NO. 01-11170

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NEW ORLEANS, LOUISIANA

TORONTO MARKKEY PATTERSON,	§	**PETITIONER - APPELLANT**
VS.	§	
	§	
JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION	§	**RESPONDENT - APPELLEE**

Appeal from the United States District Court for the Northern District of Texas Dallas Division (U.S.D.C. No. 3:99-CV-0808-G)

APPLICATION FOR CERTIFICATE OF APPEALABILITY AND BRIEF IN SUPPORT

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VS.	§	
	§	
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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1) Toronto Markkey Patterson, Petitioner - Appellant

2) Janie Cockrell, Director, Texas Department of Criminal Justice, Institutional Division, Respondent - Appellee

_____

J. GARY HART
Attorney of Record for
Toronto Patterson, Appellant

STATEMENT CONCERNING ORAL ARGUMENT

Appellant requests oral argument, believing that oral argument would be useful to the Court in resolving the issues raised in this appeal. Appellant's arguments involve application of well settled Supreme Court precedent to fairly unique and complex factual circumstances, and some explication through oral argument would undoubtedly aid this Court in its resolution of the issues.

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TO THE HONORABLE JUDGES OF THE COURT OF APPEALS:

COMES NOW TORONTO MARKKEY PATTERSON, Petitioner-Appellant in the above numbered and styled cause, by and through his attorney, **J. GARY HART**, and pursuant to Fed.R.App.Pro. 28 and Local R. 28.2, files this his application for certificate of appealability and brief in support.

STATEMENT OF JURISDICTION

This is a direct appeal of a final judgment of the district court entered on August 20, 2001, denying Patterson's petition for writ of habeas corpus, in which he sought relief from a state conviction for capital murder and sentence of death. The district court had jurisdiction pursuant to 28 U.S.C. § 2254. Patterson timely filed his notice of appeal on September 13, 2001. The district court denied Patterson's Application for Certificate of Appealability on September 21, 2001. This Court has jurisdiction to determine whether or not to grant Patterson a Certificate of Appealability pursuant to 28 U.S.C. § 2253 (c), and Fed.R.App.Pro. 22 (b). Patterson's application and brief in support is due on November 9, 2001, and is therefore timely filed.

STATEMENT OF THE ISSUES

Patterson would ask this Court to grant him permission to appeal the following issues, which, for the reasons that follow, he maintains are at least debatable among reasonable jurists:

Issue One

Whether Petitioner' was prevented from presenting a complete defense in violation of the Due Process Clause of the Fourteenth Amendment and/or his Sixth Amendment right to confront the witnesses against him because he was prevented from presenting evidence that Detective Wiginton extracted a false confession from Michael Martinez using tactics similar to those he used with Petitioner.

Issue Two

Whether Petitioner's sentence of death violated the Supremacy Clause because the International Covenant on Civil and Political Rights, an international treaty ratified by the United States, prohibits the execution of offenders for crimes committed while under the age of eighteen.

Issue Three

Whether Petitioner's sentence of death violated the Sixth Amendment because Petitioner was deprived of the effective assistance of trial and/or appellate counsel in that counsel failed to invoke the provisions of the International Covenant on Civil and Political Rights, an international treaty ratified by the United States which prohibits the execution of offenders for crimes committed while under the age of eighteen.

Issue Four

Whether Petitioner's death sentence violates the Sixth Amendment Guarantee of effective assistance of counsel because his trial counsel failed to investigate and present substantial mitigating evidence at the punishment phase of trial.

STATEMENT OF THE CASE

Petitioner was found guilty of capital murder on November 17, 1995, and on November 21, 1995, the jury answered the statutory special issues in such a way that

the trial court was obliged to assess the death penalty. On appeal, the Texas Court of Criminal Appeals affirmed this conviction in an unpublished opinion. *Patterson v. State*, (Tex.Cr.App., No. 72,282, delivered January 13, 1999). An attorney from Texarkana, Barry Bryant, was appointed by the Court of Criminal Appeals to represent Petitioner in his state post-conviction application for writ of habeas corpus, filed with the district clerk in Dallas County on September 8, 1997. On May 21, 1998, the convicting court entered an order finding no controverted, previously unresolved facts requiring an evidentiary hearing. Petitioner and the State timely filed proposed findings of fact and conclusions of law. On June 24, 1998, the convicting court essentially adopted the State's proposed findings and conclusions, and transmitted the proceedings to the Texas Court of Criminal Appeals.

