

STATE OF TEXAS	§	IN THE 144 <sup>TH</sup> JUDICIAL
	§	
vs.	§	DISTRICT COURT IN AND FOR
	§	
NAPOLEON BEAZLEY	§	SMITH COUNTY, TEXAS

**DEFENDANT BEAZLEY'S SUBMISSION**

TO THE HONORABLE JUDGE CYNTHIA STEVENS KENT:

COMES NOW Defendant, Napoleon Beazley, by and through his counsel, David L. Botsford and Walter C. Long, and presents this his "Defendant Beazley's Submission," and as grounds therefore, would respectfully show this Honorable Court the following:

On April 17, 2002, the Texas Court of Criminal Appeals dismissed Beazley's second state petition for writ of habeas corpus, finding that it did not comply with Section 5 of Article 11.071.<sup>1</sup>

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<sup>1</sup> The Petition raised the following claims:

1. Beazley did not receive competent state habeas counsel in violation of his rights to due process under the Fourteenth Amendment to the United States Constitution and Article 1, Sections 10 and 19 of the Texas Constitution.
2. Beazley was denied his rights to due process of law and a fair trial by the prosecutors' knowing use of false testimony about a deal for leniency they made with his codefendants, in violation of the Fourteenth Amendment to the United States Constitution.
3. Beazley was denied his rights to due process of law and a fair trial by the prosecutors' knowing use of false testimony relevant to this state of mind before and after the offense, in violation of the Fourteenth Amendment to the United States Constitution.
4. Beazley was denied his rights to a fair and impartial jury under the Sixth Amendment, to be free of Cruel and Unusual Punishment under the Eighth Amendment, and to Equal Protection of the Laws and Due Process under the Fourteenth Amendment because at least one of his jurors was actually biased

See attached **Exhibit 1**. On the following day, this Court, upon receipt of the Court of Criminal

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against him on the basis of his race.

5. The prosecutors' knowing suppression of a juror's bias denied Beazley his rights to a fair and impartial jury under the Sixth Amendment, to be free of cruel and unusual punishment under the Eighth Amendment, and to equal protection of the laws and due process under the Fourteenth Amendment to the United States Constitution.

6. Beazley was denied his rights to a fair and impartial jury under the Sixth Amendment, to be free of cruel and unusual punishment under the Eighth Amendment, and to equal protection of the laws and due process under the Fourteenth Amendment because one of his jurors was actually biased against him, having intentionally suppressed her relationship to the victim

7. Beazley's death sentence violates Article 6, Paragraph 5, of the International Covenant on Civil and Political Rights as it is applied to the State of Texas through the Supremacy Clause of the United States Constitution, because he was under 18 at the time of the offense.

8. Beazley's death sentence violates a rule of jus cogens which now prohibits, with no room for dissent, the execution of persons who were under eighteen years old at the time of the offense.

9. Beazley's death sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution because he was under 18 at the time of the offense.

10. Beazley's conviction and sentence violate the due process clause of the Fourteenth Amendment and the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution because his trial counsel was not allowed to prepare a defense and conduct voir dire, nor to have a punishment phase instruction, based upon the principles recently announced in *Apprendi v. New Jersey*.

Appeals' Order, issued an "Order Setting Hearing to Set Date of Execution," announcing that the hearing is to be held in this Court on Friday, April 26, 2002, at 10 A.M.

Defendant requests this Court to examine the points herein closely as bases for abating the setting of an execution date for a reasonable period of time, or setting an execution date that, at the very least, justly and equitably allows for an ordinary and adequate amount of time for clemency and certiorari review before Defendant can be executed. Counsel for the Texas Board of Pardons and Paroles has informed Defendant that, if another execution date is set, he has the right to another full round of clemency review. The Board voted 10-6 to deny commutation when the last execution date was set, before the Board or Governor had this Court's letter or a subsequent letter produced by 18 members of the House of Representatives in support of this Court's letter. Defendant will seriously pursue commutation of the death sentence to life imprisonment.

Section (c) of Article 43.141, Texas Code of Criminal Procedure,<sup>2</sup> allows this Court complete discretion in regard to the setting of the date, so long as it is outside the relevant minimal time period. There is nothing that requires this Court to set the date *now*, rather than to abate the date setting while Defendant awaits a decision in his case from the Inter-American Commission on Human Rights, *see infra*, and/or undertakes his full certiorari appeal process at the United States Supreme Court. If this Court sets a date, there is no statutory limit on how far in the future the Court could set the date. One thing is certain: once this Court has set a date, it apparently has no discretion under Texas law to withdraw or modify it except in very limited circumstances. Tex. Code Crim. Proc. art. 43.141 § (d).

**I.**  
**Taking “Precautionary Measures” to Protect  
The Subject Matter of Defendant’s Petition to the  
Inter-American Commission on Human Rights**

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<sup>2</sup> The setting of an execution date is governed by Article 43.141, Texas Code of Criminal Procedure, which reads in pertinent part:

The first execution date may not be earlier than the 91<sup>st</sup> day after the date the convicting court enters the order setting the execution date. A subsequent execution date may not be earlier than the 31<sup>st</sup> day after the date the convicting court enters the order setting the execution date.

Tex. Code Crim. Proc. art. 43.141 § (c).

Defendant has filed a petition at the Inter-American Commission on Human Rights, under the authority of Articles I, II, VII, and XXVI of the American Declaration of the Rights and Duties of Man, which are binding on the member states of the Charter of the Organization of American States. The United States is a member state. The petition asks the Inter-American Commission to determine that the United States is bound by a universal rule of *jus cogens* that prohibits the execution of persons who were under 18 years of age at the time of their offense. The petition was filed on February 19, 2002. Another petition raising the same issue was filed on behalf of Michael Domingues, a Nevada juvenile offender, a couple of years ago. Defendant has moved to have his petition joined with that of Domingues, which is permissible under the Commission's rules and should be granted. *See e.g. Pinkerton and Roach v. United States*, Res. 3-87, Case 9647, Annual Report of the Inter-Am. C.H.R. 147, OEA/Ser.L/V/II.71 doc.9 rev. 1 (1987). Because the same issue has been pending at the Commission for some time in Domingues' case, and the Respondent United States Government has responded to the effect that domestic remedies have been exhausted in Defendant's case, Defendant hopes and expects that the Commission will issue an opinion in his and Domingues' case in the near future. *See attached Exhibit 2* (Petition, *Napoleon Beazley v. The United States of America and the State of Texas*); **Exhibit 3** (Letter from Howard G. Baldwin, Jr., First Assistant Attorney General, Attorney General of Texas, to Ambassador Roger F. Noriega, United States Permanent Mission to the Organization of American States).<sup>3</sup> Defendant has every reason to believe that the Commission will find that the rule of *jus cogens* exists and binds the

