No.

IN THE SUPREME COURT OF THE UNITED STATES

NAPOLEON BEAZLEY,
Petitioner

v.

THE STATE OF TEXAS
Respondent

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

PETITION FOR WRIT OF CERTIORARI

DAVID L. BOTSFORD
WALTER C. LONG
Law Office of David L. Botsford
1307 West Ave.
Austin, Texas 78701
512/479-8030 (Phone)
512/479-8040 (Fax)

QUESTIONS PRESENTED

WHETHER THE EXECUTION OF PERSONS FOR OFFENSES COMMITTED WHEN THEY WERE UNDER 18 YEARS OLD VIOLATES THE EIGHTH AMENDMENT?

WHETHER THE EXECUTION OF PERSONS FOR OFFENSES COMMITTED WHEN THEY WERE UNDER 18 YEARS OLD IS BARRED BY THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS?

INTERESTED PARTIES

1. Napoleon Beazley, Petitioner.

2. Honorable John Cornyn, Attorney General, representing the State of Texas.

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The order below is *Ex parte Napoleon Beazley*, No. 36,151-02 (Tex. Crim. App. April 17, 2002). *See* **Appendix A**.

JURISDICTION

The Texas Court of Criminal Appeals had jurisdiction under Article 11.071, Texas Code of Criminal Procedure. This Court has certiorari jurisdiction under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VIII

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

Amendment XIV

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Penal Code § 8.07 (c)

No person may, in any case, be punished by death for an offense committed while he was younger than 17 years.

Texas Code of Criminal Procedure Art. 11.071, §§ 2(a) and 3(a)

Sec. 2. (a) An applicant shall be represented by competent counsel unless the applicant has elected to proceed pro se and the convicting trial court finds, after a hearing on the record, that the applicant's election is intelligent and voluntary.

Sec. 3 (a) On appointment, counsel shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus.

STATEMENT OF THE CASE

Napoleon Beazley, an African American juvenile offender, was convicted and sentenced to death in Cause No. 4-94-226 in the 114th Judicial District Court, Smith County, Texas, for the

carjacking/murder of John Luttig, a white, upper-middle class Tyler, Texas, businessman. The offense occurred in John Luttig's driveway late at night in the presence of his wife, Bobbie Luttig. Beazley and brothers Donald and Cedric Coleman had traveled about 80 miles from Grapeland to Tyler, Texas, on the night of April 19, 1994, with the intent to conduct a carjacking. They followed the Luttigs home. Beazley and Donald Coleman confronted John and Bobbie Luttig as they got out of their car. John Luttig attempted to defend himself and Bobbie, and Beazley shot him two times in the head. Beazley also fired once at Bobbie, missing her as she fell to the ground on the other side of the car. Bobbie fled to a neighbor's house after the co-defendants hastily left the driveway in the Luttig's Mercedes-Benz, damaging the car in the process. Beazley and Donald Coleman abandoned the Mercedes shortly after leaving the Luttig residence, whereupon Cedric Coleman, Donald's brother, who had been trailing them in Napoleon's mother's car, picked them up and they all returned to theirs homes in Grapeland.[1]

[1] In its answer to this petition, the State will rely upon the Texas Court of Criminal Appeals' version of the facts. This Court should be aware that the Coleman brothers provided the main testimony at trial identifying who committed the offense, describing in detail how it was committed, and describing Beazley's state of mind before, during, and after the offense. Without their testimony, which was relied upon by the State's mental health experts, the State had very little aggravating evidence apart from the physical facts of the offense itself. Their testimony as to state of mind, used effectively by the prosecution and its experts, was not corroborated, was exceedingly prejudicial, and (in significant part) has been recanted.

At the time of the offense, Beazley was seventeen years old and an outstanding and very popular high school student, a promising athlete, a participating member in his family's church, with no arrest record and absolutely no history of assaultive behavior.[2] Many respectable Grapeland citizens (including the Houston County District Attorney) traveled to Smith County (Tyler) to testify on Beazley's behalf at the punishment stage, where they repeatedly affirmed that the crime was a shocking aberration in their estimation of Beazley, and maintained that they continued to believe in his essential goodness and potential for reformation. To this date, Grapeland residents stand behind Beazley's potential for rehabilitation, and the Houston County District Attorney, Cindy Garner, submitted a letter during the clemency process in August 2001 wherein she asserted that Beazley was not the sort of offender against whom she would have sought the death penalty. The Honorable Judge Cynthia Stevens Kent, who presided over Beazley's capital murder trial, also recommended commutation in a letter to Governor Rick Perry dated August 15, 2001.

Beazley's co-defendants were tried by jury separately in September 1994 under a federal carjacking charge, based upon the same underlying incident charged to Mr. Beazley. The Colemans were both found guilty of the federal charge and were formally sentenced in January 1995, just prior

[2] The State produced no evidence that Beazley ever committed any improper act of physical aggression against anyone or anything prior to (and after) the instant offense. He has had an exemplary record on death row. When at the Ellis I unit, before transfer to the present unit where all inmates are on lockdown 23 hours a day, Beazley was given a status that allowed him to be out of his cell every day, assisting with food delivery to the other inmates and clean-up of the cell block and recreation yard.

to Beazley's trial. At that time, they decided to cooperate with the state prosecutors and provided them with affidavits containing material about which they testified at Beazley's trial. Following Beazley's trial, both Colemans were also tried for and convicted of capital murder by the Smith County District Attorney's Office, which waived the death penalty in their cases.

After the trial jury found Beazley guilty of capital murder and returned answers to the punishment phase special issues, Judge Kent imposed the death penalty on March 17, 1995. In an unpublished opinion, the Court of Criminal Appeals affirmed the conviction and sentence. *Beazley v. State*, No. 72,101 (Tex. Crim. App. Feb. 26, 1997).

In December 1996, the Texas Court of Criminal Appeals appointed Mr. Robin Norris to represent Beazley in the state habeas proceedings. Norris filed a petition on June 1, 1997, raising **only four record-based claims**, two of which already had been raised and rejected on direct appeal.[3]

The State did not file a reply to Norris' record-based claims. Judge Kent held a perfunctory hearing on September 5, 1997, after which she issued findings and conclusions on October 31, 1997. In an unpublished order dated January 21, 1998, the Court of Criminal Appeals adopted those

[3] The claims were: (1) The Texas capital sentencing scheme, as applied to the facts at the penalty phase, precluded the jury from being able to consider evidence of Beazley's good character, in violation of the Eighth Amendment. *This issue had been presented and rejected on direct appeal, regardless of Mr. Norris' attempts to distinguish it*; (2) The Court of Criminal Appeals' refusal to undertake appellate review of the sufficiency of the evidence to support the jury's answer to the mitigation punishment issue violated the Due Process Clause of the Fourteenth Amendment. *This issue also had been presented and rejected on direct appeal*; (3) A juror was excluded on account of her opposition to the death penalty, in violation of the Impartial Jury Clause of the Sixth Amendment; (4) Direct appeal counsel was ineffective for failure to obtain appellate review of the trial court's erroneous refusal to exclude evidence of the good character of the victim.

findings and conclusions and denied Beazley relief. Judge Kent set Beazley's execution date for May 26, 1998.

Upon motion by the undersigned, the federal district court for the Eastern District of Texas stayed Mr. Beazley's execution date on May 18, 1998. The federal habeas petition was timely filed on October 1, 1998, raising numerous issues that had not been presented to the state courts by appointed state habeas counsel. The following issues were raised in the federal petition and the subsequent successor state habeas petition from which Beazley now appeals:

> 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.
>
> Beazley was denied his rights to due process of law and a fair trial by the prosecutors knowing use of false testimony relevant to his state of mind before and after the offense, in violation of the Fourteenth Amendment to the United States Constitution.
>
> 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 against him on the basis of his race.
>
> 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.
>
> 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
>
> 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.
>
> Beazley's death sentence violates a peremptory norm of international law which now prohibits the execution of persons who were under eighteen years old at the time of the offense.
>
> 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.

The federal district court issued an opinion and judgment on September 30, 1999, finding these issues defaulted, denying relief, and ordering the stay vacated. Beazley appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit affirmed. *Beazley v. Johnson*, 242 F.3d 248 (5th Cir. 2001). Rehearing and rehearing en banc were denied on March 15, 2001. On March 30, 2001, the state trial court set an execution date for August 15, 2001.

