unfortunately, the United States has entered a reservation to that portion of the treaty that bars such executions, to the dismay of every other signatory country. Only two countries in the world continue actually to conduct juvenile executions (Iran 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). The ban on executing seventeen year old offenders has attained the status of a *jus cogens* peremptory norm, a kind of international “common law” that is so pervasively accepted that it is not even regarded by the rest of the world as a subject of valid exception. Other practices that have been recognized world-wide to violate a *jus cogens* peremptory norm include slavery, torture, piracy, and genocide.⁵ **Toronto has filed a petition with the Inter-American Commission on Human Rights alleging that his execution would violate such a peremptory norm, and the IACHR has requested that the United States take precautionary measures to preserve his life until it can investigate and rule on the petition.**

g. 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.

h. Relative Culpability of Juvenile Offenders: Retribution & Deterrence

The Supreme 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*

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As Texans, we are a proud and independent bunch, and deservedly so. We do not like it when other sovereignties deign to tell us what we can make legal and illegal within the borders of our own state. It seems undemocratic to us; and ordinarily we would be right. But surely even we Texans would protest if, for example, Mexico passed a law that made it acceptable under certain circumstances for its federal police to torture American tourists, or even its own citizens. We would undoubtedly protest that such a law ought not to be within the moral authority of any country to promulgate, and we would be enraged if Mexico reacted to our moral indignation with the diplomatic equivalent of thumbing its nose at us. Perhaps it can give us a little perspective to realize that the rest of the world regards our own law that sanctions the execution of seventeen year old offenders as just as morally reprehensible and unjustifiable as we would consider a Mexican law that sanctioned torture. Or slavery. Or genocide. Proud and Independent as we are, we simply cannot afford to thumb our nose at the attitude of the *entire rest of the world* that executing seventeen year olds is likewise beyond our moral authority to legislate.

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 scientific research; 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 Directory 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* Exhibit G, Declaration of Ruben C. Gur (verified), at 1-2. 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 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., 13-15.

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 adults uniformly and correctly identified "fear," using the prefrontal cortex of the brain, which is the part of the brain associated with "executive" functions such as 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 Exhibit F, Daniel R Weinberger, *Editorial: Teen Brains Lack Impulse Control*, *Seattle Post-Intelligencer*, Tuesday, March 13, 2001. (Attached as Exhibit H)

Thus, research reveals 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. 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 the Supreme 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* the Supreme Court identified one more reason 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. Like the mentally retarded, juvenile defendants in capital cases may be peculiarly susceptible to the danger of false confessions. *Id.* Indeed, in Applicant’s own case, he gave an inculpatory statement that not only failed to match the physical evidence in the case, but which may also have been the product of an interrogation technique that caused another youthful suspect, 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

Toronto 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, the American public, and the world community 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,” the Supreme Court will almost surely hold in the not-too-distant future that executing seventeen year old offenders is *per se* excessive.

i. Toronto's Trial and Habeas Lawyers Failed to Raise the Issue

However, at no point in the course of his regular judicial proceedings, including during his state habeas corpus proceedings, did Toronto's lawyers ever attempt to argue that to execute him would violate either the Eighth Amendment or international law. Perhaps that is because, until the Supreme Court granted review in *Atkins*, there was no reason to believe that the issue of evolving standards of decency would be revisited any time soon in the context of the mentally retarded, much less juvenile offenders. Undersigned counsel has made several attempts to raise these arguments belatedly, but they have been and will almost surely continue to be rejected by the courts as untimely. Toronto could be executed without the benefit of any judicial review of these claims. It would be

shameful and embarrassing for the State of Texas to execute Toronto in three weeks time, only to have the courts announce next year or the year after that the Eighth Amendment categorically prohibits such executions. The Supreme Court has made it clear in another context that such a holding would be retroactive. *See Penry v. Lynaugh*, 492 U.S. 302, at 328-330 (1989). But because of the lack of foresight of Toronto's attorneys, the courts are presently powerless to rectify this situation. The executive branch is not powerless, however, and the Board should guarantee that the Eighth Amendment will not be violated, while at the same time garnering the gratitude and praise of professional and religious organizations and, perhaps most importantly, the international community, by recommending that Toronto (and every other juvenile with an impending execution date) receive a commutation of his sentence to life imprisonment.

3. INEFFECTIVE ASSISTANCE OF COUNSEL THROUGHOUT

The lawyers who represented Toronto at every stage of his state proceedings, from trial through his state habeas corpus, utterly failed to utilize the fact of his juvenile status as a mitigating factor militating for a sentence of life imprisonment. Trial counsel never investigated or presented significant evidence about the details of Toronto's deprived and rudderless childhood. They made no attempt whatsoever to obtain expert assistance to educate the jury about the relative lack of culpability that can be ascribed to a seventeen year old offender. They never even argued to the jury that Toronto's youth constituted sufficient mitigation to justify a life sentence under the second special punishment issue. The manifest deficiencies of Toronto's trial lawyers could have been exploited by the lawyer who represented Toronto in his initial state habeas application. But that lawyer conducted no investigation into Toronto's childhood, and made no attempt whatsoever to

fault trial counsel for wholly neglecting the most promising aspects of his defense against the death penalty. Because of the limitations imposed upon Toronto's federal habeas lawyer by the AEDPA, Toronto was unable to persuade the federal courts to reach the merits of his claim of ineffectiveness of his trial counsel. As a consequence, no jury or judge, state or federal, has ever reviewed Toronto's claim that because of the fact that he was only seventeen at the time of the offense, and because of the particular circumstances of his young life, he does not deserve the ultimate punishment. The judicial system has utterly failed him. But the Board can rectify that failure now, as part of its executive prerogative to dispense mercy whenever it is apparent that an injustice exists that is not amenable to judicial remedy.

