

NO. 38,095-03

IN THE COURT OF CRIMINAL APPEALS
STATE OF TEXAS

AND

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

EX PARTE TORONTO MARKKEY PATTERSON

SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS
(TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 11.071, SECTION 5)
EXECUTION SCHEDULED AUGUST 28, 2002

COURT OF CRIMINAL APPEALS CAUSE NUMBER ON APPEAL 72,282
TRIAL COURT CAUSE NUMBER F-95-47764-LU

ROBIN NORRIS
Texas Bar # 15096200
Attorney for Applicant
2408 Fir St.
El Paso, Texas 79925
(915) 590-4446

J. GARY HART
Texas Bar # 09147800
Attorney for Applicant
2906 Skylark Drive
Austin, Texas 78757
(512) 206-3118

IN THE COURT OF CRIMINAL APPEALS
STATE OF TEXAS

AND

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

Ex parte

TORONTO MARKKEY PATTERSON,
Applicant

§
§
§
§
§
§

WRIT NO. 38,095-02

CCA APPEAL NO. 72,282

CAUSE NO. F-95-47764-LU

**SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS
BROUGHT PURSUANT TO ARTICLE 11.071, SECTION 5 (a) (3)**

1. This application is presented by J. GARY HART, hereinafter referred to as “Petitioner” (see Tex. Code Crim Proc. arts. 11.12 & 11.13), who is the attorney of record for Applicant in this cause, appointed to represent Applicant by the Texas Court of Criminal Appeals on December 3, 1998, under authority of Article 11.071, section 2, Texas Code of Criminal Procedure.

2. Applicant, the person for whose relief this writ is asked, is TORONTO MARKKEY PATTERSON, who is illegally restrained in his liberty by the Director of the Texas Department of Criminal Justice, Institutional Division, by virtue of a judgment imposing a penalty of death rendered in cause number F-95-47764-LU before the 291st

District Court of Dallas County, hereinafter referred to as “the convicting court,” which judgment was affirmed on appeal before the Texas Court of Criminal Appeals in cause number 72,282.

3. Applicant’s restraint is illegal for the following reasons:

(a) Applicant’s sentence of death violates the Eighth Amendment of the United States Constitution because the execution of an offender for any crime committed when he was less than eighteen years of age constitutes cruel and unusual punishment.

(b) Applicant’s sentence of death violates Article I, § 13 of the Texas Constitution because the execution of an offender for any crime committed when he was less than eighteen years of age constitutes cruel or unusual punishment.

(c) Applicant’s sentence of death violates the Supremacy Clause of the United States Constitution in that it violates a *jus cogens* peremptory norm of international law which prohibits the execution of offenders for crimes committed when less than eighteen years of age.

(d) Applicant’s sentence of death violates the Supremacy Clause of the United States Constitution in that it violates Article 6, Paragraph 5 of the International Covenant on Civil and Political Rights, a treaty which the United States Senate has ratified, which prohibits the execution of offenders for crimes committed while less than eighteen years of age.

(e) Applicant’s sentence of death deprived him of his Sixth and Fourteenth Amendment right to have a jury determine, to a level of confidence *beyond a reasonable doubt*, every fact that operates to increase the punishment authorized to the death penalty, as required by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), as construed by the Supreme Court in *Ring v. Arizona*, 122 S.Ct. 2428 (2002), in that the State was not required by the trial court’s charge to convince the jury *beyond a reasonable doubt* that the mitigation special issue should be answered “no.”

PROCEDURAL HISTORY

Applicant was found guilty of capital murder on November 17, 1995, and on November 21, 1995, the jury answered the special issues under Article 37.071 of the Texas Code of Criminal Procedure in such a way that the trial court was obliged to assess the death penalty. In the automatic appeal that followed, this Court affirmed this conviction in an unpublished opinion. *Patterson v. State*, (Tex.Cr.App., No. 72,282, delivered January 13, 1999). An attorney from Texarkana, Barry Bryant, was appointed by the Court to represent Applicant in his state post-conviction application for writ of habeas corpus, and he filed Applicant's initial state application with the district clerk in Dallas County on September 8, 1997. The State filed its response on May 8, 1998. On May 21, 1998, the convicting court entered an order finding no controverted, previously unresolved facts requiring an evidentiary hearing, and ordering the parties to submit proposed findings of fact and conclusions of law. Applicant and the State filed their proposed findings and conclusions on June 5, 1998, and June 11, 1998, respectively. On June 24, 1998, the convicting court essentially adopted the State's proposed findings of fact and conclusions of law, and ordered that they be transmitted along with the record of the proceedings to this Court.

On August 19, 1998, the Court granted Barry Bryant's motion to withdraw from representing Applicant in his state habeas proceedings. On December 3, 1998, the Court requested undersigned counsel to accept an appointment in a "caretaking" capacity, to

essentially shepherd the initial state writ to conclusion. On February 3, 1999, the Court denied relief in a written, unpublished order, observing that the convicting court's recommended findings of fact and conclusions of law were supported by the record. However, because the Court's computerized writ management system did not list undersigned counsel as attorney of record, the Court did not notify undersigned counsel that the state writ application had been denied. Undersigned counsel learned of the denial of the writ in early April of 1999, and immediately filed a motion to be appointed to represent Applicant under the provisions of 28 U.S.C. § 848 (q). By order of the federal district court on April 21, 1999, undersigned counsel was appointed to represent Applicant in a federal petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. On October 4, 1999, the United States Supreme Court denied Applicant's petition for writ of certiorari following his direct appeal. *Patterson v. Texas*, 528 U.S. 826 (1999). The convicting court almost immediately scheduled an execution date of February 24, 2000, but on December 16, 1999, the federal district court entered an order staying the execution.

Prior to filing his federal petition for writ of habeas corpus, on April 3, 2000, Applicant filed a subsequent application for writ of habeas corpus under the provisions of Article 11.071, subsection 5, Texas Code of Criminal Procedure. In that subsequent application, Applicant argued that trial and appellate counsel had rendered ineffective assistance of counsel under the Sixth Amendment to the United States Constitution in failing to invoke the provisions of the International Covenant on Civil and Political Rights

(hereinafter, "ICCPR"), an international treaty which the United States Senate has ratified, as a bar to his execution. Article 6, paragraph 5 of the ICCPR prohibits the execution of juvenile offenders, and Applicant was a juvenile within the purview of this prohibition, since he was only 17 years old at the time of the offense. Because the ICCPR prohibits the execution of a juvenile offender, Applicant argued that no jury could have imposed the death penalty, and he therefore met the criteria for a subsequent writ application as provided in Subsection 5 (3) of Article 11.071. This Court disagreed, and in an unpublished order dismissed the subsequent application as an abuse of the writ on May 3, 2000.

Applicant filed his federal petition for writ of habeas corpus on October 4, 2000. The Director timely filed an answer and motion for summary judgment, and Applicant filed a brief in opposition to the motion for summary judgment on February 23, 2001. On May 14, 2001, the federal magistrate judge recommended that relief be denied. Applicant filed timely objections to the magistrate judge's recommendation, but on August 20, 2001, the district court entered an order and judgment expressly adopting the findings and conclusions of the magistrate judge. When the district court denied Applicant's application for certificate of appealability, Applicant filed an application for certificate of appealability with the Fifth Circuit Court of Appeals. In an unpublished opinion filed on February 26, 2002, the Fifth Circuit denied Applicant's application for certificate of appealability. Applicant filed a petition for writ of certiorari with the United States Supreme Court on April 29, 2002, and the Director filed her brief in opposition on June 5, 2002. The Supreme Court denied

Applicant's petition for certiorari on June 28, 2002.

On June 3, 2002, Applicant 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 A. On June 12, 2002, Roger F. Noriega, United States Ambassador to the Organization of American States, forwarded the request for precautionary measures to preserve Applicant's life pending disposition of his petition with the IACHR. Exhibit A, supra. It is Applicant's hope that the State of Texas will respond to this request by staying his execution until such time as the IACHR releases 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 finding that the United States is in violation of international law in the execution of juvenile offenders.

STATEMENT OF FACTS

For purposes of the present application, there is only one relevant fact: The record shows without contradiction that Applicant was only seventeen years old on the date of the

capital murder for which he was convicted and sentenced to die. (23 RR 3953)

ARGUMENT AND AUTHORITIES

(a) Applicant's sentence of death violates the Eighth Amendment of the United States Constitution because the execution of an offender for any crime committed when he was less than eighteen years of age constitutes cruel and unusual punishment.

COGNIZABILITY UNDER ARTICLE 11.071, SECTION 5

Applicant did not object either at trial or on appeal on the basis of the Eighth Amendment claim he now asserts; nor did he raise it in his initial or first subsequent state writ applications. It may be argued, therefore, that his claim is either procedurally defaulted, or that raising it now constitutes an abuse of the writ, or both. As to the former, however, the Court should be mindful of its holdings that when a federal constitutional claim does not become apparent until too late to raise it at trial or on appeal, it may be entertained for the first time in a state post-conviction application for writ of habeas corpus. *See, e.g., Ex parte Goodman*, 816 S.W.2d 383, 385 (Tex.Cr.App. 1991) (claim predicated on *Penry v. Lynaugh*, 492 U.S. 302 (1989), could be raised for first time in post-conviction writ application); *Ex parte Chambers*, 688 S.W.2d 483, 486 (Tex.Cr.App. 1984) (Campbell, J., concurring, with five judges joining) (claim based upon a right not recognized at the time of trial could be raised for first time in post-conviction writ application despite procedural default at trial); *Ex parte Bravo*, 702 S.W.2d 189 (Tex.Cr.App. 1982). At the time of Applicant's trial and appeal, the question of the constitutionality of executing a seventeen year old offender was

governed by the Supreme Court's decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989). His lawyers could not have known in 1995 and 1996 that the Supreme Court would declare execution of the mentally retarded categorically to violate the Eighth Amendment in 2002, on the basis of considerations that were declared inapplicable to the Eighth Amendment analysis in *Stanford*, but which have now been reincorporated into the analysis, and which apply equally to a seventeen year old offender as to one who is mentally retarded.

In order to avoid a finding that he has abused the writ, Applicant must show, under Article 11.071, Section 5 (a) (1) and (d), of the Texas Code of Criminal Procedure, that his current claim could not have been presented in a timely initial application because the legal basis of the claim was unavailable at that time too, meaning that it was not recognized and could not reasonably have been formulated from prior decisional law. As of September of 1997, when Applicant filed his initial writ application, the Supreme Court had not decided *Atkins v. Virginia*, 122 S.Ct. 2242 (2002). Nor had *Atkins* come down by the time Applicant filed his first subsequent state writ application, on April 3, 2000. The question of the constitutionality of executing a seventeen year old offender was controlled by *Stanford v. Kentucky*, *supra*. There was no basis to believe the Supreme Court would soon change its view of the status of society's standard of decency with respect to executing juveniles.