Beazley filed a petition for writ of certioriari to this Court, along with a motion for stay of execution. Beazley also filed a commutation petition with the Texas Board of Pardons and Paroles. The Board of Pardons and Paroles, in a remarkable vote, denied commutation to Beazley by a 10-6 margin. Justices Antonin Scalia, Clarence Thomas, and David Souter did not participate in the certiorari appeal, and this Court split three to three on the stay motion. *Beazley v. Johnson*, 533 U.S. 69 (Aug. 13, 2001) (Mem.).

On August 15, 2001, Beazley filed his second state habeas petition and motion for stay of execution in the trial court, raising the issues noted above. He asserted that prior appointed state habeas counsel's default of these issues deprived him of due process because the State had arbitrarily denied him the right afforded under the habeas appointment statute (Article 11.071, §§ 2(a) and 3(a)) to be represented by competent counsel who would expeditiously investigate the facts and law of his case. Beazley argued, therefore, that his second state habeas petition should not fall

under the successor bar of Section 5, Article 11.071, and the issues should be granted merits review. The Court of Criminal Appeals, which was examining related issues in *Ex parte Anthony Graves*, stayed the execution by a 6-3 vote.

On October 1, 2001, this Court denied Beazley's petition for writ of certiorari. *Beazley v. Cockrell*, 122 S. Ct. 329 (Oct. 1, 2001) (Mem.). On the same date, this Court granted review in the case of *Atkins v. Virginia*, 122 S. Ct. 29 (Oct. 1, 2001), wherein the question was raised, "whether the execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment."

The State filed a response to the second state habeas petition on August 15, 2001. On September 4, 2001, Beazley filed a reply to the State's response, observing that the State had conceded that Mr. Norris defaulted all eight issues (above) due to a complete lack of diligence.

On September 18, 2001, Beazley filed a supplemental brief. In that document, he apprised the Court of Criminal Appeals of Judge Kent's recommendation of commutation based upon Beazley's age at the time of the offense and a letter written by 18 members of the Texas House of Representatives to Governor Perry on September 17, 2001, in support of Judge Kent's recommendation, and stating:

> Texas' practice of executing juvenile offenders like Napoleon runs counter to a well-established worldwide norm . . . . 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. We desire Texas to be in the lead among states and nations in affording her citizens the protection they deserve to be given under universally-recognized, fundamental, human rights norms.

See **Appendix B** (containing letters from Judge Kent and Rep. Lon Burnam et al. to Governor Rick Perry). He informed the Court of the 2000 resolution by the United Nations Sub-Commission on the Promotion and Protection of Human Rights, calling upon:

> States that retain the death penalty for juvenile offenders to abolish by law as soon as possible the death penalty for those aged under 18 at the time of the commission of the offence and, in the meantime, to remind their judges that the imposition of the death penalty against such offenders is in violation of international law.

United Nations Sub-Commission on the Promotion and Protection of Human Rights, *The death penalty in relation to juvenile offenders*, E/CN.4/SUB.2/RES/2000/17, Aug. 17, 2000. *See* **Appendix C.**

On about September 21, 2001, the State filed a response to Beazley's supplemental brief wherein the State made the following remarks:

> Applicant claims it is the duty of this Honorable Court to observe something called a "peremptory norm of international law" which is like saying that because we act in this way (normative behavior) that it has the force of law. He assumes there is a real thing called international law. . . .
>
> The issue of whether the United States or the individual states will subvert their laws and their social norms to the economic extortion of some European council [Council of Europe] to bend a "peremptory norm of international law" is a better issue for the United States Supreme Court to address, where the issue currently resides in Beazley's pending certiorari petition.
>
> This subsequent writ is about whether this Honorable Court will state the law as given by the legislature or whether it will allow itself to be made an instrument of social engineering by those who cannot achieve their neo-socialist designs on government through the democratic processes established in our state and federal constitutions.

On October 3, 2001, Beazley filed a reply to the State's response to his supplemental brief, providing authority from this Court to the effect that there is such a thing as international law and that it is the task of the courts to ascertain and apply it. Beazley also refuted a claim made by the Smith County District Attorney in a letter attached to the State's response that, at the time of the offense, Beazley was an "adult" under Texas law. It is very clear that, under Texas law, Beazley was a "legal infant" at that time, under substantial protections and with disabilities related to his age,

except in regard to criminal responsibility. *See* **Appendix D.** Section 8.07 of the Texas Penal Code sets a statutory age of criminal responsibility which is inconsistent with the rest of Texas law as to the age of responsibility, but does not define a 17-year-old as an adult.

On January 2, 2002, the Court of Criminal Appeals issued its decision in *Ex parte Anthony Charles Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002). On January 11, 2002, Beazley filed a motion asking for a full and fair opportunity to respond to *Graves*, which was granted on the same date. On January 14, 2002, Beazley filed a supplemental brief in response to *Graves* asserting that the capital habeas appointment process set up under Article 11.071 violates equal protection and the Eighth Amendment.

On February 19, 2002, Beazley filed a Petition in the Inter-American Commission on Human Rights alleging violation of a norm of *jus cogens* in his case by the United States of America. On February 27, 2002, the Commission issued a request of the United States that it take precautionary measures to prevent Beazley's execution pending the Commission's investigation of his allegations. *See* **Appendix E.** Roger F. Noriega, United States Ambassador to the Organization of American States, wrote the Texas Attorney General on March 5, 2002, requesting a response to the Commission. In a letter dated March 20, 2002, on behalf of the Attorney General, Assistant Attorney General Howard Baldwin Jr. wrote Ambassador Noriega:

> If the Court [of Criminal Appeals] upholds [Beazley's] conviction, it is likely that Mr. Beazley will file a Petition for Certiorari with the United States Supreme Court. I am sure that the courts will thoroughly consider Mr. Beazley's case. Thank you for transmitting the request from the Inter-American Commission on Human Rights to our office. If I can provide additional information, do not hesitate to contact me.

See **Appendix F.** The Attorney General seems to suggest that it is this Court's responsibility to comply with the Inter-American Commission's request for precautionary measures. Beazley filed

the petition in hopes that the State of Texas might respond to the precautionary measures, allowing him to live until the Commission releases its report in the case of Michael Domingues, a Nevada juvenile offender who has been before this Court. *Domingues v. Nevada*, 528 U.S. 963 (1999) (Mem.). Domingues case has been pending at the Commission for a couple of years. Pursuant to the Commission s procedures, the final Domingues report will be issued no later that December 2002. A preliminary report already has been issued, and the United States has been found in that report to be in violation of international law. Although the report currently is confidential, the violation found has to be either of the customary international law prohibition on the death penalty for juvenile offenders (with inconsistent dissent; which is unlikely, because the Commission found in *Roach and Pinkerton* that the United States *was* a consistent dissenter) or of a norm of *jus cogens*. *Case of James Terry Roach and Jay Pinkerton*, Resolution 3/87, Case No. 9647, Inter-American Commission on Human Rights, Sept. 22, 1987, at para. 53 (finding that [s]ince the United States has protested the norm, it would not be applicable to the United States should it be held to exist. For a norm of customary international law to be binding on a State which has protested the norm, it must have acquired the status of jus cogens.).

On February 20, 2002, this Court had oral argument in *Atkins v. Virginia*, No. 00-8452, 2002 WL 341765 (Feb. 20, 2002). On February 25, 2002, responding to comments that were made by Justices during oral argument suggesting that *Atkins* would undermine the legal authority of *Stanford v. Kentucky*, 492 U.S. 361 (1989), Beazley filed in the Court of Criminal Appeals a motion for the Court not to take action in his case pending this Court s decision in *Atkins*. On March 11, 2002, he filed a supplement to that motion. On March 15, 2002, the State filed a reply to these motions, asserting *inter alia* that this Court s denial of certiorari review on October 1, 2001, indicated that no

Justices wished to revisit *Stanford*. On March 25, 2002, Beazley filed a reply pointing out *inter alia* that this Court *never* has granted certiorari review with only six Justices participating. On March 26, 2002, Beazley filed a short document informing the Court that Indiana had just become the 28th state along with the District of Columbia and the federal government that did not have the death sentence for 17-year-olds.

