IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NANON MCKEWN WILLIAMS	§	
	§	
Petitioner,	§	
	§	
	§	
-VS-	§	**CIVIL ACTION NO. 4:02mc00185**
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	§	
	§	
JANIE COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division,	§	
	§	
	§	
Respondent.	§	

PETITION FOR A WRIT OF HABEAS CORPUS

THIS IS A CAPITAL CASE

TO THE HONORABLE UNITED STATES JUDGE:

Petitioner, Nanon Williams, is currently confined on death row at the Polunsky Unit in Livingston, Texas. Through undersigned counsel and pursuant to the Constitution of the United States and 28 U.S.C. § 2254, Mr. Williams petitions this Court to issue a Writ of Habeas Corpus and to order his release from confinement on grounds that his custody violates the Constitution and laws of the United States.

I. JURISDICTION

This court has personal jurisdiction pursuant to 28 U.S.C. § 2241(d) because Mr. Williams

was convicted in the 248st Judicial District Court in Harris County, Texas. Subject matter jurisdiction is conferred by 28 U.S.C. § 2254.

II. PRIOR PROCEEDINGS

Mr. Williams was convicted and sentenced to death in the 248th District Court of Harris County. His direct appeal was denied on May 27, 1997, *Williams v. State*, No. 72,179 (Tex. Crim. App. 1997) (unpublished) (attached as Exhibit 1), and on December 15, 1997, the United States Supreme Court denied Mr. Williams' request for writ of certiorari. *Williams v. Texas*, 522 U.S. 1030 (1997). On April 17, 1998, Mr. Williams' state habeas Application was timely filed, tolling the federal statute of limitations.

The District Court of Harris County, Texas, recommended habeas relief after two evidentiary hearings, and referred the case to the Court of Criminal Appeals on May 3, 2001. The Court of Criminal Appeals summarily denied relief in Mr. Williams' case on April 24, 2002, without explaining why it disagreed with the judge who presided over the evidentiary hearing. *Ex parte Williams*, No. 46,736-02 (Tex. Crim. App. 2002) (attached as Exhibit 2).

Mr. Mark Olive and Mr. Morris Moon were appointed by this Court on May 30, 2002, to represent Mr. Williams and, on November 5, 2002, Mr. Walter Long was appointed as co-counsel. On December 2002, Mr. Williams filed a subsequent state petition raising previously unavailable claims. This petition was dismissed by the Texas Court of Criminal Appeals on April 23, 2003. *Ex parte Williams*, No. 46, 736-03 (Tex. Crim. App. 2003) (attached as Exhibit 3).

III. STATEMENT OF FACTS

On May 13, 1992, 20-year-old Elaine Winn, invited her former boyfriend, 19-year-old Adonius Collier, to meet her and her current boyfriend, 21-year-old Vaal Guevara for the purpose

of making a drug transaction. S.F. Vol 28: 40-43.[1] The men met at Mr. Collier's apartment and then drove with several other people to Hermann park and walked together into a wooded area of the park. It is undisputed that Ms. Winn knew her current boyfriend, a convicted thief with a pending weapons charge, S.F. Vol. 28: 193, brought the .22 Magnum that would later be admitted as State's Exhibit 17 to the midnight meeting in the woods, S.F. Vol 28: 57, 83, but she failed to warn her former boyfriend of this fact, despite having the opportunity to do so. S.F. Vol 28: 71. Ms. Winn's former boyfriend, Mr. Collier, was shot and killed moments after entering the woods with Mr. Guevara. S.F. Vol 26: 15.

Elaine Winn claimed at trial that she did not enter the woods with her boyfriends. She merely introduced them to one another and waited in a white jeep owned and driven by an older black man known variously as "Xavier" and/or "Patrick." S.F. Vol 28: 79, 211. His real name was never discovered prior to trial.[2] Ms. Winn, her boyfriend Vaal Guevara, and "Xavier/Patrick" had also brought Petitioner, Nanon Williams, with them that night to the park. Mr. Williams went into the woods with the two men Ms. Winn had brought together.

Ms. Winn's ex-boyfriend, Adonius Collier, also brought friends with him to the park. Emmade Rasul, aged 19, accompanied Mr. Collier into the woods, while his girlfriend, Stephanie Anderson, aged 14, waited alone in Rasul's sedan. S.F. Vol 26: 121-129. As Winn,

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[1] In this petition, the trial record will be abbreviated S.F. Vol [number]: [page number]. References to the two state habeas evidentiary hearings will be abbreviated: EHSF1:[page number] and EHSF2: [page number].

[2] The state granted immunity to Patrick Lee Smith a few days before the state habeas evidentiary hearing in Mr. Williams' case. He testified at the evidentiary hearing that he had never used the name Xavier, but Guevara had given that name to police in order to protect him. EHSF2: 161, 168, 170.

"Xavier/Patrick" and Anderson waited in the two cars in the parking lot, they heard gunshots from the wooded area across the street. S.F. Vol 26: 129; S.F. Vol 28: 87.

According to Ms. Winn, about five minutes after the three men and Mr. Williams walked into the park, she heard somewhere between three and five gunshots. S.F. Vol 28: 87-89. She and "Xavier" moved the car nearer to the scene but could not see what was occurring. S.F. Vol 28: 87. Ms. Winn would later testify that the first two shots sounded the same but the last shot sounded louder and she identified it as a shotgun blast. S.F. Vol. 28: 90, 91. After the shots were fired, Mr. Rasul came running through the parking lot, S.F. Vol 26: 131; Vol 28: 88, followed soon after by Mr. Guevara, who got in the back seat of the Jeep with his .22 Derringer but no other weapons. S.F. Vol 28: 95.

Anderson and Rasul fled the park, flagged down a motorist, and went to Ben Taub hospital where he was treated for gunshot wounds to the face and foot, S.F. Vol 30: 74-84, and she reported the shooting to Houston Police Officer Armando Mercado. S.F. Vol 26: 130-134. Mr. Guevara, Mr. Williams, Ms. Winn, and "Xavier/Patrick" left in the Jeep, returning to Guevara's apartment without reporting the shooting. S.F. Vol 28: 103-105, 262. The body of Adonius Collier was located within an hour by Houston Police Officer Armando Mercado, 40 feet away from the street in Hermann Park, in a dark area behind trees. S.F. Vol 26: 54-56.

Officer Mercado called in the incident upon discovering Collier's body. S.F. Vol 26: 57. Detective Dale Atchetee and the crime scene unit came to the scene and conducted an investigation. S.F. Vol 26:70- 90. The sum total of physical evidence collected at the scene consisted of: (1) a bag of cocaine found near the body (State's Exhibit 9, S.F. Vol. 26: 87); (2) a live, unfired .25 caliber bullet (State's Exhibit 16, S.F. Vol 26: 81); (3) a Raider's cap (S.F. Vol

26: 83); and, (4) a pair of sandals or "flip flops" later determined to have come from Rasul's feet as he fled. S.F. Vol 26: 83. Photographs were taken of the body and the relative locations of these items. S.F. Vol 26: 75.

Harris County Assistant Medical Examiner Dr. Tommy Brown performed an autopsy on the victim's body on May 14, 1992. S.F. Vol 29: 97. A scoop of shotgun pellets also containing a small caliber bullet were removed from the victim's head and placed in a plastic container marked with the medical legal number 92-3227 that was assigned to the Collier autopsy. S.F. Vol. 29:118, 131, 133. The projectile mixed in with the pellets was not separated out, but the plastic container holding them all was admitted at trial as State's Exhibit 21, and the bullet itself was identified at trial as "EB-1." S.F. Vol 29: 130, 160, 163, 166; S.F. Vol 30:17-33.

The police recovered only one gun, Guevara's .22 derringer, from his apartment, admitted as State's Exhibit 17. S.F. Vol 28: 31, 57, 61, 95, 107, 192, 193. HPD Officer Ron Horowitz testified that he gave the evidence obtained at the autopsy from the body (placed in an evidence container marked 92-3227, later marked as State's Exhibit 21) to the firearms laboratory. S.F. Vol 29:160. Delinder Williker, HPD Investigator, picked up a bullet from Ben Taub Hospital that had been removed from Rasul's foot, and delivered it to the firearms examiner for analysis. The bullet was entered into evidence as State's Exhibit 22, and identified as "EB-2" at trial. S.F. Vol 29: 152.

A. The State's Case at Trial

At trial, the state's case was that seven people had gathered in the park that night for the sale of some crack cocaine, that Mr. Williams had carried a shotgun to the meeting, while Mr. Guevara had taken a .22 Magnum Derringer. The prosecution claimed that Mr. Williams had shot

Mr. Collier with a .25 and subsequently with a shotgun, while Mr. Guevara shot Mr. Rasul with the .22. Much of the prosecution's case was an effort to minimize Mr. Guevara's involvement through a bizarre story that hypothesized Mr. Williams switched guns in the middle of the shooting.

Elaine Winn testified that Mr. Williams carried a gun that was similar to State's Exhibit 14, an exemplar semiautomatic pistol. S.F. Vol 28: 58. She further testified that Mr. Williams had a shotgun in a Raider's football team starter's jacket when he left the apartment that night. S.F. Vol 28: 59. Winn stated that she knew Mr. Williams later took the shotgun out of car into the park because "she would have seen it" if he left it in the car. S.F. Vol 28: 80. She admitted that the weather was too warm to wear a big football jacket. S.F. Vol 28: 82.

Winn also claimed that Mr. Williams returned to the car after the shooting still dressed in a Raider's jacket and holding the shotgun in his hand. S.F. Vol 28: 98. According to Ms. Winn, Mr. Williams was also carrying a white cap, a clear beeper and a bag with a couple of rocks of cocaine in it, and stated "I can't believe this is all we got." S.F. Vol 28: 100.

Ms. Winn testified that Mr. Williams threw the pager out of the window but kept the cocaine. S.F. Vol 28: 102. Winn testified she did not know whether anyone had been shot and neither Guevara nor Mr. Williams "confessed" or said anything about what happened in the woods. S.F. Vol 28: 104. Winn admitted on cross-examination that in her prior statement to police she had not stated that Mr. Williams carried two guns nor that Guevara even had a gun. S.F. Vol. 28: 132. She confirmed that she could not see who shot whom because the men were standing in a heavily wooded area. S.F. Vol 28:149.

Despite Ms. Winn's admitted participation in the illegal transaction during which the victim was killed, Winn was never charged with a crime.

Guevara testified that he, Winn, Mr. Williams and "Xavier" went to Hermann Park to do the drug transaction with the victim and Rasul. S.F. Vol 28: 213-216. Guevara denied intending to rob or kill anyone, but stated his purpose was to buy drugs in Hermann Park. S.F. Vol. 28: 217, 223. He and Mr. Williams exited their vehicle, the victim and Rasul exited their vehicle, and "Xavier" and the two women stayed in the parked cars. S.F. Vol 28: 224. Guevara admitted he owned the .22 Derringer, State's Exhibit 17, and used it in drug transactions. S.F. Vol. 28: 192,193. He admitted bringing the .22 Derringer to this drug transaction, S.F. Vol 28: 213, stating that he carried it in his hand that night. S.F. Vol 28: 216, 219, 225. He took the Derringer into the woods with the other men. S.F. Vol 28: 225. The four men moved onto the grass, separated into two pairs and began negotiations. Guevara testified that he talked to the "lighter skinned guy" while Mr. Williams talked to the other. S.F. Vol 28: 227.

Guevara stated gunfire erupted from his right, between 8 and 10 feet away, where the other two men were standing. S.F. Vol 28: 238, 239. According to Mr. Guevara's version of events he believed that he and Mr. Williams were being robbed because when the gunfire started the guy he was talking to reached down as if to draw a weapon. S.F. Vol 28: 240. Guevara didn't know for certain whether Mr. Williams was firing in self-defense or instigating, but stated he did not think that Mr. Williams was shooting first because they did not discuss anything like that beforehand. S.F. Vol 28: 241, 242.

After hearing the first shot, Guevara shot at the "light skinned guy" who looked like he was reaching down to his pants. S.F. Vol 28: 243. Guevara fired his .22 Derringer once, possibly

hitting him. S.F. Vol 28: 244. He stated he didn't know which bullets hit whom but testified that he did not shoot at the "darker skinned guy."[3] S.F. Vol 28: 246, 247. Guevara heard two shots before he fired at the "lighter skinned guy" but couldn't see who was doing the shooting. S.F. Vol 28: 248. According to Guevara, the two shots came from the same person, either the victim or from Mr. Williams. Guevara stated "Rasul" started running away after Guevara shot at him. S.F. Vol 28: 249. Guevara testified that he didn't chase "Rasul," but they both ran away from the shots. S.F. Vol 28: 250. When he was about 10 feet away from Mr. Williams, Guevara heard a loud noise and turned around. He claimed he could see Mr. Williams but couldn't see the victim, Collier. S.F. Vol 28: 251. As Guevara started walking back towards the scene, he claimed to see Collier lying on the ground in front of Mr. Williams who was over him. Collier wasn't moving. According to Mr. Guevara, Mr. Williams swore at Collier, then searched him, rifling through his pockets, from which he took some drugs, S.F. Vol 28: 252, 253, and a beeper which he placed in a cap. S.F. Vol 28: 254.

Guevara testified, as described above, uncorrected by the state, that he did not shoot the deceased. S.F. Vol 28: 275. On cross-examination, he admitted that he had previously stated, in an audio-taped statement to police, that he aimed his .22 derringer at the victim and fired it. S.F. Vol 29: 63. Guevara claimed that he had been confused during direct examination and admitted he shot the .22 at the deceased. S.F. Vol 29: 70, 71. Guevara's original police statement stated that he was using the Derringer when he fired. S.F. Vol 29: 72. Guevara admitted that when he shot at the deceased, that person was not already shot. S.F. Vol 29: 81. He stated again, on re-

[3] The state's use of terminology in its direct examination of Guevara was to identify Rasul as the lighter-skinned guy and the victim as the darker-skinned guy.

cross examination, that he shot toward the deceased with State's Exhibit 17. S.F. Vol 29: 88. After being arrested and charged with capital murder, Guevara secured legal counsel and negotiated a plea agreement for "illegal investment" with a recommendation of 10-years in exchange for testifying against Mr. Williams. S.F. Vol 28: 184, 185.[4]

Rasul testified that he could not see who fired the shotgun. S.F. Vol 30: 84. In fact, Rasul testified that he did not see a shotgun *at all* on the night in question. S.F. Vol 30: 62. He testified, as did Guevara and Winn, that the four men exited the parked vehicles and entered the park. S.F. Vol 30: 65. According to Rasul, the distance between the parked vehicles and the transaction was about 100 feet. S.F. Vol 30: 68. Mr. Rasul told the jury that once they were in the park, and after some preliminary negotiations about the drug sale, Mr. Williams, **not Guevara**, shot at Rasul's face with a pistol at close range. S.F. Vol. 27: 12. Rasul claimed he had a clear opportunity to view Mr. Williams as the shooter; the distance between them was only about 5 feet.[5] S.F. Vol 27:13. The bullet passed through Rasul's face and was never recovered. S.F. Vol 30: 80. After being shot, he fled towards the parking lot. S.F. VoL. 30: 81. After running about 20 or 30 feet from the wooded area, he was hit in the foot with a .25 caliber bullet. S.F. Vol 30: 25, 26, 81. Rasul testified that he could not discern the sound of a shotgun blast but "just heard shots" as he ran from the woods. S.F. Vol 30: 84. Rasul stated that although Mr.