But the Supreme Court in *Atkins* has now clearly signaled a change in the law, abandoning the approach of *Stanford*. First, the *Atkins* Court showed a willingness to consider states that do not impose the death penalty at all as part of the "consensus" of states

that do not permit execution of the mentally retarded. 122 S.Ct. at 2248. This signals a rejection of the *Stanford* majority's position that such states should not be counted toward a legislative consensus. 492 U.S. at 370, n. 2. Second, and more importantly, the majority opinion in *Atkins* reestablished the significance of the views of relevant professional organizations, religious organizations, the world community, and American public opinion to the Eighth Amendment analysis, 122 S.Ct. at 2249, n. 21, which considerations had been wholly discounted in the *Stanford* plurality's analysis. 492 U.S. at 377.¹ Similarly, the majority in *Atkins* also proceeded to measure the legislative consensus against its "own judgment," asking whether executing the mentally retarded measurably advances the retributive and deterrent functions the death penalty is designed to serve. This aspect of the Eighth Amendment analysis was also rejected by the plurality in *Stanford*, supra, at 377-380, but has now been reinstated by a firm majority of the Supreme Court in *Atkins*. 122 S.Ct. at 2247-2248. In short, *Atkins* has thoroughly undermined the precedential value of *Stanford*, and the question of the constitutionality of executing a seventeen year old offender must be revisited. As Applicant will show, measuring the constitutionality of executing a seventeen

1

In fact, a majority of the justices joined Justice Scalia's rejection in *Stanford* of the notion that the views of other nations could be relevant to inform the "evolving standard of decency" contemplated by the Eighth Amendment, since Justice O'Connor expressly joined that part of his opinion. See 492 U.S. at 369, n. 1 & 382. Justice O'Connor seems to have shifted her thinking in this regard, for she joined the majority opinion without reservation in *Atkins*. There she was among six justices who expressly held that the view of the world community, while certainly not "dispositive," was nevertheless one of the factors lending "further support to our conclusion that there is a consensus among those who have addressed the issue." 122 S.Ct. at 2249, n. 21. Given that the unequivocal condemnation of the rest of the world of those few states left in this country that continue to execute sixteen and seventeen year old offenders is *vociferous and universal*, this must be considered a significant new factor in the Eighth Amendment analysis as it applies to this particular category of offender. See pp. 31-61, *post*.

year old offender against the criteria *Atkins* reinstated results in the ineluctable conclusion that such executions are just as “excessive” as executions of the mentally retarded.

Before *Atkins*, Applicant could not have “reasonably formulated” a viable argument that his execution would violate the Eighth Amendment. Article 11.071, Section 5 (d), *supra*. Such an argument would have been foreclosed by the opinions of Justices Scalia and O’Connor in *Stanford*, concluding that a consensus against executing seventeen year old offenders did not exist. After *Atkins*, there is a basis in fact and, more importantly, in law for challenging that conclusion.

Moreover, Applicant should be permitted to bring this claim under the auspices of Section 5 (a) (3) of Article 11.071 as well. Under that provision, a subsequent habeas applicant may bring any constitutional claim for which he can demonstrate that, but for the constitutional defect, no rational juror would have answered the special punishment issues “in the state’s favor.” An Eighth Amendment claim that a certain class of offender is simply categorically ineligible for the death penalty would prove, if borne out, to be fully retroactive because “analogous to a new rule placing certain conduct beyond the State’s power to punish at all.” *Penry v. Lynaugh*, 492 U.S. 302, at 328-330 (1989). To execute Applicant in the face of such a claim would amount to a “fundamental miscarriage of justice” because, given the categorical ban against execution that it would entail, no reasonable juror would (or even could) have found him eligible for the death penalty. *Cf. Sawyer v. Whitley*, 505 U.S. 333, at 348 (1992). It is true that Section 5 (a) (3) is drafted in terms of the jury’s answers to the

specific special punishment issues under Texas law, which on their face do not speak to categorical prohibitions under Eighth Amendment. But Section 5 (a) (3) was obviously meant by the Legislature to echo the federal standard in *Sawyer v. Whitley*, supra, and surely this Court would not tolerate the execution of a seventeen year old after *Atkins* without first entertaining his substantial arguments why he ought now to be regarded as categorically ineligible for a jury verdict assessing the death penalty.

EXCESSIVE / CRUEL AND UNUSUAL PUNISHMENT

Whether a particular punishment is excessive for purposes of the Eighth Amendment is a question of whether it is disproportionate in relation to the crime, according to the “evolving standards of decency that mark the progress of a maturing society.” *Atkins v. Virginia*, 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 also looks further to the views of relevant professional organizations, religious organizations, the world community, and the general American public as reflected in polling data. *Atkins v. Virginia*, supra, at 2249, n. 21; *Thompson v. Oklahoma*, supra, at 830-831. Moreover, in the end, 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, as do many religious organizations.

The American public generally disapproves. And the world community uniformly condemns the execution of juvenile offenders, including seventeen year olds. The relative culpability of a seventeen year old offender is low in comparison with a fully formed adult, for reasons similar to those adduced to establish the relative lack of culpability for the mentally retarded.

Because of this relative lack of culpability, it cannot reasonably be said that the death penalty measurably serves either the retributive or the deterrent function that normally justifies

imposition of the death penalty. In short, all the relevant indicators demonstrate that Texas's practice of executing seventeen year old offenders presently violates the Eighth Amendment.

A. The Legislative Judgment

At the present time, 28 states, plus the District of Columbia and the federal government, do not authorize the execution of a seventeen year old offender at all, under any circumstances.² This 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

2

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

3

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). *See* Exhibit B. In legislative sessions last year (2001) bills were introduced in South Carolina (Bill 236), Arkansas (SB 78), and Texas (HB 2048). *See* Exhibit C. A bill will be filed in the Texas Legislature in the 2003 session. Moreover, Indiana recently considered *and passed* legislation raising the age of eligibility for the death penalty to 18. (Senate Bill 426 signed by the Governor March 26, 2002, effective July 1, 2002)

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.

Nor is there any less “consistency in the direction of change” with respect to banning the execution of juvenile offenders than the Supreme Court found with respect to the mentally retarded. *Id.* Though the absolute number of states that reject capital punishment for a seventeen year old is similar to the number that reject execution of the mentally retarded, it may be argued that the trend is less recent and less pronounced, and therefore insufficient to overcome the Supreme Court’s 1989 determination that, at least as of that time, a consensus against executing seventeen year olds had not yet emerged. *Id.*, at 2249, n. 18).

But this would be a mistake. For while fewer states have banned juvenile executions in the thirteen years since *Stanford v. Kentucky*, 492 U.S. 361 (1989), than have banned execution of the mentally retarded since *Penry v. Lynaugh*, 492 U.S. 302 (1989), that is only because the states had farther to go in outlawing executions of the mentally retarded. The “*direction of change*” against executing seventeen year old offenders has remained constant. Recent pending legislation, *see ante* n. 2, demonstrates that the pace of change is picking up, and consistently in the same direction, toward abolition of capital punishment for any offender younger than eighteen. Considering the dwindling number of actual executions of juveniles that have occurred since *Stanford*, even among those states that explicitly permit the execution of juveniles, the execution of a seventeen year old must be regarded as just as

“unusual” for Eighth Amendment purposes as the *Atkins* Court found execution of the mentally retarded to be.

B. Jury Verdicts and Actual Executions

Over the last decade, only fifteen states have actually sent a juvenile offender to death row. Amnesty International, *On the Wrong Side of History: Children and the Death Penalty in the USA*, AMR 51/058/1998, October 1, 1998 (Table 2); *see also* Juvenile Offenders on Death Row (Washington College of Law, American University) (www.wcl.american.edu/humright/deathpenalty/juvstat.html) (visited 7/01/02). Six states that provide statutorily for the death penalty for sixteen and/or seventeen year old offenders have no juveniles on death row.⁴ Since *Stanford*, only six states [Texas (most recently, 2002), Louisiana (1990), Missouri (1993), Georgia (1993), Virginia (most recently, 2000), and Oklahoma (1999)] have *actually executed* a juvenile offender. *See* Juvenile Offenders on Death Row, *supra*. This compares with five states to conduct actual executions, since *Penry*, of offenders who were at least arguably mentally retarded. *Atkins v. Virginia*, *supra*, at 2249. Moreover, in the last nine years, only *three* states, Texas, Virginia, and Oklahoma, have actually executed an offender who had not attained his eighteenth birthday at the time of his offense. The percentage of the total population represented by those three states is only 11 percent. *U.S. Bureau of the Census*, 2000 Census (Total U.S. population, 281,421,906; Texas, 20,851,820; Virginia, 7,078,515; Oklahoma, 3,450,654).

4

Ex parte Toronto Markley Patterson. Although Idaho, Utah, Wyoming, South Dakota, New Hampshire and Delaware all expressly allow for juvenile executions by statute, none have ever executed a sixteen or seventeen year old on its death row, much less executed one. *See* Juvenile Offenders on Death Row, *Supra*.
Page 16 of 68

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

C. Relevant Professional Organizations

As was true for mental retardation, “several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon” juvenile offenders. *Id.* They include the American Bar Association, the American Psychiatric Association, the American Academy of Child and Adolescent Psychiatry, the American Society for Adolescent Psychiatry, the National Mental Health Association, The Children’s Defense Fund, The Center on Juvenile and Criminal Justice, The Coalition for Juvenile

Justice, The Child Welfare League of America, The Juvenile Law Center, The Mid-Atlantic Juvenile Defender Center, The Youth Law Center, The Urban League, the Constitution Project, and Southwest Key Program, Inc. The American Law Institute's Model Penal Code contains a prohibition against the death penalty for offenders younger than 18. ALI Model Penal Code, § 210.6, Commentary at 133 (Official Draft and Comments, 1980).

D. The Views of Religious Organizations

In *Atkins* a majority of 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*, supra, at 388, n. 4 (Brennan, J., dissenting) (listing *amici curiae*).

Just by way of example, after *Stanford* was decided, the National Council of the Churches of Christ in the U.S.A., representing 140,000 congregations of many of the most prominent Protestant denominations in the country, and over 50 million churchgoers, adopted a resolution to voice its specific opposition to the execution of offenders younger than eighteen, and calling upon state legislative bodies to ban the practice. *See* Exhibit D, A Resolution of the National Council of the Churches of Christ in the U.S.A. The United States Conference of Catholic Bishops filed an amicus brief in *Stanford*, opposing the execution of juvenile offenders, and it has never retreated from the views expressed in that

brief – which is not surprising, given its general opposition to the death penalty. *See* A Good Friday Appeal to End the Death Penalty: A Statement of the Administrative Board of the United States Conference of Catholic Bishops, April 2, 1999 (<http://www.usccb.org/sdwp/national/criminal/appeal.htm>) In joining the amicus brief that the *Atkins* Court relied upon, the American Jewish Committee, with 100,000 members and supporters, expressly alluded to the fact that it has earlier joined other such amicus briefs in opposition to the execution of offenders not yet eighteen years old. *See* Brief *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/amicuscursiae3.htm>) The Commission on Social Action of Reform Judaism has likewise taken a stand against the death penalty in general, and against executing juveniles in particular. Representing the Union of American Hebrew Congregations, with 900 congregations encompassing 1.5 million Reform Jews, as well as the Central Conference of American Rabbis, the Commission on Social Action of Reform Judaism also joined the amicus brief in *McCarver*, and similarly opposes the execution of offenders younger than eighteen. *See* Religious Action Center of Reform Judaism: Issues: Death Penalty (www.rac.org/issues/issuedp.html); Press Release: Largest Jewish Organization Calls on Okla. Governor to Grant Clemency for Crimes Prisoner Committed as a Boy (www.rac.org/news/020299.html).