On April 17, 2002, the Court of Criminal Appeals dismissed Beazley's second state habeas petition on a 6-3 vote as failing to comply with Section 5 of Article 11.071, Texas Code of Criminal Procedure. *See* **Appendix A.** Judge Meyers dissented without comment. Judge Holcomb dissented on the basis of his dissent in *Ex parte Graves*, wherein he found that there should be a constitutional right to effective assistance of counsel in state habeas proceedings. Judge Price dissented, stating that he would have held the case until this Court had delivered its opinion in *Atkins v. Virginia*.

Judge Kent issued an order for an execution date setting hearing to be held on April 26, 2002. Although she set a fast execution date, she made the following comments at the hearing:

> The letter to the Governor was based on principled objection. If I were a judge who did not follow the law, I have many chances to be intellectually dishonest and cause actions that would result in a case being reversed and no execution date being set, and findings of fact and conclusions of law that were different than the ones I made, etc. etc. etc. . . . In my opinion, philosophically, a trial judge has to be mindful — though not a slave to — but obedient to the law. But we don't have to be silent about it. We still have First Amendment free speech rights. Thank goodness we all have the opportunity to say what we believe and to have a professional, reasonable dialogue and debate about who we are and about punishment for people who threaten society — what is appropriate. And that is a protection we have to constantly remind us that [things] can change. **I am also always mindful looking back in history about judges that *blindly* followed the law when the law was *so* fundamentally inappropriate. Shall we go to Nazi Germany? Shall we talk about judges in and around that country that enforced and followed laws that were so atrocious? And in retrospect we are appalled. And I struggle with that issue on select cases and *this is one of them***. It is the law. The Texas Legislature has said it is. The Courts have consistently upheld it as being correct, sound and not in any way depriving the defendant of his Eighth Amendment rights. So throughout this case, I

> have followed the law with principled concern about the execution of youthful offenders and what I do today is follow the law. . . .

Transcription by Walter Long from videotape of the hearing (emphasis added).

Beazley prepared and filed a lengthy clemency petition on May 7, 2002, and he filed a supplement on May 13, 2002. On May 17, 2002, he joined plaintiffs Johnny Joe Martinez and Gary Etheridge in a civil action against the Texas Court of Criminal Appeals, alleging violation of their Sixth, Eighth, and Fourteenth Amendment rights based upon the Court's failure to provide them competent counsel in the state habeas process. On the same date, the federal district court dismissed the suit. *Martinez v. Texas Court of Criminal Appeals et al.*, Civil Action No. C-02-225, United States District Court, Southern District, Corpus Christi Division, May 17, 2002 (final order of dismissal) (unpublished). The Fifth Circuit affirmed on May 21, 2002.

The State that has condemned Beazley to death shamefully has committed more than one-quarter (9) of all executions of juvenile offenders in the world since 1990, and one-half of all such executions in the United States (15). AMNESTY INTERNATIONAL, CHILDREN AND THE DEATH PENALTY, ACT 50/010/2000, December 14, 2000; HUMAN RIGHTS WATCH, WORLD REPORT 2001 ("Children in Conflict with the Law"; www.hrw.org/wr2k1/children/child4.html); as supplemented by Texas' execution of Gerald Mitchell on October 22, 2001. With thirty, Texas appears outpaced by only Pakistan for the number of juvenile offenders it has placed on death row, although Pakistan now has enacted legislation barring the death penalty for 17-year-olds and President Musharraf announced in December 2001 that he would commute around one hundred juvenile offenders' death sentences. http://www.amnesty.ie/news/2001/pakistan4.shtml Texas' "juvenile" death row is racially imbalanced: 77 percent are from racial minorities (10 African Americans, 12 hispanics, 1 asian, and 7 whites). Texas Department of Criminal Justice, http://www.tdcj.state.tx.us/stat/

offendersondrow.htm. Since 1994, while every other nation formerly offending the norm was ridding itself of the practice of executing juvenile offenders, Texas added more than 20 such offenders to its death row. Indeed, despite the heavy litigation in this case on the Eighth Amendment and international law issues, the Smith County District Attorney's Office announced this past week that, unrepentant of violating international law, it will seek the death penalty against yet another juvenile offender. Anne Wright, *DA's Office Seeks Death Penalty for Hodges*, Tyler Morning Telegraph, May 10, 2002.

Ironically, a state-wide poll in February 2001 revealed that only 34 percent of Texas respondents (and only 25 percent of Harris County respondents) favored the death penalty for juvenile offenders. Steve Brewer, *Juvenile Cases: Just 1 in 4 in County Thinks Death Appropriate*, HOUSTON CHRONICLE, February 7, 2001. The Texas figure is a little higher than the national percentage. A national Gallup poll found on May 14, 2002, that only 26 percent of Americans support the death penalty for juveniles (19 % for persons with mental illness, and 13 % for persons with mental retardation). *Poll Update Gallup: Bush Job at 76 %*, The Hotline, Vol. 10, No. 9, May 14, 2002. In the 2001 Texas legislative session, the House of Representatives passed a bill (House Bill 2048, joint authored by Rep. Lon Burnam, Fort Worth, and Reps. Senfronia Thompson, Harold Dutton, and Sylvester Turner, Houston) that would have raised the eligibility age for the death penalty in Texas to 18. The bill came close to passing the Senate as a rider to an omnibus juvenile justice bill, but was defeated by the Governor's intervention.

This Court last visited the question of the constitutionality of the juvenile death penalty in 1988 and 1989 in two plurality opinions with Justice O'Connor supplying a pivotal concurrence. *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Stanford v. Kentucky*, 492 U.S. 361 (1989). This

Court held that the execution of persons who were 16 or 17 at the time of offense did not constitute cruel and unusual punishment. Those cases need to be revisited for reasons which follow. This Court should note, when considering the reasons proffered, that the facts supporting the merits of the Eighth Amendment issue (such as recommendations by blue-ribbon commissions, support by national organizations, etc.) constitute in themselves reasons for granting certiorari review.

ARGUMENT/REASONS FOR GRANTING THE PETITION

1. By holding that the Eighth Amendment does not prohibit application of the death penalty to juvenile offenders, the Texas Court of Criminal Appeals has decided an important federal question that should be revisited by this Court.

The Court of Criminal Appeals dismissal of Beazley s claim that the Eighth Amendment bars his execution should be treated as a merits ruling or may be looked through if deemed to be based upon independent state law. Furthermore, as this Court may discern from the case history, the instant Eighth Amendment claim underwent substantial development in the pleadings before the Court of Criminal Appeals beyond its form when it was presented to this Court last year following federal habeas proceedings. The development largely is due to this Court s treatment of *Atkins* in the interim. Although this Court may have a preference for certiorari review following federal habeas, this is the sort of case where certiorari review following state habeas not only is appropriate but compelling, given that the issues have been through the federal system in this case, that a momentous shift in law favorable to the petitioner seems about to take place, and the severity of the punishment.[4]

[4] 28 U.S.C. 2244 (b)(1) prevents presentation of a claim in a second federal habeas petition that was presented in a prior petition. The route through the lower federal courts currently is

closed to Beazley.

(a) ***The Court's dismissal was a merits ruling on an issue that should be revisited.*** Judge Price's dissent from the dismissal indicates that the Court denied review of the issue because it is bound by this Court's *Stanford* precedent. Had *Stanford* not preempted the Court's consideration, Section 5(a)(3) of Article 11.071 would have allowed for merits review of the issue, because Beazley presented clear and convincing evidence of his lack of *eligibility* for the death sentence, pursuant to an analysis of the facts in the light of this Court's Eighth Amendment jurisprudence. "No rational juror" can make findings allowing for the death sentence of a Texas capital defendant who is *ineligible for the death sentence as a matter of law*.