a. Toronto's Own Childhood as Mitigating Evidence

i. Mitigation at Trial

To be sure, *some* mitigation was presented at the punishment phase of Toronto's trial. Toronto's mother was only 16 or 17 years old when Toronto was born. (25 RR 4330, 4376) She was abandoned by Toronto's father before he was born, and he never had a significant male role model growing up. (25 RR 4376-4378) His infant sister, to whom Toronto was close, died of a birth defect when he was still young. (25 RR 4325-4326, 4379-4380) By the time he got to the ninth or tenth grade, Toronto was no longer living with his mother. (25 RR 4324) Instead, he migrated from household to household, living at one point with his grandmother, his aunt, his cousins, the mother of his best friend, and the parents of his girlfriend, Foria Rider. (25 RR 4323, 4327-4328, 4336) Although he sold crack cocaine for his cousin Vernon in the Prince Hall Chambers apartments, he never used drugs himself, nor did he drink. (25 RR 4336-4337) He was respectful of his elders, and

abided by the rules of whatever household he was living in. (25 RR 4330, 4358-4359) He managed to make above-average grades in school before he dropped out of the tenth grade. (25 RR 4325) He was generally peaceable, and once, when he was 16, he refused to fight his cousin Vernon, whom he was much bigger than, even though Vernon persisted in punching him in the face. (25 RR 4330, 4359, 4360-4365, 4370, 4388-4389) Nor was Toronto a threat while incarcerated, causing no infractions while awaiting trial in the county jail. (25 RR 4393)

Toronto's trial lawyers made no attempt to use this evidence, such as it is, to persuade the jury that an affirmative answer to the mitigation special issue was appropriate. Instead, the entirety of counsels' brief final argument to the jury was focused on the first special issue, concerning future dangerousness. (25 RR 4414-4422, 4431-4444) The only reference they made to Toronto's age was to argue briefly, with reference to the future dangerousness issue, that he would surely grow out of his violent tendencies. (25 RR 4439-4440) But no expert testimony was offered to back this assertion up. Thus, they effectively abandoned the most promising use that could have been made of the limited mitigating evidence they *did* produce. Moreover, they wholly failed to explore expert testimony to explain both the lesser culpability of juvenile offenders in general, and the exacerbating circumstances of Toronto's own childhood on his already-immature mind.

ii. Toronto's Story: The Mitigation that Could Have Been

Had Toronto's trial counsel delved further and conducted a more comprehensive examination of his background and social history, however, they could have presented a far more detailed and humanizing picture of Toronto than that which the jury saw. Although he testified at the guilt phase of his trial, Toronto was not encouraged by his trial counsel to testify again at the punishment phase.

Had he done so, Toronto could have given graphic testimony about the deprivations and abuse he suffered as a child, leading him ineluctably to a life of transience and drug dealing. *See* Exhibit I, Affidavit of Toronto Patterson. Moreover, his story could have been supplemented and corroborated by family and friends. *See* Exhibit J, Affidavits of Patricia Patterson, Mary Patterson, Deidra Patterson, Michael Patterson, Jerry Patterson, Floria Rider, and Calvin Walker, respectively. But Toronto's trial counsel questioned none of these witnesses extensively about the circumstances of his childhood, and so could not have been prepared to present it to the jury. Finally, Toronto's trial counsel could have sought expert testimony to help the jury comprehend the mitigating significance of Toronto's story, *see* Exhibit K, Affidavit of Psychologist Dr. Paula Lundberg-Love, effectively countering the impression the State made with the jury that Toronto was nothing but drug dealer and a willful incorrigible.⁶

Toronto was raised by his mother, Patricia Patterson, with the support of her mother, Mary Patterson. Clearly his mother meant well for him, having bought him a miniature library when he was only three years old. (Patricia Patterson) And indeed, Toronto proved to be a promising student when he was in grade school. But his home life was erratic, and his mother changed jobs often and evidently had trouble maintaining employment. (Patricia Patterson) Having been raised herself by a single mother, and punished inappropriately herself as a child, Patricia continued this legacy with Toronto. (Patricia Patterson, Mary Patterson) She was a very young, single mother, easily upset and

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The following narrative is taken largely from Toronto's own affidavit. Where a particular facet of Toronto's account is corroborated or supplemented by family or friends, the relevant affiant will be identified in a parenthetical notation. These affidavits were gathered with the use of investigative funds provided by the federal district court, which, after eight months of repeated motions for investigative moneys, opposed at every turn by the Office of the Attorney General, finally relented and approved \$3500 for a limited mitigation investigation. Given greater funds, it would undoubtedly be the case that more evidence of mitigating value could have been uncovered. Moreover, undersigned counsel paid for the services of Dr. Lundberg-Love out of pocket, but could not afford to pay her to conduct a full-blown psychological evaluation of Toronto, including psychological testing and a clinical interview. To date, such an evaluation has still never been undertaken.

short tempered, who would sometimes take out her frustrations on Toronto in the form of whipping him too hard. (Patricia Patterson, Mary Patterson, Michael Patterson, Calvin Walker) She rarely if ever showed Toronto any love or affection. (Mary Patterson, Deidra Patterson) Although a good student, Toronto occasionally acted out in school, and on those occasions when his misbehavior was reported to Patricia, “she would beat me, I’m talking about with extension cords, sticks, or whatever she could get her hands on.” (Patricia Patterson) On one particular occasion when Toronto and some friends accidentally set fire to an abandoned house, Patricia “went into her room and got a stick that was as long as a yardstick and as thick as a club, and began to beat me with it. I think she broke my ankle, and I had knots all over my body afterwards. * * * That big stick she had used to whoop me with, I got rid of that the first chance I got.” When Toronto’s uncles warned Patricia about such a beating, she told Toronto that “just because I ran to my uncles and told them about it wasn’t going to keep her off my ass, since I was her child and she would do what she wanted with me.”