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[4] Court records demonstrate he was actually convicted of attempted illegal investment several days after the conclusion of Applicant's trial.

[5] Rasul identified Mr. Williams as the man who shot him in the face and continued firing at him as he ran away in a live line-up conducted shortly after Mr. Williams was extradited to Texas from California. Rasul *did not* identify Vaal Guevara as being present at the crime scene when a live line-up including Guevara was conducted for him.

Williams was the person who shot him in the face, he thought it was "the darker skinned guy" who chased him into the parking lot. S.F. Vol 30: 84.

Dr. Brown, the State's medical examiner, testified there was one entrance wound on the victim, and no exit wounds. S.F. Vol. 29: 104. He stated it was possible that victim was shot once with a bullet and then with a shotgun, however, he never noticed the bullet itself when he removed debris from the head. S.F. Vol 29: 118. Dr. Brown opined that the pathway of the smaller bullet could have been obliterated by the subsequent shotgun blast. S.F. Vol 29:119, 120. Despite this evidence of two weapons being fired into the victim's head, the medical examiner testified that, by a "reasonable medical probability," the shotgun blast was the cause of death. S.F. Vol 29: 102. Dr. Brown based his opinion that the victim was still alive at the time of the shotgun blast on his observation of red coloring around the wound. Brown testified that the red color led him to conclude that the victim still had blood pressure at the time of the shotgun wound. He testified that if the victim was dead at the time of the shotgun blast the wound rim would be yellow. S.F. Vol. 29: 101-102, 123.

Robert Baldwin, HPD Criminalist, testified he twice examined the shotgun pellets and bullet removed from the victim and admitted as Exhibit 21. One examination occurred on May 20th, 1992 and, after a request to reexamine, a second examination was conducted on June 23, 1995. S.F. Vol 30: 17, 18. State's Exhibit 21 contained one fired bullet, wadding, and 68 lead pellets. Vol. 30: 20. Baldwin opined the slug found in State's Exhibit 21, "EB-1," was a .25 caliber bullet. S.F. Vol 30: 23.

On direct examination by the prosecution, Robert Baldwin testified at great length about how the bullet EB-1 obtained in the autopsy and admitted as part of State's Exhibit 21, could *not* have been fired from Vaal Guevara's derringer, State's Exhibit 17:

Q: Is there any way in the world based on your training your expertise and the examinations that you made, that the bullet, which was apart of the submission in SE21 was shot out of that Derringer, SE 17?

A: No, sir. It's the wrong caliber, plus the type of cartridge used in State's 17 is a rim fire cartridge and the .22 automatics are center fire cartridges."

S.F. Vol 30: 24.

Robert Baldwin also stated that the bullet from the autopsy, State Exhibit 21's "EB-1", and the bullet removed from Emmade Rasul's foot, State's Exhibit 22's "EB-2", were **both** fired from a .25 caliber automatic even though they looked different. S.F. Vol 30: 25-26:

Q: How can you been so certain that both of these are .25 caliber bullets?

A: Comparison. We compared both bullets to each other. The base diameters were consistent. We also compared the land and groove width and the number of lands and grooves and they were also consistent with each other.

Q: Now these bullets don't look at all like each other. What makes you say they are the same type of bullet?

A: The reason they don't look the same is the fact that the one bullet which was recovered from the morgue is extremely mutilated. A very large portion of its mass is missing.

Q: In fact sir, in addition to being the same diameter, are they the same make of ammunition?

A: Yes, sir.

Q: Is there any way the bullet in SE 22 could have been fired out of that Derringer, which is SE no. 17, any way in this world?

A: No sir, as indicated, SE 22 is a .25 automatic, and the cartridge for a .25 automatic is larger in diameter than this weapon would be chambered to handle. Also, the .22 is a rim fire cartridge and the – excuse me – the .25 automatic is a center fired cartridge.

The prosecutor led Baldwin to the conclusion that the bullet from the autopsy and the bullet from foot came from the same gun:

Q: Take a look . . . if you could at SE 14

A: Yes sir.

Q: Could that basic type or caliber of semiautomatic pistol have fired the bullets in State's Exhibit No. 21 and 22?

A: Certainly….

S.F. Vol 30: 27. Baldwin additionally testified that he had **never** test fired the derringer for comparison with fired bullets in the case. He stated: "I don't know what the functional condition of that Derringer is. I have never checked it. S.F. Vol 30: 33.

Consistent with the above forensic firearms evidence presented at trial, the State's theory of the shooting was contained in the first sentence of opening argument:

> Ladies and gentlemen, the evidence that you'll hear over the next two days will prove to you that this defendant killed Adonius Collier, probably by shooting him first with a .25 caliber semiautomatic weapon, but then certainly and without a doubt holding a short-barreled pistol-grip shotgun to his head and blowing a massive hole through the side of his head.

S.F. Vol 26: 15.

Thus, the state's main argument, and the attack on Mr. Williams' defense, focused the jury on (1) the "thorough" testing conducted by Baldwin, leading to his conclusion that Guevara's Derringer certainly did not fire the bullet found in the victim's head, (2) an assertion that the prosecutor, Lieutenant Maxey, and the rest of the state's prosecuting team did everything possible

to assure the right man was on trial. Near the conclusion of argument the state's attorney returned to the pathologist's testimony, arguing that it clinched the theory that only Mr. Williams could have killed the victim: "he tells you Adonius Collier was alive, that there was definitely blood pressure at the time he was killed." S.F. Vol 31: 63.

At the penalty phase, in support of future dangerousness, the state paraded Mr. Williams' criminal history in front of the jury, using California police officers, S.F. Vol 33: 6, 40, 122, a Harris County Jail officer, S.F. Vol 33, 238, and a white victim of a residential burglary in California that was committed by three black males. S.F. Vol 33: 88. Mr. Williams pleaded guilty to being involved in this particular offense, S.F. Vol. 33: 150, when he was still a juvenile under California law, in August 1992. He entered his plea without the benefit of assistance of counsel, or even his mother's presence, at the plea and sentencing hearing. The defense presented Mr. Williams' mother, S.F. Vol 34: 21-100, and sister, S.F. Vol 34:101-138, who each provided some anecdotal evidence of Mr. Williams' difficult childhood, but did not come close to describing the full picture that would later emerge. The defense also presented Mr. Williams' juvenile probation officer from California, S.F. Vol 34: 138- 189, who stated that Mr. Williams could be a contributing person in a correctional facility because he is a caring, intelligent, and likeable person. S.F. Vol 34: 164. The defense did not present a mental health expert to interpret and explain how the extremes of violence, trauma, and stress that Mr. Williams was exposed to as a young child related to the jury's task in assessing the mitigating evidence.

B. Habeas Proceedings

Forensic firearms testing conducted by Mr. Williams and the state during habeas proceedings established that the bullet taken from the victim's head, EB-1, was not a .25 caliber

bullet fired from Mr. Williams' gun. The testing conclusively established that the bullet was in fact a .22 caliber projectile fired from the .22 Magnum Derringer Guevara fired at the crime scene. Exhibit 4 (1998 Letter from Baldwin). Baldwin's January 15, 1998, report indicated that, **directly contradictory to his testimony at Mr. Williams' trial**, EB-1 was fired from the bottom barrel of Guevara's gun and not from a .25 caliber weapon. Baldwin also confirmed in this report that EB-2 (the bullet extracted from Rasul's foot) was not fired from Guevara's gun. Mr. Williams' expert, Ronald Singer of the Tarrant County Medical Examiner's Office, confirmed these facts in his report and in his testimony at the evidentiary hearing. Exhibit 5 (Affidavit of Ronald L. Singer); EHSF 1: 17- 16; EHSF 2: 17-38.

Mr. Williams presented testimony to support his claims at a state evidentiary hearing on September 23 and 23, 1998 before the Honorable Werner Voigt. Before entering findings of fact and conclusions of law, Judge Voigt's judicial term expired. The Honorable Joan Campbell again conducted an evidentiary hearing on the 18th of December, 2000 where Mr. Williams again presented the testimony supporting his claims. The testimony of the firearms expert, pathology expert, and trial counsel established the factual basis upon which his claims in relation to the misidentification of the crucial bullet at trial are based. Their testimony can be summarized as follows:

1. Ronald L. Singer, Forensic Firearms Expert

At both evidentiary hearings, Mr. Singer provided expert testimony about the firearms evidence in Mr. Williams' case. He was qualified as an expert in firearms identification and the identification of bullets and projectiles. His testimony established that the bullet "EB-1," removed by the medical examiner from the victim's head, was a .22 caliber bullet fired from Vaal

Guevara's Magnum Derringer, serial number 354714. His testimony also established that "EB2", the bullet removed from Rasul's foot, was a .25 caliber bullet.

At trial, the state's firearm expert, Robert Baldwin, testified that EB-1 was conclusively a .25 caliber bullet. Mr. Singer confirmed that Mr. Baldwin's testimony was that he did not test fire the Magnum Derringer before Mr. Williams' trial, despite the fact it was the only gun recovered and was in the state's exclusive custody, but testified at trial that EB1 was a .25 caliber bullet. Mr. Singer testified that Mr. Baldwin test fired the Magnum Derringer in January 1998, before sending it to Mr. Singer, and wrote a report stating that his testing showed that the Magnum Derringer fired EB-1 and that EB-1 was a .22 caliber bullet (not a .25 caliber bullet as he testified at trial). According to Mr. Singer, it would have been clear to any competent firearms examiner that EB-1 (although damaged from impact) and EB-2 were not bullets of the same caliber when they were viewed with the naked eye next to each other.

The bullet EB-1 came from the victim's head. EB-1 is a .22 caliber projectile that was fired from the bottom barred of the Davis Magnum Derringer .22 caliber weapon fired by Vaal Guevara and admitted at trial as State's Exhibit 17. The state's firearm's expert, Robert Baldwin erroneously characterized EB-1 as a .25 caliber at Applicant's trial. *See* State Habeas Findings of Fact at ¶ 87.

2. Loretta Muldrow, Trial Counsel

Trial counsel admitted at the hearing that she provided ineffective assistance of counsel in failing to conduct independent defense testing that would have correctly identified EB-1 as a bullet from Guevara's gun. EHSF 1: 117 – 119. Trial counsel explained that the defense at Mr. Williams' trial was that Guevara shot the victim in the head first, but the defense had no

"conclusive proof." EHSF 1: 116. Trial counsel admitted that "direct physical evidence" that proved the defense's theory that Guevara was the killer "would have been exculpatory." EHSF 1: 117. Trial counsel admitted that such exculpatory evidence "would have aided Mr. Williams." EHSF 1: 118. Trial counsel testified that such exculpatory evidence would have made the defense effective because "it would have acquitted him." EHSF 1: 118. Trial counsel admitted in her affidavit and her testimony that when Robert Baldwin, the state's firearms expert at Mr. Williams' trial testified "I do not know what the functional condition of that Derringer is, I have never checked it," "[she] should have asked the Judge for a continuance." EHSF 1: 118. Trial counsel testified:

> it was the first time that I learned that it hadn't been checked, and had I thought it through, you know, at that particular moment, I would also – I would have reached the conclusion that he obviously couldn't have made a comparison. You can't make a comparison to a missile, that EB-1 missile, if you don't have a firearm. So I just felt like it should have been a lightening bolt at that point that the Derringer was not submitted. So if the Derringer wasn't submitted, he couldn't have performed an independent microscopic evaluation of that EB-1 missile to that gun.

EHSF1: 118-119. When asked if she had "any strategic or tactical reason for not asking for a continuance to test the firearm," trial counsel testified: "No."

Trial counsel's affidavit states:

> When Mr. Baldwin made this statement on direct examination, I should have asked the judge for a continuance. I should have requested funding for an expert for the defense so that I could have the Derringer test-fired, and I should have requested that the state conduct its own testing. It was negligence on my part not to attempt to stop the trial at this point, after Mr. Baldwin had given evidence that the bullet could nor possibly have come from Vaal Guevara's Derringer, but then admitted he had never checked the gun. It was definitely not trial strategy to do nothing – I missed the importance of his testimony at the trial. I was negligent in relying on the results of the state's testing as shown to me in the offense report supplements, on the assertions of the HPD characterizations of the bullet as "mutilated," and I should have conducted independent testing of the Derringer and an independent examination of EB-1.

Exhibit 6 at ¶ 15. (Affidavit of trial counsel, Loretta Muldrow.) Trial counsel testified that she presumed that Guevara's Magnum Derringer had been tested by the state: "that is probably my failing, because as an ex-prosecutor that is the practice that I did. I mean, it's normal to presume, in a homicide case, that all missiles and all firearms are submitted for testing." EHSF 1: 119.

At the evidentiary hearing, trial counsel testified that Mr. Williams has always denied firing the shotgun and believes that either Elaine Winn or the driver (now known to be Patrick Smith) fired the shotgun at the victim. Trial counsel testified that "as far as the shotgun blasting of Adonius Collier's head, *my client adamantly denies shooting Adonius Collier....*" (EHSF 1: 128). Trial counsel knew that Mr. Williams had steadfastly maintained his innocence since his arrest:

> Nanon told me that he believed Elaine Winn shot the victim with the shotgun, but he did not see her do it. He explained that she, or the boy "Xavier"[6] who was never located at the time of the trial, were the only ones other than Vaal Guevara who had the opportunity to shoot the victim with the shotgun because the shotgun was in the car with them.…

Exhibit 6 at ¶ 42.