E. Consensus of the World Community

Worldwide condemnation of execution of juvenile offenders is not simply

“overwhelming,” as 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. Only three countries in the world continue actually to conduct juvenile executions (Iran, Pakistan, and the United States), and only the United States does so under color and sanction of domestic law (actually, only a small number of states within the United States, excluding the federal government). And the number may have dwindled even further, because on July 25, 2002, the Pakistan News Service reported that “[w]ith the enforcement of the Juvenile Justice System Ordinance 2002 in Punjab the death sentence of 74 juvenile delinquents has been converted into life imprisonment[.]” (<http://www.paknews.com/flash.php?id=5&date1=2000-07-25>) It has become clear that the ban against executing seventeen year old offenders is so universally accepted in the world community that it has reached that status of a *jus cogens* peremptory norm of international law. *See* pp. 31-44, *post*. Accordingly, Applicant has filed a petition with the IACHR alleging that his execution would violate this peremptory norm, and the IACHR has requested that the United States take precautionary measures to preserve his life until it can investigate and rule on the petition. *See* Exhibit A, *supra*.

F. Public Opinion Polling Data

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

G. Relative Culpability of Juvenile Offenders: Retribution & Deterrence

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 v. Oklahoma*, *supra*, at 835. The Court found it “obvious” that “[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.” *Id.* What was “obvious” to judicial intuition about fifteen year olds in 1988 has since been borne out in the scientific research and literature; and not only with respect to fifteen year olds, but with respect to seventeen year olds as well.

Dr. Ruben C. Gur is a neuropsychologist and tenured professor at the University of Pennsylvania, with a primary appointment in Psychiatry, and secondary appointments in Neurology and Radiology. He is currently Chief of the Brain Behavior Laboratory and 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 E, Declaration of Ruben

C. Gur (verified), at 1-3. From that review Dr. Gur has concluded:

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

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

- “w. The brain scan techniques have demonstrated conclusively that he [sic] phenomena observed by mental health professionals in persons under 18 that would render them less morally blameworthy for offenses have a scientific grounding in neural substrates. The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable. Therefore, a presumption arises that someone under 20 should be considered to have an underdeveloped brain.

Additionally, since brain development in the relevant areas goes in phases that vary in rate and is usually not complete before the early to mid-20s, there is no way to state with any scientific reliability that an individual 17-year-old has a fully matured brain (and should be eligible for the most severe punishment), no matter how many otherwise accurate tests and measures might be applied to him at the time of his trial for capital murder. This is similar to other physical characteristics such as height. While we know in detail the age at which the average adults reach their maximal height, predictions for individuals are not easy to make. Thus, although 18 is an arbitrary cutoff, given the ongoing development of the brain in most individuals, it must be preferred over 17 as assuring that only the most culpable are punished for capital crimes. Indeed, age 21 or 22 would be closer to the 'biological' age of maturity."

Id., 11-13.

Indeed, recent research involving MRI techniques has shown that teenagers actually respond to stimuli with a different part of the brain than adults. Asked to identify the emotion displayed in a series of images of faces, the adult subjects uniformly and correctly identified "fear," using the prefrontal cortex of the brain, which is the part of the brain associated with "executive" functions such a planning, goal-directed behavior, judgment and insight. Teenagers more often than not misidentified the emotion as "shock," "surprise," or "anger," perhaps because the MRI revealed they were using a different, "lower" part of the brain called the amygdala, associated with instinctual "gut" reactions to stimuli. This difference may well explain the characteristic impulsiveness of adolescents. *See Sarah Spinks, One Reason Teens Respond Differently to the World: Immature Brain Circuitry* (<http://www.pbs.org/wbgh/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.

Thus, since *Stanford* was decided in 1989, research confirms that the adult brain is not fully developed until an individual is in his early twenties. As a result, the brain of a seventeen year old has a greater tendency toward impulsiveness, lesser reasoning skills, and less awareness of the consequences of his decisions or actions. He is, in short, developmentally unable to problem-solve and control his actions as a mature adult would. Accordingly, he cannot be considered among the "worst of the worst" for Eighth Amendment purposes, in service of the retributive function of capital punishment, and he is unable to respond to the prospect of the death penalty as a deterrent in the way an adult would. See D. Keating, *Adolescent Thinking*, in "At the Threshold," 54-89 (S. Feldman et al. eds., 1990); W. Overton, *Competence and Procedures*, in "Reasoning, Necessity and Logic," 1-32 (W. Overton ed. 1990); National Institute of Mental Health, *Teenage Brain: A Work in Progress*, 2/6/01, (<http://www.nimh.nih.gov/publicat/teenbrain.cfm>). The lack of higher cognitive processing abilities that regulate impulse control and decision making in the seventeen year old reduces the degree of culpability that can be attributed to him relative to

a normal adult engaging in the same criminal behavior. Studies have shown that an adolescent typically does not plan and often gets caught up in unanticipated events, reacting in the moment, and regarding as “accidental” what most adults would have foreseen as likely consequences. Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, *Criminal Justice* (Summer 2000), at p. 27. And when under stress, even the more cognitively developed adolescents are typically unable effectively to use their most advanced judgment and decision-making skills. *Id.*

The retributive purpose of the death penalty is a function of the relative culpability of the offender. *Atkins v. Virginia*, *supra*, at 2251. A seventeen year old’s brain development – or more precisely, the lack thereof – necessarily reduces his culpability, much as the diminished capacity of the mentally retarded offender reduces his. Indeed, as Dr. Gur has expressed it, “literally, it can be stated that any juvenile is retarded relative to that juvenile as an adult.” *See* Exhibit E, at 13. Because a seventeen year old’s ability to control his impulses or foresee the logical consequences of his conduct are not appreciably better than that of a fifteen year old, and only marginally better than that of the mentally retarded, the retributive purpose of the death penalty “is simply inapplicable” to him. *Thompson v. Oklahoma*, *supra*, at 835-837; *Atkins v. Virginia*, *supra*, at 2251. Likewise, the seventeen year old’s relative inability to deliberate on the consequences of his conduct nullifies the deterrent function of the death penalty. What is true of the fifteen year old essentially holds true for the seventeen year old offender as well: “The likelihood that the teenage offender

has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.” *Thompson v. Oklahoma*, supra, at 837. Moreover, what 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. The same is true for juveniles. Like the mentally retarded, juvenile defendants in capital cases may be peculiarly susceptible to the danger of false confessions. *Id.* Indeed, in Applicant’s own case, he gave an inculpatory statement that not only failed to match the physical evidence in the case, but may also have been the product of an interrogation technique that caused another youthful suspect, Michael Martinez, a

month later, to give a demonstrably false confession. (21 RR 3601, 3610, 3650, 3691-3694; 22 RR 3734, 3915-3932; 23 RR 4025-4047) Moreover, a seventeen year old offender, like a mentally retarded one, might be less able to give meaningful assistance to counsel, may make a poor witness in his own defense (as Applicant undoubtedly did), and may display a demeanor at trial that creates an unwarranted impression of a lack of remorse, all to the detriment of his ability to persuade the jury that sufficient mitigation exists to justify a life sentence. *Id.*, at 2252. For these reasons, like the mentally retarded, juvenile capital offenders “in the aggregate face a special risk of wrongful execution.” *Id.*

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

(b) Applicant’s sentence of death violates Article I, § 13 of the Texas Constitution because the execution of an offender for any crime committed when he was less than eighteen years of age constitutes cruel or unusual punishment.

COGNIZABILITY UNDER ARTICLE 11.071, SECTION 5

Ordinarily, claims of state constitutional dimension are not cognizable in state post-conviction habeas corpus proceedings in Texas. *Ex parte Truong*, 770 S.W.2d 810 (Tex.Cr.App. 1989). But state constitutional claims of error so fundamental that they are not susceptible to a harm analysis may be entertained in a writ, and this is especially so in post-conviction proceedings that challenge capital convictions. *Ex parte McKay*, 819 S.W.2d 478 (Tex.Cr.App. 1990). Applicant contends that to execute him in light of the fact that he was only seventeen at the time of the offense would violate Article I, § 13 of the Texas Constitution, which prohibits the infliction of “cruel or unusual” punishment. In effect, what Applicant seeks is, as pointed out earlier, “analogous to a new rule placing certain conduct beyond the State’s power to punish at all.” *Penry v. Lynaugh*, supra, at 328-330. Such a rule would be fully retroactive and not subject to a harm analysis, and would be cognizable in a post-conviction writ in keeping with *Ex parte McKay*, supra.

Under *Heitman v. State*, 815 S.W.2d 681 (Tex.Cr.App. 1991), this Court is free to interpret the provisions of its own state constitution more protectively than the United States Supreme Court construes comparable provisions of the federal bill of rights. Nevertheless, especially with respect to Article I, § 13 of the Texas Constitution, this Court has been loathe to find any greater protection than the Eighth Amendment provides, at least absent some compelling argument why it should. *E.g.*, *Shannon v. State*, 942 S.W.2d 591, at 599-600 (Tex.Cr.App. 1996). Because until now no basis in law had arisen to cast doubt on the

continued authoritativeness of the Supreme Court's decision in *Stanford v. Kentucky*, supra, no such compelling argument existed against executing seventeen year old offenders. After *Atkins v. Virginia*, supra, however, such an argument can be made compellingly for the first time. This Court should therefore entertain it for the first time in this successive writ application, under the provisions of Article 11.071, Sections 5 (a) (1) and (d), for the same reasons that were set out at pp. 8-11, *ante*. Before *Atkins* was decided, there was no opinion from this Court which recognized the argument that it violates Article I, § 13 to execute a seventeen year old offender, nor was there a decision of this Court from which such an argument could reasonably be formulated. Now, the Missouri Supreme Court is considering whether the execution of a seventeen year old offender violates, *inter alia*, its own state constitution in light of *Atkins v. Virginia*. See *Missouri v. Simmons*, Case No. SC84454. This Court should do likewise.

CRUEL OR UNUSUAL PUNISHMENT UNDER ARTICLE I, § 13

Obviously, whether a particular punishment is so disproportionate as to violate Article I, § 13 cannot be primarily a function of the consensus of legislative judgments across the nation. Other states have no controlling say in Texas' view of the acceptability of executing juvenile offenders any more than they have a say in whether we find it appropriate to execute killers of policemen or child murderers under our own constitution. But neither can the acceptability of executing a seventeen year old be purely a function of the fact that heretofore our own Legislature has permitted it, in Section 8.07 (c) of the Texas Penal Code. It is true

that this Court has frequently commented that it will not find the punishment assessed in a particular case unconstitutional under Article I, § 13 so long as that punishment does not exceed a valid statutorily prescribed range. *E.g. Samuel v. State*, 477 S.W.2d 611, at 614-615 (Tex.Cr.App. 1972). Nevertheless, the Court ultimately retains authority to review the proportionality of a particular sentence, *id.*, and in any event must be able to review the constitutional validity of the statute itself which prescribes the range of punishment. For instance, it would surely be within the prerogative of this Court to declare a statute that penalized petty theft with a sentence of death to constitute “cruel or unusual” punishment under Article I, § 13.