Drug and alcohol abuse were pervasive in Toronto’s world while he was growing up. Patricia and at least one of her brothers would drink beer and smoke marijuana in Toronto’s presence. (Patricia Patterson, Deidra Patterson, Michael Patterson, Floria Rider) “It was not uncommon for him to see people using drugs. This was an accepted way of life where he lived.”

(Michael Patterson, Jerry Patterson,) The neighborhood in which Toronto largely grew up was rife with gang violence and drug abuse. (Foria Rider, Calvin Walker) Toronto:

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.

(Foria Rider) Nevertheless, although it was unavoidable that Toronto would come into contact and befriend gang members during his short life, he never used drugs or alcohol or became a gang-banger himself. (Floria Rider, Calvin Walker)

When Toronto was about nine years old, Patricia got pregnant with her second child. (Patricia Patterson) During the pregnancy she continued to drink and use drugs, and when Kenisha was born, she was premature and suffered a serious birth defect. (Patricia Patterson) Though just a child himself, Toronto was often left to care for Kenisha on his own because “all my mother wanted to do was run the streets all the time.” (Patricia Patterson, Mary Patterson) Toronto’s family would often find Toronto caring for Kenisha while Patricia was gone. (Michael Patterson, Jerry Patterson, Calvin Walker) It was as if Kenisha were his own child. (Deidra Patterson, Jerry Patterson) Whenever he was not in school, it was Toronto who fed and diapered Kenisha, and cared for her medical problems. (Mary Patterson, Michael Patterson) Fortunately, Toronto loved his sister deeply, and for the most part did not mind her being left in his care.

Kenisha lived to be almost two years old, far longer than the doctors had predicted. On the night before she died, Kenisha was sleeping with Toronto as she usually did. As Toronto recounts:

That night was unusual because the whole time she was in bed with me she just cried and cried. In between her cries I heard her call Momma, Momma, Momma. This was unusual also, so I got up to go wake my mother up. My mother got mad and cursed me out, telling me to give Kenisha her bottle, etc. I did so, but Kenisha still wouldn’t be quiet and go to sleep. So I got my sister and took her into the room with my mother . . . , and laid her down in the bed. My mother was pissed because I brought my sister in there. She knew I had to go to school the next morning, but

acted like she didn't care. I got up the next morning and went to school, not knowing that the night before would be the last time I would see my sister alive. I knew my mother was planning to take Kenisha to the hospital, and I just knew she was going to be alright. But after I made it to school I all of a sudden started not to feel well.

A teacher asked me what was wrong. I told her my mother was taking my sister to the hospital, and she asked me if I wanted to go home, or at least call home to check on the situation. I did, but no one was home. Later I called again, and that is when I learned my sister had passed away. I just started to cry when my mother told me what had happened. The teacher got the phone and hung it up, and from that point on I don't remember how I got home, or anything else until the day of the funeral.

I could not cry at the funeral, even though I was hurting very badly and had loved my sister to the fullest. I didn't realize I wasn't crying until my cousin Cedric Patterson said he must have loved my sister more than me because he was crying and I wasn't.

All I know is that I was hurting severely.

Toronto's family and friends confirm that Kenisha's death was an extremely traumatic event in his young life, and there was nobody available to him to help him cope with his grief. (Deidra Patterson, Floria Rider)

During the whole time he grew up, Toronto bounced from one school to another because his mother moved him so often. Still, he managed to perform well in school for the most part, making grades that were sufficient to place him on the honor roll. (Patricia Patterson) Toronto craved recognition from his mother for his scholastic achievements, but though she would promise to reward him for making good grades, she never did. (Deidra Patterson) Indeed, she never acknowledged his good grades at all, and only threatened to beat him if his grades were not good.

Patricia would not buy him new school clothes, and Toronto felt "separated" from the other students.

At the end of his eighth grade year, Toronto got his first summer job at the Science Place in Fair Park, and Patricia told him he could use his earnings to buy new clothes for the coming school year.

(Patricia Patterson) But Patricia borrowed the money from Toronto, and never paid it back. When Toronto quit lending her the money, Patricia:

got mad and started trying to get me to pay little bills around the house. Now, all these years she had managed to pay her bills and buy marijuana without any help from me, and now that I'm making a little money she wants to take it. My grandma wouldn't let her do it. This was at the root of the problem between my mother and me. She didn't only hate me, it seems she hated my grandma for taking up for me and what she was doing for me.

Toronto's estrangement from his mother is echoed by members of his extended family, and by friends. (Mary Patterson, Deidra Patterson, Michael Patterson, Floria Rider, Calvin Walker)

By the time Toronto started high school in 1992, Patricia had a new boyfriend named Calvin Walker, and had gotten pregnant again. Patricia continued using alcohol and marijuana through this pregnancy, and threatened to beat Toronto when he tried to warn her of their ill effects on the fetus. Patricia and Calvin often fought, and Toronto sometimes tried to intervene to protect his mother.