3. Dr. Marc Krouse, Forensic Pathology Expert

Dr. Marc Krouse testified at the evidentiary hearing that EB-1 could have caused the death of the victim, and that the victim was shot from a distance as far away as 15 feet, not by someone standing over the victim with a shotgun, thereby refuting Guevara's and Dr. Brown's testimony at trial. EHSF2: 65-68, 73.

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[6] The trial record establishes that "Xavier" is the name of the driver as given by Guevara to police after his arrest. Patrick Smith testified at the evidentiary hearing that he was the driver, has never used the name "Xavier," and that Guevara gave a false identity for the driver in order to protect Smith.

At the first hearing, Dr. Krouse testified that EB-1 (the bullet fired from Vaal Guevara's Magnum Derringer, serial number 345714, and removed at the morgue from the cranial cavity of the victim's head) was clearly and convincingly a cause of the victim's death. A penetrating injury to the brain caused by a .22 caliber bullet would knock a person to the ground, render them unconscious and, without immediate medical attention, result in their death in a very short period of time. Dr. Krouse testified that a victim displaying a "red-rimmed" wound to the head could have been shot with a shotgun immediately or very shortly after actual physiologic death from an earlier gunshot to the head. Dr. Krouse also testified that even if the victim had been shot approximately half an hour after death, his wound potentially could still be red-rimmed. Dr. Krouse testified that the victim could have bled "passively" after death from the open injury caused by the shotgun, because of antecedent blood accumulation in the cranium from the earlier, smaller penetrating wound caused by the .22 caliber bullet.

Dr. Krouse testified that a penetrating head wound from a .22 caliber bullet would render a person immediately unconscious and, even if they regained consciousness, unable to talk in more than 60 percent of cases. Dr. Krouse testified that the shotgun blast to the victim's head was fired from a distance of as much as 15 feet away from the victim's head and was absolutely not a contact wound and could not possibly have been fired by someone standing over the victim and putting the shotgun to the victim's head (as testified by Guevara at trial and Patrick Smith – the state's witness who was granted immunity from prosecution -- at the evidentiary hearing). Dr. Krouse also testified that Dr. Tommy Brown, the medical examiner who testified at Mr. Williams' trial, was mistaken when he told the jury the gun was fired from only two to three feet from the wound. Dr. Krouse testified that Dr. Brown was wrong at trial in concluding that the shotgun

wound was the cause of death at Mr. Williams' trial to the exclusion of EB-1, the .22 caliber bullet fired by Vaal Guevara from the Magnum Derringer that was not test fired by the state or the defense before Mr. Williams' trial. Dr. Krouse testified that at the time Dr. Brown viewed the body, it may have been possible to determine the sequence of the shots from the intersecting fracture lines in the skull. Dr. Brown, however, did not do this at the time of trial as he did not even find EB-1 and acted on the assumption that the only wound to the head was caused by the shotgun. (Dr. Brown found shotgun pellets and placed them into a container in which a later state actor found EB-1 among the pellets. EB-1 was identified as a bullet by Robert Baldwin, but misidentified as a .25 caliber bullet.)

Based on his examination of the autopsy photographs, Dr. Krouse concluded that "[t]here is absolutely no way that [the shotgun was fired when it was in contact with the victim's head]." EHSF1: 37-40. Dr. Brown's trial testimony to the effect that the shotgun had been fired at a closer range was inconsistent with the physical evidence offered at trial because there was no evidence of any gunpowder striking the skin. When asked "so this shotgun was not fired when it was in contact with the victim's head?" Dr. Krouse testified "There is absolutely no way that occurred, no." EHSF1: 40.

Dr. Krouse's testimony at both hearings indicated that Dr. Brown was mistaken when he said the shotgun was fired from a distance of two to four feet from the wound. At the second hearing, the following exchange took place between habeas counsel and Dr. Krouse:

> Q: (APPLICANT'S HABEAS COUNSEL) Do you have an opinion as to how far away from the victim the shooter of the shotgun was when he fired at the victim in this case.
>
> A: (DR. KROUSE) Yes, I do.

Q: How far is that?

A: From my experience in test firing smooth-bore weapons such as this in a controlled laboratory setting, I would estimate that the minimum range of fire from the muzzle to the victim's face is around six to eight feet, thus giving the shot carrier cup some chance of beginning to open and producing the injuries seen in the autopsy photograph adjacent to the left eye. It also allows the shot column to expand slightly and produce a slightly bigger defect that is produced in the autopsy photographs. And it also allows for separation of the base wad part of the shot carrier, it's a gas sealant base beneath so it does not enter the wound such as anyone can see in the crime scene photos adjacent to the body. The outside range would probably be around 15 feet or so. By that time the shot column would open up and produce a much larger, although still single-entry, wound.

Q: Would you agree with me this wound could not have been caused by placing the shotgun in contact with the victim's head?

A: Yes.

Q: Could this injury have been made by someone standing over the victim and putting the shotgun in the victim's mouth?

A: No.

Q: Could it have been made by someone standing over the victim and pointing it right at his temple as we see the wounds on the photographs?

A: You're going to have to get that target-to-muzzle distance in there somehow, maybe hanging from a ladder or tree branch, but standing normal height. I don't think so.

Q: So if the person was standing over, pointing down with the shotgun, they would have to be on a ladder in order to be six or eight feet away?

A: I think that you just about got to have that much distance, yes. It would be hard to do.

Q: Would you agree that Mr. Brown was probably mistaken in his testimony when he said the gun was fired from two to four feet from the wound?

A: Yes.

....

Q: Does the fact there was no evidence of gunpowder striking the skin also support your opinion that the [shotgun] was fired from 6 to 15 feet away?

....

> A: Yes. The shotgun will typically deposit gunpowder, sometimes even producing injury to the skin. It remains visible in a photograph even after the body has been washed up to a distance of about three to four feet most of the time. From the muzzle, I should say.

EHSF2: 75-78; *see also* ESHF1: 37-40.

Dr. Krouse testified: "if a person was standing over [the victim] and shot him from over him, they would have to be elevated to a significant altitude somehow to get that muzzle at least six to eight feet away from his head." EHSF1: 40. Dr. Krouse's testimony also demonstrated that Dr. Brown had no evidence on which to conclusively state to the jury that the cause of death was the shotgun blast. Since Mr. Williams' trial, the testimony given by Baldwin has been proven completely erroneous.[7] Dr. Krouse observed in his sworn affidavit:

> Dr. Tommy Brown's use of the terminology "reasonable medical probability" that the shotgun blast the was [sic] cause of death is the standard applied to civil cases and is commonly used where the expert can not [sic] state with certainty the conclusion asserted…. It is the opinion of this examiner that the shotgun wound is obviously a lethal wound, but it is not clearly or convincingly the only cause of death of Adonius Collier.

Exhibit 7 at ¶ 3(e).

In an affidavit dated April 16, 1998, Dr. Krouse stated that "[t]he properly phrased cause of death would be Craniocerebral trauma due to shotgun and handgun wounds of the head." Exhibit 7 at ¶ 3; EHSF1: 22-42; EHSF2: 68. Based upon the testimony given by Dr. Krouse at the hearing, which would have been the same testimony he would have provided to the jury, the

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[7] At trial, the prosecution argued that Applicant had killed Adonius Collier "by shooting him first with a .25 caliber semiautomatic weapon… [and] then certainly and without a doubt holding a short-barreled pistol-grip shotgun to his head and blowing a massive hole through the side of his head." S.F. Vol 26:15. The prosecutor argued that the bullet recovered from the victim's head at the autopsy, EB-1, was a .25 caliber projectile and that Applicant was armed with both a .25 and a shotgun on the night in question. S.F. Vol 30: 23; S.F. Vol 28: 81.

jury could find that EB-1, fired from Guevara's derringer, was the cause of death of the victim.

At the second evidentiary hearing, the following exchange took place between habeas counsel and Dr. Krouse:

> Q: Do you have an opinion as to whether EB-1 could have been a cause of the victim's death?
>
> A: In the context in which I observed it, yes, it could.
>
> ….
>
> Q: Could EB-1, the .22 caliber magnum bullet, have caused the death of Mr. Collier?
>
> A: Yes.

EHSF2: 65, 68. At both evidentiary hearings, Dr. Krouse testified that EB-1 "is clearly and convincingly a contributory, if not major cause, of the decedent's demise...." EHSF2: 73; EHSF1: 29. Dr. Krouse expanded on why he had this opinion:

> Any penetrating injury to the brain has a high potential for being fatal. Even with immediate medical attention, you're looking at a survival rate of under 50%. Without immediate medical attention, you know, penetrating injury, particularly from a bullet that does not exit. If the bullet passes on through the head and does not spend all of its kinetic energy in the brain, and the skull and in the major vessels and nerves there, the person has a better chance of surviving. But any penetrating injury where the bullet remains in the head there is a high potential for being fatal, and in my experience, without immediate medical attention would be almost invariably fatal, regardless of the caliber of weapon.

EHSF1: 32-33.[8] Based upon Dr. Krouse's testimony the jury could have found that Guevara's bullet, EB-1 was independently a clear and convincing cause of death.

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[8] Dr. Krouse's opinion survived cross-examination, by the respondent state, and lead to the conclusion that EB-1 caused the victim's death:

> Q: (MS. HARDAWAY): Would you agree with me also, assuming that EB-1 entered... the victim's cranial cavity, that's not necessarily a fatal gunshot wound?
>
> I. (DR. KROUSE) It's a very high probability, particularly without immediate medical attention.

EHSF 2: 82.

Dr. Krouse's testimony demonstrates the fundamental falsity of Dr. Brown's testimony at trial that the red color of the rim of the wound established he was living at the time of the shotgun blast. Dr. Krouse successfully discredited Dr. Brown's conclusion that the shotgun caused the victim's death based upon the red coloring around the wound. Dr. Krouse stated: "There would be no basis in fact for that opinion...." EHSF1: 24. Dr. Krouse explained that the red coloring around the edges of the shotgun wound indicates to pathologists and medical examiners only that the shotgun injury occurred around the time of death, but does not indicate that the victim was alive when the shotgun was fired. Dr. Krouse testified that it was possible to conclude, based upon the redness of the wound rim, that the shotgun wound had been inflicted *after* actual physiologic death. Dr. Krouse explained that yellow coloring around the wound indicates that a significant period of time has passed after death before the injury was inflicted, and that only yellow coloring enables a pathologist to state with certainty that it is a postmortem injury:

Q: [APPLICANT'S HABEAS COUNSEL] If the coloring around the wound or the rim of the wound is red, what does that indicate?

A: [DR. KROUSE] It falls into a slightly different category, what we call perimortem, implying that the injury occurred slightly before, at, or slightly after the time of the physiologic death of that person. That is when the heart quit beating and quit delivering blood to the head area.

....

Q: If a victim is displaying a red rim wound, could that victim have been dead when a second wound was inflicted?

A: When the red-rimmed wound is inflicted, yes.

....

Q: If someone had been shot with a .22 caliber magnum and was dead, can somebody else come up and shoot them after they're dead and still cause a red-rimmed wound around the wound?

A: Yes.

....

Q: If the victim in this case had been shot with a .22 magnum weapon and was laying on the ground dead, had been dead for half an hour to an hour and then was shot in the head with a shotgun, would the wound still be as red rimmed as it shows on the materials you've reviewed?

A: It might well be, yes.

....

Q: Mr. Krouse, does anything that you've reviewed in this case rule out the possibility that he was shot with a .22 caliber magnum and then died and later was shot with a shotgun.

A: No.

EHSF2: 71-73. The jury could have found that the victim was dead at the time the shotgun blast was fired based upon Dr. Krouse's testimony at the original evidentiary hearing where Dr. Krouse testified that he "ha[d] seen injuries that blood accumulated in up to four to six hours after death that appeared rather similar to this." EHSF1: 25-28.

Dr. Krouse's testimony and affidavits demonstrate that Dr. Brown could not have validly concluded that the shotgun blast was the cause of death to the exclusion of EB-1. EHSF1: 74. Dr. Krouse's testimony demonstrated clearly that the fact that reddening of the wound rim was improperly used by Dr. Brown at trial to mislead the jury into believing that the victim was still alive when he was hit with the shotgun:

[Habeas Counsel]: Assume this victim was hit in the head with a .22 caliber magnum and left there, half an hour to an hour later someone comes along and shoots him in the head again with a shotgun. Would he look the same as he looks now.

[Dr. Krouse]: I believe so, yes. It would be hard to tell the difference.

EHSF1: 77. Dr. Krouse also testified that the victim was unlikely to have been yelling or talking after being felled by Guevara's shot, thus contradicting Guevara's testimony that he heard the victim murmuring as he lay on the ground and Patrick Smith's habeas testimony that he heard the victim yelling before he heard the shotgun blast. *See* EHSF2: 152. Dr. Krouse's testimony indicates that there was little or no possibility that Mr. Collier would be yelling after being shot by Guevara:

> [Habeas Counsel]: Can a person who's been shot with a .22 magnum bullet such as EB-1 continue to talk?
>
> [Krouse]: It would depend entirely upon what part of the brain was injured by the penetration, assuming it had been penetrated--the penetration and passage of that projectile. For example, if it just passed through a superficial part of the cortex, a part of the cerebrum of the brain, it would almost certainly produce unconsciousness because of the concussion type effect. It would at least temporarily scramble brain stem level of consciousness, but they might be able to regain consciousness for a few minutes or seconds and utter utterances as recognizable words. If the projectile passed fairly close to the brain stem, that would pretty well obviate that happening; however, so it would really be depending on the path of the bullet.
>
> [Counsel]: So it's highly unlikely that a person who received an injury from a bullet such as EB-1 would be shouting?
>
> [Krouse]: They might recover enough to shout briefly. Again this would be an interval of at least a few seconds to a few minutes of unconsciousness.

EHSF 2: 74-75.

The State's theory was also undermined by Troy Lymuel and Antonio Joseph, witnesses discovered in during habeas investigation. Lymuel, who provided an affidavit for Mr. Williams' state habeas application in which stated that he overheard Winn confessing to shooting someone. Mr. Lymuel recalled:

> I personally know Vaal Guevara and Nanon Williams, and I was at Vaal's apartment at the Woodridge apartments early on the morning following the shooting in Herman Park, where Adonius Collier was killed.
>
> While I was at the apartment, I saw a woman there who I now know to be Elaine Winn. At that time I knew her as Vaal Guevara's girlfriend. I heard her say "I can't believe I shot that nigger in the face." She repeated this over and over. I also heard her say "What if I have to go to jail, what will happen to my baby?" Vaal Guevara and other people who were in the apartment were trying to get her to calm down. Vaal Guevara said that he was going to buy a ticket and fly to Trinidad. He said, "If I go down, I'll make sure everyone goes down."