On August 19, 1998, the Texas Court of Criminal Appeals granted Barry Bryant's motion to withdraw. On December 3, 1998, the Court requested undersigned counsel to accept an appointment in a "caretaking" capacity. On February 3, 1999, the Court of Criminal Appeals denied relief in a written, unpublished order, observing that the convicting court's recommended findings of fact and conclusions of law were supported by the record. By order of this Court on April 21, 1999, undersigned counsel was appointed under the provisions of 28 U.S.C. § 848 (q) to represent Petitioner in the present federal petition for writ of habeas corpus brought pursuant to

28 U.S.C. § 2254. On October 4, 1999, the United States Supreme Court denied Petitioner's petition for writ of certiorari following his direct appeal. *Patterson v. Texas*, 528 U.S. 826 (1999).

Patterson filed his federal petition on October 4, 2000. The Director timely filed an answer and motion for summary judgment, and Patterson filed a brief in opposition to the motion for summary judgment on February 23, 2001. On May 14, 2001, the Federal Magistrate Judge recommended that relief be denied. Patterson filed timely objections to the Magistrate Judge's recommendation, but on August 20, 2001, the district court entered an order and judgment expressly adopting the findings and conclusions of the Magistrate Judge.

STATEMENT OF FACTS[1]

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

[1] The Record of Patterson's capital murder trial in state court will be denominated as "RR," while the record in the federal district court will be denominated "ROA."

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 Patterson'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)

Other evidence circumstantially tied Patterson with the shootings. A minute spray of blood was detected on the clothes Patterson wore on the day of the offense. (20 RR 3318, 22 RR 3835-3844) Although the murder weapon was never recovered, a few months before the shooting Patterson's uncle saw him in possession of a .38 caliber pistol very much like the probable murder weapon. (22 RR 3784-3786)

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 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) At the time of the offense, Patterson was seventeen years old. (23 RR 3953)

SUMMARY OF ARGUMENT

1) The trial court prohibited Patterson from developing evidence that the same police officer who interrogated him had extracted a false confession from another young suspect, using substantially the same tactics, in another capital investigation shortly after extracting Patterson's statement. This ruling deprived Patterson of his rights under the Due Process Clause of the Fourteenth Amendment and the

Confrontation Clause of the Sixth Amendment to present a complete defense. The state court's contrary ruling constituted an unreasonable application of Supreme Court precedent, failing to extend the legal principle of Supreme Court caselaw to a set of facts that, while not materially indistinguishable, nevertheless to which the principle ought logically to apply. The state court was unreasonable to conclude that the proffered evidence was only "marginally relevant." It was highly relevant, not only to the voluntariness of Patterson's statement, but also, critically, to its reliability. Moreover, the state court's alternative holding that any error was harmless was an unreasonable application of harmless error principles to the facts of Patterson's trial. Assuming that the damaging potential of the trial court's ruling excluding the evidence was fully realized, the jury may not have disregarded the only direct evidence that Patterson was the actual shooter. Since identity of the actual killer was a hotly contested issue in the case, the error could not have been harmless, either under the harmless error test that applies on direct appeal or that which applies to federal courts in federal habeas review.

2) The International Covenant on Civil and Political Rights, to which the United States is a party, prohibits execution of offenders younger than 18 years of age. Patterson was seventeen. Thus, his death sentence violates the Supremacy Clause, which makes treaty law supreme over inconsistent state law. While the United States

Senate purported to enter a reservation to the prohibition on executing minors, that reservation is void as contrary to the object and purpose of the treaty. Moreover, invalid reservations to human rights treaties are generally severable, meaning that the treaty applies in full force, notwithstanding the reservation. The United States Senate also entered a declaration that the treaty is not self-executing. Its intent was to avoid the creation of new private causes of action. However, the declaration itself is of questionable validity, and in any case Patterson invoked the treaty as a defense, which does not fall under the terms of the declaration. Should enabling legislation be required, then 28 U.S.C. § 2254 (a) itself provides a mechanism by which Patterson can challenge the legality of his death sentence under binding treaty law.

Because both trial and appellate counsel were either unaware of the existence of, or failed to investigate the applicability of, this treaty to Patterson's case, and because Patterson could not have been assessed a death sentence had they invoked it, Patterson was also deprived of his Sixth Amendment right to the effective assistance of counsel. Although Patterson's treaty-based claims were not raised in state court, the federal habeas courts must entertain them nonetheless because failure to do so would result in a fundamental miscarriage of justice.

3) Trial counsel rendered deficient representation at the punishment phase of Patterson's trial when they failed to investigate significant mitigating evidence. Had

trial counsel supplemented the mitigating evidence they presented with other readily available evidence, there is a reasonable probability the jury would have imposed a life sentence. Although Patterson did not raise this claim in the state court, his procedural default should be excused because his state habeas counsel failed to investigate any extra-record claims, and state habeas corpus was the first and only forum in which he could have raised ineffectiveness of his trial counsel. The ineffectiveness of Patterson's state habeas counsel constitutes cause for his procedural default.