(Patricia Patterson, Floria Rider, Calvin Walker) Other times when she was mad at Calvin, Patricia would take it out on Toronto. It became clear to Toronto that Patricia did not want him around:

When she would cook a meal, it would only be for Calvin, and I was told not to touch it. I had to eat at friends' houses when I wasn't at school, or go out and cut grass to make money to buy something to eat. My mother didn't know where I was getting money from, and told me that I better not be stealing from her purse or out there selling dope, which I wasn't doing. I made an arrangement with my mother that as long as I did not eat at her house, I wouldn't have to wash dishes. This arrangement worked fine until the dishes started to build up in the sink from her cooking only for Calvin and him cooking for himself. At that point she demanded that I wash the dishes despite our arrangement, and I refused. So now my mother got highly pissed off at me and tried to hit me but I dodged her. Then she threatened to put Calvin on me when he got home. After my mother told Calvin about our incident, he then came in my room and tried to whoop me. Calvin slung me around the room swinging the belt, but I wouldn't cry or holler, just kept my balance and kept moving. Calvin then got very upset because he couldn't do anything with me, and left. But before he left

out the front door he told my mother, "You better get this damn boy before I hurt him."

After this incident Patricia expelled Toronto from the house.

Since Patricia also forbade Toronto to go live with his grandmother, he contacted his Aunt Helen in Oak Cliff, and was allowed to live with her and her family as long as he abided by her rules and stayed in school. He made good grades that year, and earned an allowance from Helen for helping out around the house. On weekends he stayed with his grandmother. On January 3, 1993, Toronto's little brother, Calvin, was born. But Toronto did not find out about the birth until the next weekend, and Patricia would not let Toronto see his new brother very often. Toronto continued to alternate living with his aunt and his grandmother through the summer of 1993.

Shortly before school started up again in the fall of 1993, Toronto:

had no money or job, and didn't know what to do about school clothes. My cousin, Vernon Stiff, had just gotten out of prison in May of 1993, and I knew he was dealing dope. He knew I had lost my summer job, and he knew I lacked money to buy school clothes. He would tell me that this was the year for gaining popularity in school. He would flash his money, clothes, and jewelry around me to an extent, where it would leave a person wishing they had those things too. It seemed to me that Vernon was, but then again wasn't trying to influence me to sell dope for him. As the summer continued to wind down, it came to me that my last resort to make some money for school clothes was to sell some dope. Soon I was moving the dope damn good for my cousin, and with the money I made I would go buy me school clothes, shoes, and supplies. When my mother and grandma found out, they got on my butt and told me to quit. My mother tried to make me come home, but my grandma let me stay with her, and I told her I would quit selling dope when I had bought school clothes. I had several uncles also either selling dope or smoking, and some told me they would look after me and others said to be careful. My grandma told me not to bring any of that stuff in her house. I just wanted to be able to make money without having to rob anybody or steal.

Toronto's family believed that it was a positive thing that he looked up to Vernon, because of Vernon's past military service. (Deidra Patterson) Because his mother was not providing him even the basic necessities, Toronto began to sell drugs in order to support himself. (Jerry Patterson)

When his grandmother's lease ran out, Toronto moved into the home of Phyllis Fullwood, the mother of a friend. "Mrs. Phyllis," as Toronto called her, was aware he had begun to sell drugs for Vernon, but allowed him to stay with her on the condition that he quit as soon as he started school, or within two weeks thereafter. Although Patricia told Toronto she did not want him selling drugs, she soon began to ask him for money. (Floria Rider) She even began to threaten to call the police if he had none to give her. Vernon began to pay Patricia to get her to stop hassling Toronto, and after that "Vernon just continued to put dope in my hand, and I was influenced to continue to sell even more, because all I could see now was more money, more money." Although she lectured Toronto against his drug dealing, his grandmother nevertheless accepted money from him, knowing how he had earned it. (Mary Patterson, Floria Rider) When Mrs. Phyllis discovered that Toronto had continued selling drugs past her two week deadline, she asked Toronto to move out of her house.

So, at the age of fifteen, Toronto moved in with his cousin Vernon. Soon Vernon began to complain that Toronto was not making enough money selling drugs because he kept going to school. Toronto began to stay out late at night peddling drugs, and to fall asleep in class. Eventually he simply quit attending school for the most part. Although never a gang member himself, Toronto began to gain the respect of the Dixon neighborhood as a dope dealer. When Toronto had a falling out with Vernon, he moved back in with Mrs. Phyllis and began attending school again. But by the summer of 1994, he was selling dope again, and Mrs. Phyllis kicked him out a second time. He

began to live variously with his grandmother and Mrs. Phyllis. By the end of 1994 Toronto was staying with the family of his girlfriend, Floria Rider. (Floria Rider) He lived there for about seven and a half months, and would remark how nice it felt to live in a “normal” two-parent family for a change. (Floria Rider)

Everyone who knows Toronto well can attest to his love for, and nurturing attitude toward, small children. As a child himself, he enjoyed playing with his younger cousins. (Deidra Patterson) He helped his mother take care of Kimberly’s children when she would run off and leave them for days at a time, and was as good with them as he had been with Kenisha. (Patricia Patterson) When living with Floria Rider’s family, he spent a lot of time playing with and caring for her small nieces and nephew, feeding, diapering, bathing, and playing with them. (Floria Rider) He had one of Kenisha’s baby shoes bronzed after she died. (Floria Rider) He often spoke to Floria about having children of his own, particularly a little girl whom he could name after Kenisha. (Floria Rider) Toronto’s family and friends continue to find it incredible that it could have been within Toronto’s character ever to have killed Ollie and Jennifer. (Patricia Patterson, Floria Rider)

iii. Expert Gloss on Toronto’s Childhood

Several weeks before trial, Toronto was examined by a psychiatrist, Dr. Lisa Clayton, for the purpose of determining his competency to stand trial and his sanity at the time of the capital offense. There is no indication from an examination of trial counsel’s files, however, that Dr. Clayton was ever asked to evaluate Toronto with an eye toward testifying as a mitigation witness. Nor was Dr. Clayton supplied with any detailed information about Toronto’s abused and neglectful background,

that information apparently being regarded as irrelevant to a determination of incompetency or insanity.