Exhibit 8 (Affidavit of Troy Lymuel).

Lymuel's statement was consistent with Mr. Williams' trial counsel memory that Mr. Williams denied firing the shotgun and believed that the only people with access to the shotgun, which was in the Jeep, were Winn and the driver, "Xavier/Patrick." Exhibit 6 at ¶ 42.

Mr. Joseph was one of Vaal Guevara's roommates at the time the crime was committed. Like Mr. Lymuel, Mr. Joseph was never contacted by defense counsel prior to trial. Mr. Joseph also provided important information which could have been used to impeach and discredit the prosecution's trial theory. Mr. Joseph states:

> I had seen a shotgun [in the apartment] on several occasions which belonged to Vaal. I knew it was Vaal's because I was sitting in the apartment late one night when Vaal returned home with the shotgun in one hand and a big bag of money. I don't remember the exact date but it was before the incident in Hermann Park. I believe that was the first time I saw Vaal's shotgun in the apartment.

Exhibit 14 (Declaration of Ben Gold).

IV. INTRODUCTORY STATEMENT ON STANDARD OF REVIEW

Mr. Williams' instant federal petition falls under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which normally requires that a petitioner is not entitled to habeas relief unless he can establish that the state court resolved his claims "contrary to," or based on "an

unreasonable application of," clearly established Supreme Court precedent, 28 U.S.C. § 2254(d)(1), or "on an unreasonable determination of the facts in light of the evidence," 28 U.S.C. § 2254(d)(2). The claim Mr. Williams has brought forth from his direct appeal falls within the above deferential scheme, because the state court fact findings and conclusions are manifest in the opinion. However, in state habeas, the Texas Court of Criminal Appeals issued nothing more than a two-page "post-card" denial, cryptically commenting:

> Evidentiary hearings were held and the trial judge entered findings of fact and conclusions of law as to the allegations raised. In those findings and conclusions the trial court has recommended relief be granted due to the ineffective assistance of counsel. However, we do not believe, based on our review of the record presented, that some of the crucial fact findings and the recommendation based, at least in part, on them, are supported by the evidence presented at the evidentiary hearing.

Order, *Ex parte Williams*, No. 46,736-02, April 24, 2002, at 2. The Court of Criminal Appeals said nothing more about the Record. Thus, just as if the CCA had issued a "white card" order stating no more than "relief denied," the Court has dispatched the trial court's findings and recommendations without leaving a trace of what its own findings might be. There is, thus, no state court record on any of the issues considered at the state court hearing to which this Court may apply 2254(d) deference. Under such circumstances, the Fifth Circuit requires that a *de novo* evidentiary hearing be held in the federal district court. *Singleton v. Johnson*, 178 F.3d 381 (5th Cir. 1999).

V. MR. WILLIAMS WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

As discussed, *supra*, the state argued to the jury that Mr. Williams first shot Mr. Collier with a .25 caliber handgun and subsequently shot him again with a shotgun. Vaal Guevara, a

participant in the drug deal who admittedly carried a .22 Derringer, provided the primary testimony against Mr. Williams. Guevara informed the jury that he definitely did not shoot the victim and that he turned around to see Mr. Williams standing over the victim with a shotgun. Guevara also testified that he witnessed Mr. Williams rummaging through the victim's pockets after he shot him with the shotgun.

Prior to trial, trial counsel conducted to minimal investigation and made no attempt to secure an independent examination of the ballistics evidence. Trial counsel also failed to consult an independent forensic pathologist who could provide crucial evidence contradicting the prosecution's theory of the case. Because of these errors, Mr. Williams' trial resulted in a complete breakdown of the adversarial system. Subsequent testing and analysis of the state's case reveals not only that the prosecution's theory was based on unreliable evidence but that key facts argued to the jury with scientific certainty were absolutely wrong.

Ballistics testing conducted in state habeas revealed that the bullet taken from the victim's head was not fired from Mr. Williams' gun but rather was fired from the .22 Derringer carried by Guevara. This conclusive testing demonstrates that Guevara's testimony was false thus undermining all confidence in Mr. Williams' capital murder conviction and the underlying robbery.

A. Legal Standard

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court recognized a criminal defendant's Sixth Amendment right to effective assistance of counsel. The Court stated:

> [A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the

> Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled.

Strickland, 466 U.S. at 685 (internal citations and quotation marks omitted). A defendant claiming ineffective assistance of counsel must show that (1) counsel's performance was deficient, falling below an "objective standard of reasonableness," and (2) the deficient performance prejudiced the defense. *Id*. at 687; *see Bryant v. Scott*, 28 F.3d 1411, 1414-15 (5th Cir. 1994); *Vela v. Estelle*, 708 F.2d 954, 963-64 (5th Cir. 1983), *cert. denied*, 464 U.S. 1053 (1984). In order to show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

B. Trial Counsel Erred in Failing to Request a Continuance or Obtain an Independent Test Firing of Vaal Guevara's .22 Derringer Which Would Have Shown That Mr. Guevara, Not Mr. Williams Shot the Victim with a Handgun.

There is no duty in every case to consult experts even where the State is proposing to present expert testimony. *U.S. v. Anderson*, 61 F.3d 1290, 1298-99 (7th Cir. 1995); *Yohey v. Collins*, 985 F.2d 222, 228 (5th Cir. 1993). However, in a case where the defense cannot effectively cross-examine the State's expert and the evidence is crucial to the outcome of the case, it is irresponsible not to consult an expert. *Miller v. Anderson*, 255 F.3d 455, 459 (7th Cir. 2001) (finding trial attorney ineffective for failing to present expert testimony which could have supported alibi defense), order vacated at *Miller v. Anderson*, 268 F.3d 485 (7th Cir. 2001) (order to retry petitioner vacated due to settlement of parties); *Wallace v. Stewart*, 184 F.3d 1112, 1117

(9th Cir. 1999) (finding ineffective assistance where trial attorney failed to properly develop and present evidence to hired mental health expert). In Mr. Williams' case, trial counsel's failure to consult with a defense expert and independently test the sole weapon recovered in connection with the murder of Adonius Collier deprived the jury of a crucial fact: Mr. Guevara and not Mr. Williams shot the victim in the head with a handgun.

1. State Habeas Court Decision

After hearing evidence on this claim, the Honorable Joan Campbell of the 248th District Court of Harris County entered findings of fact and conclusions of law recommending that Mr. Williams be granted relief. Judge Campbell specifically found that trial counsel should have conducted defense testing of the firearm evidence, Findings of Fact ¶51, and that there was no strategic reason for trial counsel not to request independent testing of the bullet found in the victim's head. Findings of Fact at ¶54; Conclusions of Law at ¶6. Moreover, Judge Campbell held that "the failure to hire an independent firearms examiner prejudiced the Defendant because a reasonable probability exists that but for the failure to hire, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984)." Conclusions of Law at ¶7.

2. Court of Criminal Appeals Decision

The Court of Criminal Appeals rejected Judge Campbell's recommendation of relief without explanation. The CCA issued an unpublished two-page order stating simply "we do not believe, based on our review of the record presented, that some of the crucial fact findings and the recommendation based, at least in part, on them, are supported by the evidence presented at the evidentiary hearing." The CCA made no effort to identify which "crucial fact findings" they

disagreed with nor how the legal recommendation "based, at least in part, on them" did not comport with existing precedent.

3. Trial Counsel's Failure to Obtain Independent Testing of Mr. Guevara's Gun Was Unreasonable Performance

Although the courts give great deference to *informed* strategic choices, they "closely scrutinize an attorney's preparatory activities." *Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993) (citing *Chambers v. Armontrout*, 907 F.2d 825, 831, 835 (8th Cir.) (en banc), *cert. denied*, 498 U.S. 950 (1990)). Counsel's error in failing to engage a defense expert to test fire the gun taken from Mr. Guevara can only be the result of an oversight. There simply can be no rational strategic reason that trial counsel in a capital murder case would not examine the only weapon seized by police in connection with the crime. Although in many cases a single error will not amount to a finding of ineffective assistance of counsel, "[s]ometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard." *Nero v. Blackburn*, 597 F.2d 991, 994 (5th Cir.1979).

Trial counsel concedes that this crucial omission was not part of any trial strategy. She states:

> I did not do any testing of the firearms evidence. I did not ask the trial court for any funding for ballistics, firearms or forensic pathology experts. I reviewed the state's file, talked to my client, and talked to the co-defendant's attorney about the weapons that were involved. (As far as I was aware, no testing was performed on the victim or Emmade Rasul to determine if either of them had fired a gun.)

Affidavit of Loretta Muldrow at ¶10.

> When Mr. Baldwin [stated he hadn't checked the weapon] on direct examination, I should have asked the judge for a continuance. I should have requested funding for an expert for the defense so that I could have the Derringer test-fired, and I should have requested that the state conduct its own testing. It was negligence on my part not to attempt to stop the

> trial at this point, after Mr. Baldwin had given evidence that the bullet could not possibly have come from Vaal Guevara's Derringer, but then admitted he had never checked the gun. It was definitely not trial strategy to do nothing – I missed the importance of his testimony at trial. I was negligent in relying on the results of the state's testing as shown to me in the offense report supplements, on the assertions of the HPD characterization of the bullet as "mutilated," and I should have conducted independent testing of the Derringer and an independent examination of EB-1.

Affidavit of Loretta Muldrow at para. 15.

During the state evidentiary habeas hearing, Ms. Muldrow reaffirmed her oversight in not requesting a continuance or obtaining independent firearms testing and admitted that she had not strategic reason for her failure. EHSF1: 119. Ms. Muldrow stated that she had presumed that the Derringer had already been test fired:

> That is probably my failing, because as an ex-prosecutor that is the practice that I did. I mean, it's normal to presume, in a homicide case, that all missiles and all firearms are submitted for testing.

EHSF1: 119

The state habeas trial court, Judge Campbell, made findings that there was no strategic reason for either not requesting a continuance or failing to request independent testing. Findings of Fact at ¶54; Conclusions of Law at ¶¶6-8.

4. Trial Counsel's Unreasonable Performance Prejudiced the Defense.

The "reasonable probability" test of prejudice in *Strickland v. Washington* does not require the petitioner to show that his attorney's deficient performance "more likely than not altered the outcome in the case." 466 U.S. at 693. The "reasonable probability" of *Strickland* is, instead something less – "a probability sufficient to undermine confidence in the outcome." *Id*. at 694. A court's confidence in the outcome should be shaken where "counsel's conduct so

undermined the proper functioning of the adversarial system that the trial cannot be relied on as having produced a just result." *Id.* at 686.

The egregious nature of counsel's oversight in Mr. Williams' case served to undermine confidence in the outcome of his trial in numerous ways. Most apparently, counsel's oversight prevented the jury from learning a crucial fact: that the state's prime witness had himself fired a bullet into the victim's head. Secondly, without knowledge of this fact counsel was deprived the ability to effectively cross-examine the state's witnesses. Lastly, counsel failed to secure other key experts whose examination of the offense could have contradicted other state witnesses.

i. Counsel's failure to test the Derringer prevented the jury from learning that Mr. Guevara and not Mr. Williams shot the victim in the head with a firearm

By failing to secure independent testing of the firearm recovered from Mr. Guevara and by failing to independently review the bullet comparison made by Mr. Baldwin of the Houston Police Department, trial counsel was unable to inform the jury of the key fact that Mr. Guevara, and not Mr. Williams, fired a bullet from a handgun into the victim's head. This fact alone undermines the state's trial theory and would certainly present a reasonable probability that the outcome of Mr. Williams' trial would have been different.

As discussed in detail, above, the state's case hinged largely on the testimony of Guevara and the fact that the bullet taken from the victim's head matched Mr. Williams' gun. In closing, the prosecutor argued:

> Again, Vaal may be a bad crook. He's either one of the two, he's obviously very stupid or very, very smart. But why does he fess up to having a Derringer with him?
> I am telling you, in order for him to have been the killer he either would have had to have snuck into Ben Taub Hospital, examined that bullet himself or he has to have ESP. . . .

> How did he know the bullet out of Emmade's foot was going to match up to a bullet that Dr. Brown didn't see and why is he fessing up to it?
>
> . . .
>
> Robert Baldwin, uncontradicted, told you both were .25 caliber bullets, told you both were the same brand, told you the markings were consistent but they couldn't make a positive match. He told you absolutely, positively certain that they couldn't be fired out of the Derringer.

S.F. Vol 31: 101-110.

Had the defense been able to establish that the first shot was actually from Guevara's gun, there can be little question that the state's case would have been discredited and the results of Mr. William's trial would have been different.

Indeed, several jurors who sat on Mr. Williams' case have stated this crucial fact would have mattered in deliberations. Juror Colette Cox stated:

> Had I known that the other bullet found in the head of the victim came from the co-defendant Vaal Guevara's .22 Derringer, that information would have raised a reasonable doubt that Nanon Williams was guilty of capital murder. Consequently, I would have acquit[t]ed.

Exhibit 9 (Affidavit of Colette Cox).

Juror Dianna Kay Lindsey also noted that this information would have altered the jury's deliberatons:

> As a juror, this information, had I known about it at the trial, would have changed the effectiveness of the defense and would have altered the jury's deliberation. As we jurors were held to the high standard of "beyond a reasonable doubt," this evidence may have changed our verdict.

Exhibit 10 (Affidavit of Dianna Kay Lindsey).

ii. Counsel's failure to test the Derringer deprived Mr. Williams of meaningful adversarial testing of the state's case.

Although the direct and obvious effect of this crucial firearms evidence is alone sufficient to establish *Strickland* prejudice, the repercussions of this revelation were felt throughout each aspect of the trial. Mr. Guevara's testimony was absolutely crucial to the State's ability to secure Mr. Williams' conviction and death sentence. Mr. Guevara adamantly denied any involvement in the victim's death thus leading the jury to believe that Mr. Williams was solely responsible for the shooting. Even though Mr. Guevara admitted firing his .22 Derringer, he vehemently denied hitting anyone:

[Wisner]: Is there any way either you fired at or shot the darker-skinned guy who was selling you dope?

[Guevara]: No.

[Wisner]: You're positive about that?

[Guevara]: Positive.

[Wisner]: Absolutely positive about that?

[Guevara]: Positive. My Derringer couldn't reach that far.

[Wisner]: Is there any way you could be responsible for his death?

[Guevara]: No.

. . .