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<sup>3</sup> Although exhaustion of domestic remedies is not addressed directly, the Assistant Attorney General's letter indicates that, once the Texas Court of Criminal Appeals ruled in Napoleon's case, the *jus cogens* issue would have traveled through the entire domestic court

United States not to execute him. These findings, in turn, should bind the State not to execute Defendant, because a rule of *jus cogens* cannot be preempted by domestic law. See *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940-41 (D.C. Cir. 1988) (Rules of *jus cogens* "may well restrain our government in the same way that the Constitution restrains it. . . . Such a conclusion was indeed implicit in the landmark decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)."). The same findings should enhance Defendant's Eighth Amendment claim, because rules of *jus cogens* occupy the highest plane of the law of nations, which is integrated into our own Constitution. The findings also would enhance Defendant's claim that the International Covenant on Civil and Political rights, to which the United States is a Party, bars his execution. See *infra* note 4.

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, 700 (1900); Paust, *Human Rights Treaties*, *supra*; Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998). The Restatement (Third) provides that "[i]nternational law and international agreements of the United States are the law of the United States and supreme over the law of the several States" and "[c]ourts of the United States are bound to give effect to international law and to international agreements of the United States." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 102. The United States Supreme Court's early cases confirmed a purpose to incorporate international laws and standards into our own jurisprudence. Chief Justice Jay asserted, for example, in *Chisholm v. Georgia*, 2 Dall. 419, 474 (1793), that the United States "had, by taking  

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system, along with executive clemency (last year).

a place among the nations of the earth, become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed." The Court held in 1804 that Congress should never act in a way that violates the law of nations, if an alternative exists. *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804). "There can be no question that the law of nations prohibits the execution of juvenile offenders." Justice Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L. J. 39, 47-48 (1994); see also **Exhibit 4** (Letter from Susan Lee, Program Director for America, Amnesty International to Judge Cynthia Stevens Kent, dated April 19, 2002) (reporting resolution by United Nations Sub-Commission on the Promotion and Protection of Human Rights calling upon all countries to "remind their judges that the imposition of the death penalty against juvenile offenders is in violation of international law"); **Exhibit 5** (United Nations Sub-Commission on Human Rights Resolution 2000/17, *The Death Penalty in Relation to Juvenile Offenders*, 26<sup>th</sup> Meeting, August 17, 2000).

The principle that customary international law is a part of United States law applies with greater force when considering a peremptory *jus cogens* 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*, 25 F.3d 1467 (9th Cir. 1994); *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992); *White v. Paulson*, 997 F. Supp. 1380 (E.D. Wash. 1998).

As the Ninth Circuit Court of Appeals noted in *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715-16 (9th Cir. 1992), "[b]ecause *jus cogens* norms do not depend solely on the consent of states for their binding force, they `enjoy the highest status within the international law. . . . For example, a treaty that contravenes *jus cogens* is considered . . . to be void . . . ." *Id.* at 715 (citing

the Vienna Convention on the Law of Treaties).<sup>4</sup>

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<sup>4</sup> A reservation to a treaty that violates a rule of *jus cogens* also is void. The status of the United States' reservation to Article 6(5) of the International Covenant on Civil and Political Rights has been an issue in Defendant's case. Article 6(5) prohibits the death penalty for persons under 18 at the time of the offense. Article 50 of the Covenant states that the treaty's provisions extend to all parts of the countries that are parties to it "without any limitations or exceptions." The United States has ratified the treaty, and as a Party to the treaty is bound under Article 2 (3b) of the treaty to ensure that any person claiming a remedy under the treaty shall have his right to the remedy "determined by competent judicial . . . authorities." The United States is bound by the same section of the treaty to "develop the possibilities of judicial remedy."

The United States ratified the Covenant with a reservation to Article 6(5) taking exception to its bar on the death penalty for juvenile offenders. The reservation has been condemned by the United Nations Human Rights Committee, which was set up by Articles 28 and 40, inter alia, of the Covenant to monitor compliance with the treaty. In its first report on United States compliance, which occurred after Defendant's trial, the HRC found the United States' reservation to Article 6(5) of the Covenant incompatible with the object and purpose of the treaty:

Para. 279. The Committee is . . . particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant.

Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40*, U.N. DOC. A/50/40 (October 3, 1995), para. 279. Contrary to the Fifth Circuit's opinion in Defendant's case, it cannot be doubted that the HRC found the reservation invalid, for the HRC added that it "**deplore[d]** provisions in the legislation of a number of states which allow[ed] the death penalty to be pronounced for crimes committed by persons under 18 and the actual instances where such sentences have been pronounced and executed." *Id.* at para. 281 (emphasis added); *see also* REPORT OF THE [UNITED NATIONS] SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS, MISSION TO THE UNITED STATES OF AMERICA, Jan. 22, 1998, E/CN.4/1998/68/Add.3, paras. 140, 156(k) (suggesting removal of the reservation because it is "void").

According to the jurisprudence of the HRC and in agreement with decisions rendered by international courts in similar contexts, when a reservation to a human rights treaty is contrary to the treaty's object and purpose, it simply is deemed severed and of no effect for the reserving Party. The HRC has explained this process of severance as follows:

1. "[W]here a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty."

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2. "Reservations that offend **peremptory norms** would not be compatible with the object and purpose of the Covenant. . . . Accordingly, a State may not reserve the right . . . to execute . . . children."

3. "While there is no automatic correlation between reservations to **non-derogable provisions**, and reservations which offend against the object and purpose of the Covenant, a State has a **heavy onus** to justify such a reservation." (Although the issue was raised, the Fifth Circuit failed to recognize that the reservation violated Article 4(2) of the Covenant which states, point blank, "No derogation from Article 6 . . . may be made . . .").

4. "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."