Had Toronto's trial counsel done an adequate job of investigating Toronto's background, and supplied that information to an appropriately trained psychologist, they could have presented expert testimony at the punishment phase of his trial of the mitigating significance of Toronto's difficult and disadvantaged childhood. *See* Exhibit K, *supra*. Dr. Paula Lundberg-Love, a forensic psychologist and psychology professor who specializes, *inter alia*, in issues of family violence and drug abuse, has reviewed the information summarized above. From her professional perspective, she (or some other comparably trained and experienced expert) could have explained to Toronto's jury just how neglectful and abusive his childhood really was, and how that childhood inevitably shaped Toronto's character. She could also have explained how remarkable it was that many positive aspects of Toronto's innate personality persevered *despite* the profound neglect and abuse he suffered. She could explain how Toronto's mother neglected not only his medical needs, but she also failed the basic parental duties of supervision and care-taking, not only for Toronto, but for his baby sister as well. Toronto's mother abused him emotionally as well, depriving him of affection and even a stable home environment, all of which "contributed to his long-standing sense of alienation and a starvation for love, affection and attention." Dr. Lundberg-Love could have explained to the jury just how traumatic and life-altering the death of Toronto's sister was to him. Indeed, in her opinion Toronto should have been interviewed and tested with a view toward determining whether

this experience may have triggered the onset of Post-Traumatic Stress Disorder.⁷ Dr. Lundberg-Love could further have explained how Toronto managed to transcend the abuse and neglect for a remarkably long time without dropping out of school and degenerating into the lifestyle of violence and drug abuse that surrounded him. Still, he was ultimately forced from his mother's home, "due to a need to escape the neglect and conflict and violence between his mother and her boyfriend . . . as opposed to a volitional act of rebellion." It is "not particularly surprising[.]" according to Dr. Lundberg-Love, that Toronto "eventually ended up selling drugs, in order to support his basic survival needs[.]" Nor was it surprising that Toronto, "who initially felt compelled to deal drugs, and was then given mixed messages regarding this behavior from his family members, continued to support himself in this manner, particularly after he started obtaining the respect of his community." If anything, it is surprising he did not succumb to the lifestyle of the street much earlier.

b. Toronto's Juvenile Status as a Mitigating Fact in Itself

Even putting aside for the moment the evidence that could have been presented to flesh out Toronto's own troubled childhood, his trial counsel made no effort whatsoever to use the fact of his status as a juvenile as a mitigating factor in and of itself. One of the reasons the Supreme Court gave in its 1989 opinion holding imposition of the death sentence against a seventeen year old not to violate the Eighth Amendment *per se* was its trust in juries to take that fact into account in determining the appropriateness of such an extreme penalty in the individual case, as part of the total package presented in mitigation. *See Stanford v. Kentucky*, supra, at 374-377 (plurality opinion). Such trust necessarily assumes a defense team that will be alert to the mitigating potential of

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State habeas counsel neglected to seek funds for such testing. Although undersigned counsel was able to investigate mitigating circumstances to the extent possible within the limited funds provided by the federal court, he was unable to afford Markley Dutton pocket for the kind of full psychological evaluation that would have been necessary to diagnose his mental health maladies as Post-Traumatic Stress Disorder. Such testing has never been done.

juvenile status as a reason in and of itself to impose a lesser sentence than would apply to a comparable adult offender. But here, Toronto's own lawyers treated him as an adult offender, employing a mental health expert only to determine such non-juvenile-specific issues as his competency to stand trial and his sanity at the time of the offense. They made no effort to educate the jury about the factors that typically make the juvenile offender less culpable than adult offenders even for the most heinous crimes.

An expert could have "teased out" the facts for a jury that demonstrate the differences in the brains of juveniles and adults that render the latter generally less culpable. She could have told the jury that even a seventeen year old's brain is less mature than an adult's, and in just those areas of the brain, such as the prefrontal lobes, that are most important to "executive functioning," including planning, judgment, problem-solving, controlling impulsiveness, and foreseeing the consequences of one's own behavior. Seventeen year olds are not only less mature physically, but also in their identity development, moral frame of reference and moral judgment, assessment of risk and future consequences, emotional functioning (e.g., understanding emotions and sense of remorse and responsibility to others), and in their abilities to control impulses and regulate behavior. Moreover, because a seventeen year old's brain is still developing, he may be more susceptible to rehabilitation than the adult offender. Armed with such expert testimony, Toronto's lawyers could have argued to the jury that the goals typically ascribed to the death penalty simply would not be met by sentencing him to death. Because he is less culpable than a comparable adult offender, they could have argued, executing him would serve no substantial retributive purpose. And because of his limited ability to assess risk and perceive the future consequences of his behavior, the death penalty

did not act as a deterrent in the same way that it would for an adult offender. Indeed, because expert testimony would have shown the jury that Toronto's immature brain made him more amenable to rehabilitation, they could even have enhanced the only age-related argument they did make at trial, that he would not pose a significant future threat to society.

Thus, it could be argued with expert assistance that a seventeen year old offender is no more deserving of the death penalty than is a mentally retarded offender. Moreover, unlike the fact of mental retardation, which can be disputed, Toronto's status as a seventeen year old offender is a static fact, not subject to contradiction or change. There is no conceivable reason that Toronto's trial lawyers should not have developed its full mitigating potential. Indeed, the failure to do so undermines the legitimacy of the only rationale still supporting the imposition of the death penalty for juvenile offenders, namely, that evidence of a juvenile's relative lack of culpability as a *class* can be presented to the jury on an individualized basis, and the jury can then make the best judgment, in combination with any other mitigating facts, whether he is one of those juvenile offenders who are among the "worst of the worst" killers deserving of the death penalty. Toronto's jury sentenced him to death without ever having made that individualized judgment.