Whether this Court finds the death penalty to be an excessive punishment for a particular class of offender, as the Supreme Court did in *Atkins*, must therefore depend upon the many other factors which the Supreme Court found (and still others which this Court may find, in “following its own lights”) informative. That the “consistency of the direction of change” in the rest of the country is against the execution of seventeen year old offenders should inform this Court’s judgment (though it is obviously not dispositive). Even our own Legislature has considered such a change, and will consider it again in the next session. Moreover, like the Supreme Court after *Atkins*, it is appropriate for this Court to consider the judgment of the rest of the world in considering for itself whether execution of a particular class of offender is excessive. That includes the views of professional and religious organizations, international human rights bodies, and other sovereign nations. It should be

clear from the balance of this writ application that the rest of the world finds the prospect of Applicant's impending execution morally indefensible, and therefore, legally untenable. Finally, it is appropriate for this Court to decide for itself whether the execution of a juvenile serves the legitimate purposes of retribution and deterrence, in view of his reduced culpability due to immature judgment and impulse control, and his inability to foresee the consequences of his actions. Since Applicant has elsewhere developed these arguments both *post* and *ante*, he will not belabor them here. *Atkins* has thrown the authoritativeness of *Stanford* into doubt, and the latter can no longer serve as a reliable guide in its consideration of the constitutionality of Section 8.07 (c) of the Penal Code under Article I, § 13. Applicant urges the Court to take cognizance of this issue of Texas constitutional law, which he could not effectively have raised before now, and "follow its own lights."

(c) Applicant's sentence of death violates the Supremacy Clause of the United States Constitution in that it violates a *jus cogens* peremptory norm of international law which prohibits the execution of offenders for crimes committed when less than eighteen years of age.

COGNIZABILITY UNDER ARTICLE 11.071, SECTION 5

This issue is cognizable even though not raised in Applicant's initial application for writ of habeas corpus brought pursuant to Article 11.071, or in his first subsequent application for writ of habeas corpus. Subsection 5 (a) (3) of Article 11.071 permits judicial consideration of the merits of any subsequent state writ application if, among other

alternatives, it “contains sufficient specific facts establishing that . . . by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state’s favor one or more of the special issues that were submitted to the jury in the applicant’s trial under Article 37.071[.]” Applicant can show such “specific facts.” As Applicant will demonstrate, under a *jus cogens* peremptory norm of international law, applicable to Texas through the Supremacy Clause of the United States Constitution, Applicant’s jury should never have even *reached* the Article 37.071 special issues, much less could it have rationally answered them in the State’s favor. For this reason, the instant subsequent writ application should be adjudicated on the merits.

JUS COGENS PEREMPTORY NORM OF INTERNATIONAL LAW

Under Article 53 of the Vienna Convention on the Law of Treaties (hereinafter Vienna Convention), a *jus cogens* peremptory norm is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties, *adopted* May 22, 1969, art. 53, 1155 U.N.T.S. 331, at 352. Treatises on international law in the United States agree with this standard. The Restatement (Third) of the Foreign Relations Law provides that a *jus cogens* norm is a “norm accepted and recognized by the international community of states as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character,” that the norm

is established where there is acceptance and recognition by a “large majority” of states, even if over dissent by “a very small number of states.” Restatement (Third) of Foreign Relations Law § 102, and reporter’s note 6 (1986) (citing Report of the Proceedings of the Committee of the Whole, May 21, 1968, U.N. Doc. A/Conf. 39/11 at 471-72). A norm must meet four requirements in order to attain the status of a peremptory norm: 1) it is general international law; 2) it is accepted by a large majority of states; 3) it is immune from derogation; and 4) it has not been modified by a new norm of the same status. *See* Connie de la Vega, *Amici Curiae Urge the U.S. Supreme Court to Consider International Human Rights Law in Juvenile Death Penalty Case*, 42 Santa Clara U.L.Rev. 1033 (2002). The prohibition against the execution of offenders who were under 18 at the time of their offense clearly meets those requirements.

A. The Prohibition is General International Law

First, the prohibition against the execution of persons who were under 18 years old at the time of their offense is general international law. Numerous treaties, declarations, and pronouncements by international bodies, as well as the laws of the vast majority of nations are evidence that the prohibition against the execution of offenders younger than 18 is general international law. Among the treaties that prohibit the death penalty for juvenile offenders are the International Covenant on Civil and Political Rights (hereinafter

“ICCPR”),⁵ the United Nations Convention on the Rights of the Child (hereinafter “CRC”),⁶ the Geneva Convention Relative to the Protection of Civilian Persons in the Time of War (hereinafter “Fourth Geneva Convention”),⁷ the American Convention on Human Rights (hereinafter “American Convention”),⁸ and the American Declaration of the Rights and Duties of Man.⁹

5

Article 6(5) (the International Covenant on Civil and Political Rights, Dec. 19, 1966. 999 U.N.T.S. 171). “The U.S. is the only country to ratify this treaty with an outstanding reservation regarding the execution of juveniles.” Death Penalty Information Center, *Executions of Juvenile Offenders*, <http://www.deathpenaltyinfo.org/juvexec.html>.

6

Article 37 (Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989), *reprinted* in 28 I.L.M. 1448 (1989)). The CRC forbids the execution of juvenile offenders, but the U.S. has failed to ratify this treaty. Yet, every other nation in the world with an organized government has ratified it. See Death Penalty Information Center, *Executions of Juvenile Offenders*, <http://www.deathpenaltyinfo.org/juvexec.html>.

7

Art. 68 (Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 286).

8

Ch. 2, Art. 4, Sec. 5 (American Convention on Human Rights, O.A.S. Official Records, OEA/Ser. K/XVI/1.1, doc. 65. rev. 1. corr. 2 (1969)).

9

American Declaration of the Rights and Duties of Man, Ninth International Conference of American States, Bogotá, Colombia 1948.

In addition to the above, a 1984 resolution by the United Nations Economic and Social Council opposes the imposition of the death penalty for juvenile offenders. *See Safeguards Guaranteeing Protection of the Rights of those facing the Death Penalty*, E.S.C. Res. 1984/50, annex. 1984 U.N. ESCOR Supp. (No.1) at 33. U.N. Doc. E/1984/84 (1984).

In 1985, the United Nations General Assembly adopted by consensus the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”) which also oppose capital punishment for juveniles. G. A. res. 40/33, annex, 40 U.N. GAOR Supp. (no. 53) at 207, U.N. Doc. A/40/53 (1985). Since 1997, the United Nations Commission on Human Rights has passed a series of resolutions calling upon states to abolish the death penalty generally, but has specifically asked countries “not to impose it for crimes committed by persons below 18 years of age.”¹⁰ While the Commission resolutions passed with a number of dissenting votes, that can be attributed to the fact that they also called for a moratorium on the death penalty generally, and that a number of countries still have the death penalty which is not prohibited by the ICCPR and the prohibition is not as widely accepted. That is supported by the fact that recent Commission resolutions that mention only the prohibition against the juvenile death penalty passed by consensus without

10

See The Question of the Death Penalty, Comm. on Hum. Rts., 57th Sess. Res. 2001/68, adopted April 25, 2001, E/CN.4/2001/RES/68 (2001); *The Question of the Death Penalty*, Comm. on Hum. Rts., 56th Sess., Resolution 2000/65, adopted April 27, 2000, E/CN.4/2000/RES/65 (2000); *The Question of the Death Penalty*, Comm. on Hum. Rts., 55th Sess., Resolution 1999/61, adopted April 28, 1999, E/CN.4/RES/1999/61 (1999); *The Question of the Death Penalty*, Comm. on Hum. Rts., 54th Sess., Resolution 1998/8, adopted April 3, 1998, E/CN.4/1998/RES/8 (1998); *The Question of the Death Penalty*, Comm. on Hum. Rts., 53rd Sess., Resolution 1997/12, adopted April 3, 1997, E/CN.4/1997/RES/12 (1997).

a vote.¹¹ Those same resolutions also request governments to comply with the mandates of Article 27 of the CRC and Article 6(5) of the ICCPR.

See Rights of the Child, Comm. on Hum. Rts., 58th Sess., Resolution 2002/92, adopted April 26, 2002, E/CN.4/RES/2002/92 Para. 31(a) (2002); *Human Rights in the Administration of Justice, In Particular Juvenile Justice*, Comm. on Hum. Rts., 58th Sess., Resolution 2002/47, adopted April 23, 2002, E/CN.4/RES/2002/47 Para. 19 (2002); *Rights of the Child*, Comm. on Hum. Rts., 57th Sess., Res. 2001/75, adopted April 25, 2001, E/CN.4/2001/RES/75 Para. 28(a) (2001).

The United Nations Sub-Commission on the Promotion and Protection of Human Rights has passed similar resolutions. In the 1999 resolution, the United States is specifically mentioned as one of the six countries that had executed juvenile offenders since 1999 and that is accounted for 10 of the 19 executions during that time period.¹² One year later, the Sub-Commission affirmed “that the imposition of the death penalty on those aged under 18 at the time of the commission of the offence is contrary to customary international law.”¹³ Again, the latter resolution was adopted without a vote.

B. The Prohibition is Accepted by All States Except One

The second requirement for a *jus cogens* norm to be satisfied is that the norm is accepted “by ‘a very large majority of’ States, even if over dissent by ‘a very small number’ of states.” Restatement, supra. The United States is the only country in the world that has not accepted the international norm against the execution of offenders younger than 18. The only other countries known to have executed juvenile offenders in the last ten years have since abolished the practice, acknowledge that such executions were contrary to their laws, or deny that they have taken place. Not only is the United States one of the only nations still executing juveniles, but it does so at a higher rate than any other country. A news release by Amnesty International on August 18, 2000, in response to a previous execution date for

12

The Death Penalty, Particularly in Relation to Juvenile Offenders, United Nations Sub-Commission on the Promotion and Protection of Human Rights, 52nd Sess., Res. 1999/4, adopted August 24, 1999, U.N. Doc. E/CN.4/Sub.2/RES/1999/4 (1999).

13

The Death Penalty in Relation to Juvenile Offenders, United Nations Sub-Commission on the Promotion and Protection of Human Rights, 53rd Sess., Res. 2000/17, adopted August 17, 2000, U.N. Doc. E/CN.4/Sub.2/RES/2000/17 (2000).

Alexander Williams, a Georgia juvenile offender then sentenced to the death penalty, stated “if Williams is executed, the United States will have executed more juvenile offenders in just over seven months than the rest of the world combined has executed in the past seven years.”