GENERAL COMMENT 24,, U.N. GAOR Human Rights Comm., 52d Sess., paras. 5, 6, 8, 10, 18, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 1994). Accordingly, if the Inter-American Commission holds that there is a *jus cogens* rule barring his execution, as expected, Defendant's position that the International Covenant also bars his execution will be reinforced.

The Inter-American Commission has requested that the United States and Texas take “precautionary measures to preserve Mr. Beazley’s life pending the Commission’s investigation of the allegations in his petition.” See attached **Exhibit 6** (Letter from Juan Mendez, President, Organization of American States, to David Botsford and Walter Long, dated Feb. 27, 2002). The United States and Texas responded with the aforementioned letter from the Texas Attorney General, assuring the Commission that, when Defendant returns this time to the United States Supreme Court on petition for writ of certioari, “the courts will thoroughly consider Mr. Beazley’s case.” Letter from Howard G. Baldwin, Jr., *supra*.

Even if this Court perceives that it is without discretion to refuse to set an execution date, it may give effect to the Commission’s request for “precautionary measures” by abating the date setting until the Commission has ruled in Defendant’s or Domingues’ cases. Members of the Organization of American States are bound by an international legal obligation to comply with “precautionary measures” like those issued in Defendant’s case. The Inter-American Commission on Human Rights (IACHR) has repeatedly asserted that the United States is bound to take such measures under an international obligation as a member of the Organization of American States (OAS), which is under the jurisdiction of the IACHR, and governed by the Charter of the OAS (Bogota 1948) as amended by the Protocol of Buenos Aires on February 27, 1967, then ratified by the United States on April 23, 1968. The American Declaration on the Rights and Duties of Man constitutes a source of legal obligation for all OAS member states. The only way for the Commission to enforce the binding nature of the United States’ obligation is to issue precautionary measures.

## **II.**

**Grounds for Allowing An Orderly Approach  
To The United States Supreme Court on  
Certiorari Review**

This Court has set execution dates for Defendant on two other occasions. This Court last set an execution date allowing four and a half months for orderly litigation to be carried out pertaining to the certiorari petition. *See Breard v. Greene*, 523 U.S. 371, 379-81 (1998) (Stevens, J., Breyer, J., and Ginsberg, J., in separate dissents) (objecting to shortness of time for consideration of case). Defendant sought certiorari review. The Supreme Court split three to three, with three Justices recused, on Defendant's motion for stay of execution. After the Supreme Court was thus reduced to *six Justices* in Defendant's case, and after the Texas Court of Criminal Appeals stayed Defendant's execution in order to consider his second state application for writ of habeas corpus, the Supreme Court denied certiorari.

Defendant now will return to the United States Supreme Court. If he is allowed at least the amount of time for an orderly approach to the Supreme Court on a petition for writ of certiorari,<sup>5</sup> he will be in a stronger posture than when he sought certiorari review out of the Fifth Circuit Court of Appeals. The reasons for that, elaborated upon at more length below, are as follows:

(1) Defendant, faced with a Catch-22 situation between upholding the appearance of fairness and having full access to the courts, will waive any right he may have to appearance of fairness, so that all nine Justices can participate in his case.

(2) If the Supreme Court rules in favor of the petitioner in *Atkins v. Virginia* (opinion due by July 2002), the opinion will undermine the legal basis for the holding in *Stanford v. Kentucky*, thereby removing *Stanford* and *Thompson v. Oklahoma* as

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<sup>5</sup> The Rules allow 90 days to file the certiorari petition, 30 days for Respondent to answer, and then there should be some time for the Court's deliberations on the case, with everything before it (including any reply or "supplemental brief" that may subsequently be filed by the Petitioner). Supreme Court Rules 13 and 15.

*stare decisis* barriers to certiorari review of Defendant's claim that the Eighth Amendment bars his execution.

(3) Defendant will be joined this time at the Supreme Court by Kevin Stanford, whose attorneys will be filing an original petition at the Court on or about April 29, 2002. Kevin Stanford is the appellant in *Stanford v. Kentucky*. Defendant expects the Supreme Court's interest in the Eighth Amendment issue to be heightened as a result of Stanford's return.

(4) Defendant will raise a critical new concern before the Supreme Court, having major implications for the administration of capital punishment in Texas. He will ask the Court to hold that denial of review of his challenges to his conviction and sentence in his second state habeas petition violates the Sixth, Eighth, and/or Fourteenth Amendments, and to remand his case to this Court for review of those substantive issues. In pleadings before the Texas Court of Criminal Appeals, the State argued that Claims 2 through 8 in Defendant's second Article 11.071 petition were forfeited because they were available to appointed state habeas counsel, Mr. Robin Norris, during the first writ process, and he did not exert reasonable diligence to uncover, discover, or assert them. In pleadings before the Court of Criminal Appeals, Defendant asserted that deprivation of his statutory right to competent counsel who expeditiously investigated violated due process, equal protection, and the Eighth Amendment. Responding to *Ex parte Graves*, Defendant made known to the Court of Criminal Appeals that Mr. Norris' deficient performance in failing to conduct expeditious habeas investigation of the law and facts is only the tip of an ominous iceberg. See attached **Exhibit 7** (Supplemental Brief in Response to This Court's Opinion in *Ex parte Anthony Charles Graves*, No. 73, 927). The federal habeas constraints on Defendant's various challenges to appointed habeas counsel's performance and the state habeas system are absent on this return journey to the Supreme Court. See, inter alia, 28 U.S.C. § 2254(i).<sup>6</sup> Furthermore, Defendant and the Supreme Court will have the benefit of the *Graves* decision.

#### **A. Exchange of Appearance of Fairness for Access to the Court**

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<sup>6</sup> 28 U.S.C. § 2254(i) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.").

Needing to return to the United States Supreme Court, Defendant finds himself in a Catch-22. Three Justices have recused themselves from the case, apparently because of their varying relationships with Mr. John Luttig's son and a resulting desire to maintain public confidence in the fairness of the court. Although, in the case of two of the recused Justices, Defendant informed the Supreme Court of those relationships, Defendant has not asserted that any Justice harbors actual bias against him. With a depleted Court of six Justices, Defendant stands no realistic chance of gaining a stay and certiorari review.<sup>7</sup> In a lower federal appellate court, Defendant's case could simply be shifted to another panel and he would be guaranteed full access and meaningful appellate review of his sentence. That remedy to the loss of appellate rights is unavailable at the Supreme Court. In this instance, the Supreme Court's need for appearance of fairness conflicts with Defendant's ability to access the Court. Given that access is critical to his survival, Defendant will waive any right that he may have to the appearance of fairness in the adjudication by the Supreme Court of his petition for writ of certiorari. This should allow the full court of nine Justices to participate. See attached **Exhibit 8** (Affidavit of Napoleon Beazley, dated March 12, 2002). Defendant's waiver surely must trump the public's interest in the appearance of fairness, especially where his life is in the balance. Having all nine Justices participate should enhance Defendant's chances at obtaining a stay and having certiorari review granted.