ARGUMENTS AND AUTHORITIES

STANDARD OF REVIEW

A certificate of appealability should be issued if the applicant makes a substantial showing of the denial of a constitutional right. *Lamb v. Johnson*, 179 F.3d 352, at 356 (5th Cir.), *cert. denied*, 528 U.S. 1013 (1999). A petitioner makes a substantial showing if he demonstrates that his petition involves issues which are debatable among reasonable jurists, that a court could resolve the issues differently, or that the issues are adequate enough to deserve encouragement to proceed further. *Id*. The applicant need not show he would necessarily prevail on the merits of his claims. *Barefoot v. Estelle*, 463 U.S. 880 (1983). The dire nature of the penalty in a capital case is a relevant consideration in determining whether to issue a certificate of appealability. *Lamb v. Johnson*, supra, at 356. In capital cases, any doubts should be

resolved in favor of the petitioner. *Id*.

Issue One

Whether Petitioner' was prevented from presenting a complete defense in violation of the Due Process Clause of the Fourteenth Amendment and/or his Sixth Amendment right to confront the witnesses against him because he was prevented from presenting evidence that Detective Wiginton extracted a false confession from Michael Martinez using tactics similar to those he used with Petitioner.

UNREASONABLE APPLICATION

This Court reviews the district court's grant of summary judgment *de novo*. *Williams v. Scott*, 35 F.3d 159, 161 (5th Cir. 1994) *cert. den.* 513 U.S. 1137 (1995). This Court is also governed, however, by the same limitations as those imposed on the district court by 28 U.S.C. § 2254 (d) (1), which 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*, the Supreme 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 Seventh 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), but most 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*, 2001 WL 914539 (2001); *Lurie v. Wittner*, 228 F.3d 113, at 129-130 (2nd Cir. 2000), *cert. denied*, 121 S.Ct. 1404 (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).

THE FACTS

Patterson testified that he was taken to a small interrogation room with carpet on the walls and floor sometime between 7:00 and 7:15 p.m., and left waiting there for 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 Kim 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)

SUPREME COURT PRECEDENT

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, 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 often 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).

UNREASONABLE APPLICATION REDUX

The district court essentially held that because the facts of Patterson's case are not on all fours with the facts of *Crane*, Patterson can show neither that the state court's rejection of his claim was "contrary to" nor an "unreasonable application" of Supreme Court precedent. 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 district court 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*. (3 ROA 644-645, 668)

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 the Supreme Court's conclusion in *Williams v. Taylor*, supra, at 405. The district court has simply 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. It decided neither whether such an analysis is appropriate under § 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 application for certificate of appealability and address these questions.

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

The 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 only "marginally relevant." (2 ROA 331-

332)

But 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 ought not to be believed. Its purpose as impeachment was far more specific than that. It is 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 have been addressed in a limiting instruction, under Rule 105 (a) of the former Texas Rules of Criminal Evidence, which the State may invoke as readily as a criminal defendant to direct a jury's attention to the appropriate purpose for which evidence is admitted, and away from the inappropriate.

2. 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.[2] 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. 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

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[2] The district court regarded it as "highly questionable" that Martinez's testimony was inadmissible for any purpose other than to attack the voluntariness of Patterson's second statement. (3 ROA 644-645) But the main thrust of Patterson's argument has always been that Martinez's testimony is far more relevant to challenge the *reliability* of Patterson's second statement, for reasons that follow in the text. Surely it is at least debatable among reasonable jurists whether the evidence has this additional probative value.

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. 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 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 natural 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." (2 ROA 331) But Martinez's testimony *did* tend to rebut Wiginton's denial that he used 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, the United States Supreme 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. 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 a character 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.

3. Constitutional Law Trumps State Law

This leaves only Rule 608 (b) as a bar to its admission. But even the Court of Criminal Appeals acknowledged that this rule must bow to paramount constitutional rights. "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. The United States Supreme 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 the Supreme 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, the Supreme 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).

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 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 has demonstrated *ante*, 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 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*, 518 U.S. 37, at 49-50 & 53 (1996) (plurality opinion). 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 Supreme Court precedent, in that it marked a refusal to extend a general legal principle that is well-settled in Supreme Court precedent to a new context in which it should clearly apply. Reasonable jurists could disagree whether the district court should have deferred to it.

HARM ANALYSIS

The Court of Criminal Appeals also concluded that, in any event, any error in

excluding evidence about Martinez's interrogation was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18 (1967). (2 ROA 332-333) The district court ratified the holding of the state court, concluding that even without Patterson's second statement, "there was still overwhelming evidence of his guilt." (3 ROA 646) Therefore, the district court reasoned, the state court's application of *Chapman* to the facts of the case was not unreasonable. *Id*.