Death Penalty Information Center, *Executions of Juvenile Offenders* (visited Sept. 4, 2001); <http://www.deathpenaltyinfo.org/juvexec.html>. Since that time, this Court may take judicial notice that Texas alone has executed two more: Gerald Mitchell and Napoleon Beazley.

Almost every nation in the world has ratified the Convention on the Rights of the Child. *Status of the Convention on the Rights of the Child, Report of the Secretary General U.N. ESCOR, Hum. Rts. Comm. 54th Sess., Agenda Item 20, ¶ 2, U.N. Doc. E/CN.4/1998/99 (1997)*. The only State other than the United States not to ratify is Somalia, which has no government. *See Rights of the Child: Status of the Convention on the Rights of the Child, U.N. ESCOR, 57th Sess., Agenda Item 13, U.N. Doc. E/CN.4/2001/74, ¶ 5 & Annex 1 (2000)*. But even Somalia has recently signed the treaty, with a promise to ratify it post haste. Amnesty International Press Release, UN General Assembly Special Session on Children, IOR 41/017/2002, May 14, 2002 (www.amnesty.org). This will leave the United States as the only nation in the world that has not ratified the C.R.C. and recognized the universal

norm against imposition of the death penalty on juvenile offenders.

Indeed, the CRC has been the catalyst that has prompted many countries in the past ten years to change their laws raising the eligibility for the death penalty to 18. The United Nations reported that Barbados, Yemen, and Zimbabwe changed their laws in 1994. Crime Prevention and Criminal Justice, *supra* note 43, at 21 ¶ 90, U.N. Doc. E/2000/3, March 31, 2000. China changed its age to 18 in 1997. *Id.* Indeed, by the time of that report, only 14 of the countries that had ratified the CRC had not yet changed their laws to adhere to the prohibition. *Id.*, at 21, n. 36. However, none of those countries made reservations to the CRC requirements, and furthermore, only 6 have executed juvenile offenders since 1991: Democratic Republic of the Congo (1 in 2000), Iran (6: 3 in 1992, 1 in 1999, 1 in 2000, 1 in 2001), Nigeria (1 in 1997), Pakistan (3: 1 in 1992, 1 in 1997, 1 in 2001), Saudi Arabia (1 in 1992), and Yemen (1 in 1993). Amnesty International, *The United States of America: Too Young to Vote, Old Enough to be Executed*, AI Index: AMR 51/105/2001, July 2001; <http://www.amnesty.org>.

Of the six countries besides the United States where juveniles have been executed since 1990, the laws have been changed or the governments have denied that the executions of juvenile offenders have taken place. The laws have changed in Yemen, as noted above, and Pakistan, where it was reported that the death penalty for people under 18 at the time of

offense was abolished.¹⁴ In December 2001, President Musharraf of Pakistan announced that he would commute the death sentences of all juvenile offenders on death row in his country.¹⁵ On July 25, 2002, the Pakistan News Service announced that 74 juvenile death sentences were in fact commuted to sentences of life imprisonment. *See* p. 20, *ante*. Nigeria, as noted in the United Nations report above, has national legislation setting the age at 18. With respect to an execution that occurred in 1997, the Nigerian government insisted to the Sub-Commission on the Promotion and Protection of Human Rights in 2000 that the offender was well over 18 at the time of the offense and reiterated that any juveniles convicted of capital offenses would have their sentences commuted.¹⁶ Saudi Arabia has adamantly insisted at the Commission on Human Rights that the allegations regarding the execution of a juvenile in 1992 are untrue.¹⁷ While there has been documentation that the executions in Nigeria and Saudi Arabia did take place,¹⁸ they do appear to be isolated incidents, and the

14

Amnesty International Press Release (June 7, 2001) (referring to Ordinance to Provide for Protection of the Rights of Children Involved in Criminal Litigation, Ordinance No. XXII of 2000).

15

See Amnesty International (Irish Division) Press Release (Dec. 13, 2001) (welcoming the announcement of President Musharraf that he would commute the death sentences of about 100 juvenile offenders). <http://www.amnesty.ie/news/2001/pakistan4.shtml>

16

See Summary Record of the 6th Meeting of the Sub-Commission on the Promotion and Protection of Human Rights, 52nd Sess., August 4, 2000, E/CN.4/Sub.2/2000/SR.6 ¶ 39 (2000).

17

See Summary Record of the 53rd Meeting of the Commission on Human Rights, 56th Sess., April 17, 2000, E.CN.4/2000/SR.53. ¶ ¶ 88 and 92 (2000).

18

denial by the governments is an indication that they in fact have accepted the norm. While executions of juvenile offenders seem to have taken place with more frequency in Iran, the government recently denied at the Commission on Human Rights that they actually do take place.¹⁹

Amnesty International, *Children and the Death Penalty: Executions Worldwide Since 1990*, ACT 50/10/2000.

19

See U.N. Press Release, Commission on Human Rights Starts Debate on Specific Groups and Individuals, April 11, 2001 (Right of Reply by Republic of Iran).
Ex parte Toronto Markky Patterson
No. 38-095-03
Page 41 of 68

The Democratic Republic of the Congo, which is in the midst of civil war, is also reported to have executed a juvenile offender in 2000 despite a moratorium on the death penalty in that country.²⁰ His name was Kasongo and he was 14 years old, both at the time of the crime and at the time of the execution.²¹ That execution was carried out by the Military Order Court rather than through the judicial process.²² In 2001, when five juvenile offenders were sentenced to death by the Military Order Court, the executions were stayed and the sentences commuted following appeals from the international community.²³ Thus, it appears that not only does the military intend to comply with the law even during wartime, but that the Congo recognizes the international norm and has begun to abide by it. Finally, in Iran, Mehrdad Youssefi was reportedly executed on May 29, 2001.²⁴ He was 16 at the commission of the crime. When confronted during the Commission on Human Rights in 2001, about the continuing practice of executing juvenile offenders contrary to international

20

See Amnesty International, Dem. Republic of Congo: *Killing Human Decency*, AI Index: AFR 62/11/00, May 31, 2000 at 12.

21

See Amnesty International, *The United States of America: Too Young to Vote, Old Enough to be Executed*, AI Index: AMR 51/105/2001, July 2001; <http://www.amnesty.org>.

22

Id.

23

Id.

24

Id.

law, the government of Iran denied that they take place at all.²⁵ This denial demonstrates Iran's knowledge that they are violating the law.

Hence, only the United States has not accepted the norm against the execution of juvenile offenders. Even if the reports were true and verifiable that executions of juveniles took place not only in the United States but in Iran and the democratic Republic of the Congo, the norms which have attained peremptory status are similar to those noted in the Restatement (Third). Such norms include rules prohibiting genocide, slave trade and slavery, apartheid and other gross violations of human rights. *See* Restatement, *supra*. The United States courts have accepted other international norms (for example, the prohibition against torture). *See e.g., Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987). Amnesty International has found, however, that 125 countries violated the *jus cogens* norm against torture last year.²⁶ In stark contrast, only three countries violated the norm prohibiting the execution of juvenile offenders in the past couple of years, indicating the widespread importance of this norm. Yet the United States refuses to abide by it. Furthermore, the United States has not taken any steps to educate, inform, or require the states of the United States to abide by the international norm.

C. The Prohibition is a Non-Derogable Norm

The prohibition is non-derogable. Article 4, paragraph 2 of the ICCPR expressly provides that there shall be no derogation from Article 6, paragraph 5 of which prohibits the imposition of the death penalty on juvenile offenders. In 1980 the United States itself

collaboratively sponsored a United Nations General Assembly resolution that Article 6 of the ICCPR (which includes paragraph 5, the norm that prohibits executing juvenile offenders) establishes a “minimum standard” for all member states, whether or not they had adopted the ICCPR. *See* G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980). The express prohibition in the treaty coupled with the wide acceptance, evidenced by treaties, resolutions, national laws and practice, support the conclusion that the norm is non-derogable.

D. There is no Emerging Norm Modifying this Norm

As to the fourth and final requirement, there is no emerging norm that contradicts the current norm. The prohibition of the juvenile death penalty has been universally accepted by all but one country. There is thus no question that the prohibition against the execution of persons who were under 18 at the time of their offense has attained the status of a *jus cogens* peremptory norm of international law.

APPLICABLE TO TEXAS THROUGH THE SUPREMACY CLAUSE

As the United States Supreme Court long ago noted, customary international law is “part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction.” *The Paquete Habana*, 175 U.S. 677, at 700 (1900). Thus, the Restatement (Third) rightly concludes that customary international law, “while not mentioned explicitly in the Supremacy clause,” is nevertheless regarded as supreme federal law within the meaning of Article VI, clause 2 of the United States Constitution, “and as such [is]

supreme over State law.” Restatement, *supra*, § 111 comment d, at 44. See Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 Mich.J.Int’l L. 301, at 304 & nn. 22 & 23 (1999). A noted commentator has recognized that “as in cases of treaties, American courts will give effect to the obligations of the United States under customary law; at the behest of affected private parties, courts will prevent violations of international law by the States” Louis Henkin, *Foreign Affairs and the Constitution* 223 (1972).

The principle that customary international law is part of United States law applies with greater force in the context of a *jus cogens* peremptory norm. See, e.g., *United States v. Mata-Ballesteros*, 71 F.3d 754 (9th Cir. 1995); *In re Estate of Ferdinand E. Marcos Human Rights Litigation (“Marcos II”)*, 25 F.3d 1467 (9th Cir. 1994); *In re Estate of Ferdinand E. Marcos Human Rights Litigation (“Marcos I”)*, 978 F.2d 493 (9th Cir. 1992); *White v. Paulson*, 997 F. Supp. 1380 (E.D.Wash. 1998). Indeed, domestic courts are obligated to enforce *jus cogens* norms. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, at 715-716 (9th Cir. 1992). This is “because *jus cogens* norms do not depend solely on the consent of states for their binding force, [and therefore] they enjoy the highest status within the international law.” *Id.*, at 715 (internal quote and citation omitted). See Connie de la Vega, *Amici Curiae Urge the U. S. Supreme Court to Consider International Human Rights Law in Juvenile Death Penalty Case*, 42 Santa Clara L.Rev. 1033 (2002).

“As law of the United States, international law is also the law of every State, is a basis

for the exercise of judicial authority by State courts, and is cognizable in cases in State courts, in the same way as other United States law.” Restatement, supra, § 111, comment d, at 44. International law, and more importantly, a *jus cogens* peremptory norm of international law, from which there can be no derogation, prohibits the execution of an offender younger than eighteen when his crime was committed. This Court should exercise its judicial authority to enforce that peremptory norm by vacating Applicant’s death sentence in this case as a violation of supreme, and therefore constitutionally binding, law.

(d) Applicant’s sentence of death violates the Supremacy Clause of the United States Constitution in that it violates Article 6, Paragraph 5 of the International Covenant on Civil and Political Rights, a treaty which the United States Senate has ratified, which prohibits the execution of offenders for crimes committed while less than eighteen years of age.