Moreover, an expert could have explained that the circumstances of Toronto's chaotic childhood might also have stunted his brain development, rendering him even less culpable than a normally undeveloped seventeen year old. As a renowned expert in child and adolescent psychiatry, Dr. Bruce D Perry, M.D., Ph.D., has explained:

"A child raised in a chaotic and threatening environment – one impoverished of emotional, social and cognitive experiences – will grow up at a different rate and in different ways from a child in a safe, nurturing, predictable and enriched

environment. As these children grow up, they age. But they do not mature at the same rate or in the same ways as children from healthy environments. They can be seventeen chronologically, but have the emotional and social maturity and functioning of a five-year-old. A five-year-old in a seventeen year old body will show a capacity for judgment, impulse control, insight and social functioning expected for a pre-school child. This child suffers from, in some senses, a form of emotional and social retardation.”

See Exhibit L, Statement by Bruce D. Perry, M.D., Ph.D. That Toronto’s trial lawyers failed to develop any in-depth evidence of his chaotic upbringing at his trial meant that they were unequipped to make this argument to the jury as well.

But assume for a moment that Toronto’s trial counsel made a deliberate decision to forego expert testimony showing the relative lack of culpability of the class of juvenile offenders, and of Toronto in particular, for whatever reason. Such a “strategic” decision would have been an intolerable gamble, and it is hard to imagine any possible advantage. Even so, appellate courts are wont to defer to such “strategic” decisions on the part of trial counsel in gauging claims of ineffective assistance of counsel. But the Board of Pardons and Paroles owes no such deference to Toronto’s trial counsel, and there is nothing to preclude the Board from *now* taking Toronto’s juvenile status, and the particular circumstances of his tumultuous childhood, into consideration in reaching its executive decision with respect to clemency. Executive mercy would be particularly apt in Toronto’s case, where trial counsel’s failure prevented the jury, and hence the judiciary, from making the individualized assessment of the extent of Toronto’s culpability in light of all, and maybe even the best, mitigating evidence. The Board but serves its legitimate executive function by recommending a commutation to a life sentence under circumstances such as these.

c. The Failure of the Judiciary to Remedy the Deficiency

At this juncture, the Board may ask: Why haven't the courts remedied this obvious deficiency? After all, claims of ineffective assistance of trial counsel under the Sixth Amendment may be resolved by way of state and federal habeas corpus proceedings. Unfortunately, the deficiencies of representation did not end with Toronto's trial counsel. Because of the omissions of Toronto's initial state habeas counsel, Toronto's claims of ineffective trial counsel were never considered in habeas corpus proceedings, either in state or federal court.

i. Initial State Habeas Counsel

On April 16, 1996, the Texas Court of Criminal Appeals appointed Texarkana lawyer Barry Bryant to represent Toronto in his initial post-conviction application for writ of habeas corpus. Bryant was among the hundreds of criminal defense attorneys state-wide who were essentially conscripted to represent the more than two hundred death row inmates entitled to appointed representation under Article 11.071 of the Code of Criminal Procedure, enacted in 1995. Many of these attorneys lacked any significant experience with either capital jurisprudence and/or the complex body of law surrounding state and federal procedure in habeas corpus. Mr. Bryant himself had never before prepared a post-conviction writ application in a capital murder case. *See*, Exhibit E *supra*.

It showed. The initial state writ application filed by Barry Bryant raised nothing but a handful of record-based claims. *See* Exhibit F, *supra*. The writ application was six pages in length, and cited practically no law. When Bryant sent undersigned counsel his "file" in the case, it consisted of a copy of the appellate record, copies of press clippings about the offense, some case law, and little else. Indeed, in the initial state application Bryant filed on Toronto's behalf, he prayed

the convicting court “further order production of all materials held by either Applicants [sic] trial counsel or counsel for the State prior to” the evidentiary hearing he so futilely requested. But no investigation into grounds for a state post-conviction writ application in a capital case can be regarded as properly *begun*, much less *completed*, without the most rudimentary step of reviewing trial counsel’s files and, where available, the State’s files as well, *before* the writ application is filed in the convicting court! Any experienced capital habeas attorney knows to do this, but Bryant did not do so.

Bryant ultimately billed the Court of Criminal Appeals \$12,151.44 for his services. Approximately two-thirds of those services consisted of simply reading the appellate record of Toronto’s trial, and conducting preliminary research into purely record-bases claims. In other words, Bryant’s approach to Toronto’s habeas corpus application was to treat it very much like a second direct appeal! He never sought out the files of Toronto’s trial lawyers for review, neither did he attempt to interview those lawyers. Nor did he attempt to review the prosecutor’s files in the case. These are all the most obvious *starting* points in any investigation of non-record facts to form the basis of a proper habeas corpus application. After obtaining an extension of time to file the state writ application, and with barely a month left before the application was required to be filed under that extension, Bryant for the first and only time traveled to the penitentiary to interview his client about the case. He took an investigator, Mr. Randy Coburn, with him for that interview, which lasted between two and three hours. Mr. Coburn subsequently billed Mr. Byrant a total of \$900 for services he performed in the case, which included ten hours driving to the penitentiary, two hours interviewing Toronto, and apparently two hours typing up notes of that interview. It is unclear how

Coburn spent the remainder of his investigative time on the case, since his investigative reports have been misplaced. Both Bryant and Coburn appear to have spent some minimal amount of time in communication with members of Toronto's family, but whatever else they may have been looking for in the way of non-record based claims, they did not investigate "very thoroughly, if at all, whether mitigating evidence existed which might have been, but was not, developed at the punishment phase" of Toronto's trial. Bryant spent the remainder of his attorney's time on the case researching and drafting the five purely record-based claims he ultimately presented in Toronto's brief state writ application.