[Wisner]: Could we agree that if it turned out that a .22 caliber Derringer bullet killed that man who's left there dead at the scene that you would have basically convicted yourself of capital murder?

[Guevara]: It's impossible for me to shoot that far.

...

[Wisner]: If it turned out that the dead man had been shot with that gun and that gun could be positively linked to you and that bullet could be positively matched from coming from that gun we could agree that you would have confessed to killing somebody in a capital murder; right?

[Guevara]: Like I said, like I told you, it was self-defense though, yes.

[Wisner]: But is there any way that you shot the darker-skinned guy?

[Guevara]: No, I didn't.

[Wisner]: Is there anyway you could have shot at the darker-skinned guy?

[Guevara]: No, I couldn't.

S.F. Vol 28: 245-48.

Mr. Guevara was also the only witness at trial who claimed to have seen Mr. Williams with a shotgun standing over the victim.[9] Had trial counsel been able to discredit Guevara, the State's theory of the crime would have also been undermined. If the jury had heard that Guevara had actually shot the victim, it is unlikely that they would have given credence to his assertions that Mr. Williams shot the victim with a shotgun. The jury likely would have given more weight to Rasul's testimony that Mr. Williams was wearing sweatpants and a T-shirt and thus could not have been holding a shotgun.

The importance of Mr. Guevara's testimony was not lost on Mr. Wisner, the trial prosecutor. In a 1999 letter to the Pardons and Parole Division of the Texas Department of Criminal Justice, Mr. Wisner vigorously (and ultimately futilely) opposed Mr. Guevara's pending parole. In his letter, Ms. Wisner states:

> Prior to my becoming involved in the case [Guevara] entered into a plea bargain for which he was to receive 10 years in prison on EOCA in cause 634507 in exchange for his cooperation and **truthful** testimony in William's [sic] trial. Evidence showed the defendant and Williams were purchasing drugs from Adonius Collier and Collier's friend at the time of the murder. [Guevara] claimed to have been involved only in the drug transaction and that he did not know that Williams planned a robbery. At trial Guevara

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[9] Elaine Winn, Mr. Guevara's girlfriend, testified that she could not see what was going on in the park. S.F. Vol 28: 87. She did, however, inform the jury that Mr. Williams had a shotgun in his possession, S.F. Vol 28: 79-80, a fact contradicted by Emmade Rasul, one of the men who walked with Mr. Williams into the park. S.F. Vol 30: 62.

> was very evasive and apparently not at all truthful. We could not prove his story false at the time. During this year subsequent firearms testing was performed and an additional witness was located in preparation for a writ hearing on Williams [sic] case. The additional evidence indicates that [Guevara] rather than merely being a witness, **likely participated in Collier's murder.**

Exhibit 11 (1999 Letter from Vic Wisner) (emphasis in original).

Had trial counsel secured independent ballistics testing, those results could have been helpful in attacking other witnesses at trial. Elaine Winn, for example, was another essential witness for the state. Winn testified that Mr. Williams was wearing a large Raiders jacket the night of the crime despite that fact that it was very warm. Winn informed the jury that she saw Mr. Williams concealing the shotgun under the jacket as he walked out into the park. Winn also claimed she saw Mr. Williams return to the car with the shotgun carrying, among other things, the victim's pager and a baseball cap.

Winn's testimony is placed in a very different light if seen in conjunction with the ballistics testing. First, Winn and Guevara were admittedly dating and, therefore, Winn had great motive to assist Guevara escape prosecution for the victim's death. Moreover, Winn and Guevara lived next door to each other and certainly had ample opportunity to discuss their plans and stories before consulting their lawyers and giving statements to the police. Had trial counsel learned of the ballistics testing results prior to trial, she could have vigorously pursued these fertile areas on cross-examination. If the jury knew that Guevara had shot the victim in the head and was, nevertheless, adamantly denying doing so, his friend and lover Elaine Winn's testimony would certainly also become suspect to the jury.

Secondly, Winn had previously dated the victim, Adonius Collier. This fact would also have provided fruitful impeachment evidence. If the jury knew that Winn had dated the victim

and was now sleeping with Guevara, they likely would have explored the possibility that robbery was not the prime motive of the shooting, but rather could have been an expression of Winn or Guevara's anger or jealousy.

Finally, the failure to conduct testing on the firearms prior to trial caused counsel to overlook important impeachment evidence regarding the alleged robbery. Although both Guevara and Winn testified that Mr. Williams stole items from the victim, these allegations are contradicted by other evidence. For example, a May 21 HPD police report notes that the victim's step-father called to say "that he has his step sons [sic] beeper." Exhibit 12 (HPD Police Report). This report clearly contradicts the trial testimony of Winn and Guevara who claimed that Mr. Williams returned to the with the victim's beeper. S.F. Vol 28: 100; S.F. Vol 28: 254.

iii. Counsel's failure to test the Derringer obscured the necessity to consult other key experts.

The failure of trial counsel to discover that the initial bullet fired into Mr. Collier's head came from Vaal Guevara's gun directly led to trial counsel's decision not to employ or consult other crucial experts. Trial counsel, for example, did not seek the services of an independent forensic pathologist to analyze the results proffered to the jury by the state.

State District Court Judge Campbell, sitting in habeas, recognized the important link between trial counsel's failure to test the ballistics evidence and her subsequent failure to secure a forensic pathologist:

> According to the affidavit and habeas testimony of Marc Krouse, M.D., who testified for the Applicant during habeas proceedings, the injury caused by the bullet recovered from the medical examiner's office could have caused the death of the Complainant. Further, Krouse testified that the Complainant was shot from a distance of 6-16 feet, and not by someone standing over him with a shotgun, refuting the testimony of Guevara.

> The Court finds that the great importance of an independent pathologist is based on knowing that EB-1 is in fact a .22 bullet from Guevara's gun and that Guevara was the first person to shoot the Complainant. Certainly with the knowledge that EB-1 is a .22 bullet, the testimony of a pathologist such as Krouse is vital to defensive argument that Applicant either was not guilty, or punishment should be different.

Findings of Fact at ¶63-4.

In addition to the now-discovered fact that Guevara had initially shot the victim in the head with a handgun, Dr. Krouse's testimony would have provided the defense with a means to demonstrate that Guevara's description of the shooting defied scientific analysis. According to Dr. Krouse, the shotgun injury inflicted on the victim could not have occurred from a distance less than six feet and could have been as great at fifteen feet. Mr. Williams, therefore, could not have fired the shotgun as described by Guevara unless, as Dr. Krouse testified, he was standing on a ladder or hanging from a tree. EHSF2: 76-7. Coupled with Mr. Rasul's testimony that Mr. Williams was wearing a T-shirt and sweats and thus had no means of hiding a shotgun, Dr. Krouse's important findings provided a necessary link to the defense theory that the shotgun was fired by either Patrick Smith or Elaine Winn. Had the jury heard this information at trial, it is reasonable to conclude (as did the state district judge) that trial counsel's oversight undermined confidence in the jury's verdict and that Mr. Williams is entitled to habeas relief.

B. Mr. Williams Was Denied the Effective Assistance of Counsel When Trial Counsel Failed to Locate and Interview Exculpatory Witnesses.

There can be little dispute that pretrial preparation and investigation is a keystone to providing the effective representation guaranteed by the Sixth Amendment. *See Birt v. Montgomery*, 709 F.2d 690, 701 (7th Cir. 1983) ("Essential to the effective representation . . . is the independent duty to investigate and prepare.") It is one of the core duties of counsel to

interview potential witnesses and make an "independent examination of the factual circumstances involved." *Groseclose v. Bell*, 895 F.Supp. 935, 954 (M.D. Tenn. 1995); *see also Strickland v. Washington*, 466 U.S. 668, 691 (1984) ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). The cases are legion acknowledging that "a lawyer who fails adequately to investigate, and to introduce into evidence, [information] that demonstrate[s] his client's factual innocence, or that raise[s] sufficient doubt as to that question to undermine the confidence of the verdict, renders deficient performance." *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999); *see also Rummel v. Estelle*, 590 F.2d 103 (5th Cir. 1979); *Bell v. Georgia*, 554 F.2d 1360 (5th Cir. 1977); *Sullivan v. Fairman*, 819 F.2d 1382 (7th Cir. 1987); *Code v. Montgomery*, 799 F.2d 1481 (11th Cir. 1986); *Nealy v. Cabana*, 764 F.2d 1173 (5th Cir. 1985); *Crisp v. Duckworth*, 743 F.2d 580 (7th Cir. 1985); *Thomas v. Lockhart*, 738 F.2d 304 (8th Cir. 1984). "Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice . . . when s/he has not yet obtained the facts on which such a decision could be made." *United States v. Gray*, 878 F.2d 702, 711 (3rd Cir. 1989).

Trial counsel for Mr. Williams breached this duty by failing to conduct an adequate investigation, an investigation which would have uncovered readily available witnesses who were essential to demonstrate Mr. Williams' innocence. Trial counsel's file in Mr. Williams' case contains a log of investigatory activities conducted prior to trial. Exhibit 13 (Investigation Log). This log clearly demonstrates the minimal effort of the investigator hired to develop Mr. Williams' case. The complete investigation appears to include only interviews of Mr. Williams and his

grandmother despite the documented request by Mr. Williams that the investigator seek out other witnesses such as Troy Lymuel. *Id*.

Equally troubling is the fact that trial counsel knew Mr. Williams steadfastly denied shooting the victim. In an affidavit provided to state habeas counsel, trial counsel states:

> the motive for firing the shotgun was argued by the state at trial as a "cover-up" measure – to destroy the evidence of the first shot. The person with motive to hide the .22 bullet was either Vaal Guevara, who fired it, or Elaine Winn, Vaal Guevara's girlfriend, who Nanon has always told me had the shotgun in the car and is the person he believes fired the shotgun.

Exhibit 6 (Affidavit of Loretta Muldrow). During testimony in a state habeas hearing, trial counsel confirmed that Mr. Williams had always denied firing a shotgun: "But as far as the shotgun blasting of Adonius Collier's head, my client adamantly denies shooting Adonius Collier." EHSH1: 128. Despite this fact, trial counsel unreasonably failed to follow through by seeking out other witnesses.

1. Had Trial Counsel Diligently Investigated, There Is a Reasonable Probability That the Outcome Would Have Been Different.

Had Mr. Williams' trial counsel diligently investigated, she could have easily discovered a wealth of evidence demonstrating Mr. Williams' innocence. The testimony of these witnesses could have been used to impeach the state's witnesses and establish that Mr. Williams did not shoot the victim with a shotgun.

i. Troy Lymuel

Despite Mr. Williams' request that trial counsel interview Mr. Lymuel, he was never contacted until the state habeas proceedings. When he was finally interviewed, Mr. Lymuel provided a crucial piece of evidence of Mr. Williams' innocence. Mr. Lymuel stated:

> While I was at [Vaal Guevara's] apartment, I saw a woman there who I now know to be Elaine Winn. At that time I knew her as Vaal Guevara's girlfriend. I heard her say "I can't believe I shot that nigger in the face." She repeated this over and over. I also heard her say "What if I have to go to jail, what will happen to my baby?" Vaal Guevara and other people who were in the apartment were trying to get her to calm down. Vaal Guevara said that he was going to buy a ticket and fly to Trinidad. He said "If I go down, I'll make sure everyone goes down."

Exhibit 8 (Affidavit of Troy Lymuel).

ii. Antonio Joseph

Mr. Joseph was one of Vaal Guevara's roommates at the time the crime was committed. Like Mr. Lymuel, Mr. Joseph was never contacted by defense counsel prior to trial. Mr. Joseph also provided important information which could have been used to impeach and discredit the prosecution's trial theory. Mr. Joseph states:

> I had seen a shotgun [in the apartment] on several occasions which belonged to Vaal. I knew it was Vaal's because I was sitting in the apartment late one night when Vaal returned home with the shotgun in one hand and a big bag of money. I don't remember the exact date but it was before the incident in Hermann Park. I believe that was the first time I saw Vaal's shotgun in the apartment.

Exhibit 14 (Declaration of Ben Gold). Mr. Joseph's observations not only show that Guevara was using the shotgun to commit other robberies prior to the Hermann Park shooting but also directly contradict the trial testimony of Guevara who claimed that Mr. Williams owned the shotgun and brought it to Guevara's apartment. *See* S.F. Vol 28: 204-5.

Taken together the testimony of Mr. Lymuel and Mr. Joseph demonstrate a reasonable probability that if they had been presented the outcome of Mr. Williams' trial would have been different. Had the jury learned of Winn's confession and Guevara's previous robbery with a shotgun, they would have certainly given less credence to Winn and Guevara's damning testimony. Moreover, if evidence was adduced that Winn was shot the victim, she would have to

had been considered by the jury to be an accomplice and consequently, her testimony could not have served to corroborate Guevara's accomplice witness testimony that Mr. Williams shot the victim with a shotgun.

C. Mr. Williams Was Denied the Effective Assistance of Counsel When Trial Counsel Failed to Consult an Independent Forensic Pathologist.

Trial counsel was ineffective in failing to secure the services of an independent forensic pathologist. The harm of trial counsels failure in this regard is immeasurable – particularly given that the only court to ever hear evidence of an independent examination found that the fatal shot could not have been fired by Mr. Williams.

At trial, the prosecution presented testimony from medical examiner Dr. Tommy Brown to bolster the prosecution theory about the victim's death. Dr. Brown testified that the shotgun blast, although inflicted after another gunshot wound, was the cause of death. Dr. Brown based this opinion on his belief that "a red margin around the entrance wound of the left temple" indicated that the victim "had blood pressure at the time he was shot with the shotgun." S.F. Vol 29: 101-02. According to Dr. Brown the wound would have been yellow if the victim was already dead "because one does not sustain blood pressure."

Dr. Brown also informed the jury that the shotgun was fired no further than five to six feet from the victim's head. S.F. Vol 29: 101. Upon further questioning, Dr. Brown estimated the range to be between two to seven, eight feet, something like that." *Id*. The importance of Dr. Brown's opinions was emphasized repeatedly to the jury in closing argument as the prosecution belittled the defense's argument:

> That ain't all. Evidently Tommy Brown is just horribly wrong when he tells you Adonius Collier was alive, that there was definitely a blood pressure at the time he was killed.

...