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<sup>7</sup> It is conceivable that the Supreme Court could grant certiorari review on the basis of three votes, yet not have sufficient votes (i.e., a fourth vote) to grant a stay of execution if necessary. *Pryor v. United States*, 404 U.S. 1242, 1243 (1971) ("[T]hree out of seven are enough to grant a petition for certiorari.").

## **B. The Effect of *Atkins v. Virginia* Upon *Stanford v. Kentucky*.**

In the interim since August 15, 2001, the Supreme Court granted review in *Atkins v. Virginia*, 533 U.S. 976 (Sept. 25, 2001) (order granting petition for writ of certiorari from the Supreme Court of Virginia). Oral argument in *Atkins* suggests that, if the Court grants relief to Atkins, the decision, due by July 2002, will likely undermine the legal basis for *Stanford v. Kentucky*, 492 U.S. 361 (1989), the case cited by the Fifth Circuit as barring Defendant from relief on his jus cogens, International Covenant, and Eighth Amendment claims related to his juvenile status at the time of the offense. *Beazley v. Johnson*, 242 F.3d 248, 268-69 (5<sup>th</sup> Cir. 2001) (holding that the Fifth Circuit is bound by Supreme Court precedent). See Exhibit 1 in attached **Exhibit 9** (Oral Argument, *Atkins v. Virginia*, No. 00-8452, 2002 WL 341765 (Feb. 20, 2002); **Exhibit 10** (Motion for this Court Not to Take Action in This Case Pending The Imminent Decision by the United States Supreme Court in *Atkins v. Virginia*); **Exhibit 9** (Supplement to Motion for this Court Not to Take Action in This Case Pending The Imminent Decision by the United States Supreme Court in *Atkins v. Virginia*).

Justice O'Connor, who was one of the three voting against a stay for Defendant in August 2001, demonstrated at *Atkins* oral argument on February 20, 2002, that she has reversed course and has adopted a new legal position that should support a stay and grant of certiorari in Defendant's case on this return journey to the Supreme Court. She made a clear and dramatic break with the reasoning of the slim majority in *Stanford* that the non-death penalty states cannot be counted in discernment of the legislative basis for finding "evolving standards of decency." *Atkins v. Virginia*, No. 00-8452, 2002 WL 341765 (Feb. 20, 2002), at \*42; *Stanford*, 492 U.S. at 371 n.2. Justice Scalia, writing for a five-Justice majority in *Stanford* that included Justice O'Connor, observed:

The dissent takes issue with our failure to include, among those states evidencing a consensus against executing 16- and 17-year-old offenders, the District of Columbia and the 14 states that do not authorize capital punishment. . . . It seems to us, however, that while the number of those jurisdictions bears upon the question whether there is a consensus against capital punishment altogether, it is quite irrelevant to the specific inquiry in this case: whether there is a settled consensus in favor of punishing offenders under 18 differently from those over 18 insofar as capital punishment is concerned.

*Stanford*, 492 U.S. at 371 n.2. Justice O'Connor has changed sides, joining the four Justices that indicated in *Stanford* that they *would* consider the non-death penalty states and the District of Columbia. *Id.* at 383, 384 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting).

Although the court membership has changed since 1989, O'Connor would likely be joined now by at least four additional Justices on this issue. *See Beazley v. Johnson*, 122 S. Ct. 11 (2001) (Mem.) (Stevens, Ginsberg, and Breyer, JJ., dissenting from denial of stay on depleted court) (Scalia, Thomas, and Souter, recused). Justice Ginsberg asserted during *Atkins* argument that the 30 states barring the death penalty for persons with mental retardation (combining states with statutes and states with no death penalty) was a "super-majority" akin to the percentage required to block a filibuster in the Senate. *Atkins* Oral Argument at \*41. Following the same approach, there are 28 states now barring the death penalty for juvenile offenders, plus the District of Columbia and the federal system. The mental retardation and juvenile offender issues are very close, as analyzed through lenses the Supreme Court has deemed significant for Eighth Amendment analysis:

- Roughly the same number of states currently will be deemed opposed to the execution of juvenile offenders. (28 [J] to 30 [MR]).
  
- Roughly the same number of states currently will have explicit bars on the execution of juvenile offenders. (16 [J] to 18 [MR]). At least six states presently have been considering legislation that would raise the death penalty eligibility age to 18.

– Roughly the same number of states will have actually executed juvenile offenders over the last nine years (3[J] to 2 or 3 [MR]). This reflects a reluctance of jurors and administrators of state systems to act so as to bring about the execution of members of either class.

– Roughly the same percentage of the overall population will reside in states that have not executed juvenile offenders over the last nine years. (approximately 90 percent; 89 [J] and 93 [MR]).

– There are strong reasons related to brain capacity for exempting persons with mental retardation and juvenile offenders as classes. In neither category is the brain as fully developed as an adult brain. The adult brain is not fully developed until the early 20s. The brain of a 17-year-old, as a result, is marked by tendencies toward impulsivity, lesser reasoning skills, and less awareness of the consequences of decisions or actions. Similar attributes are examined in mentally retarded persons to determine their “mental age.” The question whether these populations “know the difference between right and wrong” is a false issue. Of course they know the difference – except in the cases of the extremely young or persons with very severe mental retardation. However, due to actual brain development or mental age, persons in these categories are developmentally unable to problem-solve and control their actions as a mature adult would. Accordingly, they cannot be among the “worst of the worst” for whom the death penalty is designed. In the case of juveniles, full development and maturity offer the hope of rehabilitation.