COGNIZABILITY UNDER ARTICLE 11.071, SECTION 5

This issue is cognizable even though not raised in Applicant’s initial application for writ of habeas corpus brought pursuant to Article 11.071, or in his first subsequent application for writ of habeas corpus. Subsection 5 (a) (3) of Article 11.071 permits judicial consideration of the merits of any subsequent state writ application if, among other alternatives, it “contains sufficient specific facts establishing that . . . by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state’s favor one or more of the special issues that were submitted to the jury in the applicant’s trial under Article 37.071[.]” Applicant can show such “specific facts.” As

Applicant will demonstrate, under Article 6, paragraph 5 of the ICCPR, applicable to Texas through the Supremacy Clause of the United States Constitution, Applicant's jury should never have even *reached* the Article 37.071 special issues, much less could it have rationally answered them in the State's favor. For this reason, the instant subsequent writ application should be adjudicated on the merits.

THE ICCPR AND THE SUPREMACY CLAUSE

Article 6, paragraph 5 of the ICCPR provides: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." ICCPR, Dec. 19, 1966, art. 6, S. Treaty Doc. No. 95-2, 999 U.N.T.S. 171, at 175. The United States Senate ratified this treaty in June of 1992, three years before Applicant's offense. Article VI, clause 2 of the United States Constitution makes "all treaties made . . . under the Authority of the United States . . . the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *See also* Restatement (Third) of the Foreign Relations Law of the United States § 111 (1) (1987) ("International law and international agreements of the United States are law of the United States and supreme over the law of the several States."). Thus, under the terms of the ICCPR, if binding on the State of Texas through the United States Constitution, Applicant could not lawfully be sentenced to death for a crime he committed when he was only seventeen.

A. Senate Reservation: Validity

When it ratified the ICCPR, the United States Senate purported to enter a reservation providing that, notwithstanding its ratification, the states could continue to impose capital punishment “including such punishment for crimes committed by persons below eighteen years of age.” 138 Cong.Rec. S4781-01, S4783-84 (daily ed. April 2, 1992). No other signatory-nation to the ICCPR filed any reservation to Article 6, paragraph 5. Moreover, the governments of Belgium, Denmark, Finland, France, Germany, Italy, Netherlands, Norway, Portugal, Spain, and Sweden all registered objections to the Senate’s reservation as incompatible with the object and purpose of the ICCPR. *See Multilateral Treaties Deposited with the Secretary-General, Status as of 31 December, 1994*, U.N. Doc. ST/LEG/SER.E/13, at 127-130 (1995). The Senate’s purported reservation is invalid, for the following reasons.

Under international law, a signatory state wishing to become a party may make a reservation only if the treaty itself permits it and “the reservation is not incompatible with the object and purpose of the treaty.” Vienna Convention on the Law of Treaties, *adopted* May 22, 1969, art. 19 (c), 1155 U.N.T.S. 331, at 336. *See also* Restatement, *supra*, at § 313 (1) (c). While the United States has not yet ratified the Vienna Convention, our Department of State has taken the position that it is the authoritative guide to current treaty law and practice. *See* Nicholls, *Too Young to Die: International Law and the Imposition of the Juvenile Death Penalty in the United States*, 5 *Emory Int’l Rev.* 617, 639-640, n. 171 (1991). The American Law Institute, in revising the Restatement of the Foreign Relations Law of the United States, took the Vienna Convention as its “black letter” for setting out

principles related to the law of treaties. Maria Frankowska, *The Vienna Convention on the Law of Treaties Before the United States Courts*, 28 Va.J.Int'l.L. 281, 286 (1988). If indeed the Senate's purported reservation to Article 6, paragraph 5 of the ICCPR is, as the various governments listed above have opined, incompatible with the object and purpose of the ICCPR, then pursuant to the Vienna Convention it should not be recognized as valid.

The Human Rights Committee [hereinafter, "HRC"]) has declared the Senate's purported reservation to be incompatible with the object and purpose of the ICCPR. The HRC was established as an adjudicative body by Part IV of the ICCPR itself, and is charged under Article 40 therein with reviewing and commenting on the reports of party states on the measures they have taken to implement the guarantees of the ICCPR, and also to render "such general comments as it may consider appropriate." Pursuant to these functions, the HRC has registered its opinion that the United States Senate's purported reservation to Article 6, paragraph 5 of the ICCPR *is*, in fact, "incompatible with the object and purpose of the Covenant." *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant; Comments of the Human Rights Committee*, 53rd Sess., para. 14, U.N. Doc. CCPR/C/79/Add.50 (April 7, 1995); *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (hereinafter, "*Official Records*"), para. 279, U.N. Doc. A/50/40 (October 3, 1995). *See* Exhibit G. This specific comment came on the heels of the HRC's General Comment the year before in which it categorically declared that any reservation by any party state to the Covenant purporting to allow, *inter alia*, execution of minors would be

impermissible as incompatible with the object and purpose of the Covenant. *General Comment No. 24(52) Relating to Reservations*, U. N. GAOR, Hum. Rts. Comm., 52nd Sess., 1382nd mtg., para. 8, U. N. Doc. CCPR/C/21/Rev. 1/Add. 6 (1994). See Exhibit H. Because the United States Senate's reservation was impermissible under the terms of the treaty itself, and was in any event clearly incompatible with its object and purpose, it was invalid.²⁷

Moreover, Article 4, paragraph 2 of the ICCPR itself states in no uncertain terms that there may be no derogation from Article 6 of the treaty, which includes the prohibition on the execution of offenders less than eighteen years of age. ICCPR, 999 U.N.T.S. at 174. The HRC has noted that “[w]hile there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the [ICCPR], a State has a heavy onus to justify such a reservation.” *General Comment 24(52)*, supra, at para. 10. But the comments of the Senate Foreign Relations Committee in discussing the reservation to Article 6, paragraph 5 make clear that its purpose was simply to allow those individual states that impose capital punishment against 16 and 17 year olds to endure in that practice (at least for the time being), branding the ICCPR's contrary prohibition as “not acceptable.” *United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights*, 31 I.L.M. 645, at 650 & 653 (1992). See Exhibit I. This attitude hardly satisfies the “heavy onus” to show the

27

The Senate's purported reservation is inconsistent, moreover, with a United Nations General Assembly resolution, collaboratively sponsored by the United States almost twelve years earlier, that Article 6 of the ICCPR (which includes paragraph 5, the norm that prohibits executing juvenile offenders) establishes a “minimum standard” for all member states, whether or not they had adopted the ICCPR. G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980).

reservation does not offend against the object and purpose of the ICCPR. On the contrary, it seems purposefully to thwart that object and purpose in a bald attempt to preserve the primacy of local domestic law. As such, it not only violates Article 4, paragraph 2 of the ICCPR, it also runs counter to Article 50, which expressly provides that all provisions of the ICCPR “shall extend to all parts of federal States without any limitation or exceptions.” ICCPR, 999 U.N.T.S. at 185.

By ratifying the ICCPR and participating in the election of officers to the HRC, the United States expressly recognized the HRC’s authority. A number of federal courts have also explicitly acknowledged the HRC’s authority in matters of the ICCPR’s interpretation. *See, e.g., United States v. Duarte-Acero*, 208 F.3d 1282, 1287 (11th Cir. 2000) (the HRC’s guidance may be the “most important” component in interpreting ICCPR claims); *United States v. Benitez*, 28 F.Supp.2d 1361, 1364 (S.D. Fla. 1998) (same); *United States v. Bakeas*, 987 F.Supp. 44, 46, n. 4 (D.Mass. 1997) (HRC has “ultimate authority to decide whether a party’s clarifications or reservations have any effect”); *Maria v. McElroy*, 68 F.Supp.2d 206, 232 (E.D.N.Y. 1999) (HRC interpretations are “authoritative”).

However, in *Beazley v. Johnson*, *supra*, at 264-267, the Fifth Circuit refused to acknowledge the authoritativeness of the HRC’s construction of the ICCPR, and its declarations that the Senate’s purported reservation to Article 6, paragraph 5 was void. The Fifth Circuit found that the HRC’s 1995 report did *not* authoritatively hold that Article 6, paragraph 5 was void, but merely issued a precatory “suggestion” and “recommendation” that

the United States “review” its reservation “with a view to withdrawing” it. *Official Records*, supra, para. 292. 242 F.3d at 265. Moreover, the Fifth Circuit regarded the Senate’s declaration recognizing the HRC as “competent” for purposes of dispute resolution under Article 41 of the ICCPR, see 31 I.L.M. at 649 & 658, as insufficient to “bind the United States to its decisions.” 242 F.3d at 267.

What the *Beazley* panel ignored in these holdings was the fact that the HRC has no powers of enforcement, such that it could ever purport to *order* the United States (or any other party state) to withdraw an invalid reservation. But this lack of executive power does not detract from the fact that the HRC is nevertheless the authoritative adjudicative body set up within the terms of the ICCPR itself for resolving disputes regarding the meaning, import, and applicability of the ICCPR’s substantive provisions. As the HRC itself observed in its *General Comment 24(52)*, supra, at paras. 17 & 18:

“[Human rights treaties], and the [ICCPR] specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity [for determining the validity of reservations *inter se*] has no place It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the covenant. This is in part because, as indicated above, it is an inappropriate task for State parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions. In order to know the scope of its duty to examine a State’s compliance under article 40 . . . , the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the [ICCPR] and with general international law.”

The declaration of the Senate recognizing the “competence” of the HRC to resolve disputes

between party states, *inter se*, necessarily implies a concomitant recognition of the authority of the HRC to say what is (or what is *not*) contrary to the object and purpose of the substantive provisions of the ICCPR. The *Beazley* panel erred to conclude otherwise.

B. Senate Reservation: Severability

By nevertheless ratifying the ICCPR, and in other respects as well, the United States has demonstrated its intent otherwise to accept and be bound by the treaty as a whole, and the result is that the United States is bound by all the provisions of the treaty, notwithstanding the purported reservation.²⁸ See William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 *Brook. J. Int'l. L.* 277, at 278, 316-323 (1995). As the HRC observed in its *General Comment No. 24(52)*, *supra*, at para. 18:

“The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.”

That this severability is “[t]he normal consequence” of an invalid reservation is established in the jurisprudence of other international adjudicative bodies that have construed international human rights treaties that preceded the ICCPR.

For example, the European Court of Human Rights has recognized, in construing the

28

In 1995, the United States subsequently signed another multilateral treaty, the Convention on the Rights of the Child, which contains the same ban on the execution of juvenile offenders as does Article 6, paragraph 5 of the ICCPR. Under Article 18 of the Vienna Convention, the United States is bound to refrain from acts that would defeat the object and purpose of a treaty it has signed which is pending ratification. That the United States would so readily bind itself to the ban on juvenile offenders in 1995 is another indication that the Senate's reservation to Article 6, paragraph 5 of the ICCPR in 1992 was not intended as a condition of ratification of the ICCPR.

