NO. __________

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 2001

TORONTO MARKKEY PATTERSON,
Petitioner,

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

On Petition for Writ of Certiorari
To the United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

J. GARY HART
Texas Bar No. 09147800
Counsel of Record
2906 Skylark Drive
Austin, Texas 78757
(512) 206-3118
Fax (512) 206-3119

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

QUESTIONS PRESENTED FOR REVIEW

1. **DID THE FIFTH CIRCUIT COURT OF APPEALS ERR TO REJECT PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM ON THE BASIS OF ITS CONCLUSION THAT THE PROVISION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS BARRING EXECUTION OF JUVENILE OFFENDERS DOES NOT APPLY TO THE STATES THROUGH THE SUPREMACY CLAUSE OF THE CONSTITUTION?**

2. **DID THE FIFTH CIRCUIT COURT OF APPEALS ERR IN FAILING TO EXTEND THE LEGAL PRINCIPLE OF *CRANE V. KENTUCY*, 476 U.S. 683 (1986), TO THE FACTS OF PETITIONER'S CASE TO WHICH IT OUGHT LOGICALLY TO APPLY, AND FOR THAT REASON FAIL TO CONCLUDE THAT THE TEXAS COURT OF CRIMINAL APPEALS RENDERED A DECISION THAT WAS AN UNREASONABLE APPLICATION OF SUPREME COURT PRECEDENT FOR PURPOSES OF 28 U.S.C. § 2254 (d) (1)?**

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

COMES NOW Petitioner TORONTO MARKKEY PATTERSON and prays that a writ of certiorari issue to review the judgment of the United States Court Of Appeals For The Fifth Circuit described hereinbelow.

OPINIONS AND ORDERS IN THE CASE

This cause is on appeal from the denial of a petition for writ of habeas corpus on behalf of a Texas

death row inmate brought pursuant to 28 U.S.C. § 2254. The opinion of the Fifth Circuit Court of Appeals denied Patterson a certificate of appealability from the judgment of the district court in an unreported opinion, delivered on February 26, 2002. (Appendix A) The order of the United States District Court for the Northern District of Texas, Dallas Division, denying Patterson a certificate of appealability was signed on September 21, 2001. (Appendix B) On August 20, 2001, the district court's order was entered of record adopting the recommendation of the magistrate judge, thus granting Respondent's motion for summary judgment and denying the petition for habeas corpus relief. (Appendix C) The magistrate judge issued its recommendation on May 14, 2001. (Appendix D) In an unpublished order entered on May 3, 2000, the Texas Court of Criminal Appeals dismissed Petitioner's successive state post-conviction application for writ of habeas corpus as an abuse of the writ. (Appendix E) In an unpublished order entered February 3, 1999, the Texas Court of Criminal Appeals denied Petitioner relief in his initial state post-conviction application for writ of habeas corpus brought pursuant to Article 11.071 of the Texas Code of Criminal Procedure. (Appendix F) Petitioner's capital murder conviction was affirmed on direct appeal by the Texas Court of Criminal Appeals in an unpublished opinion on January 13, 1999. (Appendix G) Petitioner was convicted of capital murder and sentenced to death pursuant to a judgment in the state district court that was entered on November 21, 1995. (Appendix H)

JURISDICTION OF THIS COURT

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on February 26, 2002. This petition is timely filed within 90 days of the latter date by placing it in the United States Mail on or before May 27, 2002. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254

(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

1. **U.S. Const. Article VI, Section 2:**

> [a]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. **U.S. Const. Amend. VI:**

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the assistance of counsel for his defence.

3. **U.S. Const. Amend. XIV:**

> Section 1. . . . 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.

4. **International Covenant on Civil and Political Rights:**

> Article 4, Section 2. No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18 may be made under this provision.
>
> Article 6, Section 5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

5. **28 U.S.C. § 2254 (d) (1):**

> (d) An application for a writ of habeas corpus on behalf of a person in

custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

6. **Rule 608 (b), former Texas Rules of Criminal Evidence:**

> **(b) Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence.

STATEMENT OF THE CASE[1]

Issue One: At the time of this capital offense, Patterson was only seventeen years old. (23 RR 3953) Patterson failed to raise any issue with respect to his age at the time of the offense either on direct appeal or in his initial post-conviction application for writ of habeas corpus brought in state court. After the Texas Court of Criminal Appeals denied relief on his initial state writ application but before he filed his federal petition for writ of habeas corpus with the district court in Dallas, Patterson filed a subsequent application for writ of habeas corpus in state court, where for the first time he argued that his legal counsel at trial and on appeal had rendered ineffective assistance in failing to argue that his death sentence violated the International Covenant on Civil and Political Rights, a treaty to which the United States is a party state (hereinafter "ICCPR"). *See* Appendix I. The Texas Court of Criminal Appeals denied Patterson

1 "RR" denotes the reporter's record of Petitioner's state trial for capital murder.

permission to pursue this subsequent application, holding that he failed to meet the requirements for a subsequent writ application spelled out in Article 11.071, Section 5 (a) of the Texas Code of Criminal Procedure. Appendix E.

Having thus exhausted his ICCPR claim in state court, Patterson proceeded to raise it again in his federal petition. There he argued that the federal district court should reach the merits of his ineffective assistance of counsel claim, notwithstanding that it was procedurally defaulted in state court, because the execution of a juvenile offender is prohibited by the ICCPR, and therefore the imposition of the death penalty against him would constitute a fundamental miscarriage of justice in contemplation of this Court's opinion in *Sawyer v. Whitley*, 505 U.S. 333 (1992). The magistrate judge rejected this argument on the strength of the Fifth Circuit's opinion in *Beazley v. Johnson*, 242 F.3d 248 (5th Cir.), *cert. denied*, 122 S.Ct. 329 (2001), holding that Patterson could not demonstrate a fundamental miscarriage of justice because the specific provision of the ICCPR upon which he relied does not apply in capital cases within the United States. The district court adopted this recommended disposition, and denied Patterson a Certificate of Appealability. In an unpublished opinion, the Fifth Circuit also denied Patterson a Certificate of Appealability. The Fifth Circuit noted that, in order to show he is entitled to a Certificate of Appealability on an issue rejected on procedural grounds, Patterson must show it is reasonably debatable both whether he has a valid claim of a constitutional right on the merits, and whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The Fifth Circuit held that Patterson failed to establish the first of these requirements. Relying on its opinion in *Beazley*, the Fifth Circuit held that, because "this circuit has held unambiguously that the International Covenant on Civil and Political Rights does not apply to capital cases tried within the United States[,]" Patterson cannot establish the

"prejudice" prong of *Strickland v. Washington*, 466 U.S. 668 (1984).