(b) ***This Court may look through the dismissal if it is on state law grounds, and revisit the issue.*** In the alternative, if this Court does not see the dismissal of the Eighth Amendment claim as a merits ruling, this Court may look beyond Article 11.071 as an adequate and independent state ground because the Eighth Amendment issue clearly falls within the narrow exception to procedural default for "miscarriage of justice." *Sawyer v. Whitley*, 505 U.S. 333 (1992) (allowing federal review 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). As Beazley noted in his petition to this Court last year, the finality and comity concerns underlying the procedural default doctrine have no force when the constitution "deprives the State of the power to impose a certain penalty." *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)).[5]

Despite assertion of adequate and independent grounds by the State, this Court recently looked through Article 11.071, Section 5, to grant stays in the cases of Curtis Moore and Brian Davis, who claimed that the rule this Court will announce in *Atkins* would bar their execution. *Davis v. Texas*, No. 01-10022 (01A853), 2002 WL 888308 (May 7, 2002); *Moore v. Texas*, No. 01-9935 (01A834), 2002 WL 819104 (May 1, 2002). The same rule (when applied to the relevant facts) should bar *Beazley*=s execution. Thus, the lower state court=s procedural disposition of the case should raise no impediment to a stay of execution and certiorari review. In light of the developments in *Atkins*, Beazley can make a substantial showing of the denial of a constitutional

[5] Given that the miscarriage of justice exception clearly controls, a response by the State alleging failure by Beazley to allege cause and prejudice would miss the mark. *Sawyer* makes it perfectly clear that the miscarriage of justice exception applies to exemption from the punishment as well as actual innocence of the offense.

right (*infra*) and, thus, merits relief from this Court. *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983).[6]

2. This Court should revisit the Eighth Amendment issue as applied to juvenile offenders, because the law and facts are virtually indistinguishable from those presently before the Court in *Atkins v. Virginia*, and the facts themselves are a compelling reason for review.

This Court's recent stays in Moore and Davis may indicate that the Court is going to hold that the Eighth Amendment prohibits the death penalty for mentally retarded offenders.

In order to grant certiorari review in *Atkins,* this Court had to have questioned the validity of the holding in *Stanford* that non-death penalty states are irrelevant to the question whether our society has formed a consensus against a particular punishment as applied to a particular class of offender. The reason for this is that there are only 18 states that have statutes barring the death penalty for persons with mental retardation. Although that is a significant number, it is not compelling in regard to societal consensus, because it continues to comprise less than half of all the death penalty states. Given that this Court looks to legislative enactments as the most sure guide of societal consensus, it is doubtful therefore that this Court would have granted certiorari if it was not

[6] *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). *Slack* discusses the standard for COA where a procedural bar prevented the federal district court from reaching the merits. This is irrelevant in the instant case because the *Slack* standard is designed to effectuate Congressional intent in 28 U.S.C. § 2254. However, even if it were relevant, Beazley makes a substantial showing that he is ineligible for the death sentence and, thereby, that a reasonable jurist would conclude that he should be allowed to proceed further, despite the procedural ruling by the Court of Criminal Appeals.

also considering a change in the law, not merely an updating of facts from the *Penry v. Lynaugh* decision in 1989 to the present. Justice O'Connor's comments at *Atkins* oral argument indicate strongly that she has shifted her position on the relevance of the non-death penalty states which, based upon the voting behavior and comments of the other Justices, seems to be what this Court would need to render a decision in *Atkins* that overrules the legal basis for *Stanford*. Once the legal basis for *Stanford* is overruled, then *Stanford* poses no *stare decisis* impediment to this Court on the juvenile offender issue, and the question becomes how the facts compare between evidence of a societal consensus against the execution of persons with mental retardation and evidence of the same in relation to juvenile offenders. The facts are *very close*, with the exception that the world-wide prohibition on the execution of juvenile offenders is unquestionably stronger than the comparable rejection of the death penalty for persons with mental retardation.

At *Atkins* oral argument on February 20, 2002, Justice O'Connor 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. Four Justices 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). 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 this 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 this Court has deemed significant for Eighth Amendment analysis:

> Roughly the same number of states are opposed to the execution of juvenile offenders. (28 [J] to 30 [MR]).[7]

[7] Twelve states have no death penalty. Eighteen states now bar execution of persons with mental retardation by statute. (Georgia, Maryland, Arizona, Arkansas, Colorado, Connecticut, Florida, Indiana, Kansas, Kentucky, Missouri, Nebraska, New Mexico, New York, North Carolina, South Dakota, Tennessee, and Washington, along with the federal government; the District of Columbia also bans the practice). 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 on March 26, 2002; effective July 1, 2002); Kansas

(Kansas Stat. 21-4622); Maryland (Md. Code 1957, art. 27, § 412 (g)); Montana (law passed in 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 federal government bars the death penalty for juvenile offenders, along with the District of Columbia. E.g., 18 U.S.C. § 3591 (federal); D.C. Code 22-2104 (life sentence for first degree murder; those under 18 at time of offense must be eligible for parole).

Five states specifically allow the execution of persons who were seventeen at the time of the offense. Texas (Tex. Penal Code 8.07(c)); Florida (*Brennan v. State*, 754 So. 2d 1 (Fla. 1999)); Georgia (O.C.G.A. 17-9-3); New Hampshire (N.H. Stat. § 630:1); and North Carolina (N.C. Stat. 14-17). In Eighteen states, 16-year-old offenders are eligible for the death sentence. *Id*. (Alabama, Arizona, Arkansas, Delaware, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Nevada, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Virginia, and Wyoming).

Twenty-eight states, therefore, currently bar the execution of juvenile offenders, based upon Justice O'Connor's apparent new position that non-death penalty states may be included in the calculus. Thirty bar the execution of persons with mental retardation.

 Roughly the same number of states have explicit bars on the execution of juvenile offenders. (16 [J] to 18 [MR]). At least seven states presently have been considering legislation that would raise the death penalty eligibility age to 18 (it has been signed into law in Indiana).[8]

 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.[9]

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[8] In the 2002 legislative year, ***at least seven*** state legislatures have been considering bills that would raise the eligibility age for the death penalty to 18 (Florida (CS-SB 1212; HB 1615), Kentucky (HB 447; SB 127), Mississippi (HB 167), Missouri (SB 819; HB 1836), Arizona (SB 1457; HB 2302), Pennsylvania (SB 27), and Indiana (Engrossed SB 426)). In legislative sessions last year (2001) bills were introduced in South Carolina (Bill 236), Arkansas (SB 78), and Texas (HB 2048). A bill will be filed in the Texas Legislature in the 2003 session.

[9] Over the last decade, only fifteen states actually have had juvenile offenders on their death rows. 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) (Alabama, Arizona, Arkansas, Florida, Georgia, Kentucky, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, Pennsylvania, South Carolina, Texas, and Virginia); *see also* Juvenile Offenders on Death Row (Washington College of Law, American University; www.wcl.american.edu/humright/deathpenalty/juvstat.html). Since *Stanford* in 1989, only ***six states*** [Texas (most recently, 2001), Louisiana (1990), Missouri (1993), Georgia (1993), Virginia (1998 and 2000), and Oklahoma (1999)] have executed juvenile offenders. *See* Juvenile Offenders on Death Row, *supra*. ***Only***

three have done so in the last nine years. *Id.* The number of states that actually have executed persons with mental retardation since 1989 is about *two*. *Atkins* Oral Argument at *40.

 There are presently 3,711 persons under a sentence of death in the United States. Of that number, 83 (all males) are juveniles. Death Row, U.S.A. (Winter 2002); http://deathpenaltyinfo.org/DEATHROWUSArecent.pdf (visited April 2002). Thus, juvenile offenders comprise approximately 2.24 percent of the death row population. ***If Texas is removed from the calculation***, the percentage of juvenile offenders on the other death rows in the country combined is only 1.43 percent. This also supports the conclusion that contemporary sentencing juries generally reject the death penalty as a sentencing option for a 17-year-old defendant.

 Roughly the same percentage of the overall population resides in states that have not executed juvenile offenders over the last nine years. (approximately 90 percent; 89 [J] and 93 [MR]).[10] Hypothetically, ***if Texas were added to the states that did not execute juvenile offenders in the last nine years***, the percentage of the population not executing juvenile offenders would leap to ***96 percent***, because Texas comprises 7 percent of the national population. This again supports the conclusion that contemporary sentencing juries generally reject the death penalty as a sentencing option for a 17-year-old defendant.