The district court failed to resolve the question, however, whether it is appropriate for the federal courts to conduct a deferential review of the Court of Criminal Appeals's harm analysis, under 28 U.S.C. § 2254 (d) (1), or a *de novo* review for harm under the standard applicable in federal habeas corpus under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *See Tucker v. Johnson*, 242 F.3d 617, at 628, n. 16 (5th Cir.), *cert. denied*, 122 S.Ct. 18 (2001). Reasonable jurists could disagree about which review was appropriate, and indeed, it is not even immediately clear which standard is the more onerous for Patterson, i.e., whether it is more burdensome for him to demonstrate the objective unreasonableness of the Court of Criminal Appeals's analysis under *Chapman*, or to prove directly to the federal courts that excluding his proffered evidence had a substantial and injurious effect or influence on the jury's deliberations, under *Brecht*.

Moreover, like the state court, the district court exaggerated the weight of the

circumstantial evidence against Patterson, focusing on the weight of the evidence to establish Patterson was present at the scene of the shootings, but ignoring the fact that the identity of the shooter was hotly contested. The murder weapon was never recovered. Although Patterson was seen in the possession of a gun of the same type and caliber as the murder weapon, this was apparently some two months *before* the offense. (22 RR 3783-3785) A substance that was "most likely blood" was found on the clothes Patterson was wearing on the day of the offense, but it could not be said that it was *human* blood, much less *whose* blood it was. (22 RR 3835-3843) While this evidence was sufficient to support an inference that Patterson was the shooter, it was hardly "overwhelming." That the evidence is otherwise legally sufficient to support the verdict does not mean constitutional error is harmless. *Satterwhite v. Texas*, 486 U.S. 249, 258-259 (1988).

Patterson admitted from the witness stand that he was present at the crime scene on the day of the offense, but insisted that Kimberley and her children were alive when he left. (23 RR 4011) Thus, the jury was presented with testimony to contradict the State's circumstantial evidence. Patterson's second statement to Wiginton was vital to the State because it constituted the sole admission by Patterson, and therefore the most conclusive evidence, that he *was* in fact the one who pulled the trigger. It was *important* as both substantive evidence of that fact, and as impeachment of Patterson's

personal denials from the witness stand. It was *not cumulative*, since the State had no other admission or direct evidence that Patterson was the shooter. Under *Delaware v. Van Arsdall*, supra, at 684, this Court is to assume "that the damaging potential" of the erroneously excluded evidence was "fully realized." In the present context that means assuming that the jurors would have found Patterson's second statement to Wiginton to be *both* involuntary *and* unreliable. In that event, it's evidentiary value would be lost to them. Without Patterson's second statement included in the evidentiary mix, the jury was left with less-than-compelling circumstantial evidence that Patterson pulled the trigger. Moreover, assuming the jury found Patterson's statement not just involuntary, but *also* unreliable, its impact to impeach Patterson's stout denials of guilt from the witness stand would have been effectively neutralized. And assuming anything less is to distort the proper conduct of the harmless error analysis as explicated in *Delaware v. Van Arsdall*, supra.

Given a proper harm analysis under *Delaware v. Van Arsdall*, supra, it cannot reasonably be said that there is no reasonable possibility that exclusion of evidence of Martinez's interrogation and false confession contributed to Patterson's conviction. Assuming it is appropriate for the Court to review the state court's harm analysis under § 2254 (d) (1), it can only conclude that the state court's decision that the error was harmless was an unreasonable application of *Chapman* and *Van Arsdall* to the

facts of the case. Nor can this Court rationally conclude that exclusion of the evidence did not substantially and injuriously affect or influence the jury's verdict. *Brecht v. Abrahamson*, supra. At *best*, a reasonable reviewing court might find itself in equipoise in resolving the question whether Patterson was harmed. Under those circumstances that reviewing court would have no recourse but to reverse the conviction and remand the cause for a new trial, under *O'Neal v. McAninch*, 513 U.S. 432 (1995).

Issue Two

Whether Petitioner's sentence of death violated the Supremacy Clause because the International Covenant on Civil and Political Rights, an international treaty ratified by the United States, prohibits the execution of offenders for crimes committed while under the age of eighteen.

Issue Three

Whether Petitioner's sentence of death violated the Sixth Amendment because Petitioner was deprived of the effective assistance of trial and/or appellate counsel in that counsel failed to invoke the provisions of the International Covenant on Civil and Political Rights, an international treaty ratified by the United States which prohibits the execution of offenders for crimes committed while under the age of eighteen.