Thus, although the district court and the Fifth Circuit rejected Patterson's ineffective assistance of counsel claim on somewhat different grounds, the rationale of each court was predicated on the same holding in *Beazley*. Although this Court denied Beazley's petition for certiorari, it did so without a full complement of justices. For reasons not present in Patterson's case, Justices Scalia, Souter, and Thomas took no part in consideration of Beazley's case. This Court should grant Patterson's petition for certiorari in order to address the important recurring federal question whether the ICCPR applies through the Supremacy Clause to ban the execution of juvenile offenders in domestic courts in the United States.

Issue Two: Shortly after 4:00 p.m. on June 6, 1995, Valarie Brewer arrived at the home of Evelyn Stiff, her mother, located at 1502 Prichard, in Dallas. (19 RR 3136, 3144, 3146, 20 RR 3237) There she discovered the body of her sister, Kimberly, in a recliner in front of the television set. (19 RR 3148-3151, 20 RR 3238-3239) Kimberly had been fatally shot once in the top left side of her head. (21 RR 3663-3670) In a bedroom of the house were found the bodies of Kimberly's daughters, six-year-old Jennifer Brewer and three-year-old Ollie Brown. (19 RR 3134-3135, 3153, 20 RR 3243, 3253-3254) Both had been shot in the head, and were dead. (20 RR 3277-3278, 21 RR 3605-3605, 3671-3675, 3678-3690, 3694)

There were many valuables in the house, but it appeared that nothing had been taken, and nothing in the house was out of order. (19 RR 3157, 3205-3206, 20 RR 3245-3246, 3438, 21 RR 3624) The next day Valarie realized that something was amiss in the garage. (19 RR 3162-3166, 20 RR 3442-3443) Three of the four wheels on her brother's BMW automobile were missing, and it was apparent someone had tried unsuccessfully to remove the fourth. (19 RR 3164-3165, 3179-3180) The wheels that had been

stolen were very expensive chrome-and-gold Daytons. (20 RR 3394, 3400, 3403) Knowing that her cousin, Patterson, had a particular affinity for such expensive wheels, and that his own Daytons had recently been stolen, she immediately suspected him, and told police. (19 RR 3183-3184, 20 RR 3303, 3443)

At that time Patterson was living part-time at the home of the parents of his girlfriend, Floria Rider, at 126 Buttercup. (20 RR 3297, 3350, 23 RR 3953) Around 3:00 p.m. on June 6th, Patterson arrived at Rider's house driving his grandmother's car. (20 RR 3316, 23 RR 4012) He seemed scared. (20 RR 3317) Patterson's friend, George Williams, was there at the house, and Patterson asked Williams to help him unload three Dayton wheels from the car and take them into the house. (20 RR 3320, 3325, 23 RR 4013, 4015) They hid the wheels in Floria's closet. (20 RR 3326) The next afternoon, Patterson, Rider, and Williams tried to sell the wheels. (20 RR 3328, 3331-3332, 3334-3336, 3391-3392, 3395-3397, 23 RR 4018-4020) Failing that, they drove to the home of Patterson's friend, Andrea Patterson (no relation), and left the wheels in her parent's garage. (20 RR 3337-3339, 21 3552, 3559-3564) When they arrived back at Rider's house, they found police officers waiting. (20 RR 3340-3341, 3418-3419) Patterson and Williams were taken downtown for questioning. (20 RR 3341, 23 RR 4022-4023)

Homicide Detective K. W. Wiginton took a pair of written statements from Patterson. (20 RR 3449-3479, 26 RR SX-103) In the first statement, Patterson admitted he had left Rider's house at about 11:00 a.m. on June 6th, and gone over to his Aunt Evelyn's house. He stayed for only a short while visiting Kimberly and Ollie, and then left. From there he drove to south Dallas, to a neighborhood he had lived in previously. There he ran into two Jamaicans he knew as "Jamaican Dee" and "Jamaican Clyde." Two days before these Jamaicans had "threatened" Patterson and his girlfriend and family unless Patterson would agree to "distract" Kimberly. (Apparently the Jamaicans needed Patterson's help in gaining access

to the house at 1502 Prichard so that they could, as they assured Patterson, "only . . . talk to" Kimberly.) The Jamaicans also agreed to pay Patterson $2,500 to help them. Patterson drove back to 1502 Prichard, and Kimberly met him at the door. As they visited, the Jamaicans drove up and came in the house. At gunpoint, Patterson was forced to help Clyde remove the wheels from the BMW in the garage. Clyde told Patterson to put the wheels in Patterson's grandmother's car, which Patterson did. That night he delivered the wheels to the Jamaicans, as instructed. They asked Patterson whether he wanted the money they had offered him. Patterson refused, stating he had only done what they had demanded "for my family." (26 RR SX-103) In this first statement, Patterson made no mention at all of the killings of Kimberly, Jennifer, and Ollie.

After taking Patterson's first statement, Wiginton conferred with the officer interrogating Williams. (20 RR 3472) Wiginton learned that Williams had revealed the true location of the wheels at Andrea Patterson's house, and had agreed to take police there. (20 RR 3341-3342, 3473) (Police later recovered the wheels in Andrea's garage, and found several of Patterson's fingerprints on one of the rims. (20 RR 3342, 21 RR 3566-3567, 3577-3578, 3583, 3627-3634)) Wiginton confronted Patterson with the inconsistency, and Patterson agreed to give a second statement. (20 RR 3472-3474) In it, Patterson adhered to his story about the Jamaicans. He also admitted, however, that he had shot Kimberly. Then he went to the children's room, stood at the doorway, and looked in. He started to walk away, but then "I turned back, closed my eyes and fired once. Then I had my eyes still closed and fired twice. Then I ran out of the house." He did not later meet the Jamaicans to hand over the wheels as instructed. (26 RR SX-103)

Patterson testified and gave an account similar in many respects to the combined statements he gave