 The skewed statistics in Texas may reflect the zeal with which prosecutors seek the death penalty against juvenile offenders as opposed to the opinion of jurors and the public on the issue. If the death penalty is vigorously sought against juvenile offenders as a matter of statewide policy, as it seems to be in Texas, the resultant higher numbers are not surprising. Public opinion polling in Texas indicates, however, that even in the most retributive of states, the public is opposed to the death

[10] The percentage of the total population represented by the states not conducting executions of persons with mental retardation may represent a *consensus*. *Atkins* Oral Argument at *41 (a Justice noting that the two states that had executed persons with mental retardation represented 7 percent of the population). The percentage of total population represented by states executing juvenile offenders over the last nine years is 11 percent. *U.S. Bureau of the Census*, 2000 Census (Total population of the United States, 281,421,906; Texas, 20,851,820; Oklahoma, 3,450,654; Virginia, 7,078,515). Thus, roughly 93 percent of Americans are disassociated from states executing persons with mental retardation, and roughly 89 percent are similarly separated from states executing juvenile offenders over nearly a decade.

sentence for juvenile offenders. As noted *supra*, only 34 percent of Texas respondents favored the death penalty for juvenile offenders in 2001, not too far removed from the national figure of 26 percent. Also, the passage of HB 2048 in the Texas House and near passage in the Senate in 2001 suggests that the Governor and state executive leaders are out of step with the Legislature and the people on the issue.

 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. Since *Stanford*, research has shown that the adult brain is not fully developed until the early 20s. The brain of *any* 17-year-old, as a result, has a greater tendency toward impulsiveness, 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. (Reflecting this simplistic notion of right and wrong, under the common law, only children under the age of *seven* were conclusively presumed to have no criminal capacity and for children from age 7 to 14, the presumption was rebuttable and such children could be convicted of a crime and executed.)[11] 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 service to the retributive function of punishment, and as a class they are unable to respond to the death penalty as a deterrent in the way that adults can. *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; Physical Changes in Adolescent Brains May Account for Turbulent Teen Years, McLean Hospital Study Reveals, http://www.mclean.harvard.edu/PublicAffairs/TurbulentTeens.htm; Daniel R. Weinberger, A Brain Too Young for Good Judgment, *New York Times*, March 10, 2001 (by Director, Clinical Brain Disorders Laboratory, National Institutes of Health). Because children are still in development, our system generally recognizes that they are more capable of rehabilitation than adults.

[11] *Case of James Terry Roach and James Pinkerton*, Resolution No. 3/87, Case 9647, Inter-American Commission on Human Rights, Sept. 22, 1987, at para. 58.

 The deep opposition of American professional organizations to the execution of persons with mental retardation is equal in regard to execution of juvenile offenders. The organizations and institutions opposed to the death penalty for juvenile offenders 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.

 Several blue-ribbon commissions in the last year have recommended that the remaining states that have the death penalty for juvenile offenders amend their statutes. 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). Similarly, the Attorney General of Arizona, Janet Napolitano, has presented an Interim Report by an Arizona Capital Case Commission that recommends raising the minimum age for capital punishment to 18. (http://www.ag.state.az.us/CCC/IntRpt.html). The recent Report by the Governor's Commission on Capital Punishment in Illinois makes no recommendation on juvenile offenders, because Illinois already bars their execution by statute, but it does recommend barring the death penalty for persons with mental retardation. George H. Ryan, Governor, Report of the Governor's Commission on Capital Punishment (April 2002).

 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 government, except the United States and Somalia (soon to ratify), 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. 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, excluding the federal government).

3. This Court should revisit the Eighth Amendment issue as applied to juvenile offenders, because the international norm against the death penalty for juvenile offenders now has achieved the status of *jus cogens* and, therefore, may be of equal stature with the Constitution.

Stanford should not be interpreted as completely rejecting international standards as a component of Eighth Amendment jurisprudence. If it did, it would erroneously reject the original intent of the founders who considered our nation bound to the "law of nations." This intent is reflected in Article I, Section 8, Clause 10, of the Constitution which gives Congress the power to define and punish offenses against the Law of Nations. It is found again in the Supremacy Clause, Article VI, Clause 2, which deems international treaties to be part of the "supreme Law of the Land." This Court's early cases confirmed a purpose to incorporate international laws and standards into our own jurisprudence. *Chisholm v. Georgia*, 2 Dall. 419, 474 (1793); *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804) (holding that Congress should never act in a way that violates the law of nations where an alternative exists).

A *jus cogens* norm of international law may impose obligations of *constitutional* stature on our domestic courts and practices. *Citizens of Nicaragua v. Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988). It "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)." *Id*. at 941. "A peremptory norm of general international law 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, art. 53, 1155 U.N.T.S. 331, 352 ("Treaties Conflicting with a Peremptory Norm of General International Law (Jus Cogens)"). The norm is established over dissent from "a very small number" of states.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 102, and reporter's note 6 (1986). The United States is the only country in the world that has not clearly recognized the norm against the death penalty for juvenile offenders. "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." *Beazley v. Johnson*, No. 00-10618, Brief of Amici Curiae Human Rights Advocates, Human Rights Watch, Minnesota Advocates for Human Rights, Human Rights Committee Bar of England and Wales in Support of Petitioner, at 7. The norm clearly is customary international law and is non-derogable, as illustrated by its universal acceptance and protection in treaties as a non-derogable right. *Id*. at 3-11; United Nations Sub-Commission on the Promotion and Protection of Human Rights, *The death penalty in relation to juvenile offenders*, Resolution 2000/17 ("the imposition of the death penalty on those aged under 18 at the time of the commission of the offense is contrary to customary international law" and is "condemn[ed] unequivocally"); International Covenant on Civil and Political Rights art. 4(2) ("No derogation from Article[] 6 . . . may be made . . ."); art. 6(5) (barring the death penalty for "crimes committed by persons below 18 years of age"); United Nations Convention on the Rights of the Child art. 51(2) ("A reservation incompatible with the object and purpose of the present Convention shall not be permitted."); art. 37(a) (barring the death penalty for "offenses committed by persons below 18 years of age").

Given that there is no competing developing norm in conflict with the world-wide observance of the norm against the death penalty for juvenile offenders, United Nations bodies, international commissions, and courts (international and domestic) are going to recognize the *jus cogens* norm. When they do, as is expected in the Domingues case to be released by the Inter-American

Commission on Human Rights by December, the federal courts will be placed in the difficult position of having to decide which norm (our Constitution as interpreted by this Court or the *jus cogens* norm) prevails.

4. This Court should revisit the Eighth Amendment issue as applied to juvenile offenders out of respect for the "law of Nations" that informs our Constitution and for the opinion of the entire rest of the world on the issue.

Justice Scalia wrote for the *Stanford* lead plurality, "We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant" to Eighth Amendment analysis. *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989). If a majority of this Court decides that international law should not inform our own evolving standards, it nevertheless should afford respect to international law, and to our treaty, democratic, and business partners, by granting a stay and certiorari or original review in this, or a companion,[12] case, and determining whether our domestic standards match the international norm. Justice O'Connor told the American Law Institute this week that "no institution of government can now afford to ignore the rest of the world." Gina Holland, *Justice Urges Focus on International Law*, Associated Press, May 15, 2002

On May 2, 2002, Walter Schwimmer, Secretary General of the Council of Europe, representing 44 nations, wrote Chairman Gerald Garrett of the Texas Board of Pardons and Paroles

[12] The issue is pending before this Court in Kevin Stanford's original petition. It also may soon come before the Court in the case of Christopher Simmons, who has raised it in a successor state petition at the Missouri Supreme Court. That Court has set his execution date at June 5, 2002. Prior to the filing of the successor petition, the date had been set for May 1, 2002.

that, as an Observer to the Council of Europe, the United States is deemed to share the same fundamental values and principles. He pointed out that the execution of Beazley would flout Resolution 2000/17 of the UN Sub-Commission on Human Rights on the death penalty in relation to juvenile offenders and Resolutions adopted by the UN Human Rights Commission including Resolution 2002/104 adopted on 25 April 2002, but would also contravene international legal standards, including those drawn up by the Council of Europe. He asked, in the name of human decency, that Beazley be spared. The European Union has issued similar appeals for Beazley. Mexico also has written a letter on behalf of Beazley, asserting:

> Mexico has great respect for the judicial system of the United States. Nevertheless, as a responsible member of the international community, and as a party to the International Covenant on Civil and Political Rights, Mexico has a legitimate interest in promoting respect for norms of international law. Mexico also notes that the Inter-American Commission on Human Rights has issued precautionary measures in the case of Mr. Beazley . . . . The Commission is composed of human rights experts whose opinions on matters of international law carry great weight in the member states of the Organization of American States.

The letter closes with an appeal to the Board to commute Beazley's sentence in accordance with international law. Letter from Juan Jose Bremer to the Texas Board of Pardons and Paroles, dated May 3, 2002.