> Dr. Brown is wrong when he tells you that Adonius Collier had a blood pressure at the time he was killed. He's just flat out wrong. Here's the best part. Here's what they want you to believe. Think about this. He shoots a dead man, okay. Vaal Guevara is the real killer. He shoots a bullet into Adonius Collier's head. This defendant checks, well, gee, there isn't any pulse. Feels for the heart. I don't hear any heartbeat. But I guess he probably tries C.P.R. He never wanted to kill anybody. He can't get any help. The guy said, what the heck, I will mutilate a corpse, I will fire my shotgun into a dead body. If you think that is the most ridiculous thing you ever heard, I agree with you. That's the whole defense. It's implausible. It's ridiculous.

S.F. Vol 32: 63-5.

During state habeas, Marc Krouse, Deputy Chief Medical Examiner of the Tarrant County Medical Examiner's Office reviewed Dr. Brown's testimony and the evidence in Mr. Williams' case. Based upon his review, Dr. Krouse stated:

> Tommy Brown's assertion that the wound would be yellow if he had already been dead from the first bullet is not correct, since blood may accumulate passively (or under the effect of gravity) in and around such post-mortem wounds. A pathologist cannot sequence a number of firearm injuries based on the presence or absence of red color around the wound.
>
> . . .
>
> My review of the testimony indicates that Tommy Brown was not justified in stating that, either in terms of reasonable medical probability, or in terms of clear and convincing, the shotgun blast was *the* cause of death because as stated above a pathologist can not "sequence" cause of death by coloration of the wound, especially lacking any examination of the entry wound produced by the .22 caliber bullet. The properly phrased cause of death would be "Craniocerebral trauma due to shotgun and handgun wounds to the head.
>
> Consequently, Adonius Collier's death may have been effectively caused prior to infliction of the shotgun blast by the penetration of the .22 Magnum projectile (EB-1) into his head.

Exhibit 7 (Affidavit of Marc Krouse, MD).

During both state habeas hearings, Dr. Krouse reaffirmed his concern with Dr. Brown's methods and findings. Dr. Krouse also expressed dismay with Dr. Brown's conclusion that the shotgun was fired at a range of less than seven or eight feet. According to Dr. Krouse, the

minimum distance between the muzzle of the shotgun and the victim had to be six to eight feet and the outside range "would probably be around 15 feet or so." EHSF2: 75-6. Dr. Krouse stated without hesitation that the victim's wound could not have been caused by someone standing over the victim:

> [Counsel]: Would you agree with me this wound could not have been caused by placing the shotgun in contact with the victim's head?
>
> [Krouse]: Yes.
>
> [Counsel]: Could this injury have been made by someone standing over the victim and putting the shotgun in the victim's mouth?
>
> [Krouse]: No.
>
> [Counsel]: Could it have been made by someone standing over the victim and pointing it right at his temple as we see the wounds on the photographs?
>
> [Krouse]: You're going to have to get that target-to-muzzle distance in there somehow, maybe hanging from a ladder or tree branch, but standing normal height, I don't think so.
>
> [Counsel]: So if the person was standing over, pointing down with the shotgun, they would have to be on a ladder in order to be six or eight feet away?
>
> [Krouse]: I think that you just about got to have that much distance, yes. It would be hard to do.
>
> [Counsel]: Would you agree that Mr. Brown was probably mistaken in his testimony when he said the gun was fired from two to four feet from the wound?
>
> [Krouse]: Yes.

EHSF2: 76-7.

Furthermore, Dr. Krouse testified that the .22 caliber bullet alone could have caused Mr. Collier's death. EHSF2: 68. According to Dr. Krouse, the .22 caliber bullet was "clearly and

convincingly a contributory, if not major cause, of the decedent's death," and nothing could rule out the possibility that he was already dead when he was shot with the shotgun. EHSF2: 73.

1. State Habeas Court Decision

After hearing evidence on this claim, the Honorable Joan Campbell of the 248th District Court of Harris County entered findings of fact and conclusions of law recommending that Mr. Williams be granted relief. Judge Campbell ruled:

> According to the affidavit and habeas testimony of Marc Krouse, M.D., who testified for the Applicant during habeas proceedings, the injury caused by the bullet recovered from the medical examiner's office could have caused the death of the Complainant. Further, Krouse testified that the Complainant was shot from a distance of 6-16 feet, and not by someone standing over him with a shotgun, refuting the testimony of Guevara.
>
> The Court finds that the great importance of an independent pathologist is based on knowing that EB-1 is in fact a .22 bullet from Guevara's gun and that Guevara was the first person to shoot the Complainant. Certainly with the knowledge that EB-1 is a .22 bullet, the testimony of a pathologist such as Krouse is vital to defensive argument that Applicant either was not guilty, or punishment should be different.

Findings of Fact at ¶63-4.

2. Court of Criminal Appeals Decision

The Court of Criminal Appeals rejected Judge Campbell's recommendation of relief without explanation. The CCA issued an unpublished two-page order stating simply "we do not believe, based on our review of the record presented, that some of the crucial fact findings and the recommendation based, at least in part, on them, are supported by the evidence presented at the evidentiary hearing." The CCA made no effort to identify which "crucial fact findings" they disagreed with nor how the legal recommendation "based, at least in part, on them" did not comport with existing precedent.

3. Trial Counsel's Failure to Consult an Independent Forensic Pathologist Undermined Confidence in the Jury's Verdict.

Had the testimony of Marc Krouse been presented to Mr. Williams' jury, there is certainly a reasonable probability that the outcome of his trial would have been different. Dr. Krouse's testimony provided evidence critical to the impeachment of the prosecution's theory of events. At trial, only Guevara claimed to have seen Mr. Williams standing over the body with the shotgun. Guevara told the jury he had run about ten feet away from the victim when he heard a loud blast:

[Guevara]: I was running the opposite way when I heard the shotgun blast. I immediately turned to my right, turned back to where everybody was at.

[Prosecutor]: Did you see the shotgun in anybody's hand?

[Guevara]: Yes.

[Prosecutor]: Whose hand?

[Guevara]: It was in the defendant's hand.

[Prosecutor]: How long did you hear the shotgun blast?

[Guevara]: A matter of seconds, maybe.

[Prosecutor]: Did you see the guy who was on the ground, the darker-skinned guy who was selling you cocaine, did you see his body doing anything when you looked back after the shotgun blast?

[Guevara]: When I looked back I didn't immediately, but when I came closer I did.

[Prosecutor]: What did you see?

[Guevara]: I saw his foot twitching.

S.F. Vol 28: 180-81.

Guevara's testimony thus provided the prosecution a supposed eyewitness to Mr. Williams standing over the victim with the shotgun. In addition to the now-discovered fact that

Guevara had initially shot the victim in the head with a handgun, Dr. Krouse's testimony would have provided the defense with a means to demonstrate that Guevara's description of the shooting defied scientific analysis. According to Dr. Krouse, the shotgun injury inflicted on the victim could not have occurred from a distance less than six feet and could have been as great at fifteen feet. Mr. Williams, therefore, could not have fired the shotgun as described by Guevara unless, as Dr. Krouse testified, he was standing on a ladder or hanging from a tree. EHSF2: 76-7. Coupled with Mr. Rasul's testimony that Mr. Williams was wearing a T-shirt and sweats and thus had no means of hiding a shotgun, Dr. Krouse's important findings provided a necessary link to the defense theory that the shotgun was fired by either Patrick Smith or Elaine Winn.

Moreover, with Dr. Krouse's testimony, the jury could reasonably have concluded that the victim was already deceased when he was shot with the shotgun, a theory raised by trial counsel and belittled in the state's closing argument. *See* S.F. Vol 31:65 ("If you think that is the most ridiculous thing you ever heard, I agree with you. That's the whole defense. It's implausible. It's ridiculous."); S.F. Vol 31: 98 ("Isn't that the most ridiculous thing you heard in your life? ... You realize that's about the stupidest thing you ever heard."). Had the jury heard Dr. Krouse's testimony at trial, it is reasonable to conclude (as did the state district judge) that trial counsel's oversight undermined confidence in the jury's verdict and that Mr. Williams is entitled to habeas relief.

VI. THE PROSECUTION VIOLATED MR. WILLIAMS' RIGHT TO A FAIR TRIAL BY SUPPRESSING EXCULPATORY EVIDENCE IN VIOLATION OF *BRADY V. MARYLAND* AND PRESENTING FALSE EVIDENCE IN VIOLATION OF *GIGLIO V. UNITED STATES* AND *NAPUE V. ILLINOIS*.

With further discovery authorized by this Court and an evidentiary hearing Mr. Williams will demonstrate that the prosecution in his case suppressed material evidence and presented false testimony regarding the degree of Guevara's involvement in the crime and the fact that Guevara's .22 Caliber firearm was responsible for Mr. Collier's death in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States,* and *Napue v. Illinois* its progeny. Had this evidence been made available to the defense, it would have destroyed the State's theory of Mr. Collier's murder and exculpated Mr. Williams.

A. The Legal Standards for Mr. Williams' Claims

In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id*. at 87. Subsequent decisions have abandoned the prerequisite of a defense request for exculpatory evidence before an accused may benefit from the Court's decision in *Brady*. *United States v. Bagley*, 473 U.S. 667, 682 (1985). Moreover, the Court has rejected any distinction between impeachment and exculpatory evidence for purposes of *Brady* analysis. *Id*. at 677; *Giglio v. United States*, 405 U.S. 150, 154 (1972). Under *Brady* and its progeny, a proceeding is rendered fundamentally unfair if: 1) the prosecution suppressed favorable evidence; and, 2) the evidence was material to either the guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). *See Kyles v. Whitley*, 514 U.S. 419, 432 (1995); *United States v. Bagley*, 473 U.S. 667, 683 (1985); *Blackmon v. Scott*, 22 F.3d 560, 564 (5th Cir), *cert. denied*, 513 U.S. 1060 (1994); *Ex parte Adams*, 768 S.W.2d 281, 290 (Tex. Crim. App. 1989).

Evidence is material "if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Kyles*, 519 U.S. at 432; *Bagley*, 473 U.S. at 682; *Blackmon*, 22 F.3d at 564; *Adams*, 768 S.W.2d at 290. The *Kyles* decision clarifies four significant aspects of materiality analysis under *Brady*. First, to demonstrate materiality, a Petitioner is not required to demonstrate by a preponderance of the evidence that the suppressed evidence, if known to the defense, would have ultimately resulted in an acquittal or a life sentence. *Kyles*, 514 U.S. at 434. The inquiry is more properly whether the suppressed evidence undermines confidence in the jury's decision. *Id*. at 1566. Second, materiality analysis "*is not a sufficiency of the evidence test*." *Id*. (emphasis added). The Supreme Court clearly stated, "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict [or return a sentence of death]." *Id*. at 434-35. One demonstrates a *Brady* violation by "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id*. (footnote omitted); *see also Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (suppressed impeachment evidence may have consequences for the case far beyond discrediting the witness's testimony). Third, harmless error analysis is not applicable to *Brady* violations. *Kyles*, 514 U.S. at 435. The *Kyles* Court stated, "once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless error review." *Id*. Finally, materiality must be assessed "in terms of the suppressed evidence considered collectively, not item by item." *Kyles*, 514 U.S. at 436. In Mr. Williams' case, there is a reasonable probability that the result of the guilt/innocence phase of his trial would have been different had the defense known of the suppressed information.

In order to obtain relief under *Giglio*, 405 U.S. 150, Mr. Williams must show that (1) the testimony in question was actually false, (2) the state knew it was false and (3) the testimony was material. *See Pyles v. Johnson*, 136 F.3d 986, 996 (5th Cir. 1998); *United States v. O'Keefe*, 128 F.3d 885, 893 (5th Cir. 1997); *Faulder*, 81 F.3d at 519. "False evidence is 'material' only "if there is any reasonable likelihood that [it] could have affected the jury's verdict." *Goodwin v. Johnson*, 132 F.3d 162, 185 (5th Cir. 1997) (quoting *Westley v. Johnson*, 83 F.3d 714, 726 (5th Cir.1996), *cert. denied*, 117 S.Ct. 773 (1997). It is immaterial whether the false testimony directly concerns an essential element of the Government's proof or whether it bears only upon the credibility of the witness. *O'Keefe*, 128 F.3d at 893; *Barham*, 595 F.2d at 241-42. Even if there is sufficient evidence in the case to support a guilty verdict, it is the jury, and not judges, that is the body given the constitutional responsibility to decide guilt or innocence. *Barham*, 595 F.2d at 242. Due process is also violated when a prosecutor capitalizes on false testimony that has been elicited. The Fifth Circuit recently declared:

> [E]ven when the defense is aware of the falsity of the testimony, a deprivation of due process may result when the information has been provided to the defense but the government reinforces the falsehood by capitalizing on it in its closing argument, or the defense is unable to utilize the information, or when the government thereafter asks misleading questions. Thus, materiality is a method of maintaining the equal playing field between the prosecution and the defense necessary to allow the jury to perform its truth-seeking function.

O'Keefe, 128 F.3d at 894-95 (citations omitted). Habeas relief is warranted if there is a reasonable likelihood that the false testimony could have affected the jury's determination.

Bagley, 473 U.S. at 678-79 & n.9; *Moody v. Johnson*, 139 F.3d 477, 484 (5th Cir.), *cert. denied*, 119 S.Ct. 359 (1998).[10]

B. In Mr. Williams' Case, The State Suppressed Evidence That Guevara's .22 Caliber Firearm Had Been Used to Shoot the Victim and Knowingly Presented Evidence to the Jury That Contradicted This Evidence.

Prior to trial, Mr. Williams filed *Defendant's Motion for Discovery and Inspection* specifically requesting inspection of "the weapon or weapons which the State of Texas alleged or may allege was or were used in the commission of the alleged offense." Trans. at 94-6. In addition, the defense requested inspection of exculpatory evidence including "the results of any scientific tests conduced which are favorable to the Defendant or exculpatory in nature including, but not limited to, ballistics tests..." *Id*. Despite the efforts of defense counsel, the state failed to disclose information suggesting that the HPD crime lab results were suspect and that Guevara's version of events deviated from the truth.

On May 20th, 1992 and again on June 23, 1995, Robert Baldwin, a ballistics examiner with the Houston Police Department, compared a bullet taken from the victim's head with a bullet removed from another witness' foot. S.F. Vol 30: 17-8. At trial, Baldwin informed the jury that the bullet removed from the victim's head matched the one removed from the witness' foot and could absolutely not have been fired from Guevara's .22 Magnum but rather was consistent with

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[10] This standard is "considerably less onerous" than the standard for relief under *Brady v. Maryland*, 373 U.S. 83 (1963). *United States v. O'Keefe,* 169 F.3d 281, 292 (5th Cir. 1999) (Dennis, J. dissenting from order granting temporary stay pending appeal). The *Brady* standard requires a showing of a reasonable probability that the result of the proceeding would have been different if the evidence in question had been disclosed to the defense. A "reasonable probability" is defined as a probability sufficient to undermine confidence in the outcome of the proceeding. *See Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir. 1993) (citing *United States v. Bagley*, 473 U.S. 667, 679 n.9 (1985)).