Wiginton, except that he testified that Kimberly and her children were still alive when he and the Jamaicans left 1502 Prichard. (23 RR 4011, 4102) He denied ever telling Wiginton he killed them, or that he had in fact killed them. (23 RR 4037, 4060-4061) Patterson testified that upon his arrest he was taken to a small interrogation room with carpet on the walls and floor, sometime between 7:00 and 7:15 p.m., and left waiting there for about a half an hour. (23 RR 4025-4026) The room had a table and two chairs. (23 RR 4026) When Wiginton first entered the room, he was friendly, and Patterson felt he could trust him. (23 RR 4027-4028) This was his "first time being in a room and in some trouble like that." (23 RR 4028-4029) He had, in fact, never been interrogated by a police officer before. (22 RR 4038) He gave Wiginton a statement in which he admitted his presence at the crime scene, but not to the murders themselves. (23 RR 4027-4031) When Wiginton re-entered the room to take a second statement after consulting with another officer, he began to shout and forced Patterson to sit in the corner. (23 RR 4031) He was red-faced and angry, and close enough to spit in Patterson's face. (23 RR 4031-4032) He accused Patterson of lying in his first statement, and told Patterson (falsely) that police had recovered the gold rims and the murder weapon. (23 RR 4032) Wiginton then described the murder scene to Patterson, which was the first Patterson heard of the details of the shootings. (23 RR 4034) Wiginton accused Patterson of killing Kimberley, Jennifer, and Ollie, in order to obtain the rims. (23 RR 4034) He yelled at Patterson, and poked and pushed him with his finger in various places to illustrate where the victims had been shot, causing his head to move to the side. (23 RR 4036, 4038, 4047) The accusations persisted for a half an hour before Wiginton began to write out the second statement. (23 RR 4043) Patterson was upset, and cried the whole time Wiginton wrote out the second statement. (23 RR 4034-4035, 4038) At one point Wiginton's beeper went off, and after looking at the display, he informed Patterson (falsely) that

Patterson's fingerprints had been found on the murder weapon. (23 RR 4045) Patterson only signed the second statement because he had been held incommunicado in the room for over four hours, scared and confused. (23 RR 4047)

Wiginton testified that, after conferring with another officer, he re-entered the interrogation room and told Patterson that George Williams was going to show the police where the rims were located. (20 RR 3472-3473) He told Patterson that strangers could not have committed the murders, because Kimberly appeared too relaxed when found dead in the recliner, and a stranger would not have found it necessary to kill the children, since the children would not have been able to identify a stranger. (20 RR 3473) Patterson's eyes then "began to water," and he "wanted to do the next statement." (20 RR 3473) Wiginton denied he ever "punched" Patterson in the head, or slapped him, or spit on him. (23 RR 4138-4139) He denied forcing Patterson into a corner of the room during the interrogation. (23 RR 4139) He did admit that he had been trained to make a suspect uncomfortable during an interrogation, while himself appearing comfortable. (21 RR 3496-3497)

Patterson made a bill of exceptions, to proffer to the trial court the testimony he intended to elicit in the jury's presence. (22 RR 3897) During the bill, Wiginton testified about an interrogation he conducted about a month after Patterson's, in another capital murder investigation. (22 RR 3899-3900) He admitted that he took a statement from Michael Martinez, with Martinez dictating and Wiginton writing it out long-hand. (22 RR 3900-3901) After taking Martinez's first statement, Wiginton took two subsequent statements. (22 RR 3903-3905) In between statements, Wiginton confronted Martinez with "new facts," and told him that "we know you are lying." (22 RR 3904, 3906) He denied telling Martinez he could just go home if he signed the subsequent statements, or that he threatened to charge Martinez's

girlfriend unless he signed them. (22 RR 3907) He admitted, however, that it was not unusual for him to take a statement from a suspect, then confront him with conflicting physical evidence, and take another statement. (22 RR 3914) He acknowledged that another individual was ultimately charged with the capital murder to which he had gotten Martinez to confess. (22 RR 3908)

Michael Martinez also testified during the bill. (22 RR 3915) A twenty-one year old man, Martinez was arrested and charged with capital murder in July of 1995. (22 RR 3916) He was placed in a small interrogation room with two chairs and a table, and carpet on the walls, and made to wait for fifteen minutes. (22 RR 3918-3919) Martinez had never been in trouble with the law before, and never subjected to police interrogation. (22 RR 3921) At first Wiginton was friendly with Martinez, but he turned "rude" and forced him to sit in the corner when Martinez told him where he had been on the night of the murders. (22 RR 3926-3927) Wiginton sat up very close to Martinez and looked at him "straight in the eyes." (22 RR 3926) Wiginton assured Martinez that he knew Martinez was guilty, and that Martinez was "going to go down for these crimes." (22 RR 3921) After taking one statement from Martinez, Wiginton told Martinez that he knew he was a liar. (22 RR 3924) He yelled at Martinez and intimidated him, telling him he would "get the needle." (22 RR 3925-3927) He told Martinez he had witnesses "that can say you did it." (22 RR 3926) Wiginton then wrote out a second statement, telling Martinez that the first was "bullshit." (22 RR 3925) He told Martinez to "sign right here and you can go home." (22 RR 3928) He threatened to lock up Martinez's girlfriend and take her children away from her if he did not sign. (22 RR 3928) This continued "all night." (22 RR 3928) Martinez continually denied Wiginton's accusations, but he ultimately signed all three statements because he was "confused." (22 RR 3929-3932) The charges brought against him based on his statements were later dismissed, and another

man was charged with the capital offense. (22 RR 3908, 3916) The trial court ruled that none of this evidence could be proffered to the jury. (23 RR 3940, 4150)

On direct appeal, the Texas Court of Criminal Appeals held that evidence of Wiginton's interrogation of Martinez was inadmissible under Rule 608(b) of the former Texas Rules of Criminal Evidence. Acknowledging that under some circumstances, the rule must give way to paramount constitutional considerations, the Court nevertheless held that it was within the trial court's discretion, under *Delaware v. Van Arsdall*, 475 U.S. 673, at 679 (1986), to exclude the proffered evidence as potentially confusing to the jury and only "marginally relevant." (2 ROA 331-332) This Court denied Patterson's petition for certiorari. *Patterson v. Texas*, 528 U.S. 826 (1999).

Patterson raised the issue again in his federal petition for writ of habeas corpus. The magistrate judge held that the Court of Criminal Appeals's ruling was neither "contrary to" nor an "unreasonable application of" this Court's precedents under 28 U.S.C. § 2254 (d) (1), and Patterson was therefore not entitled to relief. Appendix D, at 14-17. The district court adopted this ruling and denied Patterson's Application for Certificate of Appealability. The Fifth Circuit also denied Patterson a Certificate of Appealability, holding that reasonable jurists would not find the district court's resolution of the claim to be debatable or wrong. Appendix A, at 2-4. Specifically, the lower federal courts declined to hold that the Court of Criminal Appeals unreasonably failed to extend the holding of *Crane v. Kentucky*, 476 U.S. 683 (1986), to apply to the facts of Patterson's case.