MISCARRIAGE OF JUSTICE

Patterson attempted to raise issues with respect to legality of his death sentence under the International Covenant on Civil and Political Rights [hereinafter, "ICCPR"] for the first time in a successive state habeas application, but his successive writ

application was dismissed as an abuse of the writ. Because the state court refused to consider the merits of his claims on the basis of procedural default, the federal courts may entertain his claims only if, *inter alia*, he can establish that failure of the federal courts to hear them would constitute a miscarriage of justice. *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992). In the context of a capital punishment proceeding, this means Patterson must "focus on those elements that render [him] ineligible for the death penalty," and show "by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty under [Texas] law." *Id*., at 347-348. The ICCPR prohibits execution of offenders who were younger than eighteen at the time of their offenses. The district court held that Patterson was unable to demonstrate a miscarriage of justice according to this standard, on the strength of this Court's recent opinion in *Beazley v. Johnson*, 242 F.3d 248 (5th Circuit), *cert. denied*, 122 S.Ct. 329 (2001). (3 ROA 649-651) This Court reviews the district court's judgment *de novo*. *Williams v. Scott*, supra.[3]

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[3] Patterson did not expressly argue either in his successive state habeas application or in his federal petition in the district court that imposition of the death penalty against him violated the Supremacy Clause, and makes that argument now for the first time on appeal. It is clear, however, that the Texas Court of Criminal Appeals would now regard the claim as procedurally defaulted, just as it regarded his Sixth Amendment claims based upon the ICCPR to be barred. The new claim is therefore essentially "exhausted" for purposes of federal review, and all that is left is to determine whether the procedural default may be excused. *E.g., Nobles v. Johnson*, 127 F.3d 409, at 420 (5th Cir. 1997), *cert. denied*, 523 U.S. 1139 (1998). Should the Court now agree that Patterson has demonstrated he will suffer a "miscarriage of justice" if his Sixth Amendment claims based upon

the ICCPR are not addressed on the merits, in keeping with *Sawyer v. Whitley*, supra, there is no reason in policy that it should not also address his Supremacy Clause argument on the merits, though raised for the first time on appeal. Whenever an issue raised for the first time on appeal involves a pure question of law, and a refusal to consider it would result in a miscarriage of justice, the general rule requiring that issues be raised first in the district court in order to be entertained on appeal should give way. *E.g., French v. Estelle*, 696 F.2d 318 (5th Cir.), *cert. denied*, 461 U.S. 937 (1983). There is no dispute that Patterson was only 17 at the time of the offense.

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 cannot lawfully be sentenced to death for a crime he committed when he was only seventeen.

1. Senate Reservation: Validity

It is true that when it ratified the ICCPR, the United States Senate purported to enter a reservation providing that, notwithstanding its ratification, it would 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). However, this purported reservation is invalid. 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). The Human Rights Committee [hereinafter, "HRC"), was established as an adjudicative body by Part IV of the ICCPR itself, and is charged under Article 40 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'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). 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). 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.

Moreover, Article 4(2) of the ICCPR itself states in no uncertain terms that there may be no derogation from Article 6 of the treaty, which includes the prohibition on the execution of offenders less than eighteen years of age. ICCPR, 999 U.N.T.S. at 174. The HRC has noted that "[w]hile there is no automatic correlation between reservations to non-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(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). 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(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.

However, in *Beazley v. Johnson*, supra, at 264-267, this Court 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(5) was void. The Court found that the HRC's 1995 report did *not* authoritatively hold that Article 6(5) was void, but merely issued a precatory "suggestion" and "recommendation" that the United States "review" its reservation to Article 6(5) "with a view to withdrawing" it. *Official Records*, supra, para. 292. 242 F.3d at 265. Moreover, the Court 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.

2. 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. *See* William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 Brook. J. Int'l. L. 277, at 278, 316-323 (1995). As the HRC observed in its *General Comment No. 24(52)*, supra, at para. 18:

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

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

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

3. The Panel Opinion in Beazley

The *Beazley* panel instead placed uncritical reliance on two state supreme court cases that have rejected the argument that the Senate reservation was invalid. 242 F.3d at 266. In *Domingues v. State*, 114 Nev. 783, 961 P.2d 1279, at 1280 (1998), *cert. denied*, 528 U.S. 963 (1999), the Nevada Supreme Court essentially held the Senate reservation to be valid simply because execution of juveniles has withstood Eighth Amendment scrutiny in the U.S. Supreme Court. The Alabama Supreme Court drew the same conclusion for the same purported reason. *Ex parte Pressley*, 770 So.2d 143, at 148-149 (Ala.), *cert. denied*, 531 U.S. 931 (2000). Whether the Senate reservation is consistent with the Supreme Court's Eighth Amendment precedent, however, does

not even logically speak to the question whether it is or is not invalid as incompatible with the object and purpose of the ICCPR. That the manifest purpose of the reservation was to vouchsafe domestic understanding and implementation of the meaning of cruel and unusual punishment under the Eighth Amendment only goes to demonstrate it was the Senate's intent expressly to deviate from a contrary international human rights norm that the ICCPR was meant to codify in treaty form. It does not mean that the Senate's deviation from the treaty is an acceptable option, 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 Court was referencing a different reservation to the ICCPR, in a context in which the *validity* of the reservation was not 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(5) of the ICCPR is valid.