– The deep opposition of American professional organizations to the execution of persons with mental retardation is equal in regard to execution of juvenile offenders. These organizations include the American Bar Association, the American Psychological Association, the American Academy of Child and Adolescent Psychiatry, the National Mental Health Association, The Children’s Defense Fund, The Center on Juvenile and Criminal Justice, The Coalition for Juvenile Justice, The Child Welfare League of America, The Juvenile Law Center, The Mid-Atlantic Juvenile Defender Center, The Youth Law Center, The Urban League, and Southwest Key Program, Inc.

-- The Constitution Project Death Penalty Initiative, a task force including, among others, the Honorable William Sessions, ex-Director of the FBI and former Chief Judge of the United States District Court for the Western District of Texas, recommended in a comprehensive study last year eighteen death penalty reforms, which included raising the eligibility age in all jurisdictions in the United States to 18. The Constitution Project, Mandatory Justice: Eighteen Reforms to the Death Penalty 2001 (<http://www.constitutionproject.org/dpi/MandatoryJustice.pdf>).

– A more manifest consensus exists in the world against executing juvenile offenders

than against executing persons with mental retardation, by virtue of the fact that every organized government, except the United States, has ratified the United Nations Convention on the Rights of the Child without reservation to the provision that bars the death penalty for juvenile offenders. Evidence suggests that only two countries in the world continue to execute juveniles (Iran and the United States) and only one under some claim of law (a small number of states within the United States). *See* attached **Exhibit 2**.

Most assuredly, if *Atkins* is decided in favor of the petitioner (by July), adequate and independent state grounds doctrine will not keep the Supreme Court from reaching the merits of Defendant's claim that the Eighth Amendment bars his execution. *Sawyer v. Whitley*, 505 U.S. 333 (1992) (allowing federal review of abused or successive claims where petitioner can show by clear and convincing evidence that but for constitutional error, no reasonable juror would find petitioner eligible for the death penalty); *Beazley v. Johnson*, 242 F.3d 248, 265-66 (2001) (citing *Sawyer*, 505 U.S. at 345 & n.12) (suggesting that where condition of eligibility -- age -- is not satisfied, miscarriage of justice is found). *Stanford* will not be good law and, thus, the Supreme Court, more easily than at present, will be in a position to say that the Eighth Amendment trumps Texas' procedural law, because Defendant is actually innocent of the death penalty. The State correctly did not contest throughout the federal round of litigation that *Teague v. Lane*, 489 U.S. 288 (1989), provides no impediment to relief for Defendant on the Eighth Amendment issue, because relief on the issue would mean that Defendant falls within a class of persons who may not be punished with death. *Penry v. Lynaugh (Penry I)*, 492 U.S. 302, 300 (1989) (citing *Thompson v. Oklahoma*, 487 U.S. 815 (1988)) (showing that a new blanket rule protecting persons under 18 at the time of offense from the death penalty would fall into the first *Teague* exception); *see McKenzie v. Day*, 57 F.3d 1461, 1470, 1479 (9th Cir. 1995) (Norris, C.J., dissenting from panel decision) (noting that justifications underlying the relevant *Teague* exception and those for miscarriage of justice exception

are indistinguishable) (citing *Prihoda v. McCaughtry*, 910 F.2d 1379, 1385-86 (7th Cir. 1990); *Sawyer v. Butler*, 881 F.2d 1273, 1293-94 (5th Cir. 1989) (en banc), *aff'd*, 497 U.S. 227 (1990)).

The Seventh Circuit noted in *Prihoda* that the "exceptions in *Teague* deal with changes so substantial, or so strongly suggesting factual innocence, that they would allow collateral relief under the "fundamental miscarriage of justice exception." 910 F.2d at 1386 (opinion by Easterbrook, C.J.).

The Fifth Circuit itself recognized the same in *Butler*. 881 F.2d at 1292-93 (describing *Teague* as a "radical extension of the procedural default rule").

### **C. The Effect of *Ex parte Graves* Upon Texas' Death Penalty System.**

In the interim since August 15, 2001, the Texas Court of Criminal Appeals decided *Ex parte Graves*, 2002 WL 4528 (Tex. Crim. App. Jan. 2, 2002). The Court stayed Defendant's execution date pending its decision in *Graves* regarding whether a capital inmate had a constitutional right to effective assistance of appointed state habeas counsel, and what the parameters of such a right might be. The Court held that the federal constitution affords no such right. Additionally, the Court held that the alleged right was a collateral issue, not cognizable on state post-conviction review in Texas. Since there is no other procedural stance within the state system from which a capital inmate can complain of violation of a right to competent counsel in state habeas proceedings, the Court effectively foreclosed defendants from being able to raise any such claim in Texas courts. Defendant raised a slightly different challenge than *Graves*, arguing additionally that deprivation of the *statutory right* of "competent counsel [that] investigate[s] expeditiously" the law and facts of the case violated due process. Defendant also asserted that the *Graves* decision revealed Texas to have a system that denies capital inmates meaningful access to the courts, in violation of the Eighth and Fourteenth Amendments. These claims are of immense gravity and importance for the fair adjudication of

capital cases in Texas.

Adequate and independent state grounds doctrine will not bar the Supreme Court from reaching the merits of Defendant's claims that the Eighth and Fourteenth Amendments are violated by the State's arbitrary denial of the statutory right to competent counsel that investigates expeditiously and denial of meaningful appellate review. These issues were fully exhausted at the Court of Criminal Appeals. The Court dismissed Defendant's case in part because it held in *Graves* that a state habeas petitioner could not complain about the quality of his representation in an Article 11.071 petition. Since a claim related to such representation is only ripe for review in a successive state habeas petition, and can be raised nowhere else, the *Graves* rule frustrates the assertion of Defendant's federal rights to due process, equal protection, access to the courts, and meaningful appellate review as these rights relate to guarantees made in Article 11.071 regarding his state habeas representation. Under these circumstances, the United States Supreme Court is able to look around the state grounds asserted and address the merits of the federal constitutional claims. *James v. Kentucky*, 466 U.S. 341, 348-52 (1984) (quoting Justice Holmes in *Davis v. Wechsler*, 263 U.S. 22 (1923) ("Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."); *Michel v. Louisiana*, 350 U.S. 91, 93 (1955) (holding that a state statute "raise[s] an insuperable barrier to" vindication of federal rights when it prevents the defendant from having "a reasonable opportunity to have the issue as to the claimed right heard and determined by the State court"); *Herndon v. Georgia*, 295 U.S. 441, 454 (1935) (Cardozo, J., dissenting) (state rule rendered federal constitutional claim "impertinent and futile"); *Williams v. Lockhart*, 873 F.2d 1129, 1131-32 (8<sup>th</sup> Cir.), *cert. denied*, 493 U.S. 942 (1989) (noting that a "new [state] rule designed