This case has drawn enormous international interest. Texas' continued flouting of international law chafes our international allies, the nations with whom our nation does the majority of its business and which aspire to the ideals we claim. The Smith County District Attorney's office has responded to the interest expressed by denying that there is such a thing as international law, *supra*, and by making a curious comparison (unflattering to the United States) between our human rights situation and abuses by Nazi Germany. The Tyler Morning Telegraph reported in 2001 that the Smith County District Attorney's office had a file of letters against Beazley's execution, one

third to one half inch thick, from within the United States and from such places as "Iceland, Austria, New Zealand, Italy, Denmark, Australia, France, and Germany." Marilyn Covey, *On the Scene: Let's Not Forget the Victims*, Tyler Morning Telegraph, 2001 (exact date unclear). The paper reports that the Assistant District Attorney complained of these letters and remarked, "I find it particularly odious that a German should write that we shouldn't execute a child. . . . I don't recall them apologizing for Dachau and Auschwitz and all those other places." *Id*.

Meanwhile, this week Somalia signed the United Nations Convention on the Rights of the Child during a United Nations General Assembly Special Session on Children, and it promised to ratify the Convention post haste. Amnesty International Press Release, UN General Assembly Special Session on Children, IOR 41/017/2002, May 14, 2002 (www.amnesty.org) ; e-mail from Mike Bochenek, Human Rights Watch, to Walter Long, May 17, 2002 (expressing understanding that Convention was signed at the Special Session). This will leave the United States as the only nation in the world that has not ratified the Convention and recognized the universal norm against the death penalty for juvenile offenders. Delegates to the Conference expressed exasperation with the United States for its unwillingness to ratify the Child Convention, describing United States' efforts to steer the meeting as "the latest move by the White House to withdraw from global cooperation." Evan Osnos, *Bush vs. the World on Sex*, Chicago Tribune, May 19, 2002. Nobel Peace laureate[13] Rigoberta Menchu described United States attempts to downplay the Child

[13] Nobel Peace laureate Archbishop Desmond Tutu has written the Texas Board of Pardons and Paroles pleading for Beazley's sentence to be commuted, reporting that the South African Constitution bears explicit protections of children, and observing that "[b]ecause resistance to change in America is so strong and progress is glacial, I think it is hard for many Americans, of all races and backgrounds, to apprehend that, in a variety of ways, America has fallen behind the rest of the world in the protection of fundamental human rights." Letter from Archbishop Desmond Tutu to Gerald Garrett, Chairman, Texas Board of Pardons and Paroles, May 16,

Convention as "unacceptable." *Id*. In a conversation during the session, Nelson Mandela also is reported to have warned: "If the U.S. continues to act as if it's the only country in the world, it will increase chaos around the globe." *Id*.

Recognizing that execution of juvenile offenders is contrary to international law, Justice Harry Blackmun once affirmed, "Under the principles set forth in the Paquete Habana, interpretation of the Eighth Amendment, no less than interpretations of treaties and statutes, should be informed by a decent respect for the global opinions of mankind." Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L. J. 39, 48-49 (1994). This Court should ask itself, and the Texas Attorney General, how "decent respect for the global opinions of mankind" would be reflected in the execution of Napoleon Beazley.

5. By holding that the International Covenant on Civil and Political Rights does not prohibit application of the death penalty to juvenile offenders, the Texas Court of Criminal Appeals has decided an important federal question that should be revisited by this Court.

For the same reasons developed above in regard to the Eighth Amendment issue, the Court of Criminal Appeals' dismissal of Beazley's claim that the International Covenant [ICCPR] bars his execution should be treated as a merits ruling or may be "looked through" if deemed to be based upon independent state law. Federal constitutional, treaty, and statutory law is superior to all conflicting Texas judgments, orders, or statutes. Adequate and independent state grounds pose no bar to review where the Covenant sets the threshold age for the death sentence at 18 at the time of the offense, rendering Beazley ineligible. *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). Beazley was indicted under Section 8.07(d) [now (c)] of

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2002. He also has just informed counsel that four additional Nobel laureates, including the former President of South Africa under apartheid, are planning to join in his request for a commutation.

the Texas Penal Code, setting the age of eligibility for the death penalty at seventeen. TEX. PENAL CODE § 8.07(d) (1994). Through the Supremacy Clause, Article 6(5) of the International Covenant on Civil and Political Rights voids § 8.07(d). *Hauenstein v. Lynham*, 100 U.S. 483, 488-89 (1879); *Ware v. Hylton*, 3 U.S. 199, 236-37 (1796) (Chase, J., opinion); *id*. (Iredell, J., opinion); *Galveston, Harrisburg & San Antonio Railway Co. v. State*, 34 S.W. 746 (Tex. 1896) (concession by Texas Attorney General that a treaty voids an inconsistent state statute).

6. This Court should grant review of the Covenant issue out of respect for the longstanding opinion of the United Nations and the United States' treaty partners that the United States is violating a key provision of the treaty.

Article 6(5) of the ICCPR prohibits the death sentence for "crimes committed by persons below eighteen years of age." ICCPR, at art. 6, para. 5. Upon ratification of the treaty in 1992, the United States attached a reservation to Article 6, reserving "the right, subject to its Constitutional constraints, to impose capital punishment on any person, including such punishment for crimes committed by persons below 18 years of age." SENATE COMM. ON FOREIGN RELATIONS REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 31 I.L.M. 645, 653-54 (1992) [hereinafter 31 I.L.M. 645]. In 1994, the United Nations Human Rights Committee [HRC], charged with monitoring treaty compliance, responded to the United States' reservation and others by issuing a General Comment that set strict limits on reservations to the ICCPR:

> 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."
> 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."

> 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) [GENERAL COMMENT] (emphasis added).

The reservation to Article 6 ***falls into every criterion for an unacceptable[14] reservation***: it is incompatible with the object and purpose of the treaty, offends a peremptory norm against the execution of persons under 18 at the time of offense, and attempts to reserve a non-derogable provision. As noted *supra*, the United States has not come close to meeting the "heavy onus" of justification for its reservation to Article 6.[15] In its first report on United States compliance, the

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[14] An unacceptable reservation may also be referred to as invalid. "Invalidity" is used in this sense by jurists. *See* WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 89 (Cambridge U. Press 1997) ("The [United Nations Human Rights] Committee considers that the reservation to Article 6 5 . . . and to article 7 should be held to be *invalid*.") (emphasis added).

[15] In the rounds of federal and state litigation on this issue in this case, neither the Texas Attorney General nor the courts offered any substantive justification for the reservation. As the norm against the death penalty for juvenile offenders has developed, the reservation has simply become repugnant. ***It is unjustifiable.***

The Senate initially justified the reservation to Article 6(5) on the grounds that prompt ratification would not be obtained if the non-complying states within the United States had to raise their eligibility ages first. 31 I.L.M. 645, 650 (1992). This does not actually approach an acceptable justification for derogation (e.g., national emergency).

In fact, the United States jointly sponsored a General Assembly resolution in 1980 that Article 6 established 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). This indicates that the United States was aware of the centrality of Article 6 to the object and purpose of the treaty long before it ratified it.

The Child Convention appears to have been designed to avoid repetition of this kind of permanent abuse of the right to enter a reservation, by incorporating a provision barring

HRC found the United States' reservation to Article 6(5) of the ICCPR contrary to the "object and purpose" of the treaty. 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 [hereinafter *Official Records*]. The HRC added at the same time 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).

An unacceptable reservation to a multilateral human rights treaty, and to the Covenant in particular, "generally" is void. GENERAL COMMENT 24 at para. 18. When viewed from the perspective of the HRC's jurisprudence (and that of international courts which have addressed similar issues), the reservation to Article 6(5) unquestionably is void.[16]

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reservations contrary to the object and purpose. This prevents a country like the United States from becoming a party to the treaty, while wilfully violating one of its principal sections and asserting, nevertheless, that it is not barred from doing so by the "object and purpose" provisions in the Vienna Convention on the Law of Treaties or customary international law.

[16] The Fifth Circuit panel in Beazley's case unfairly described this process of interpretation as "piggyback[ing] several HRC statements," when it really is a matter of appropriately evaluating the HRC's findings about United States' compliance with the ICCPR in light of the HRC's norms, tracing the legal sources of those norms, and applying those norms in light of the Senate's expressions of intent regarding the reservation to Article 6. *See Beazley v. Johnson*, 242

F.3d 248, 264 (5th Cir. 2001).