Though other courts have found the constructions of the HRC persuasive, *e.g., U.S. v. Duarte-Acero*, 208 F.3d 1282, at 1287-1288 (11th Cir. 2000), 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 does not prevent 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*).

4. 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*. This holding gives too broad a sweep to the Senate declaration.

The original purpose of the Supremacy Clause was to alter the British rule that all treaties are non-self-executing, to avoid the necessity of legislative implementation before any treaty provision could be enforced domestically. Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am.J.Int'l L. 695, at 697-700 (1995). While acknowledging early on that this was the import of the Supremacy Clause, the Supreme Court nevertheless recognized that a treaty provision must be found to "operate[ ] of itself without the aid of any legislative provision" before a domestic court can enforce it. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, at 314 (1829). Whether a treaty provision was meant to "operate of itself," or instead, to require legislative implementation, 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(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 signatory States – and the specific purpose of Article 6(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(5) as a defense to imposition of the death penalty. Recognizing Article 6(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.

When the Senate declared the ICCPR's substantive provisions to be non-self-executing, it 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. 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* Vasquez, 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, and more importantly, 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(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). In any event, 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 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 this particular article, it did not intend 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). The Supreme Court has sanctioned this kind of defensive use of treaty provisions without hesitating 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). 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."

Should statutory authority nevertheless be necessary for Patterson directly to challenge his unconstitutional sentence of death in federal court, the Court need look no further than the federal habeas corpus provisions themselves. "[R]ights of action to enforce treaty provisions may be supplied by federal statutes." Vasquez, supra, at 720; Sloss, supra, at 152. Federal courts have found a private right of action for aliens seeking redress for violations of international law in the Alien Tort Claims Act, 28

U.S.C. § 1350. *Abebe-Jira v. Negewo*, 72 F.3d 844, at 847-848 (11th Cir. 1996). The court in *Abebe-Jira* found the language of the statute requiring an allegation of an act "committed in violation of" international law to be sufficient to raise a claim without the need "to invoke a separate enabling statute as a precondition to relief" in federal court. *Id*., at 847. The Ninth Circuit held similarly in *In re Estate of Ferdinand E. Marcos, Human Rights Litigation*, 25 F.3d 1467, 1474-1476 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995). *See also Alvarez-Machain v. United States* 266 F.3d 1045, at 1054 (9th Cir. 2001) (ATCA "creates a cause of action for violations of international law"). The federal habeas corpus statute, 28 U.S.C. § 2254 (a), similarly mandates that the federal courts entertain a petitioner's application for writ of habeas corpus "on the ground that he is in custody in violation of the Constitution or . . . treaties of the United States." This Court should now hold that § 2254 (a) constitutes an enabling or implementing provision, allowing Patterson to invoke Article 6(5) of the ICCPR and the Supremacy Clause as grounds for federal habeas corpus relief, even assuming the ICCPR is not self-executing. *See* Paust, supra, at 327. The *Beazley* panel recognized this argument, but, curiously, does not appear to have addressed it in resolving his ICCPR claim against him. 242 F.3d at 267.

INEFFECTIVE ASSISTANCE OF COUNSEL

Because the defensive use of Article 6(5) of the ICCPR must be recognized

irrespective of the Senate's declaration of non-self-execution, Patterson's trial counsel needed no implementing legislation to object to his death sentence. In failing at any point in the state proceedings to object on this basis of the ICCPR, both trial and appellate counsel rendered constitutionally ineffective assistance. Had trial counsel invoked the ICCPR, they could have prevented the trial court from imposing a sentence of death that was in violation of the supreme law of the land. And since that death sentence was unauthorized, because violative of an international treaty that trumps any contrary state law, it was void at its inception, and could be challenged for the first time on appeal. *E.g.*, *Fullbright v. State*, 818 S.W.2d 808, 809-810 (Tex.Cr.App. 1991). Thus, appellate counsel could have obtained an appellate reversal of the death penalty on appeal, notwithstanding trial counsel's failure to object.