Given that Bryant limited himself to record-based claims of ineffective assistance of trial counsel, it is remarkable that he nevertheless did not fault Toronto's trial lawyers for failing to utilize Toronto's juvenile status as a mitigating fact. After all, the only "fact" that had to be established was Toronto's age, which is manifest from the appellate record. Bryant failed to argue that Toronto's execution was prohibited by both the Eighth Amendment and international law, or to fault trial counsel for failing to make the argument. Bryant failed to argue that, even if Toronto's execution were not categorically barred, his trial counsel should have produced expert evidence to educate the jury why juveniles as a class ought not to be regarded as having the same degree of culpability as adults, even for the same crimes. He failed to seek funds for expert assistance in pursuit of such a claim, though funds were available (since he only billed the Court of Criminal Appeals about half of what the Court was typically willing to disburse at that time for capital habeas representation). And he failed to fault trial counsel for conducting an insufficient mitigation investigation in order to persuade Toronto's jury that the death penalty was particularly inappropriate for him, given his

juvenile status in combination with the particular circumstances of his own childhood. Because he raised none of these deficiencies in Toronto's state writ application, and did not even attempt to investigate further mitigation to show what trial counsel could have presented, the Texas Court of Criminal Appeals was powerless to reach the issue of trial counsel's constitutional ineffectiveness.

ii. Futility in Federal Habeas Corpus

These deficiencies on the part of Toronto's initial state habeas lawyer left undersigned counsel, appointed by the federal court to represent Toronto in his federal habeas proceedings, in the lurch. Under the AEDPA, Toronto is generally limited to raising the same claims that have already been exhausted in state court, either on direct appeal or in state habeas corpus proceedings. Toronto attempted to raise many of the "unexhausted" issues anyway, arguing that to execute him in light of trial counsel's failure to object on the basis of the International Covenant on Civil and Political Rights implicates a "fundamental miscarriage of justice," and that state habeas counsel's own inexplicable failure to complain of trial counsel's ineffectiveness in failing to develop mitigating evidence constituted a sufficient excuse for Toronto's failure to raise the issue in his state habeas proceedings. These attempts were rebuffed by the federal courts on the basis of *Beazley v. Johnson*, 242 F.3d 248 (5th Cir. 2001) and *Martinez v. Johnson*, 255 F.3d 229 (5th Cir. 2001), respectively, two cases with which the Board is presumably familiar. The Supreme Court has declined review. In addition, undersigned counsel has attempted to exhaust other of these issues by way of successive state habeas applications filed with the Texas Court of Criminal Appeals, but that Court will likely declare this attempt to constitute an abuse of the writ under Section 5 of Article 11.071, and dismiss it.

iii. Executive Clemency is the Only Remedy

The courts are thus at a loss to provide Toronto with a judicial remedy. One purpose of executive clemency is to fix judicial irregularities whenever an injustice is manifest and the judicial process itself is inadequate to the task. Here, perhaps because of the tremendous glut of capital state habeas cases that occurred in 1996, the state habeas process did not adequately serve its appointed function. Statutory impediments incorporated into federal law that same year in the guise of the AEDPA have placed undersigned counsel in the untenable position of trying to make up for state habeas counsel's shortfalls, without success. As Attorney General Cornyn likes to point out in his briefs to the Fifth Circuit in these cases, federal habeas corpus relief does not lie to correct inadequacies in state habeas procedures. In a case such as Toronto's, therefore, it falls upon the executive branch to remedy the situation. Only the Governor, upon recommendation of this Board, can rectify the manifest injustice that will result from putting Toronto to death when 1) the Supreme Court will likely find in the near future that juvenile executions violate the Eighth Amendment; 2) the Inter-American Commission on Human Rights will likely find by the end of the year that juvenile executions violate international law that is binding upon Texas; and 3) in any event, Toronto's death sentence was imposed without the usual assurance of a jury review of the mitigating value of his juvenile status, which is the only thing that (if anything can) may save it from offending the Eighth Amendment outright even under pre-*Atkins* constitutional law.

4. NO EVIDENCE OF FUTURE DANGEROUSNESS

Finally, it is the public policy of Texas that no person be executed for a crime unless it is likely that he will commit criminal acts of violence in the future which pose a continuing threat to

society. At the time of his conviction for capital murder, a jury found that Toronto would probably pose just such a threat. But he was only seventeen years old, had no criminal record, and there was little apart from the severity of the offense for which he was convicted from which an inference of future dangerousness could be drawn with any confidence.

We now know that Toronto is not the kind of threat he was predicted to be at trial. For almost seven years he has been confined in facilities operated by the Texas Department of Criminal Justice, Institutional Division. During that time, he has been a near-model prisoner, with only a handful of disciplinary incidents on his record for nonviolent rule infractions such as possession of contraband (including a blue light bulb, cigarettes, decongestant pills, and Elavil) and a refusal to move to another cell to be housed against his will with another inmate whom he considered to be a pervert (he preferred disciplinary lock-down, to avoid any confrontation). *See* Exhibit M, Toronto's TDCJ Disciplinary Record. In a place where life is strictly controlled and where it is common for inmates frequently to engage in prohibited behavior, ranging from disobedience to deadly assault, Toronto has been compliant and cooperative. He has demonstrated absolutely no inclination to threaten the lives or safety of others, including inmates, prison guards or support staff. If he remains in prison for the balance of his life, subject only to early release at the discretion of the executive, there will almost certainly be no chance of his endangering anyone ever again.