European Covenant on Human Rights, that “[u]nlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States.” *Ireland v. United Kingdom*, (1978) 2 E.H.R.R. 25, para. 239. It creates, instead, “objective obligations” on the part of each party state to recognize and enforce basic fundamental rights, and empowers any party state to complain under the terms of the treaty of any other party state’s breach, whether or not the breach affects the rights of a national of the complaining party state, or otherwise affects the interests of the complaining party state at all. *Id*; *Austria v. Italy*, (1963) Application No. 788/60, 4 European Yearbook of Human Rights 116, at 140. The Inter-American Court of Human Rights has expressed a similar opinion with regard to the nature of human rights treaties, observing that “[t]heir object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States.” *The Effect of Reservations on the Entry into Force of the American Convention (Arts. 74 and 75)*, Advisory Opinion OC-2/82, 2 Inter-Am. Ct. H.R. (Ser. A) (1982), at 15-16.

Because human rights treaties are designed to protect the rights of individuals within a party state, regardless of their nationality, rather than the interests of the party states themselves *inter se*, ordinary principles with respect to the adjustment of rights and obligations as between specific contracting party states, *see* Vienna Convention, *supra*, art. 20, at 337; Restatement, *supra*, at § 313 (2) & (3), do not apply. The European Court of Human Rights has not hesitated to strike purported restrictions to the European Covenant as

invalid, and hold the party state that attempted the invalid restriction to the terms of the treaty as a whole, *sans* the invalid restriction. See *Loizidou v. Turkey*, (1995) 20 E.H.R.R. 99, paras. 91, 94-95; *Belilos v. Switzerland*, (1988) 10 E.H.R.R. 466, para. 60. Thus, the position taken by the HRC in its *General Comment 24(52)*, *supra*, is based on well established international jurisprudence on the proper construction of international human rights treaties and the competence and necessity of treaty-created adjudicative bodies to construe them. Its view on the severability of the Senate reservation, like its view of its validity, ought to be regarded as authoritative on the question of the United States's obligations (and hence Texas', under the Supremacy Clause), given its ratification of the ICCPR.

C. The Panel Opinion in Beazley

The *Beazley* panel instead placed uncritical reliance on two state supreme court cases that have rejected the argument that the Senate reservation was invalid. 242 F.3d at 266. In *Domingues v. State*, 114 Nev. 783, 961 P.2d 1279, at 1280 (1998), *cert. denied*, 528 U.S. 963 (1999), the Nevada Supreme Court essentially held the Senate reservation to be valid simply because execution of juveniles has withstood Eighth Amendment scrutiny in the Supreme Court. The Alabama Supreme Court drew the same conclusion for the same purported reason. *Ex parte Pressley*, 770 So.2d 143, at 148-149 (Ala.), *cert. denied*, 531 U.S. 931 (2000). Whether the Senate reservation is consistent with the Supreme Court's Eighth Amendment precedent, however, does not even logically speak to the question whether it is or is not invalid as incompatible with the object and purpose of the ICCPR. That the

manifest purpose of the reservation was to vouchsafe domestic understanding and implementation of the meaning of cruel and unusual punishment under the Eighth Amendment only goes to demonstrate it was the Senate's intent expressly to deviate from a contrary international human rights norm that the ICCPR was meant to codify in treaty form. It does not mean that the Senate's deviation from the treaty is acceptable as a matter of binding principles of international law.

The *Beazley* panel also relied upon the Fifth Circuit's opinion in *White v. Johnson*, 79 F.3d 432, at 440, n. 2 (5th Cir.), *cert. denied*, 519 U.S. 911 (1996), for the proposition that Senate reservations to the ICCPR must generally be recognized as valid. 242 F.3d at 266. But in *White* the Fifth Circuit was referencing a different reservation to the ICCPR, in a context in which the *validity* of the reservation was not even in issue. It is apparent that no argument was made in *White* that the reservation at issue conflicted with the object and purpose of the ICCPR, so that question cannot fairly be taken as having been resolved by the Court. The same observation holds true for the other authority the *Beazley* panel cited at this juncture, *viz: Austin v. Hopper*, 15 F.Supp.2d 1210, at 1260, n. 222 (M.D. Ala. 1998). Neither case addresses, much less informs, the issue whether the Senate's reservation to Article 6, paragraph 5 of the ICCPR is valid.

Though other federal courts have found the constructions of the HRC persuasive, the *Beazley* panel noted that "these courts looked to the HRC only for guidance, *not* to void an action by the Senate." 242 F.3d at 267. Even if true as an empirical matter, that should not

have prevented the Fifth Circuit from looking to the “guidance” of the HRC in resolving both the issue of the validity and of the severability of the Senate reservation. After all, the HRC has squarely addressed these issues, and spoken unequivocally on them – even if the HRC lacks authority to enforce its pronouncements. *General Comment 24(52)*, supra, paras. 8 & 18; *Official Records*, supra, paras. 279 & 281. It is puzzling that the *Beazley* panel should have preferred to look for its “guidance” to oblique case authority that either misconceives the true nature of the issue (*Domingues and Pressley*), or fails utterly even to address it, because not raised (*White and Austin*).

D. Is the ICCPR “Self-Executing”?

The *Beazley* panel declared the issue of whether the ICCPR is “self-executing” to be “moot” in light of its view of the validity of the Senate reservation, but nevertheless considered the issue “briefly.” 242 F.3d at 267-268. In consenting to the ICCPR, the Senate also attached a declaration to the effect that the first 27 articles of the ICCPR are not self-executing. 31 I.L.M. at 657. The panel held the ICCPR *not* to be self-executing, based upon the holdings of other courts that had uncritically accepted this Senate declaration. 242 F.3d at 267-268. The panel observed that non-self-execution means that, absent express legislative implementation, a treaty fails to give rise to privately enforceable rights. *Id.* Because the panel found no legislation incorporating the first 27 articles into domestic law, it refused to enforce them. *Id.* See also *Hain v. Gibson*, 287 F.3d 1224, at 1243 (10th Cir. 2002); *Buell v. Mitchell*, 274 F.3d 337, at 372 (6th Cir. 2001). This holding gives too broad

a sweep to the Senate declaration.

The original purpose of the Supremacy Clause was to alter the British rule that all treaties are non-self-executing, to avoid the necessity of legislative implementation before any treaty provision could be enforced domestically. Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am.J.Int'l L. 695, at 697-700 (1995). While acknowledging early on that this was the import of the Supremacy Clause, the Supreme Court nevertheless recognized that a treaty provision must be found to “operate[] of itself without the aid of any legislative provision” before a domestic court can enforce it. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, at 314 (1829). But unless the language of a treaty is unclear, or the treaty's terms “import a contract, when either of the parties engages to perform a particular act[,]” or the treaty itself calls for implementing legislation by the party states, it is deemed to be self-executing. *Id.*; *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833). None of these conditions apply here. Article 6, paragraph 5 could not be more plain in its prohibition against executing juvenile offenders. Contractual obligations are not at issue. The ICCPR does not by its terms require legislation in the party states as a condition of implementation of this plain prohibition. Such treaty “[o]bligations not to act . . . are generally self-executing.” Restatement, supra § 111 (Reporter's Note 5), at 54.

Ultimately, whether a treaty provision was meant to “operate of itself,” or instead, to require legislative implementation, is “a matter of interpretation for the courts when the issue presents itself in litigation,” and is generally regarded as a matter of the intent of the parties

to the agreement. *United States v. Postal*, 589 F.2d 862, 876 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979). Factors specifically relevant to the question of self-execution *vel non* are the purpose of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement mechanisms, and the consequences of declaring a particular treaty provision self- or non-self-executing. *Id.*, at 877. Assessing these factors here, it would seem that Article 6, paragraph 5 of the ICCPR ought to be regarded as self-executing. The purpose of the ICCPR is clear – to protect basic human rights within the jurisdiction of party states – and the specific purpose of Article 6, paragraph 5 itself could hardly be more clear, *viz.*: categorically to prohibit the execution of juvenile offenders. Domestic procedures exist for direct implementation, since violation of the right will invariably arise in the context of a capital prosecution of a juvenile offender in a domestic court, wherein the juvenile defendant can directly interpose the prohibition embodied in Article 6, paragraph 5 as a defense to imposition of the death penalty. Recognizing Article 6, paragraph 5 as a defense would essentially obviate the need for any alternative, legislatively-created enforcement mechanisms. The consequence of recognizing self-execution would be simply to guarantee, in keeping with the manifest objective of the drafters of the ICCPR, that no offender younger than 18 at the time of his offense could be executed by virtue of a judgment in the domestic courts of the United States.

Despite these clear indications that, left to their own devices, the courts would

construe Article 6, paragraph 5 of the ICCPR to be self-executing, the Senate declared otherwise. There are several problems with the Senate's declaration. In the first place, there is some question whether the Senate can unilaterally "declare" the intent of the parties with respect to the executory status of the ICCPR, consonant with the Supremacy Clause. *See Vazquez, supra*, at 707-708, & n. 61; Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 Mich.J.Int'l L. 301, at 324-325 (1999). Second, for the Senate unilaterally to "declare" that all substantive provisions of the ICCPR are non-self-executing would itself obstruct the object and purpose of the treaty, and would be both invalid and severable for the same reasons that the purported reservation to Article 6, paragraph 5 is both invalid and severable. Paust, *supra*, at 322-323; Connie de la Vega & Jennifer Fiore, *The Supreme Court of the United States Has Been Called Upon to Determine the Legality of the Juvenile Death Penalty in Michael Domingues v. State of Nevada*, 21 Whit.L.Rev. 215, 220, n. 33 (1999). Third, and perhaps most importantly, the Senate's declaration of non-self-execution arguably violates Article II, Section 2 of the Constitution, which plainly excludes the House of Representatives from the treaty making process. Except when limited to treaties that by their own explicit terms stipulate the need for implementing legislation, a non-self-executing declaration gives the House of Representatives veto authority over a treaty, since it can simply refuse to pass enabling legislation.

But even assuming that the Senate's declaration of non-self-execution is valid, it

would not have prevented Applicant's trial and appellate attorneys from invoking Article 6, paragraph 5 of the ICCPR to preclude a sentence of death. In explaining its declaration, the Senate announced that its "intent is to clarify that the Covenant will not create a private cause of action in U.S. courts." 31 I.L.M. at 657. Applicant is not asserting his right under the ICCPR not to be executed for a crime committed when he was only 17 as a "private cause of action," as the Senate meant to foreclose, but rather, as a defense in a criminal prosecution.

The Senate's declaration of non-self-execution was not all-encompassing. Article 50 of the ICCPR provides that its provisions "shall extend to all parts of federal states without any limitations or exceptions." The Senate entered an "understanding" by which it purported to "emphasize domestically" that in ratifying Article 50, it did not intend thereby to "federalize" all matters involving protection of individual human rights, but only intended to:

"signal to our treaty partners that the U.S. *will implement its obligations* under the Covenant by appropriate legislative, executive and *judicial means*, federal *or state* as appropriate, and that the Federal Government will remove any federal inhibitions to the State's abilities to meet their obligations."