Patterson can meet both prongs of the standard of ineffectiveness of counsel announced in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Certainly there could have been no strategic reason to forego invoking the ICCPR, at least by the time of the punishment phase of Patterson's trial. Nor do trial or appellate counsel assert any strategic reason for failing to invoke it. *See* Affidavits of Donna Winfield, C. Wayne Huff, and Robert P. Abbot (2 ROA at 371, 373 & 376), respectively.[4] It could

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[4] It is true that Wayne Huff had been aware "in general terms" of the ICCPR, but he "believed that the terms of this covenant did not apply to Patterson." (2 ROA 374) He admits, however, that

only have benefitted Patterson, without presenting any downside. No deference is due under *Strickland* to decisions of counsel that are uninformed and could not possibly advantage the accused. *Profitt v. Waldron*, 831 F.2d 1245, at 1249 (5th Cir. 1987); *Bryant v. Scott*, 28 F.3d 1411 (5th Cir. 1994); *Moore v. Johnson*, 194 F.3d 586, at 615 (5th Cir. 1999); *Lockett v. Anderson*, 230 F.3d 695, at 714-715 (5th Cir. 2000). A reasonably diligent lawyer, knowing he was representing a juvenile on a charge as serious as capital murder, would have investigated, thoroughly researched, and presented any and all possible claims that the death penalty is invalid on account of the age of his client. In view of the United States Supreme Court's opinion in *Stanford v. Kentucky*, 492 U.S. 361 (1989), foreclosing any domestic constitutional claim, counsel should have known that the best and probably only source for such a claim would be international law. *Cf. Murphy v. Netherland*, 116 F.3d 97, at 100 (4th Cir.), *cert. denied*, 521 U.S. 1144 (1997) (reasonably diligent counsel representing foreign national in capital case should have known to consult treaties as source of relief for this

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he did not conduct any research into the matter. *Id*. All of the authorities Patterson now cites for the proposition that the Senate reservations are invalid, and that the treaty therefore applies to the United States in full force, and particularly the pronouncements of the HRC, were extant in advance of Patterson's trial in this cause. Reasonably diligent research would have revealed them readily. Given the potential benefit to their client, trial counsel should have pursued the matter in greater depth. Their failure to do so was uninformed, and cannot be regarded as a defensible strategy. "To do no investigation at all on an issue that . . . implicates the accused's only defense . . . is not a tactical decision. Tactical decisions must be made in the context of a reasonable amount of investigation, not in a vacuum." *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990).

particular kind of client). In failing to perceive and present this obvious avenue of relief for their juvenile client, Patterson's counsel, both trial and appellate, rendered constitutionally ineffective assistance.

Moreover, there is more than a "reasonable probability" that, had counsel timely invoked the ICCPR, the result of the punishment proceeding would have been different. Indeed, had trial counsel timely invoked the ICCPR, the punishment phase of trial could have been avoided altogether, as the trial court would have had no alternative but to impose the only other punishment legally available for a capital crime, *viz*: a life sentence. *Cf. State v. McPherson*, 851 S.W.2d 846 (Tex.Cr.App. 1992), *cert. denied*, 508 U.S. 939 (1993) (trial court properly reformed death sentence to life upon negative answer to non-statutory fourth special punishment issue which established that death sentence violated Eighth Amendment). And had appellate counsel raised the issue on appeal, the Court of Criminal Appeals would at *least* have been required to remand for a new punishment proceeding, at which the ICCPR could be invoked. *See* Article 44.29 (c) of the Texas Code of Criminal Procedure.

MISCARRIAGE OF JUSTICE REDUX

This Court has observed that in deciding whether a capital defendant is actually innocent of the death penalty," "we should consider only whether a petitioner is factually innocent of either an element of the crime or a mandatory sentencing

criterion." *Callins v. Johnson*, 89 F.3d 210, 215 (5th Cir.), *cert. denied*, 519 U.S. 1017 (1996). Under the ICCPR, as imposed on Texas through the Supremacy Clause of the United States Constitution, one of the "mandatory sentencing criterion" at the punishment phase of any capital case is that the defendant have attained his eighteenth birthday by the time he committed his crime. Patterson was only seventeen at that time. He was therefore "factually innocent of . . . a mandatory sentencing criterion." For this reason, this Court should consider the merits of his Supremacy Clause claim and Sixth Amendment claims of ineffective assistance of counsel, notwithstanding that he procedurally defaulted them, and grant relief.

Issue Four

Whether Petitioner's death sentence violates the Sixth Amendment Guarantee of effective assistance of counsel because his trial counsel failed to investigate and present substantial mitigating evidence at the punishment phase of trial.

In the district court Patterson argued that his trial counsel failed adequately to investigate and present substantial mitigating evidence at the punishment phase of his trial. (2 ROA 280-293) Had trial counsel supplemented the mitigating evidence they presented with other readily available evidence, there is a reasonable probability the jury would have imposed a life sentence. (2 ROA 294-296) Because Patterson did not raise this claim in state court, the district court required a showing of cause and prejudice before entertaining its merits in federal habeas review. (3 ROA 651-652)

The district court rejected Patterson's argument that the ineffectiveness of his state habeas counsel was sufficient to establish cause for his procedural default in state court, holding that, since there is no constitutional right to counsel in state post-conviction proceedings, any deficiencies in state habeas counsel's representation cannot suffice to show cause, under *Coleman v. Thompson*, 501 U.S. 722 (1991). (3 ROA 652-653)