Mr. Williams' .25 caliber firearm. S.F. Vol 30: 24-6. In January of 1998, after the district trial court granted habeas counsel's request for an independent examination of the ballistics evidence, Baldwin wrote a letter stating that he had now test-fired the .22 Magnum Derringer and found that the bullet (EB-1) taken from the victim's head was consistent with that gun. Exhibit 4 (1998 Letter of Robert Baldwin). Baldwin also stated in the letter that the firearm "had not been previously submitted to the laboratory for testing or comparison to the fired evidence." *Id*.

Although the prosecution and the state habeas judge deemed Baldwin's admittedly false testimony a "mistaken or accidental mischaracterization," Findings of Fact at ¶87-8, the actions of the prosecutor in Mr. Williams' case, the specific circumstances of Mr. Baldwin's work in Williams' and one other case, a possible pattern of misuse by the Harris County District Attorney's office of HPD ballistics evidence all suggest that something more than carelessness was involved on the part of the prosecutor and/or Mr. Baldwin. Despite Mr. Baldwin's assertion that the firearm was never submitted for testing prior to trial, it is unfathomable that the only weapon recovered in a capital murder case was never tested. It is doubly hard to believe in Mr. Williams' case, wherein *identity* of the shooter was a central issue affecting both guilt and punishment. Even if the firearms inspector had absentmindedly omitted to test-fire the gun, it is hard to comprehend how the case would have proceeded to trial without the prosecutor having alerted to the omission and corrected it. From the pre-trial perspective of the prosecutor, this would have been a case *about ballistics*, because ballistics was the central physical evidence in a case otherwise heavily reliant on accomplice-witness testimony. Trial counsel, who was a former Assistant District Attorney in Harris County, reinforced this fact in her state habeas testimony, asserting that she had presumed at trial that the Derringer had been tested, because "as an ex-

prosecutor that is the practice I did. I mean, it's normal to presume, in a homicide case, that all missiles and all firearms are submitted for testing." EHSF1: 119. It may be one thing for a prosecutor to omit test-firing a weapon in a case wherein identity of the shooter is not at issue. Suspicion about intentional misconduct in this case is heightened by the prosecutor's[11] argument to the jury that, if the jury had any doubt, it nevertheless could rely on the failsafe of the ballistics testimony.[12] Without test-firing of the weapon, the argument could not have been undertaken in good conscience.

Baldwin's trial testimony in Williams' case, viewed in the most favorable light, indicates gross incompetence. At worst, it suggests outright perjury. In the context of the criminal investigation and development of the state's case, the prosecution should have been aware of Baldwin's false testimony. No professionally competent firearms expert – knowing that (1) the only gun recovered in connection with the crime was in HPD's possession and (2) a bullet that might match the gun had been recovered from the victim's head – would have failed to conduct a test-firing of the weapon without *intentionally* doing so for some reason. No professionally

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[11] Mr. Baldwin's comment about the firearm never having been "submitted" is curious. Presumably, when evidence is collected by the Houston Police Department it remains in police custody until it is subpoenaed for trial. If Baldwin's own office had physical possession of the weapon, he clearly would have had access to it for testing. His statement oddly suggests otherwise.

[12] Mr. Wisner argued: "Did that defendant kill Adonius Collier? You know that he did. But again, there's a ***fail-safe*** involved in all of this. That's why we forwarded all of the firearms evidence to Bob Baldwin." S.F. Vol. 31: 105 (emphasis added). "Robert Baldwin, uncontradicted, told you both were .25 caliber bullets, told you both were the same brand, told you the markings were consistent but couldn't make a positive match. He told you absolutely, positively certain they couldn't be fired out of the Derringer. S.F. Vol. 31: 110. Mr. Wisner's assertion that the District Attorney's office *forwarded all* of the firearms evidence to Mr. Baldwin baldly contradicts Baldwin's testimony that the gun was *not submitted* to him for testing, indicating that, between Wisner and Baldwin, someone is being less than candid.

competent prosecutor, knowing the same facts, would have failed to ask the firearms expert to test-fire the gun unless he had a strategic reason not to ask for the test, or to outright tell the expert *not* to conduct the test. The evidence of invidious intent here is heightened by the facts that:

> (1) the prosecutor made a very favorable deal with codefendant Guevara in return for Guevara's testimony against Mr. Williams; and,
>
> (2) the prosecutor and the Houston Police Department possessed an oral statement from Guevara to the effect that he fired his weapon in the direction of Collier.

This circumstantial evidence strongly suggests that either the weapon *was* test-fired before[13] trial (but perhaps after the deal had been forged with co-defendant Guevara and the State had committed itself to its theory of the case) or the weapon was intentionally not tested, again so as to protect the State's commitment to its theory of the case and strategy to win a conviction without regard to the truth. Mr. Singer's state habeas testimony reinforces these suspicions, by showing either that Mr. Baldwin would have known his own testimony was false or that Mr. Baldwin could have been used by the prosecutor to place the evidence in a false light (if, indeed, the gun never was "submitted" to Baldwin): "[T]here is no question that [EB-1 and EB-2] are of different calibers and that should have been noted by a competent firearms examiner at the beginning of any examination that had been made." EHSF2: 27-8. Mr. Singer stated that just by looking at the bullets a person would be able to tell they were of different calibers: "Certainly to the trained naked eye, it should be obvious without very much difficulty at all that EB-1 and EB-2 are two different caliber projectiles." EHSF2: 24. Indeed, according to Mr. Singer, "[t]here is

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[13] The prosecutors' and Baldwin's decision to test-fire the weapon before turning it over to the defense expert in the state habeas process may shed some light on this. What if this was undertaken to cover up a prior test?

enough of difference between a .25-caliber bullet and a .22 Magnum that even a nonexpert could look at them and tell the difference." Exhibit 26 (Houston Chronicle article, 3/23/03).

The circumstantial evidence of misconduct in Williams' case is reinforced by a currently emerging pattern and practice of suppression and dubious presentation of HPD ballistics identification evidence by the Harris County District Attorney's office. As interest has stirred in the press recently over the HPD crime lab's DNA section, the press has also exposed problems associated with the ballistics section and ballistics testimony. Two additional death penalty cases with similarly very troubling ballistics elements have come to light: Johnnie Bernal and Anibal Rousseau.

1. Johnnie Bernal

In the same year as Williams' trial, Mr. Wisner and Mr. Baldwin teamed up again to produce similarly dubious testimony in Johnnie Bernal's capital murder case. *See* Wendy Grossman, *An Absolute Maybe*, Houston Press, August 8, 2002; Roma Khanna, *Cases Cast Doubt On Ballistics Work at HPD Lab*, Houston Chronicle, March 23, 2003.[14] (Attached as Exhibit 26). The facts in Bernal's case may be summarized as follows:

> Bernal, another 17-year-old defendant, was riding in a car on August 19, 1994, with four other youths. The driver of the car pulled into the parking lot of an ice house where four young adults who had just finished their first year of college were standing and talking. The ice house was closed and only the lights in the parking lot were on.
>
> As the car pulled into the parking lot, the young woman whose father owned the ice house, Debra Nicholson, turned and ran across the parking lot to her house, which was located behind the ice house. One of the young men, Matt

[14] The following summary of Mr. Bernal's case is culled from these news articles and a conversation between Mr. Long and Mr. Robert Rosenberg, current habeas counsel for Mr. Bernal.

Iwama, also testified he immediately turned and ran behind her. The other two young men waited a few seconds after the car pulled into the ice house. According to the testimony of several of the witnesses, the shooter pointed a gun out of the car window and yelled "Give me your loose change." At that point, the remaining two young men in the parking lot turned and started to run. Shots were fired from the car and one bullet punctured Lee Dilley's lung and heart, killing him.

At the crime scene, Nicholson and Iwama were unable to provide the police with a description of the shooter or anything else. Richard Mistchke, the other young man who was in the parking lot gave a description of the shooter as being approximately 5'8" tall with long hair. (A police sketch based on Mistchke's description resembled Juan Reynoso, a fourteen-year-old in the car.) At the time Johnnie Bernal was arrested, several weeks after the shooting, he was approximately six feet tall, weighed about 190 pounds, and wore his hair in a buzz cut.

Mr. Bernal was arrested on an anonymous tip. The police took a .357 revolver and eleven .38 bullets out of a dresser drawer in Bernal's bedroom. A .38 caliber bullet was used to kill Lee Dilley. Robert Baldwin testified at trial that the .357 revolver taken from Bernal's room matched the bullet taken from Dilley's body. However, Baldwin's method in reaching that conclusion was exceedingly dubious. Baldwin testified that he test-fired the eleven bullets taken from Bernal's room and *none of them matched* the bullet from the victim. He then test-fired an *additional fourteen bullets of his own* before finally obtaining what he described as a match. After taking a couple of these shots, Baldwin applied an unnamed solvent to the barrel to remove heavy lead deposits. He then fired twelve more shots, failing to keep records as to which of the final twelve bullets provided the alleged match.

State habeas counsel, Mr. Rosenberg, contacted Richard Ernst – at that time a Tarrant County ballistics examiner – and provided him with a summary of the gun-related evidence. Mr. Ernst opined that in all likelihood Baldwin's testimony was false and that Baldwin violated the procedures of ballistics examiners and actually destroyed the gun evidence by cleaning the barrel with the solvent. Ernst asked Rosenberg to send him the testimony. After reading the testimony of Baldwin, Ernst gave an affidavit asserting that the likelihood of the results of the testing being a match were improbable if not impossible and that Baldwin had destroyed the evidence by cleaning the barrel and violated the professional standards of a weapons examiner. Ernst attested that it was "astronomically improbable, if not impossible" for the bullet to match after Mr. Baldwin cleaned the weapon. "Your best chance," he said, "of making a match is actually on the 1st 2 or 3 rounds. . . . If you should clean the weapon, then you're actually removing the material that marked the original evidence bullet." Mr.

Baldwin subsequently disagreed, asserting that the cleaning would not have altered the "individual imperfections in the rifling" that produce the identification pattern.

Prior to Mr. Bernal's trial, defense counsel, Don Cantrell and Rueben Guerra requested and were authorized funds to hire a ballistics expert. However, they did not follow through on hiring the expert. They also had funds available to hire an identification expert but never followed through on that either. Cantrell concluded in an affidavit submitted in the state habeas process that, if the state had informed him of the "unconventional manner in which the gun had been tested," he would have "vigorously pursued" a request for a weapons examiner to "challenge and discredit" Baldwin's testimony that a match was made. Cantrell wrote that, at the time of trial, both he and Bernal believed the weapon recovered from Bernal's room had been wielded by one of the other companions on the night of the crime, Juan Reynoso, and had been used by Reynoso to shoot and kill Dilley. However, Reynoso also had admitted to owning a .38 caliber gun and, at the time of trial, was in boot camp for violating his probation with the possession of a nine-millimeter semi-automatic pistol. Cantrell admitted that he should have challenged the veracity of Mr. Baldwin's test results and thereby obtained support for "Mr. Bernal's testimony that he was not the shooter, but that Mr. Reynoso was using the .38 caliber pistol he testified he owned. . . . The great weight of evidence would have clearly pointed to Mr. Reynoso as the shooter." Reynoso, incidentally, fled to Mexico immediately after the shooting, and did not return to the United States until after Bernal was arrested.

Rosenberg repeatedly asked for leave from the court to conduct discovery during the state habeas proceedings and each time discovery was denied. The Harris County District Attorney resisted all of his discovery efforts. The Court of Criminal Appeals denied habeas relief and, according to Bernal's habeas counsel, the case is pending in this Court.

2. Anibal Rousseau

Rousseau's death penalty case was handled by current District Attorney Chuck Rosenthal. *Rousseau* is very much like *Williams* in that it similarly involves suppression and the *timing of testing* by the ballistics lab, again with an apparent intent to support the State's theory of the offense at a cost to truth. *See generally* Roma Khanna and Steve McVicker, *Fingers Pointed at*

HPD Crime Lab in Death Row Case, Houston Chronicle, April 24, 2003, at A1.[15] (Attached as Exhibit 27).

> Rousseau was convicted of capital murder for the killing of EPA official David Delitta during an October 1998 armed robbery outside of a southside Houston restaurant. He was sentenced to death in May 1989 after a brief trial. Twelve years later, his state habeas counsel discovered, in the District Attorney's file, that the HPD ballistics lab had matched the bullet that killed Delitta to bullets from another killing. *One month after Rousseau was sentenced to death*, the same lab also had matched bullets from both of the shootings to a weapon that had been found on Juan Guerrero, who was convicted of the other murder. This exculpatory ballistics evidence was never turned over to the defense until it was discovered by habeas counsel.
>
> The chronology of Rousseau's case reflects that Rousseau surrendered himself to the police on December 9, 1988, as the prime suspect in the Delitta murder. Leo Williams was found shot to death in southeast Houston on March 1, 1989. Juan Guerrero was arrested after a traffic accident on March 14, 1989, and the police recovered from Guerrero a black .38 revolver at that time. On April 15, 1989, the HPD ballistics section determined that bullets from Delitta's and Williams' bodies were fired by the same weapon. On April 19, 1989, the revolver recovered from Guerrero was "submitted for testing." On May 8, 1989, testimony began in Rousseau's trial, and on May 17th, he was sentenced to die. Subsequently, on June 27, 1989, the HPD ballistics section determined that the bullets in Williams' body, which matched those from Delitta, were from Guerrero's revolver. Nevertheless, when Guerrero was paroled on January 28, 2002, he was immediately deported to the Dominican Republic.
>
> Former Asst. District Attorney Lorraine Parker, who was second chair to Rosenthal in Rousseau's trial, reportedly told the Houston Chronicle in April 2002 that "someone knew something," appearing to suggest that, in her opinion, the suppression of the match to the gun in Guerrero's possession was intentional.

[15] The following summary is drawn from this news article.