to thwart the assertion of federal rights” is not adequate, and its violation will not be allowed to defeat federal jurisdiction). Neither is there any risk that the Supreme Court might find these claims barred under *Teague v. Lane*. Defendant is unaware of any authority supporting *Teague's* applicability to certiorari cases arising from the state courts. In fact, many courts have found *Teague* to have been subsumed under the Anti-Terrorism and Effective Death Penalty Act, which decidedly does not apply to certiorari. In any event, Defendant's chief complaint, that a state may not enact a mandatory statute creating a personal liberty interest and then arbitrarily deprive that interest, is a simple and long-standing rule of due process, not a “new rule” at all for *Teague* purposes. Defendant's other complaints regarding access to the courts and meaningful appellate review equally are tied to long-standing rules of procedural due process which would only be applied here in a new factual setting.

Defendant asserted that the Texas Legislature's use of the mandatory ("shall") language in Sections 2(a) and 3(a) of Article 11.071 creates a personal liberty interest in being afforded "competent counsel . . . that expeditiously investigates." Deprivation of this liberty interest violates due process. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 463 (1989). State laws create a protectable liberty interest when they: (1) "place substantive limitations on the exercise of official discretion," and (2) contain "explicit mandatory language" comprising "'specific directives to the decision maker that if the [laws'] substantive predicate acts are present, a particular outcome must follow.'" *Pachette v. Nix*, 952 F.2d 158, 160 (8th Cir. 1991) (quoting *Thompson*, 490 U.S. at 460). Article 11.071 guarantees that, if an indigent death row inmate requests appointed state habeas counsel, he “shall” be given "competent" counsel who "shall investigate [his case] expeditiously." "Shall" is "explicitly mandatory language," and indigence and election to request counsel are

"substantive predicate acts." The "particular outcome" that "must follow" is appointment of "competent" counsel who shall investigate expeditiously. There can be no question that Defendant enjoyed a "substantial and legitimate expectation" of competent representation in his state habeas corpus process. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1979). He was arbitrarily deprived of that expectation by appointment of counsel who did not expeditiously investigate the facts nor law by anyone's definition. This violated due process.

Prior state habeas counsel has admitted major deficiencies in his representation and the State, in its pleadings before the Court of Criminal Appeals, held that he was responsible for having failed to diligently raise the issues in Claims 2 through 8 of Defendant's second petition for writ of habeas corpus. These Claims contain "controverted, previously unresolved factual issues material to the legality of [Defendant's] confinement." Article 11.071 § 8(a). Factual issues remain unresolved over the Coleman brothers' recantations of testimony materially relevant to Defendant's sentence: e.g., their claim that they testified falsely when they denied having forged any deals with the Smith County District Attorney's office in return for their testimony against Defendant; their claim that Defendant made comments suggesting premeditation of the murder of John Luttig. The State has not controverted Defendant's "actual juror bias" claim that Juror Maxine Herbst suppressed a relationship with John Luttig, resulting from her longtime employment by the co-incorporator of Luttig's principal business, Clemco Inc. The State has weakly controverted Defendant's allegation that Mr. Jack Skeen knew of and suppressed (1) Luttig's business connection with Herbst's employer and (2) Herbst's relationship with Luttig by producing an affidavit in which he asserts that he cannot "recall" if he knew of these things when he examined Ms. Herbst during voir dire. The State has not meaningfully controverted Defendant's allegation that another of the jurors was actually racially

biased against him, said juror having referred to him as a “nigger” and having a reputation, corroborated by an opinion from his own wife, of harboring racist belief. If the Supreme Court remands upon finding that Defendant’s due process rights were offended by the state habeas appointment system and prior state habeas counsel’s failures, these issues, along with Defendant’s age related claims, should be afforded a hearing in this Court before there can be any closure to the question whether Defendant has been fairly tried, convicted, and sentenced.

Defendant alerted the Court of Criminal Appeals to the problem that not only his case and Graves’, and a few other cases pending before the court, raised doubt regarding the confidence that should be reasonably had in the conviction and sentence due to incompetence of appointed state habeas counsel. The Court of Criminal Appeals’ files are full of petitions like Defendant’s that appear to have been presented with little or no investigation of the law and facts, and raise mainly issues not pertinent to state post-conviction review. The issues in Defendant’s first state habeas petition are record-bound and essentially direct appeal issues. This Court did its best to provide Defendant with a hearing where facts could have been introduced challenging his conviction and sentence. State habeas counsel, who understandably would have been surprised to have a hearing on such claims, unfortunately did not have anything to present. The following state petitions, among others of similar quality filed in the Court of Criminal Appeals, should cause alarm as to the adequacy of the system to provide meaningful appellate review:

*Ex parte Anibal Garcia Rousseau*, 185<sup>th</sup> Judicial District, Harris County (raising 2 claims within the space of 4 pages; 10 pages total); *Ex parte Gayland Bradford*, 265<sup>th</sup> Judicial District, Dallas County, No. 72,163 (turning 8 record issues into Eighth Amendment claims, alleging in some violation of the “Eighth Amendment right to due process”); *Ex parte Kenneth DeWayne Thomas*, 194<sup>th</sup> Judicial District, Dallas County, Texas (alleging two direct appeal errors and one ineffective assistance of appellate counsel claim in the course of 8 pages total); *Ex parte Craig Neil Ogan*,