<u>REASONS FOR ALLOWANCE OF THE WRIT</u>

1. DID THE FIFTH CIRCUIT COURT OF APPEALS ERR TO REJECT

PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM ON THE BASIS OF ITS CONCLUSION THAT THE PROVISION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS BARRING EXECUTION OF JUVENILE OFFENDERS DOES NOT APPLY TO THE STATES THROUGH THE SUPREMACY CLAUSE OF THE CONSTITUTION?

THE ICCPR AND THE SUPREMACY CLAUSE

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

A. Senate Reservation: Validity

When it ratified the ICCPR, the United States Senate purported to enter a reservation providing that, notwithstanding its ratification, the states could continue to impose capital punishment "including such punishment for crimes committed by persons below eighteen years of age." 138 Cong.Rec. S4781-01,

S4783-84 (daily ed. April 2, 1992). No other signatory-nation to the ICCPR filed any reservation to Article 6, paragraph 5. Moreover, the governments of Belgium, Denmark, Finland, France, Germany, Italy, Netherlands, Norway, Portugal, Spain, and Sweden all registered objections to the Senate's reservation as incompatible with the object and purpose of the ICCPR. *See Multilateral Treaties Deposited with the Secretary-General, Status as of 31 December, 1994*, U.N. Doc. ST/LEG/SER.E/13, at 127-130 (1995). The Senate's purported reservation is invalid, for the following reasons.

Under international law, a signatory state wishing to become a party may make a reservation only if the treaty itself permits it and "the reservation is not incompatible with the object and purpose of the treaty." Vienna Convention on the Law of Treaties, *adopted* May 22, 1969, art. 19 (c), 1155 U.N.T.S. 331, at 336. *See also* Restatement, supra, at § 313 (1) (c). While the United States has not yet ratified the Vienna Convention, our Department of State has taken the position that it is the authoritative guide to current treaty law and practice. *See* Nicholls, *Too Young to Die: International Law and the Imposition of the Juvenile Death Penalty in the United States*, 5 Emory Int'lL.Rev. 617, 639-640, n. 171 (1991). The American Law Institute, in revising the Restatement of the Foreign Relations Law of the United States, took the Vienna Convention as its "black letter" for setting out principles related to the law of treaties. Maria Frankowska, *The Vienna Convention on the Law of Treaties Before the United States Courts*, 28 Va.J.Int'l.L. 281, 286 (1988). If indeed the Senate's purported reservation to Article 6, paragraph 5 of the ICCPR is, as the various governments listed above have opined, incompatible with the object and purpose of the ICCPR, then pursuant to the Vienna Convention it should not be recognized as valid.

The Human Rights Committee [hereinafter, "HRC") has declared the Senate's purported

reservation to be incompatible with the object and purpose of the ICCPR. The HRC was established as an adjudicative body by Part IV of the ICCPR itself, and is charged under Article 40 therein with reviewing and commenting on the reports of party states on the measures they have taken to implement the guarantees of the ICCPR, and also to render "such general comments as it may consider appropriate." Pursuant to these functions, the HRC has registered its opinion that the United States Senate's purported reservation to Article 6, paragraph 5 of the ICCPR *is*, in fact, "incompatible with the object and purpose of the Covenant." *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant; Comments of the Human Rights Committee*, 53rd Sess., para. 14, U.N. Doc. CCPR/C/79/Add.50 (April 7, 1995); *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (hereinafter, "*Official Records*"), para. 279, U.N. Doc. A/50/40 (October 3, 1995). *See* Appendix J. This specific comment came on the heels of the HRC's General Comment the year before in which it categorically declared that any reservation by any party state to the Covenant purporting to allow, *inter alia*, execution of minors would be impermissible as incompatible with the object and purpose of the Covenant. *General Comment No. 24(52) Relating to Reservations*, U. N. GAOR, Hum. Rts. Comm., 52nd Sess., 1382nd mtg., para. 8, U. N. Doc. CCPR/C/21/Rev. 1/Add. 6 (1994). *See* Appendix K. Because the United States Senate's reservation was impermissible under the terms of the treaty itself, and was in any event clearly incompatible with its object and purpose, it was invalid.[2]

Moreover, Article 4, paragraph 2 of the ICCPR itself states in no uncertain terms that there may

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

be no derogation from Article 6 of the treaty, which includes the prohibition on the execution of offenders less than eighteen years of age. ICCPR, 999 U.N.T.S. at 174. The HRC has noted that "[w]hile there is no automatic correlation between reservations to non-derogeable provisions, and reservations which offend against the object and purpose of the [ICCPR], a State has a heavy onus to justify such a reservation." *General Comment 24(52)*, supra, at para. 10. But the comments of the Senate Foreign Relations Committee in discussing the reservation to Article 6, paragraph 5 make clear that its purpose was simply to allow those individual states that impose capital punishment against 16 and 17 year olds to endure in that practice (at least for the time being), branding the ICCPR's contrary prohibition as "not acceptable." *United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights*, 31 I.L.M. 645, at 650 & 653 (1992). *See* Appendix L. This attitude hardly satisfies the "heavy onus" to show the reservation does not offend against the object and purpose of the ICCPR. On the contrary, it seems purposefully to thwart that object and purpose in a bald attempt to preserve the primacy of local domestic law. As such, it not only violates Article 4, paragraph 2 of the ICCPR, it also runs counter to Article 50, which expressly provides that all provisions of the ICCPR "shall extend to all parts of federal States without any limitation or exceptions." ICCPR, 999 U.N.T.S. at 185.

By ratifying the ICCPR and participating in the election of officers to the HRC, the United States expressly recognized the HRC's authority. A number of federal courts have also explicitly acknowledged the HRC's authority in matters of the ICCPR's interpretation. *See, e.g.*, *United States v. Duarte-Acero*, 208 F.3d 1282, 1287 (11th Cir. 2000) (the HRC's guidance may be the "most important" component in interpreting ICCPR claims); *United States v. Benitez*, 28 F.Supp.2d 1361, 1364 (S.D. Fla. 1998) (same); *United States v. Bakeas*, 987 F.Supp. 44, 46, n. 4 (D.Mass. 1997) (HRC has "ultimate authority

to decide whether a party's clarifications or reservations have any effect"); *Maria v. McElroy*, 68 F.Supp.2d 206, 232 (E.D.N.Y. 1999) (HRC interpretations are "authoritative").