Suggestions by the HRC and others that the reservation be withdrawn are based upon the unacceptability, severability, and voidness of the reservation.[17] The United States' treaty partners consider the reservation severable and void.[18] The United Nations Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions considers the reservation void.[19] In addition, numerous respected human rights organizations and jurists find the reservation unacceptable and void. *E.g.*, WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW

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[17] *Cf. Beazley*, 242 F.3d at 265 (failing to recognize that the HRC has no enforcement powers to *order* the United States to remove the reservation it otherwise finds "contrary to the object and purpose" of the treaty and "deplores").

[18] Eleven immediately and expressly opined that the reservation was unacceptable (Belgium, Denmark, Germany, Finland, Sweden, Spain, Portugal, Norway, the Netherlands, Italy, and France). *Multilateral Treaties Deposited With the Secretary General, Status as at 31 December 1994*, U.N. Doc. ST/LEG/SER.E/13 (1995). The Fifth Circuit panel completely avoided addressing their opinions. Italy, for one, has declared that the "reservation is **null and void** since it is incompatible with the object and purpose of art. 6 of the Covenant." *Id*.

The government of Switzerland wrote last year in this case, "Although Switzerland is aware of the reservation related to Article 6 of the Covenant made by the United States, [the] Government ***fully shares the view of the other Parties to the Covenant*** that this reservation is contrary to the object and purpose of the Covenant and should therefore, in accordance with the principles of international law, ***have no effect*** and be withdrawn." Letter from Ambassador Alfred Defago regarding "Execution of Mr. Napoleon Beazley" to Governor Rick Perry, July 16, 2001. The Swiss further emphasized that "Article 6 of the Covenant reflects the minimum rules under customary international law for the protection of life regarding juveniles, which cannot be altered through unilateral declarations." *Id*. Mexico, likewise, this year has appealed to Texas to stop Beazley's execution, citing the fact that the United States and Mexico are both parties to the Covenant.

[19] In 1998, the United Nations Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions "suggested" (as the HRC had) that the United States "lift the reservations, particularly on Article 6." However, he made this "suggestion" based upon his assessment that the reservation actually was "**void**." REPORT OF THE 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, at paras. 140, 156(k).

125 (Cambridge 1997) (finding that the United States is the "principal, if not the sole, offender of the prohibition on juvenile executions" found in Article 6(5) of the International Covenant) (full list too long to include).

The Administration of George Herbert Walker Bush promised our treaty partners that the United States would use judicial means to guarantee full compliance with the provisions of the Covenant. 31 I.L.M. 645, 657 (1992). Respecting that promise and the opinions of the United Nations and our friends, this Court should grant review to examine the possibility of a judicial remedy.

7. This Court should grant review of the Covenant issue in order to define for the lower federal and state courts the nature of rights afforded United States citizens in multilateral human rights treaties to which the United States is a party.

The well-established jurisprudence of European courts and commissions interpreting the European Convention on Human Rights (the first international human rights treaty, completed in 1950, and a model for the Covenant) and the Inter-American Court on Human Rights interpreting the American Convention holds that multilateral human rights treaties create "objective obligations" rather than a network of mutual, bilateral undertakings. *Ireland v. United Kingdom*, (1979-80) 2 E.H.R.R. 25 at para. 239; App.No. 788/60 *Austria v. Italy*, 4 Yearbook 116 at 140; *France (et al.) v. Turkey*, (1984) 6 E.H.R.R. 241; *The Effect of Reservations on the Entry into Force of the American Convention (Arts. 74 and 75)*, Advisory Opinion OC-282, 2 Inter-Am. Ct. H.R. (ser. A) (1982), at 15-16. The European Court of Human Rights has eloquently explained why, for example, the European Union, The Council of Europe, Switzerland, Norway, Sweden, Mexico and other countries have intervened in Beazley s case, even though he is a ***United States citizen***:

> Unlike international treaties of the classic kind, . . . [a multilateral human rights] Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement". . . . [A] Convention allows Contracting States to require the observance of those obligations without having to justify an interest deriving, for example, from the fact that a measure they complain of has prejudiced one of their own nationals.

Ireland v. United Kingdom, *supra*. The HRC also rejects the bilateral reciprocity model for Covenant practice and interpretation. 3 R. 0777-0778 (GENERAL COMMENT 24 at paras. 16-17). The Covenant is not a "web of inter-State exchanges of mutual obligations [but rather concerns] the endowment of individuals with rights." *Id*. at para. 17.

Given that treaty law fundamentally rests upon consent, a court may severe a reservation to a multilateral human rights treaty if: (1) the reserving Party recognizes the competence of the treaty monitor to judge Parties' compliance (*see* 31 I.L.M. 645, 649-50, 658-59 (1992); GENERAL COMMENT at para. 11; *United States v. Duarte-Acero*, 208 F.3d 1282 (11th Cir. 2000); (2) the competent treaty monitor declares the reservation unacceptable and its consequence deplorable (*Official Records*, *supra*); and (3) the Party was aware or merely *should have been* aware that its reservation might be deemed unacceptable (31 I.L.M. 645, 650 (1992); the Senate **was** aware). *Loizidou v. Turkey*, (1995) 20 E.H.R.R. 99, at paras. 94-95 (allowing severance of invalid restrictions where "respondent Government *must have been aware* . . . that the impugned restrictive clauses were of questionable validity under the Convention system and might be deemed impermissible by the Convention organs"); *Belilos v. Switzerland*, (1988) 10 E.H.R.R. 466, at para. 60 (allowing severance of invalid declaration where it was "beyond doubt that Switzerland [was], and regard[ed] itself as, bound by the Convention irrespective of the validity of the [challenged] declaration [and] the Swiss Government recognized the Court's competence to determine the . . .

issue"); *Power Authority v. Federal Power Comm'n*, 247 F.2d 538, 541 (D.C. Cir. 1957) (holding that federal court could determine acceptability of and sever a "reservation" that was "merely an expression of domestic policy which the Senate attached to its consent").

Separation of powers doctrine is no impediment to this Court's ability to exercise "judicial means" to guarantee the United States' compliance with the objective rights contained in the Covenant. Consistent with the international courts and HRC jurisprudence, the severability of the United States' reservation was recognized by the Senate during its period of advice and consent, as well as at the time of ratification. The Chair of the Senate Foreign Relations Committee pointedly observed that the Covenant reservations were purely domestic statements, not a part of the treaty, and, therefore, *not binding upon the judiciary* in the way a traditional treaty reservation might be.[20] Upon ratification of the Covenant, the Senate Foreign Relations Committee characterized the reservation to Article 6 in particular as non-binding and subject to removal (and, therefore, not a part of the treaty contract).[21] The record makes clear that, if this Court were to declare the reservation

[20] The Chair of the Senate Foreign Relations Committee, Sen. Claiborne Pell, held that the Covenant reservations were "purely domestic statement[s] . . . not part of the treaty contract and therefore hav[ing] no international effect." INTERNATIONAL HUMAN RIGHTS TREATIES: HEARINGS BEFORE THE COMM. ON FOREIGN RELATIONS, 96th Cong., 1st Sess. 79 (1979); *accord United States v. Duarte-Acero*, 208 F.3d 1282, 1285-86 (11th Cir. 2000) (finding that the Covenant's provisions themselves do "not purport to regulate affairs between nations"). Senator Pell concluded that, since the reservations were not integral to the Covenant, they probably would not bind the judiciary. *Id* (relying, in part, upon *Power Authority v. Federal Power Commission*, 247 F.2d 538 (D.C. 1957)). Certainly, according to Sen. Pell's and the Eleventh Circuit's understanding, an *invalid* reservation would not be binding upon the courts through the Supremacy Clause.

[21] The non-binding character of the reservation to Article 6 finds expression in the Senate Foreign Relations Committee's comments upon adoption of the Covenant recognizing that the necessity to remove the reservation might arise. The Committee "recognize[d] the importance of adhering to internationally recognized standards of human rights," and observed that, because Article 6 represented an "internationally recognized standard of human rights," change in

void, it would not invade the Senate's or Executive's treaty making powers. The reservation is severable. It is not a constituent part of the treaty, but rather a direction regarding domestic implementation of the treaty. This Court should grant review in order to clarify the law for the lower federal and state courts regarding the effect of a reservation on a multilateral human rights treaty.