230<sup>th</sup> Judicial District, Harris County, Texas, No. 549893-A (alleging one very insufficiently briefed ineffective assistance punishment issue in the course of 9 pages total); *Ex parte Gustavo Julian Garcia*, 366<sup>th</sup> Judicial District, Collin County (asserting 1 5<sup>th</sup> Amendment and 5 6<sup>th</sup> Amendment violations, very inadequately pleaded in the course of 6 pages total); *Ex parte Joe Lee Guy*, 242<sup>nd</sup> Judicial District, Hale County (asserting 5 very inadequately pleaded claims made within 2 pages of 9 page brief); *Ex parte Roy Gene Smith*, 208<sup>th</sup> Judicial District, Harris County, No. 512673 (asserting one very inadequately pleaded IAC-punishment claim in the course of 15 pages total); *Ex parte Roger Wayne McGowen*, 339<sup>th</sup> Judicial District, Harris County, No. 448450-A (asserting 1 direct appeal issue and 1 IAC-punishment issue very inadequately pleaded in course of 17 pages total); *Ex parte Robert Alan Shields, Jr.*, 122<sup>nd</sup> Judicial District, Galveston County, No. 94-CR-1685 (asserting a few IAC-punishment issues very inadequately pleaded, along with legal insufficiency of the evidence); *Ex parte Larry Edgar Estrada*, 262<sup>nd</sup> Judicial District, Harris County, No. 746585A (asserting 3 IAC claims very inadequately pleaded in 16 pages total); *Ex parte Alva Curry*, 167<sup>th</sup> Judicial District, Travis County, Writ No. 71630 (raising a number of claims in disorderly fashion); *Ex parte Johnny Joe Martinez*, 347<sup>th</sup> Judicial District, Nueces County, No. 71,818 (raising 4 direct appeal issues in 7 pages total) [parallel to Applicant, except for page length]; *Ex parte Toronto Markkey Patterson*, 291<sup>st</sup> Judicial District, Dallas County, No. F-9547764-LU (raising 5 vague issues in 6 pages total); *Ex parte Reginald Lenard Reeves*, 102<sup>nd</sup> Judicial District, Red River County, No. 141-CR-9-93-A (raising 4 claims in 15 pages total); *Ex parte Leonard Uresti Rojas*, 249<sup>th</sup> Judicial District, Johnson County, No. 30507A (raising 3 direct appeal issues in 15 pages total); *Ex parte Colella*, 357<sup>th</sup> Judicial District, Cameron County, No. 92-CR-173-E (raising 3 direct appeal issues and one outlined IAC claim in total of 12 pages); *Ex parte Jamie Elizalde, Jr.*, 351<sup>st</sup> Judicial District, Harris County, No. 744957-A (raising numerous direct appeal claims).

One petition, four pages long, notably raises one issue: that the death penalty violates the Eighth Amendment prohibition on cruel and unusual punishment. *Ex parte Ramiro Rubi Ibarra*, Cause No. 96-634-CA, 54<sup>th</sup> Judicial District Court, McLennan County, Texas, June 21, 1999. Indeed, almost half (44) of 103 state habeas applications filed under Article 11.071 between 1995 (when the statute went into effect) and 2000 fail to include any extra-record evidence, indicating that appointed counsel are not conducting the expeditious investigation required by the statute. Texas Defender Service, *A State of Denial: Texas Justice and the Death Penalty* 107.

The Court of Criminal Appeals laid the crisis represented by the aforementioned cases, and

others, on the Legislature's doorstep, although for the above-mentioned time period the Court itself was making the habeas appointments. *Graves*, 2002 WL 4528, at \*6 (holding that "competence" merely refers to "qualifications, experiences, and abilities" at the time of appointment); \*7 (implying that the Legislature crafted the appointment scheme requiring nothing more than a "qualified" attorney to serve the State's interest in finality). Nothing could be more constitutionally inappropriate in a death penalty case than what the Court described the Legislature as having done:

Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life. The Court thus fulfills, rather than disrupts, the scheme of separation of powers by closely scrutinizing the imposition of the death penalty, for no decision of a society is more deserving of "sober second thought."

*McCleskey v. Kemp*, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting) (quoting Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 25 (1936)). Defendant alleged to the Court that, under such circumstances, Article 11.071 violates Equal Protection and the Cruel and Unusual Punishment Clause of the Eighth Amendment. Via the Court's authoritative interpretation, the statute creates a purposefully discriminatory system so fraught with arbitrariness that nearly half of those seeking relief since the inception of the system, including Defendant, did not receive review appropriate to habeas corpus.<sup>8</sup> See Texas Defender Service, *supra*, and at [www.texasdefender.org](http://www.texasdefender.org).

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<sup>8</sup> This is "exceptionally clear proof" of the discriminatory impact of the Legislature's purpose in serving the interests of finality over those of fairness, as described by the Court in *Graves*. See *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987). According to the Court, the Legislature has deliberately provided *indigent* capital defendants a "right to counsel" in state habeas that is meaningless. *McCleskey*, 481 U.S. at 297-98. It is clear from the Court's decision (if not from the actual Legislative History) that the "state legislature[] selected . . . a particular course of action at least in part 'because of' . . . it's adverse effects upon [the identifiable group of indigent capital inmates in Texas]." *Id.* It chose to uniquely deprive them of any certainty of

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receiving habeas counsel that might provide enough performance to minimally protect their right to a fair trial. This discrimination against indigent capital defendants cannot be “rationally related to a legitimate state interest,” because it is based upon an arbitrary resolution of the irreconcilable policy conflict between the right of a capital defendant to fair adjudication and the need of the State for finality. *See Callins v. Collins*, 510 U.S. 1141 (1994) (Mem.) (Blackmun, J., dissenting from denial of certiorari) (similarly unresolvable policy dilemma leading to alleged Eighth Amendment violation).

The Court of Criminal Appeals' interpretation of the competency of counsel in Article 11.071 sacrifices reliable determination of a capital defendant's guilt and death sentence to finality. It asserts that the alternative (recognition of a habeas-cognizable right to statutorily competent habeas counsel challenging guilt and sentence) would cause the entire concept of the finality of a criminal conviction to "fall by the wayside." *Graves*, 2002 WL 4528, at \*7. If that is true, then the Texas system has arrived at a point in which the *denial* of fair and complete appellate review of critical trial rights – e.g., to have an impartial jury, to be free of prosecutorial misconduct, and to be afforded effective assistance of counsel -- undermines the guarantee of fair capital trials and, thus, denies fair distribution of the *imposition and carrying out* of the punishment.<sup>9</sup> *Clemens v. Mississippi*, 464 U.S. 738, 749 (1990) (noting repeated emphasis of Supreme Court that "meaningful appellate review of death sentences promotes reliability and consistency") (citing, inter alia, *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (pre-Article 11.071)). The Fifth Circuit recently has compounded the problem by