However, in *Beazley v. Johnson*, supra, at 264-267, the Fifth Circuit refused to acknowledge the authoritativeness of the HRC's construction of the ICCPR, and its declarations that the Senate's purported reservation to Article 6, paragraph 5 was void. The Fifth Circuit found that the HRC's 1995 report did *not* authoritatively hold that Article 6, paragraph 5 was void, but merely issued a precatory "suggestion" and "recommendation" that the United States "review" its reservation "with a view to withdrawing" it. *Official Records*, supra, para. 292. 242 F.3d at 265. Moreover, the Fifth Circuit regarded the Senate's declaration recognizing the HRC as "competent" for purposes of dispute resolution under Article 41 of the ICCPR, *see* 31 I.L.M. at 649 & 658, as insufficient to "bind the United States to its decisions." 242 F.3d at 267.

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

> "[Human rights treaties], and the [ICCPR] specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity [for determining the validity of reservations *inter se*] has no place . . . . It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the covenant. This is in part because, as indicated above, it is an inappropriate task for State parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in

> the performance of its functions. In order to know the scope of its duty to examine a State's compliance under article 40 . . ., the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the [ICCPR] and with general international law."

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

B. Senate Reservation: Severability

By nevertheless ratifying the ICCPR, and in other respects as well, the United States has demonstrated its intent otherwise to accept and be bound by the treaty as a whole, and the result is that the United States is bound by all the provisions of the treaty, notwithstanding the purported reservation.[3] *See* William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 Brook. J. Int'l. L. 277, at 278, 316-323 (1995). As the HRC observed in its *General Comment No. 24(52)*, supra, at para. 18:

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

That this severability is "[t]he normal consequence" of an invalid reservation is established in the

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

jurisprudence of other international adjudicative bodies that have construed international human rights treaties that preceded the ICCPR.

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

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

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

C. The Panel Opinion in **Beazley**

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

It does not mean that the Senate's deviation from the treaty is acceptable as a matter of binding principles of international law.

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

Though other federal courts have found the constructions of the HRC persuasive, the *Beazley* panel noted that "these courts looked to the HRC only for guidance, *not* to void an action by the Senate." 242 F.3d at 267. Even if true as an empirical matter, that should not have prevented the Fifth Circuit from looking to the "guidance" of the HRC in resolving both the issue of the validity and of the severability of the Senate reservation. After all, the HRC has squarely addressed these issues, and spoken unequivocally on them – even if the HRC lacks authority to enforce its pronouncements. *General Comment 24(52)*, supra, paras. 8 & 18; *Official Records*, supra, paras. 279 & 281. It is puzzling that the *Beazley* panel should have preferred to look for its "guidance" to oblique case authority that either misconceives the true nature of the issue (*Domingeus* and *Pressley*), or fails utterly even to address it, because not raised (*White* and

Austin).

D. Is the ICCPR "Self-Executing"?

The *Beazley* panel declared the issue of whether the ICCPR is "self-executing" to be "moot" in light of its view of the validity of the Senate reservation, but nevertheless considered the issue "briefly." 242 F.3d at 267-268. In consenting to the ICCPR, the Senate also attached a declaration to the effect that the first 27 articles of the ICCPR are not self-executing. 31 I.L.M. at 657. The panel held the ICCPR *not* to be self-executing, based upon the holdings of other courts that had uncritically accepted this Senate declaration. 242 F.3d at 267-268. The panel observed that non-self-execution means that, absent express legislative implementation, a treaty fails to give rise to privately enforceable rights. *Id*. Because the panel found no legislation incorporating the first 27 articles into domestic law, it refused to enforce them. *Id*. *See also Hain v. Gibson*, ___ F.3d ___ (10th Cir. 2002 WL 241289, decided February 20, 2002) (slip op. at 16); *Buell v. Mitchell*, 274 F.3d 337, at 372 (6th Cir. 2001). This holding gives too broad a sweep to the Senate declaration.

The original purpose of the Supremacy Clause was to alter the British rule that all treaties are non-self-executing, to avoid the necessity of legislative implementation before any treaty provision could be enforced domestically. Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am.J.Int'l L. 695, at 697-700 (1995). While acknowledging early on that this was the import of the Supremacy Clause, this Court nevertheless recognized that a treaty provision must be found to "operate[ ] of itself without the aid of any legislative provision" before a domestic court can enforce it. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, at 314 (1829). But unless the language of a treaty is unclear, or the treaty's terms "import a contract, when either of the parties engages to perform a particular act[,]" or the treaty

itself calls for implementing legislation by the party states, it is deemed to be self-executing. *Id.*; *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833). None of these conditions applies here. Article 6, paragraph 5 could not be more plain in its prohibition against executing juvenile offenders. Contractual obligations are not at issue. The ICCPR does not by its terms require legislation in the party states as a condition of implementation of this plain prohibition. Such treaty "[o]bligations not to act . . . are generally self-executing." Restatement, supra § 111 (Reporter's Note 5), at 54.

Ultimately, whether a treaty provision was meant to "operate of itself," or instead, to require legislative implementation, is "a matter of interpretation for the courts when the issue presents itself in litigation," and is generally regarded as a matter of the intent of the parties to the agreement. *United States v. Postal*, 589 F.2d 862, 876 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979). Factors specifically relevant to the question of self-execution *vel non* are the purpose of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasability of alternative enforcement mechanisms, and the consequences of declaring a particular treaty provision self- or non-self-executing. *Id.*, at 877. Assessing these factors here, it would seem that Article 6, paragraph 5 of the ICCPR ought to be regarded as self-executing. The purpose of the ICCPR is clear – to protect basic human rights within the jurisdiction of party states – and the specific purpose of Article 6, paragraph 5 itself could hardly be more clear, *viz*: categorically to prohibit the execution of juvenile offenders. Domestic procedures exist for direct implementation, since violation of the right will invariably arise in the context of a capital prosecution of a juvenile offender in a domestic court, wherein the juvenile defendant can directly interpose the prohibition embodied in Article 6, paragraph 5 as a defense to imposition of the death penalty. Recognizing Article 6, paragraph 5 as a defense would essentially obviate

the need for any alternative, legislatively-created enforcement mechanisms. The consequence of recognizing self-execution would be simply to guarantee, in keeping with the manifest objective of the drafters of the ICCPR, that no offender younger than 18 at the time of his offense could be executed by virtue of a judgment in the domestic courts of the United States.

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

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

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

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

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

at 325-326.