It should be acknowledged then that the reluctance of all to afford Toronto any meaningful consideration of his plea is surely grounded in large part on the horror and aversion we all have at the nature of the crime for which he was convicted. Indeed, it is the difficulty most of us have understanding what could motivate such an offense that moves us to recoil from any plea for mercy

in Toronto's case. But this is an especially inappropriate reaction when the public policy of our culture is to avoid the death penalty whenever it is possible safely to do so (a particularly apt policy as it applies to a juvenile offender). Texas has gained an international reputation, most of it unsympathetic, for the execution of prisoners. But it is the official position of our citizens, clearly expressed in our law, that the death penalty should not be exacted on any offender, no matter how horrible his crime or how much it may seem to some that he deserves to die for it, unless we can be reasonably certain that public safety will be imperilled if the offender is not put to death.

Even a cursory examination of our capital murder statute establishes this fact. *See* Tex. Code Crim. Proc. Article 37.071, § 2. Jurors are asked to answer several questions at the punishment phase of capital murder trials. The first of these is the dangerousness issue. Unless it is answered affirmatively, the other questions are irrelevant, and need not be answered by the jury at all. Accordingly, no decision about whether the defendant deserves to die for his crime is material to the capital punishment question until and unless the jury first determines beyond reasonable doubt that life imprisonment is inadequate to safeguard the public from further depredations by the defendant. In short, Texans do not want offenders put to death, no matter how deserving they may be, if it is not absolutely necessary to do so for public protection.

This should not be construed as a challenge to Toronto's death sentence. All such challenges have been exhausted. Rather, it is a plea for serious evaluation of relevant information about dangerousness not available at the time of Toronto's trial. Although the former governor has expressed a preference for limiting consideration of clemency petitions to claims of actual innocence and inadequate access to the judicial process, it is clear that the legal authority of the Board to

recommend, and of the Governor to grant, reprieves and commutations is not confined to these circumstances. Texas law treats the death penalty differently than other offenses by deliberately and specifically confining it to those cases in which the public safety cannot otherwise be assured. Toronto respectfully requests this Board to do the same. No person in this state should be executed for crime when it appears to the executive department of government from the best evidence available that he does not present a continuing threat to society, especially when the prediction of dangerousness made at trial has proven to be unreliable.

One of the characteristics that separates juvenile offenders from adults is that, because their brains are not yet fully formed, they maintain a capacity for rehabilitation. Indeed, in the dubious second statement Toronto gave to Detective Wiginton, he declared: "I can be rehabilitated." Those who knew Toronto well before this offense cannot believe he could have committed it. Those who have gotten to know him since, such as his pen-pal from France, Beatrice Gernot, are struck by his intelligence and warmth, his gentleness, and his sensitivity. Exhibit N, Letter to the Board from Beatrice Gernot. Even if he did commit this terrible crime, it is impossible for them to believe he could ever do such a thing again. Please, listen to them.

D. CONCLUSION

There are substantial reasons to doubt Toronto's guilt in this case which were never developed before the jury that convicted him. While that residual doubt may not be sufficient to declare him actually innocent, it is enough to raise the specter of executing an innocent juvenile. It appears substantially certain that the Supreme Court will soon declare the execution of seventeen

year old juveniles unconstitutional. In any event, none of the arguable justifications for holding juvenile offenders susceptible to the death penalty can be brought to bear on Toronto's case. Because his trial attorneys failed to educate the jury why juvenile offenders are less culpable than comparable adult offenders, and failed adequately to inform the jury of the particular mitigating circumstances of Toronto's life, the usual safeguards against the unwarranted execution of juvenile offenders did not operate in Toronto's case. And because his state habeas lawyer failed to raise these problems in a timely manner in post-conviction judicial proceedings, the judiciary was powerless to intervene. Only the executive branch of Texas government can remedy this manifest injustice now. Finally, Texas law militates against execution of the death penalty in this case because there exists substantial evidence, not available to the jury, that Toronto does not pose a significant danger to prison society and that a sentence of life imprisonment is sufficient to ensure that Toronto will not commit further acts of criminal violence in the future which pose a continuing threat to society.

For most of his brief life, Toronto Patterson has been abandoned by those who were responsible for taking care of him. His father abandoned him before he was born. His mother left him largely to fend for himself, even to take care of his invalid sister, until she finally expelled him from the house by the age of fifteen. Faced with the death penalty, Toronto was abandoned again, first by his trial lawyers, and then again by his initial state habeas attorney. By the time undersigned counsel came into the case, this legacy of abandonment had proved insurmountable. The only entity left that can break this legacy of abandonment is the executive branch: The Texas Board of Pardons and Paroles and the Governor. If the Board gives up on Toronto, it will just complete the pattern of abuse and neglect and abandonment that has defined his short, disastrous life. Take account of his

youth, his now-mature intelligence, his capacity for reform and rehabilitation, and of the many individuals around the world who have come to know the young adult Toronto has become since he has been on death row, and who cherish his existence on this earth.

Toronto respectfully requests that the Board grant him an interview, pursuant to 37 T.A.C. §143.43(d),(e) and § 143.57(e),(f).

Toronto respectfully requests that the Board grant him a hearing, pursuant to 37 T.A.C. §143.43(b)(3) and the Administrative Procedures Act, §2001.001 *et seq*, and allow him to present evidence in support of reprieve and commutation. He further requests the Board to comply with the Open Meetings Act, §2001.001 *et seq* Texas Government Code, and with the Texas Constitution, Article 4, § 11 requirement that the Board give its reasons for granting or denying this application.

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