31 I.L.M. at 657 (emphasis added). It is notable that the Senate's non-self-executing declaration did not reach as far as Article 50, leaving the United States fully committed to see that the substantive provisions of the treaty are enforced at both the state and federal levels, without need for legislation to implement *that* commitment. Thus, even giving effect to the Senate declaration that any "private cause of action" under the ICCPR would require implementing legislation, ratification of the ICCPR nevertheless assures that its provisions

can be put to *defensive* use, “when used to override any inconsistent state law.” Paust, *supra*, at 325-326.

This “is a defensive use of the treaty, and thus, not contrary to the Senate declaration.” Vega & Fiore, *supra*, at 220-221. Allowing such a defensive use of the provisions of the ICCPR is consistent with the intent of the Senate declaration to avoid the creation of new private causes of action, while otherwise maximizing its admittedly competing goal fully to comply with its treaty obligations. See David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 *Yale J.Int’l L.* 129, at 137, 166, 193, 197, 210-214, 220 (1999). An express right of action is not necessary to invoke a treaty as a defense because the treaty nullifies inconsistent state law, and the Supreme Court has consistently sanctioned this kind of defensive use of treaty provisions without hesitating even to inquire whether the particular provision of the treaty relied upon was or was not self-executing. See, e.g., *Kolovrat v. Oregon*, 366 U.S. 187, 197 (1961) (treaty provided defense to escheat of property); *Ford v. United States*, 273 U.S. 593 (1927) (entertaining defensive use of treaty in criminal prosecution, but finding no conflict); *Patson v. Pennsylvania*, 232 U.S. 138, 145 (1914) (same); *United States v. Rauscher*, 119 U.S. 407 (1886) (provision of extradition treaty invoked defensively to deny trial court jurisdiction over the person). See also Restatement, *supra*, § 111 (Reporter’s Note 5), at 54.

Under Article 50 of the ICCPR and the Supremacy Clause, both the United States and Texas are obligated to recognize such a defensive challenge to inconsistent state law, even if they

are not permitted, *sans* legislation, to entertain a “private cause of action.”

(e) Applicant’s sentence of death deprived him of his Sixth and Fourteenth Amendment right to have a jury determine, to a level of confidence *beyond a reasonable doubt*, every fact that operates to increase the punishment authorized to the death penalty, as required by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), as construed by the Supreme Court in *Ring v. Arizona*, 122 S.Ct. 2428 (2002), in that the State was not required by the trial court’s charge to convince the jury *beyond a reasonable doubt* that the mitigation special issue should be answered “no.”

SIXTH AMENDMENT VIOLATION

“If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt.” *Ring v. Arizona*, 122 S.Ct. 2428, at 2439 (2002). *See also Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

Under Texas law, many facts must be found before a capital murder defendant’s punishment can lawfully be assessed at death. Each and every element of one or more theories of culpability, as set out in Section 19.03 of the Texas Penal Code, must be found. It must also be determined that the defendant is likely to be a continuing threat to society and, if his culpability is predicated on the theory that he is criminally responsible for the conduct of another, it must be determined that he caused the death himself, intended that another cause death, or anticipated that a death would occur, under Article 37.071, Section 2 (b) of the Texas Code of Criminal Procedure. Finally, the defendant may not be sentenced

to death unless the jury unanimously finds that there is no “sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.” Article 37.071, § 2(e)(1).

Under Texas law, all of these findings, except the last, must be made by a jury convinced beyond reasonable doubt that they are true. *See* Tex. Penal Code § 2.01; Tex. Code Crim. Proc. Article 37.071, § 2(c). With respect to the last, this Court has held that no jury instruction on the burden of proof is necessary because Texas law does not assign a burden on the question of mitigation. *Lawton v. State*, 913 S.W.2d 542, 557-58 (Tex.Cr.App. 1995). Nevertheless, it remains the case that no capital murder defendant in Texas may ever be assessed the death penalty under any circumstances whatsoever without a unanimous jury finding that there exist no mitigating circumstances sufficient to warrant a sentence of life imprisonment. Accordingly, there is a burden of proof in fact, if not in name, and this Court was simply mistaken as a matter of fact to hold otherwise.

The mistake was evidently produced because the statute appears to require that the jury answer only one issue:

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

Ordinarily, an issue like this would be unexceptionable under the United States Constitution, even if it imposed on the defendant a burden to prove that it should be answered

affirmatively in order to *reduce* his punishment. Thus, an affirmative answer would be permitted, and the defendant's punishment reduced, if, and only if, he could satisfy the fact-finder that such mitigating circumstance or circumstances did exist. If, on the other hand, the jurors were unable to answer affirmatively with the level of confidence required by the applicable standard of proof, they would be obliged to answer the question negatively, even if they did not affirmatively find that no mitigating circumstances existed. This is how an ordinary burden of proof works with respect to discrete issues of fact. The party with the burden of proof bears the risk of losing the issue if the fact-finder *fails to find* that the issue is true to the requisite standard of confidence. And it does not violate the United States Constitution to impose such a burden on criminal defendants at either stage of trial. That is what affirmative defenses are all about.

However, it is perfectly clear from Article 37.071 (f) that it cannot possibly work that way with respect to the mitigation special issue of Article 37.071 (e). Subsection (f) of the statute clearly does not permit the fact-finder to answer the issue negatively merely because it *fails to find* that the issue should be answered affirmatively. Rather, it must affirmatively find that the issue should be answered negatively before it may answer in that way. *Lawton* was, therefore, right to conclude that there is no clear burden of proof on the issue, since neither an affirmative nor a negative answer is permitted merely because the fact-finder *fails to find* that its opposite is true. *Lawton* was wrong, however, to conclude that no burden whatsoever exists in this context.

A burden of proof is simply a way to determine who loses when the jury *fails to find* affirmatively that an issue is true by the requisite standard of proof. Article 37.071 (f) does exactly that for the mitigation special issue by prescribing that the defendant will receive a life sentence if the jury both *fails to find* the issue true and *fails to find* the issue false. Accordingly, whenever the jury is instructed as prescribed by Article 37.071 (f), it is fully and adequately informed of the appropriate burden of proof. *Lawton* might not have been wrong to hold that the jury's decision on this issue is not subject to review on appeal for evidentiary sufficiency, but it was surely wrong to hold that there is no burden of proof associated with the issue. It is clear from the face of the statute itself that the appropriate burden of proof is in fact given, and placed squarely on the State, whenever the jury is accurately instructed in the language of Article 37.071 (f). What is not given is the standard of proof, or level of confidence, applicable before the jury is authorized to answer the mitigation issue negatively. And that, of course, is a profound shortcoming, since *Ring* and *Apprendi* clearly require the standard to be "beyond a reasonable doubt."

Bear in mind that a capital defendant may never be assessed the death penalty in Texas under any circumstances unless a unanimous jury affirmatively finds that no sufficient mitigating factors exist. It is not the defendant's burden to prove that such factors do exist, although the jury may find that they exist if ten or more of them believe it. Ultimately, however, it is the prosecution's burden to prove that there are no mitigating factors, and if it fails in this, the defendant may not be sentenced to death, whether he proved the existence

of mitigating factors or not. The elaboration and extension of *Apprendi* just announced in *Ring* therefore makes it clear that Texas, having chosen to predicate death sentences on an affirmative finding by the jury that mitigating factors do not exist, is obliged by the Sixth Amendment of the United States Constitution to require that such finding be made by the jury beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U. S. 684 (1975); *Patterson v. New York*, 432 U. S. 197 (1977).

In the instant cause, the jury was not instructed that its decision on the mitigation special issue, like its decision regarding every other element of capital murder, was to be governed by the constitutional standard of proof beyond-a-reasonable-doubt. (1A CR 158-160) Applicant's conviction thus violates the Sixth Amendment to the United States Constitution.

COGNIZABILITY UNDER ARTICLE 11.071, SECTION 5

Applicant did not object either at trial or on appeal on the basis of the Sixth Amendment claim he now asserts; nor did he raise it in his initial or first subsequent state writ applications. It may be argued, therefore, that his claim is either procedurally defaulted, or that raising it now constitutes an abuse of the writ, or both. As to the former, however, the Court should be mindful of its holdings that when a federal constitutional claim does not become apparent until too late to raise it at trial or on appeal, it may be entertained for the first time in a state post-conviction application for writ of habeas corpus. *See, e.g., Ex parte Goodman*, 816 S.W.2d 383, 385 (Tex.Cr.App. 1991) (claim predicated on *Penry v. Lynaugh*,

492 U.S. 302 (1989), could be raised for first time in post-conviction writ application); *Ex parte Chambers*, 688 S.W.2d 483, 486 (Tex.Cr.App. 1984) (Campbell, J., concurring, with five judges joining) (claim based upon a right not recognized at the time of trial could be raised for first time in post-conviction writ application despite procedural default at trial); *Ex parte Bravo*, 702 S.W.2d 189 (Tex.Cr.App. 1982). Because neither *Apprendi* nor *Ring* had appeared on the legal horizon as of the time of Applicant's trial and direct appeal, Applicant's claim has not been forfeited.

In order to avoid a finding that he has abused the writ, Applicant must show, under Article 11.071, Section 5 (a) (1) and (d), that his current claim has not been and could not have been presented in a timely initial application because the legal basis of the claim was unavailable at that time too, meaning that it could not reasonably have been formulated from prior decisional law. As of September of 1997, when Applicant filed his initial writ application, neither *Apprendi* nor *Ring* had been decided, and Applicant's current claim could not reasonably have been formulated on the basis of Sixth Amendment law preceding these cases. He could not be expected to raise it then. Nor could he have formulated the precise argument advanced here in his first subsequent writ application which was filed in April of 2000, also prior to the advent of both *Apprendi* and *Ring*. It is telling that this Court in *Lawton* placed such strong reliance on *Walton v. Arizona*, 497 U. S. 639 (1990), a case the core holding of which has not survived *Ring*. Indeed, it seems clear from that opinion that the constitutional requirement of proof beyond reasonable doubt to the express satisfaction

of a jury on all findings necessary to a sentence of death, whether at the guilt or the punishment phase of trial, is an extension of constitutional law which did not exist before *Ring* itself. Although the principle dissenting opinion in *Apprendi* did foreshadow the new rule by maintaining that *Walton* was inconsistent with *Apprendi*, the lead opinion in *Apprendi* expressly held that *Walton* was still good law. That it has now been overruled by *Ring* creates a legal basis, undermining this Court's holding in *Lawton*, which was not recognized and could not reasonably have been formulated from a final decision of the United States Supreme Court or of the state and federal appellate courts. This claim therefore meets the statutory criteria of cognizability.

PRAYER

For the foregoing reasons, Petitioner prays that a writ of habeas corpus, returnable to the Court of Criminal Appeals, be issued, and that the Court of Criminal Appeals enter a judgment reforming his sentence to life imprisonment; or, alternatively, enter a judgment vacating his death sentence and remanding the cause to the convicting court for a new punishment hearing under Article 44.29 (c) of the Texas Code of Criminal Procedure.

—

J. GARY HART
Texas Bar No. 09147800
2906 Skylark Drive

Austin, Texas 78757
(512) 206-3118 Voice
(512) 206-3119 Fax

ATTORNEY FOR APPLICANT