This "is a defensive use of the treaty, and thus, not contrary to the Senate declaration." Vega & Fiore, supra, at 220-221. Allowing such a defensive use of the provisions of the ICCPR is consistent with the intent of the Senate declaration to avoid the creation of new private causes of action, while otherwise maximizing its admittedly competing goal fully to comply with its treaty obligations. *See* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 Yale J.Int'l L. 129, at137, 166, 193, 197, 210-214, 220 (1999). An express right of action is not necessary to invoke a treaty as a defense because the treaty nullifies inconsistent state law, and this Court has consistently sanctioned this kind of defensive use of treaty provisions without hesitating even to inquire whether the particular provision of the treaty relied upon was or was not self-executing. *See, e.g., Kolovrat v. Oregon*, 366 U.S. 187, 197 (1961) (treaty provided defense to escheat of property); *Ford v. United States*, 273 U.S. 593 (1927) (entertaining defensive use of treaty in criminal prosecution, but finding no conflict); *Patsone v. Pennsylvania*, 232 U.S. 138, 145 (1914) (same); *United States v. Rauscher*, 119 U.S. 407 (1886) (provision of extradition treaty invoked defensively to deny trial court jurisdiction over the person). *See also* Restatement, supra, § 111 (Reporter's Note 5), at 54. Under Article 50 of the ICCPR and the Supremacy Clause, both the United States and Texas are obligated to recognize such a defensive challenge to inconsistent state law, even if they are not permitted, *sans* legislation, to entertain a "private cause of action."

CONCLUSION

Whether the purported Senate reservation to the ICCPR is valid; whether, if invalid, the entire treaty applies in full force to domestic American courts; whether the provisions of the ICCPR are self-

executing; and whether, if not self-executing, Patterson may nevertheless invoke its provision against executing juveniles, not as a "private cause of action," but as a defense to imposition of the death penalty by a Texas court, are all important questions of federal law that have not been, but should be, settled by this Court. *See* Rule 10 (c), Supreme Court Rules. This Court has seldom construed international human rights treaties such as the ICCPR, and the lower courts, both federal and state, lack significant guidance in this area. There could hardly be a more important context to begin than is presented by the question whether international treaty law is applicable through the Supremacy Clause of the Constitution to bar the execution of a juvenile offender.

2. DID THE FIFTH CIRCUIT COURT OF APPEALS ERR IN FAILING TO EXTEND THE LEGAL PRINCIPLE OF *CRANE V. KENTUCY*, 476 U.S. 683 (1986), TO THE FACTS OF PETITIONER'S CASE TO WHICH IT OUGHT LOGICALLY TO APPLY, AND FOR THAT REASON FAIL TO CONCLUDE THAT THE TEXAS COURT OF CRIMINAL APPEALS RENDERED A DECISION THAT WAS AN UNREASONABLE APPLICATION OF SUPREME COURT PRECEDENT FOR PURPOSES OF 28 U.S.C. § 2254 (d) (1)?

THE AEDPA

The Antiterrorism and Effective Death Penalty Act (AEDPA), and specifically, 28 U.S.C. § 2254 (d) (1), requires the federal courts to defer to the state habeas court's resolution of federal constitutional issues unless to do so would result "in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" A state habeas court's decision is deemed an "unreasonable application of" Supreme Court precedent "if the state court identifies the correct legal rule" from that precedent, "but unreasonably applies it to the facts of the particular state prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 407 (2000). In making this latter inquiry, the federal court "should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.*, at 409.

In *Williams*, this Court recognized, but did not necessarily adopt, the Fourth Circuit's alternative way in which it could be said that a state court decision amounts to an "unreasonable application" of Supreme Court precedent, *viz*: "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply, or unreasonably refuses to extend that principle to a new context where it should apply." *Id.*, at 407. The Sixth, Seventh, Eighth, and Ninth Circuits seem since to have adopted this alternative formulation, *see Van Tran v. Lindsey*, 212 F.3d 1143,

at 1150 (9th Cir.), *cert. denied*, 531 U.S. 944 (2000); *Jackson v. Miller*, 260 F.3d 769, at 774 (7th Cir. 2001); *Moore v. Purkett*, 275 F.3d 685, at 688 (8th Cir. 2001); *Taylor v. Withrow*, ___ F.3d ___ (6th Cir., 2002 WL 463731, decided March 28, 2002) (slip op. at 2), but other circuits have recognized it to be an open question whether it should apply or not. *Hurtado v. Tucker*, 245 F.3d 7, at 15-16 (1st Cir.), *cert. denied*, 122 S.Ct. 282 (2001); *Lurie v. Wittner*, 228 F.3d 113, at 129-130 (2nd Cir. 2000), *cert. denied*, 532 U.S. 943 (2001); *Bell v. Jarvis*, 236 F.3d 149, at 157-158 (4th Cir. 2000), *cert. denied*, 122 S.Ct. 74 (2001); *Williams v. Coyle*, 260 F.3d 684, at 699-700 (6th Cir. 2001). Even in its more involved post-*Williams v. Taylor* discussions of the "unreasonable application" aspect of § 2254 (d) (1), the Fifth Circuit has yet to address this issue. *E.g.*, *Gardner v. Johnson*, 247 F.3d 551, at 557 & 559-560 (5th Cir. 2001). It declined to do so in the instant case, refusing Patterson's Application for Certificate of Appealability without even mentioning the issue.

Both the Due Process Clause of the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment guarantee criminal defendants a meaningful opportunity to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, at 690 (1986). "That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Id*. These constitutional principles of due process and confrontation are of such paramount importance that they will sometimes trump even an individual state's own policy, as expressed by common-law, statute, or rule, either procedural or substantive. *Id*., at 690, citing, *inter alia*, *Chambers v. Mississippi*, 410 U.S. 284, at 302 (1973); *Davis v. Alaska*, 415 U.S. 308, at 319-320 (1974).

In *Crane* itself, a Kentucky trial court sustained the State's objection to proffered evidence of the

circumstances of the defendant's own confession, and prohibited the defendant from asking the interrogating officer questions about the circumstances of the interrogation during his cross-examination. The trial court reasoned that such evidence was immaterial because the issue of the voluntariness of the confession had already been ruled on as a matter of law in a pre-trial proceeding. The Supreme Court readily reversed the state court in a unanimous opinion, pointing out that the circumstances of the confession would also be relevant, as a factual matter for the jury's consideration, to the *reliability* of the confession. *Id.*, at 687-690. Noting that Patterson was allowed to develop the circumstances of *his own* interrogation, and to cross-examine Wiginton on that topic, the magistrate judge ruled that the state court's failure to hold it to be error to exclude evidence of Wiginton's interrogation of *another* capital murder suspect was neither contrary to, nor an unreasonable application of, *Crane*. Appendix D, at 16-17. The Fifth Circuit agreed, observing that this Court "has not extended *Crane* into new contexts such as the one presented here." Appendix A, at 3. The Fifth Circuit concluded that because of "the factual dissimilarities between *Crane* and this case, and [this Court's] refusal to extend *Crane*," Patterson could not meet the criteria for a Certificate of Appealability. Appendix A, at 4.