8. This Court should grant review of the Covenant issue in order to correct the prevalent impression among the courts that the judiciary may not recognize rights afforded in a treaty ratified by the United States that are broader than those afforded in the federal constitution, as interpreted by this Court.

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domestic law might be "appropriate and necessary." 31 I.L.M. 645, 650 (1992). The Bush Administration, in turn, promised our treaty partners that "**judicial means**" would be used to guarantee full domestic compliance with the Covenant. *Id*. at 657.

This Court's decision in *Stanford v. Kentucky* has been interpreted by the lower federal and state courts examining this Covenant issue to provide a constitutional gloss on the (otherwise unacceptable) reservation, preventing criticism and severance of the reservation. *Beazley*, 242 F.3d at 266 (5th Cir. 2001) (citing *Ex parte Pressley*, 770 So. 2d 143 (Ala. 2000); *Domingues v. Nevada*, 961 P.2d 1279 (Nev. 1998), *cert. denied*, 528 U.S. 963 (1999)) (other citations merely rely on *Pressley*)).[22] This interpretation seems to erroneously assume that the federal constitution provides a ceiling rather than floor of protection. It also fails to recognize the Senate's express statement that "changes in U.S. law" might be "appropriate and necessary" in light of the United States' need for "compliance at the international level." 31 I.L.M. at 650.

9. This Court should grant review of the Covenant issue in order to determine how a remedy may be formulated for citizens whose rights under a multilateral human rights treaty are violated.

The evidence is strong of the existence of a fully-developed *jus cogens* norm that bars the death penalty for offenses committed by persons under 18: in short, worldwide adherence to the norm by treaty (minus the United States and Somalia, which is about to ratify) and also essentially universal compliance with the norm (minus the United States and, possibly, Iran). A reservation to a

[22] The Texas Attorney General likes to assert that Beazley cannot distinguish *White v. Johnson*, 79 F.3d 432, 440 & n.2 (5th Cir.), *cert. denied*, 519 U.S. 911 (1996). In *Johnson*, the Fifth Circuit did not treat the Covenant as ratified because the relevant facts in White's case precede ratification. *Id*. at 440 n.2. The case referred to a different reservation (to Article 7) not challenged by White as violating the object and purpose of the treaty. The binding character of the treaty as ratified and the validity of that reservation were not even before the Court. Consequently, the unremarkable truism that a treaty provision must be considered in light of an applicable reservation is all that *White* has in common with Beazley's case, bringing nothing to the question of whether and how a court may inquire into the acceptability of a reservation to a treaty. The Court in *Austin v. Hopper*, 15 F. Supp. 2d 1210, 1260 n.222 (M.D. Ala. 1998), like *White*, found itself bound by the United States' reservation to Article 7 in a context in which the reservation's validity was not challenged. *Id*.

treaty that violates such a *jus cogens* norm is void (just as a treaty that conflicts with the norm would be void). From this perspective, among many, the State of Texas has violated Article 6(5) of the Covenant and the rights owed Napoleon Beazley under that provision. Yet, courts around the country that have interpreted the Covenant, including the Fifth Circuit in Beazley's case, have run into the non-self-execution declaration and have interpreted it as a roadblock to a remedy.

This state of affairs does not square with our common law tradition nor our Constitution. Blackstone considered it a "general and indisputable rule that, where there is a legal right, there is also a legal remedy, by suit at action or law, whenever that right is invaded." *Alden v. Maine*, 527 U.S. 706, 812 (1999) (Souter, J., joined by Breyer, Stevens, and Ginsberg, JJ., dissenting) (quoting 3 Blackstone 23). The generation of framers thought this principle so important that they put it in several state constitutions. *Id*. Chief Justice Marshall asserted, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Id*. (citing *Marbury v. Madison*, 1 Cranch 137, 162-63 (1803)).

The doctrine of "self-execution" itself "masks a variety of issues." Carlos Manuel Vazquez, *Treaty Based Rights and Remedies of Individuals*, 92 Columbia L. Rev. 1082 (1992). The *declaration* of non-self-execution, in addition, has obscured, altered, and sometimes improperly replaced proper evaluation of whether the Covenant itself is self-executing. The Covenant seems obviously self-executing because it "in and of itself create[s] rights which are justiciable between individual litigants." *People of Saipan v. U.S. Dep't of Interior*, 502 F.2d 90 (9th Cir. 1974) (Trask, J., concurring); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). Senate testimony on the Covenant largely supports this interpretation. Indeed, if it were not deemed likely that the Covenant

is intrinsically self-executing, there would be no purpose in appending a declaration that certain of its provisions (Articles 1-27) are non-self-executing. The Bush Administration explained that the purpose of the declaration was to clarify that Articles 1-27 would not by themselves create private rights enforceable in U.S. Courts. 31 I.L.M. 645, 657 (1992). It explained that it intentionally exempted Article 50 ("The provisions of the Covenant shall extend to all parts of the federal States without any limitations or exceptions.") from the declaration so as to signal to treaty partners that the United States would "implement its obligations under the Covenant by appropriate legislative, executive and judicial means, federal or state as appropriate, and that the Federal Government w[ould] remove any federal inhibition to the states' abilities to meet their obligations." 31 I.L.M. at 657. A federal district court has appropriately described the result: "The fact that the Covenant creates no private right of action [as per the declaration] does not eliminate the obligations of the United States and all of its branches of government." *Maria v. McElroy*, 68 F. Supp. 2d 206, 234 (E.D. N.Y. 1999). The obligation of Article 6(5) remains. The personal right afforded by Article 6(5) remains. The Bush Administration, in fact, expressly intended that there would be a means of carrying out this obligation and providing a remedy for violation of the right.

This Court should grant certiorari review in order to determine how to fashion remedies for the violation of rights in multilateral human rights treaties that are declared non-self-executing. One remedy is simply to recognize that a treaty, even if not self-executing, may be used as a defense, because a treaty always nullifies inconsistent state law (*Kolovrat v. Oregon*, 366 U.S. 187, 197 (1961) (defense to escheatment of property); *Patsone v. Pennsylvania*, 232 U.S. 138, 145 (1914) (defense permitted, but nothing conflicted with state law); *Cook v. United States*, 288 U.S. 102 (1933) (defense to personal jurisdiction over defendant); *Ford v. United States*, 273 U.S. 593 (1927)

(same); *United States v. Rauscher*, 119 U.S. 407 (1886) (government violated treaty by trying defendant on charge differing from that forming basis of extradition grant); *see United States v. Pink*, 315 U.S. 203, 230-31 (1942) ("[S]tate law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty.")).

Another approach is to find that civil rights or habeas statutes (federal or state) may afford an individual a private right of action to raise Covenant claims. In the Court below, Beazley asserted that Articles 11.01, 11.04, and 11.23 of the Texas Code of Criminal Procedure provided such vehicles. At the Fifth Circuit, he argued that a private right of action should be available to him to raise Covenant claims under 28 U.S.C. § 2254(a), which specifically provides a vehicle to complain of "violation of the . . . treaties of the United States." *See Abebe-Jira v. Negewo*, 72 F.3d 844, 846-47 (11th Cir. 1996) (noting that a majority of courts hold that 28 U.S.C. § 1350 provides a private right of action for aliens complaining of international law violations). In *Abebe*, the Eleventh Circuit noted that, by providing an implementing statute, it was not affording new rights to aliens, but merely "opening the federal courts for adjudication of rights already recognized by international law." *Id*. at 846-47 (relying on treatment of the Covenant in *Abebe-Jira v. Negewo*, 1993 WL 814304, *4 (N.D. Ga. 1993)).

There is obvious violation of treaty and international law in the instant case. This Court respectfully should take on the task of figuring out how to "open the federal courts for adjudication" of citizens" (like Beazley"s) rights under a multilateral human rights treaty.

CONCLUSION

Petitioner Beazley respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

David L. Botsford
David L. Botsford*
Counsel of Record

Walter C. Long
Walter C. Long*

Law Office of David L. Botsford
1307 West Ave.
Austin, Texas 78701
512-479-8030 (phone)
512-479-8040 (fax)

*Members, Supreme Court Bar