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<sup>9</sup> *Strickland* issues and the class of *Brady*-type errors go to the heart of a trial's fundamental fairness, raising the question whether there is a reasonable likelihood that, but for the error, the outcome of trial or sentencing would have been different. On account of the fact that state habeas counsel often follow the cases into federal court (becoming appointed federal counsel), Article 11.071 now may be interpreted to greatly enhance the possibility that, without any waiver of rights, an actually innocent person might be executed. See *Martinez v. Johnson*, 255 S.W.2d 229, 235-36 (5<sup>th</sup> Cir. 2001) (illustrating the danger that, following the dictates of Article 11.071, § 2(e), state habeas counsel who provided no appropriate post-conviction representation in state court will become federal habeas counsel on appointment).

refusing to recognize any exception to the procedural default created by the Texas system's denial of appropriate habeas representation. *Martinez v. Johnson*, 255 F.3d 229, 238-41 & n.10 (5<sup>th</sup> Cir. 2001); *Beazley v. Johnson*, 242 F.3d 248, 256 (5<sup>th</sup> Cir. 2001).

Such a discriminatory legislative statutory scheme, which flows from the *Graves* Court's description of legislative intent, violates not only Equal Protection but also the Cruel and Unusual Punishment Clause because it constitutes the kind of major systemic defect identified in *Furman*. *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987) (quoting *Pulley v. Harris*, 465 U.S. 37 (1984)). "[T]here can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.' " *McCleskey*, *supra*, at 313 (quoting *Zant v. Stephens*, 462 U.S. 862, 884 (1983)). The Constitution is satisfied, despite the imperfections, when "the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible." *Id.* (citation omitted). However, the Legislature has deliberately decided (according to the Court) to remove the safeguards. It has purposefully chosen *not* to provide a means to assure that *at some point in the State process* an applicant may meaningfully have heard his *trial-based* claims of ineffective assistance of counsel, prosecutorial misconduct, or (in Defendant's case) non-record issues of juror bias. The arbitrariness of the system resides not in the trial court's discretionary choice of specific post-conviction counsel (in accord with the present version of the statute), nor in the nature of the statute for allowing such discretion. It resides in the certainty that some (indeed, many) indigent defendants like Defendant will be forced to forfeit claims to violation of their most fundamental trial rights because the system determines, like a lottery, that they will not be afforded review if counsel fails to provide the performance ("expeditious investigation") required by the statute.

### III.

#### **An Additional Equitable Ground**

The Texas House of Representatives passed a bill during the last legislative session that would have raised the eligibility age for the death sentence to 18. Another bill will be filed during the 2003 legislative session. Eighteen members of the House of Representatives recently wrote Governor Rick Perry in support of this Court's recommendation of commutation and notifying him that a bill would be filed and vigorously pursued. Letter from Rep. Lon Burnam et al. to Governor Rick Perry, dated September 17, 2001 (*see* Exhibit 2 in attached **Exhibit 11**; Supplemental Brief to Motion for Stay of Execution and Application/Petition for Post-Conviction Writ of Habeas Corpus).

The letter closes:

We join Judge Kent in her request for a commutation of Napoleon Beazley's death sentence because we are greatly disturbed by the fact that Texas is now almost the sole executioner of child offenders in the world. . . . Had Napoleon been processed for the same offense (indeed *any* serious offense) in any other government in the world, he could not (and would not) have been sentenced to death. As a trial judge, Judge Kent is sworn to uphold the laws of our State. As legislators, we make the laws. We find that the ongoing execution of child offenders by our state is intolerable by civilized norms and, during the next legislative session, we will again support legislation designed to rectify Texas' sad record in this regard. Napoleon Beazley cannot wait that long. Governor Perry, we urge you to commute his sentence upon recommendation by the Board of Pardons and Paroles.

The possibility of change in Texas law within the next year hopefully would have some equitable bearing upon this Court's decision either to abate or set a date with consideration that relief bringing the State of Texas into conformity with international customary law (and a rule of *jus cogens*) is on the horizon.

#### **IV. Conclusion and Prayer for Relief**

Defendant has outlined issues above why he believes that an execution date is prohibited by treaty and international customary law (and in particular, a rule of *jus cogens*). He also has outlined issues that he presently intends to present to the United States Supreme Court in a petition for writ of certiorari from the dismissal of his second state petition for writ of habeas corpus by the Texas Court of Criminal Appeals. These issues are strong, timely, and certainly demonstrate a substantial showing of the denial of federal rights. *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). They are debatable among jurists of reason, as illustrated by the United States Supreme Court's stay vote in Defendant's case last summer and the dissents of Judges Meyers, Price [who would have held for *Atkins*] and Holcomb [who would have found a right to effective assistance of counsel in state habeas] to the recent order by the Court of Criminal Appeals. *Id.* at 893 n.4, 894. They are not foreclosed by any defensive procedural rules nor, soon, will they be potentially foreclosed by any authoritative court decision (*e.g. Stanford*). *Id.* The nature of the penalty and the limits on this Court's ability to retract the penalty also should be considered in determining whether the execution of punishment should be abated or set at least in a frame of time allowing orderly certioari review. *Id.* at 893.

Defendant would hope that this Court might abate the setting of his execution date until the Legislature might correct Texas law which, at present, violates international and treaty law as it applies to the state through the Supremacy Clause of the United States Constitution. Realizing that the State will oppose this as a remedy, Defendant prays that this Court will abate the execution date setting at least until after he has been afforded full review by the United States Supreme Court of his

certiorari petition raising the above issues. In the alternative, and as a less desired remedy than the foregoing, he asks that a date be set at such time in the future that he and the State are both afforded a fair chance to litigate the issues (this Court allowed 4.5 months for orderly litigation last year) and he justly and equitably has the opportunity to benefit from the Supreme Court's decision in *Atkins v. Virginia* (which must be issued by the beginning of July) and, possibly, the forthcoming decision by the Inter-American Commission on Human Rights in his case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing has been sent by Federal Express for morning delivery to Mr. Jack Skeen, Jr., Smith County District Attorney, 100 North Broadway, Tyler, Texas, 75702, and Ms. Katherine Hayes, Assistant Attorney General, Capital Litigation Division, Price Daniel Sr. Building, 209 W. 14<sup>th</sup> Street, Austin, Texas, 78711, on this the 24<sup>th</sup> day of April, 2002.

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Walter C. Long