Patterson has never contended that the Court of Criminal Appeals's disposition of this claim was "contrary to" *Crane*. That is to say, he has never maintained that the facts of his case are "materially indistinguishable" from those of *Crane*, such that it could be said that the state court's rejection of his claim was squarely at odds with the *Crane* Court's own disposition of the identical legal issue. *See Williams v. Taylor*, supra, at 406. But it has always been his contention that the state court's resolution of his claim represents an "unreasonable application" of *Crane* to the facts of his case. It must be the case, after all, that facts that are materially *distinguishable* from the facts of Supreme Court precedent announcing general

legal principles must sometimes nevertheless be sufficiently *similar* to invoke those general legal principles. Otherwise, there would be no independent significance to the "unreasonable application" clause of § 2254 (d) (1), contrary to this Court's conclusion in *Williams v. Taylor*, supra, at 405. The Fifth Circuit ignored Patterson's claim that the Court of Criminal Appeals's disposition was "unreasonable" because it unreasonably refused to extend the legal principle of *Crane* to a new context where it ought to apply. The Fifth Circuit decided neither whether such an analysis is appropriate under 28 U.S.C. § 2254 (d) (1), nor whether, assuming it was, the state court's disposition was indeed "unreasonable" in this respect. This Court should now grant Patterson's petition for certiorari to determine whether the Texas Court of Criminal Appeals's resolution of his claims was "unreasonable" in that it unreasonably refused to extend the legal principle embodied in *Crane v. Kentucky*, supra, to the facts of his case.

EXTENDING THE RULE OF CRANE V. KENTUCKY

Rule 608 (b) of the former Texas Rules of Criminal Evidence prohibits evidence of unadjudicated specific misconduct of a witness for purposes of attacking or supporting his credibility, either by eliciting testimony of such conduct during cross-examination of the witness, or by extrinsic evidence. This is in keeping with the general policy, embodied in Rule 404 (a) of those same rules to exclude evidence of a person's character or character traits in order to support an inference that he acted in conformity therewith on a particular occasion. But evidence of specific misconduct is admissible under the Texas Rules of Criminal Evidence, notwithstanding Rule 404 (a), when it serves some inferential purpose besides mere character conformity, under Rule 404 (b). *See Montgomery v. State*, 810 S.W.2d 372 (Tex.Cr.App. 1991) (opinion on rehearing). The Court of Criminal Appeals acknowledged, moreover, that the rules of criminal evidence, and Rule 608 (b) in particular, must sometimes bow to paramount constitutional rights.

Appendix G, at 19-20.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, supra, at 302. In *Chambers*, Mississippi applied its common law hearsay rule to exclude evidence that another man admitted in out-of-court statements to others that he committed the crime, refusing to recognize an exception for statements against penal interest. This Court reversed the conviction, holding that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id*. Similarly, in *Davis v. Alaska*, supra, the State invoked provisions of juvenile law to prohibit the accused from exposing the possible bias of its principal witness. Again this Court reversed, holding that "[i]n this setting, we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender." 415 U.S. at 319. The Court elaborated that "the State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records." *Id*., at 320. Finally, in *Crane* itself, this Court observed that "[i]n the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of a basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." 476 U.S. at 690-691 (internal quotation omitted).

The Fifth Circuit cited *Montana v. Egelhoff*, 518 U.S. 37, at 53 (1996) (plurality opinion), and *United States v. Scheffer*, 523 U.S. 303, at 308 (1998), for the proposition that *Crane* did not purport to undermine the principle that a defendant's right to introduce relevant evidence is not unlimited, and that states may prohibit the introduction of relevant evidence so long as it has a "valid" reason for doing so. Appendix A, at 3-4. But it is also true under this Court's precedents that any limitations imposed on the

right to confront adverse witnesses and present a complete defense "requires that the competing [state] interest be closely examined." *Chambers v. Mississippi*, supra, at 295. The Fifth Circuit did not even address the validity of the State's competing interest in this case, much less closely examine it. The Fifth Circuit seemed of a mind to think that as long as there is a valid purpose behind a statute or an evidentiary rule, any specific inquiry whether its application to a particular set of facts was unconstitutional is unnecessary. Appendix A, at 4. This notion is clearly belied by *Chambers v. Mississippi* and *Davis v. Alaska*, both supra. *See also Rock v. Arkansas*, 483 U.S. 44, at 61 (1987) (categorical rule excluding all hypnotically refreshed testimony cannot constitutionally be applied to defendant himself, without reference to the particular facts of the case, though rule was designed to ensure trustworthy evidence, because "[a] State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case.")

The only "valid" state justification that the Court of Criminal Appeals offered here was the trial court's prerogative to limit the scope of otherwise proper cross-examination to keep out only "marginally relevant" matters. As Patterson will demonstrate *post*, Martinez's testimony, and cross-examination of Wiginton about it, were far more than just "marginally relevant" to Patterson's defense, in ways that do not even begin to implicate the State's policy against inferences of bad character for truthfulness deriving from specific misconduct. The contrary conclusion of the state courts, as in *Crane*, "was wrong[,]" and, on close examination, does not present a constitutionally acceptable justification for excluding the evidence. *Montana v. Egelhoff*, supra, at 49-50 & 53. According proper significance to the relevance and weight of the evidence of Martinez's interrogation, it becomes clear that the Court of Criminal Appeals's decision constituted an unreasonable application of this Court's precedents, in that it marked a refusal to extend a

general legal principle that is well-settled in Supreme Court case law to a new context in which it should clearly apply. The district court should not have deferred to it; the Fifth Circuit erred to conclude that reasonable jurists could not find the district court's decision at least debatable.