But the district court failed to acknowledge that in *Coleman v. Thompson*, supra, at 755, the Supreme Court recognized a possible exception to this rule for claims that can only be raised for the first time in a post-conviction state writ application. The Court did not find it necessary to decide whether such an exception ought to apply in *Coleman*, however, since Coleman himself received legal representation in the convicting court in pursuing his state writ, and did not challenge the effectiveness of *that* lawyer in arguing cause for his procedural default. *Id*., at 756. But in Texas, under the provisions of Article 11.071, the convicting court merely makes a recommendation to the Texas Court of Criminal Appeals as to how the writ application should be disposed. It is the highest criminal appellate court that makes the determination whether or not ultimately to grant or deny relief. Thus, Patterson did not have the effective assistance of counsel during the only opportunity he had to raise the issue of his trial counsels' ineffectiveness at the punishment phase.

Patterson is aware that this Court has recently rejected an argument that a federal habeas petitioner should be allowed to invoke the ineffectiveness of his state habeas counsel as cause to excuse procedural default if the state habeas forum was his first and only opportunity to raise his claim. *Martinez v. Johnson*, 255 F.3d 229, 240-241 (5th Cir. 2001). Until such time as the Supreme Court should squarely rule that the potential exception identified in *Coleman* does not apply, however, Patterson will maintain that the ineffective assistance of his state habeas counsel was adequate cause for his failure to raise the issue of ineffective trial counsel in the state habeas corpus proceeding.

The Constitution guarantees the effective assistance of counsel on direct appeal as of right. *See Douglas v. California*, 372 U.S. 353 (1963); *Evitts v. Lucey*, 469 U.S. 387 (1985). In the cases that undergird *Coleman*, the Supreme Court refused to extend this constitutional right. *Ross v. Moffitt*, 417 U.S. 600 (1974), and *Pennsylvania v. Finley*, 481 U.S. 551 (1987), hold that there is no constitutional right to counsel in preparing a petition for discretionary review, and a post-conviction application for collateral relief, respectively. In both *Moffitt* and *Finley*, however, the Supreme Court emphasized that, because the convict had already received his constitutionally mandated assistance of counsel on direct appeal, he did not bear the same "handicap" as the unrepresented appellant. He had already received a "lawyerlike" review of his

trial and presentation of his issues to an appellate court of first resort, and this "access to the trial record and the appellate briefs and opinions provided sufficient tools for the pro se litigant to gain meaningful access to courts that possess a discretionary power of review." *Finley*, supra, at 557, citing *Moffitt*, supra, at 614-615. But the same cannot be said of the state habeas litigant who attempts to raise an extra-record claim like ineffective assistance of trial counsel.

Ineffective assistance of counsel claims in Texas are rarely pursued on direct appeal, for the simple reason that they almost always require the development of facts beyond the appellate record. When such claims are raised on direct appeal, "in the vast majority of cases, the undeveloped record on direct appeal will be insufficient for an appellant to satisfy the dual prongs of *Strickland*." *Thompson v. State*, 9 S.W.3d 808, 813 & n. 5 (Tex.Cr.App. 1999). This necessarily means that in pursuing a claim of ineffective assistance of trial counsel, the habeas applicant will *not* have the benefit of a lawyer's previous work, or of a record already adequate to allow him to present his *pro se* arguments meaningfully in an attempt to persuade the habeas court to exercise its discretion to examine the merits. He is effectively on his own as surely as the direct appellant in *Douglas*, without the benefit of counsel's knowledge and skill in trying to raise a complex claim in what was realistically the first available judicial forum.

Patterson's state habeas lawyer failed even to explore any extra-record claims

(1 ROA 123-146; 2 ROA 297-299), and thus was unequipped to render effective assistance in his initial state habeas proceedings. It is at least debatable among reasonable jurists that the *Coleman* exception should apply, and that the district court erred to hold that this ineffectiveness could not constitute cause for the failure to raise ineffective assistance of trial counsel at the punishment phase of Patterson's trial.

PRAYER

Wherefore, premises considered, Appellant prays that this Court reverse the judgment of the district court and remand the cause with instructions to enter an order that he be released unless the State timely gives him a new trial.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Application for Certificate of Appealability and Brief in Support was served on Tomee M. C. Crocker, Assistant Attorney General, at P. O. Box 12548, Capitol Station, Austin, Texas, 78711, via certified mail, postage pre-paid, return receipt requested, on this the 9th day of November, 2001.

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J. GARY HART

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Appellant's Brief is in compliance with the limitations imposed by Fed.R.App.Pro. 32 (a) (7). The instant brief consists of 13,912 words, exclusive of the table of contents, table of authorities, statement regarding oral argument, and certificates of interested parties, service, and compliance.

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J. GARY HART