UNREASONABLE APPLICATION OF CRANE V. KENTUCKY

A. The Excluded Evidence was Highly Probative of the Voluntariness of Patterson's Second Statement

Patterson's proffered evidence was clearly more than just "marginally relevant." In the first place, it was relevant to the issue of the voluntariness of Patterson's second statement. Patterson testified that Wiginton used certain coercive devices; Wiginton denied that he had. Martinez's testimony showed that Wiginton had used those same coercive devices to interrogate another young man just a month later. This gave the jury a concrete reason to prefer Patterson's account of his own interrogation over Wiginton's. Through Rules 608 (b) and 609 of it former Rules of Criminal Evidence, Texas has expressed a policy that evidence of specific conduct not resulting in a final felony conviction, or conviction for a lesser crime involving moral turpitude, is an unacceptable indicium of a witness's character for truthfulness. Here, however, the evidence was not offered to show Wiginton is of bad character in general, and therefore unworthy of belief. Its purpose as impeachment was far more specific than that. It was offered to show that, because Wiginton conducted an interrogation near in time to Patterson's, which was substantially similar to Patterson's description of his own interrogation, there is reason to believe that Patterson's account of his own interrogation is closer to the truth than Wiginton's. This logic does not involve the unfair inference that Wiginton should not be believed because he is a wrong-doer in general, which is what Rules 608 (b) and 609 are meant to prohibit. Any danger that the jury might improperly dwell on Wiginton's

character could easily be addressed in a limiting instruction, under Rule 105 (a) of the former Texas Rules of Criminal Evidence, which the State may invoke as readily the defendant to direct a jury's attention to the appropriate purpose for which evidence is admitted, and away from the inappropriate.

B. The Excluded Evidence was Highly Probative of the Reliability of Patterson's Second Statement

Moreover, and more importantly, Martinez's testimony also had relevance far beyond its value simply to impeach Wiginton. It was also relevant to show that there was good reason to question the *reliability* of Patterson's second statement. As was the case in *Crane*, Patterson's jury likely wondered why he would have admitted his guilt if he had not really shot Kimberley and her children. *See* 476 U.S. at 689 ("stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?"). They may well have believed that, even if Patterson's account of the interrogation were true, and Wiginton was lying, Wiginton's coercive tactics were insufficient to produce a false confession. Indeed, it is only natural for a jury to doubt that a truly innocent person would ever confess to a brutal crime under any circumstances short of torture. Martinez's testimony was relevant to show that, while investigating another brutal capital crime, the same interrogator, using substantially the same method of interrogation on another young man who had never submitted to police interrogation before, had in fact extracted a false confession. This would serve to support the inference that Wiginton's particular method of interrogation was sufficient to cause Patterson to sign a statement that was not true, and would tend to deflate the jury's natural and entrenched presumption that an innocent man would not have confessed under the circumstances. Patterson could not possibly

accomplish this objective by virtue of his own testimony alone.

Nor does the probative value of Martinez's interrogation depend upon Martinez's knowledge of Patterson's interrogation, or whether the two capital murders were "related" in any way, as the Court of Criminal Appeals seems to have believed. Appendix G, at 20. The only common denominators needed to establish relevancy are Wiginton's involvement, his use of similarly coercive interrogation tactics to obtain confessions from each of the two callow youths, and the fact that Martinez's ultimate confession turned out to be false. Under Texas law at the time of Patterson's trial, evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, former Texas Rules of Criminal Evidence. Whether or not Patterson's second confession was reliable was a fact of consequence to the determination of his guilt or innocence, specifically to the question whether he was the killer. Most jurors would be loathe to believe an accused would falsely implicate himself in so serious a crime as capital murder. That the same interrogator using the same technique did in fact obtain a false confession from another young capital murder suspect only a month after obtaining Patterson's confession has some tendency to make more probable than it would be without that evidence that Patterson's confession to a capital crime was also false. And given the tendency of that evidence to dispel the otherwise understandable assumption that a wrongly accused man would *never* falsely implicate himself in so serious a crime, its probative power is manifest.

The Court of Criminal Appeals apparently believed that Martinez's testimony was only "marginally relevant" because it demonstrated no "particular interest, bias, or motive" on Wiginton's part against Patterson. "Moreover, this testimony did not demonstrate any lack of capacity on the part of the witness

or specifically rebut any assertion made by the witness on direct examination." Appendix G, at 20. But Martinez's testimony *did* tend to rebut Wiginton's assertion that he did not use the coercive devices Patterson claimed he did, since it showed that under nearly identical circumstances he used such tactics on another occasion. In any event, this Court has never suggested that the right to present a complete defense and to confront one's accusers is necessarily limited to providing the opportunity to show bias or lack of capacity of a witness, or to rebut false assertions he might make on direct examination. Cross-examination does not exist *solely* as a means of discrediting a witness. It also serves -- in fact, it *principally* serves -- "to delve into a witness's story to test the witness's perceptions and memory[.]" *Davis v. Alaska*, supra, at 316. Martinez's testimony was relevant because it effectively impugned both the voluntariness and the reliability of Patterson's second statement, quite apart from its tendency merely to impeach Wiginton's character. From the content and tenor of Wiginton's testimony about his interrogation of Patterson, it is clear that *he* did not regard it to be of the kind likely to induce a false or involuntary confession. The constitutional principles of due process and confrontation entitled Patterson to present Martinez's story, and invite the jury, through cross-examination, to measure Wiginton's perception of Patterson's interrogation against it. As in *Crane*, it was "central to [Patterson's] claim of innocence" to test Wiginton's — and indeed, the jury's own — perception in this way. 476 U.S. at 690.

C. Failure to Extend the Legal Principle of **Crane** *and Its Precedents to a Context to Which It Ought to Apply*

The general principle laid down in *Crane* is that it violates a defendant's constitutional right, deriving from Fourteenth Amendment due process and the Compulsory Process and Confrontation clauses of the Sixth Amendment, to deprive him the opportunity to present relevant, highly probative evidence relating

to the reliability of his confession, "[i]n the absence of any valid state justification[.]" *Id*. On the facts of this particular case, Rule 608 (b) did not serve a state justification that was sufficiently compelling to trump Patterson's right to confront Wiginton, and present Martinez's story. The contrary conclusion of the Texas Court of Criminal Appeals represents an unreasonable failure to extend the principle of *Crane* and its precedents to the particular facts presented, a situation in which it clearly ought to apply. This Court should grant Patterson's petition for certiorari to clarify that "an unreasonable application of" Supreme Court precedent includes, as hinted by *Williams v. Taylor*, supra, the unreasonable failure to extend a clear and firmly established legal precedent to a distinguishable set of facts to which it should, nevertheless, logically apply. This is an important question of federal law that has not been, but should be, settled by this Court. *See* Rule 10 (c), Supreme Court Rules. The Court should then reverse the Fifth Circuit's holding that no reasonable jurist could conclude that the district court erred to find that Patterson was not deprived of his constitutional right to a meaningful opportunity to present a complete defense.

CONCLUSION

For the foregoing reasons, a writ of certiorari in this cause should be allowed to review the judgment of the United States Court Of Appeals for the Fifth Circuit described hereinabove.

Respectfully submitted,

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J. GARY HART
Counsel of Record
Texas Bar No. 09147800
2906 Skylark Drive
Austin, Texas 78757
(512) 206-3118
Fax (512) 206-3119