Due to systemic barriers to access of work product and other vital information,[16] defendants rarely are able to present direct evidence of a prosecutor's unlawful or unethical intent. As a result, courts may accept circumstantial evidence *E.g.*, *Batson v. Kentucky*, 476 U.S. 79 (1986); *Oregon v. Kennedy*, 456 U.S. 667, 679-80 (1982) (Powell, J., concurring) ("Because 'subjective' intent [of the prosecutor] often may be unknowable, I emphasize that a court--in considering [whether a prosecutor intended to provoke a mistrial]--should rely primarily upon the objective facts and circumstances of the particular case"). The circumstantial evidence of intentional suppression and presentation of false testimony in Williams' case, viewed in isolation, is strong, and consists, at least in part, of the following:

> – the fact that Baldwin's testimony unquestionably was ***false*** that there was no "way in the world" that Guevara's weapon could be tied to either the bullet in Collier's head or the bullet in Rasul's foot;
>
> – the fact of Baldwin's apparent confidence as elicited by the prosecutor's leading question ("no way in the world"), even though he allegedly had never test-fired Guevara's weapon;
>
> – the fact that even a non-expert would immediately be able to discern a significant difference between the bullet recovered from Emmade Rasul and the one recovered from Adonius Collier (requiring the logical deduction, where there were only two pistols at issue, that Guevara's gun very much might be involved);
>
> – the fact that Robert Baldwin testified, nevertheless, that the bullets from Rasul's foot and Collier's brain were from the same .25 caliber automatic, even though they looked different.
>
> – the fact that a minimally competent ballistics expert, in possession of a gun known to have been fired toward the victim in a multiple defendant case where identity was at issue, would have test-fired the gun;

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[16] In the state process, Mr. Williams diligently sought to unmask the knowing presentation of false testimony by the State in regard to Mr. Baldwin, filing various open records requests and trying to get as much discovery as possible from every source, and he plans to file a detailed discovery motion in this Court, as well, in relation to these allegations.

– the combined facts that the Baldwin testified that the weapon was *not* even submitted to him for testing prior to trial and that the prosecutor told the jury that his office forwarded all of the firearms evidence to the ballistics examiner;

– the fact that an ethical prosecutor, committed to seeking out the truth in the same case, wherein the identity of the shooter was critical, would have (at some point, at least, before termination of the trial) ordered the test-firing of the weapon, especially when he had in his possession an oral statement by Guevara admitting that he had shot the very same weapon in the direction of Collier;

– the fact that the State, early on, was involved negotiating a deal for leniency with co-defendant Guevara and, in the process, committed itself to presentation of Guevara's version of the story;

– the fact that, under all the circumstances, the prosecutor argued to the jury that it could consider the ballistics evidence the "failsafe" of a fair conviction in the case;

– emerging facts in other troubled cases suggesting a pattern of relationship between the prosecutor's office and the HPD crime lab ballistics personnel, which possibly involves selective suppression of ballistics evidence in multiple defendant cases (that may involve plea arrangements for testimony) and others that are tied to the question of identity of the shooter.

The record in Mr. Williams' case to date supports findings of presentation of false testimony and suppression of material, exculpatory evidence. Mr. Williams respectfully will file a motion asking for specific discovery on this issue, pursuant to Rule 6 of the Rules Governing Section 2254 Cases, and believes that he ultimately will be able to prove not only that the State solicited false firearms testimony, but that it knowingly and/or intentionally did so. Thus, under either *Brady* or *Agurs/Giglio*, this Court should reverse his conviction and sentence.

VII. THE CUMULATIVE EFFECT OF THE INEFFECTIVE ASSISTANCE OF COUNSEL AND THE STATE'S *BRADY* VIOLATIONS UNDERMINED CONFIDENCE IN THE VERDICT AT MR. WILLIAMS' TRIAL

In determining the prejudice of ineffective assistance of counsel as well as the materiality of a *Brady* violation, a court must look at all of the evidence cumulatively. *Kyles*, 514 S. Ct. at

436 n. 10. The court must consider what would have transpired if all of the illegally suppressed evidence had been produced to counsel who were performing effectively. *Gonzales*, 247 F.3d at 1066; *Phillips*, 267 F.3d 966; *Kyles*, 514 U.S. at 441 (to properly examine the materiality of the illegally suppressed exculpatory evidence is to inquire into the effect of "disclosure of the suppressed evidence to *competent counsel*" on the result of the trial) (emphasis added).

Such a review of Mr. Williams' case would show, among other things, that (1) Vaal Guevara and not Mr. Williams fired the first shot into the victim's head; (2) there is a reasonable probability that this shot killed the victim; (3) Guevara's description of the events in Hermann Park are contradicted by medical and scientific analysis; (4) Winn confessed to her involvement in the shooting; (5) Guevara owned a shotgun and had used it in a previous robbery and; (6) the beeper claimed to have been stolen by Mr. Williams was actually in the possession of the victim's stepfather. In short, a cumulative examination of the claims raised by Mr. Williams utterly destroy the prosecution's picture of what occurred that night in Hermann Park. Mr. Williams had a right to have the jury that convicted him and sentenced him to death hear this evidence. Because it did not, this court can have no confidence in the outcome of the proceeding. *See Strickland*, 466 U.S. at 694.

VIII. MR. WILLIAMS IS ACTUALLY INNOCENT OF THE MURDER OF ADONIOUS COLLIER AND HIS EXECUTION FOR THE CRIME WOULD VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

In *Herrera v. Collins*, 506 U.S. 390 (1993), the United States Supreme Court considered whether a Texas habeas petitioner's claim that he was actually innocent of the murder that he had

been convicted of. Although the Court did not explicitly hold that the execution of an innocent person would violate the Constitution, the Court stated that:

> We may assume for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of the defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.

Id. at 417. The Court did not formally recognize such a right, however, because it decided that Petitioner Herrera's claim of innocence was unpersuasive. *Id*. Mr. Williams' case, however, presents issues of fact which are deeply troubling and raise substantial questions as to Mr. Williams' guilt or innocence of the murder of Adonious Collier.

The state's case, as discussed above, centered on several key facts:

- Mr. Williams carried both and handgun and a shotgun into the park intending to rob the victim
- Mr. Williams shot the victim with a .25 caliber handgun and subsequently with a shotgun
- Mr. Guevara only shot in self-defense and did not shoot the victim at all
- Mr. Guevara saw Mr. Williams standing over the victim's body moments after he fired the shotgun blast
- Ms. Winn and Mr. Guevara saw Mr. Williams return to the vehicle with the victim's beeper, some crack cocaine and a baseball cap thus proving the robbery

The weight of the evidence presented in this petition unequivocally demonstrates that these allegations are contrary to scientific analysis and simply false. Once competent ballistics testing was performed, it became clear that Mr. Guevara and not Mr. Williams shot the victim with a handgun. Moreover, the State's version of the events in Hermann Park, as described by their

witnesses, are internally inconsistent and contrary to forensic science.[17] As this petition demonstrates, Mr. Williams' trial was fundamentally unfair and resulted in the conviction of an innocent man. Such a conviction is repugnant to both the Federal Constitution and any notion of justice and cannot stand.

IX. MR. WILLIAMS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PUNISHMENT PHASE OF HIS TRIAL.

When the jurors burdened with sentencing Nanon Williams gathered together to consider his life, they were denied access to the information most relevant to their decision – the quality and nature of the life they were being asked to take. Due to the gross inadequacy of the trial counsel's penalty phase preparation, the jury was asked to weigh the value of Nanon's life without knowing that his life had been spent in an atmosphere of unrelenting violence. The jury never knew that Nanon's mother physically abused him throughout his childhood, and even stabbed him in the face. In considering the moral consequences of the crime they found he had

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[17] The habeas testimony of Patrick Smith provides no solace for the State. Mr. Smith's testimony was incredulous, contradicting itself and the observations of HPD officers. The problems in Smith's account of the events in the park are legion: First, Smith's testimony from both evidentiary hearings contradicts both his affidavit for the state and the affidavit taken by Applicant. Second, Smith's testimony at the first evidentiary hearing contradicts his testimony at the second. Third, Smith's affidavit for the State as a result of being granted immunity contradicts the later affidavit he executed under oath during an interview with Applicant's counsel, at which his attorney was present. Fourth, Smith's direct examination testimony at the first and second evidentiary hearing contradicts the testimony he gave when cross-examined by habeas counsel at these hearings. Fifth, Smith's testimony and affidavit, in regards to the distance of shotgun blast, contradicts Dr. Krouse's expert testimony. Sixth, Smith's testimony and affidavits about what could be seen from the jeep where it was parked in the parking lot contradicts directly the testimony of Winn at trial in 1995 and the statement given by Winn in 1992. Lastly, Smith's testimony and affidavits from 1998 and 2000 contradict the physical descriptions of the scene and the evidence described in police reports made by Houston Police Officers at the crime scene on May 14, 1992.

committed, the jury could not weigh his actions with the staggering losses that he had suffered in his brief life, including the fatal shooting of his father, the near-fatal shooting of his uncle, and the swimming accident that turned his best friend into a vegetable. Perhaps most significantly, when contemplating Nanon's actions and reactions on that night in Herman Park, the jury was never given the benefit of knowing that Nanon Williams suffers from a debilitating psychological disorder resulting from the violence and chaos of his formative years.

During the punishment phase of a death penalty case, defense counsel bears the responsibility of thoroughly investigating the defendant's background and the State's case. A jury cannot "perform its function" of weighing the "aggravating and mitigating factors" relevant to the defendant's fate if defense counsel fails in this task. *Loyd v. Whitley*, 977 F.2d 149, 160 (5th Cir. 1992), *cert. denied*, 508 U.S. 911 (1993). As the Supreme Court has recently reaffirmed, "capital proceedings [must] be policed *at all stages* by an especially vigilant concern for procedural fairness and for the accuracy of factfinding." *Monge v. California*, 118 S.Ct. 2246, 2252 (1998) (citing *Strickland v. Washington*, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part)) (emphasis added).

During punishment phase, Mr. Williams' trial counsel violated the strictures of *Strickland* by failing to retain and consult a mental health expert. Had she done so, the jury would have learned of Mr. Williams' condition, post-traumatic stress disorder (PTSD), and understood how this condition related back to the violent life-threatening events that colored his young life. Due to the complex issues involved when a person suffers from PTSD, trial counsel should have sought the consultation of a psychiatrist in her preparation for the punishment phase defense of Mr. Williams.

Without the helpful expertise of a psychiatrist, it was impossible for the jurors to understand why the events of his background could serve to do anything more than program him to be the person he was portrayed to be by the state: a cold blooded killer. Presenting the jury with the facts of the events that caused him to suffer from PTSD, but omitting any explanation of the condition deprived the jury the ability to see Mr. Williams in the proper context: *not* a psychopath, but clearly someone who had never had the opportunity to accomplish his goals, someone who was salvageable and had great potential to be a contributing member of society. Failing to employ a psychiatrist to explain the evidence the jury received from Mr. Williams' family even while telling the jury about the violence he was exposed to as a youngster likely confused and misled the jurors and directly contributed to the jury's erroneous decision that he was likely to be dangerous in the future.

A. Relevant Facts

During the punishment phase of Mr. Williams' trial, defense counsel presented testimony from Mr. Williams' mother, sister and former probation officer. Mr. Williams' mother, Lee Bolton, informed the jury that although she currently worked as a registered nurse, when Mr. Williams was young she and her husband supported the family through the sale of drugs. S.F. Vol 34: 22-30. Ms. Bolton testified that because she was incarcerated on several occasions, Mr. Williams was frequently placed with different members of the family. S.F. Vol 34: 25-26; S.F. Vol 34: 31-33. Due to her lifestyle at that time, Ms. Bolton explained to the jury that Mr. Williams was exposed to the drug trade at an early age.

Mr. Williams sister, Angela Grant, recalled an incident where Mr. Williams, at age 7 or 8 witnessed the shooting of his uncle, S.F. Vol 34: 106-7. A few years later, Mr. Williams learned

his father had been shot to death. S.F. Vol 34: 107. Ms. Grant also remembered the FBI raid on her parents house when officers knocked down the door and held the family at gunpoint. S.F. Vol 34: 108. Even young Mr. Williams, at age 11, was brought out of the house at gunpoint. S.F. Vol 34: 109. After their parents incarceration, Mr. Williams and his sister were briefly placed in a foster home before their grandparents in Texas took them in. S.F. Vol 34: 112-13.

Howard Gold, a California juvenile probation officer, explained to the jury that Mr. Williams excelled in the California juvenile correctional program. S.F. Vol 34: 151-53. Mr. Gold testified that Mr. Williams has a close family, can follow rules and is very intelligent. S.F. Vol 34: 164. In Mr. Gold's opinion, Mr. Williams would do well in a supervised setting such as prison. *Id*.

During the state habeas hearing, testimony revealed that trial counsel was granted funding for a mental health expert, EHSF 1: 120, but never consulted an expert. Trial counsel stated that Mr. Williams initially refused to speak with a mental health expert but "he did change his mind after I asked his grandparents to visit with me at my office and they went to talk to him." *Id*. Although trial counsel testified that she was concerned that jurors would be "jaundiced about a sudden, quick, 15-minute evaluation" done on the eve of trial, *Id*. at 131, she also made clear that she didn't even know whether a psychiatrist would be helpful. *Id*. at 132.

Habeas counsel consulted an expert regarding Mr. Williams' possible mental health concerns who provided both an affidavit and testified at each evidentiary hearing. Dr. Gary Aitcheson, a forensic and clinical psychiatrist, reviewed Mr. Williams' records and conducted a mental health examination, concluding that Mr. Williams suffered from Post-Traumatic Stress Disorder (PTSD).

During both state habeas hearings, Dr. Aitcheson was qualified to give testimony in regards to Mr. Williams' major mental illness of post traumatic stress disorder and to speak to the issues of mitigation that should have been presented to the jury at trial. Dr. Aitcheson explained that he worked as a psychiatrist at the Vernon State Hospital and testified as to his experience in working with dangerous, criminally insane persons and psychopaths. He testified that unlike his patients in the TDCJ system, and despite Dr. Aitcheson's diagnosis of PTSD, Mr. Williams was an empathetic person, a non-dangerous person, and an emotionally sensitive person. Dr. Aitcheson explained why the life-threatening and other traumatic events suffered by Mr. Williams during his childhood – Mr. Williams was still a child at the time the instant crime took place – resulted in PTSD. He explained how he, as a mental health expert, could have presented Mr. Williams's social history and mental illness to the jury at Mr. Williams's trial so that the jury would be assisted in how to use the facts about his background in reaching their decision on whether to sentence him to death or give him a life sentence. He also presented at the evidentiary hearing, the important mitigation evidence discovered during habeas investigation, but not presented to the jury at Mr. Williams's trial, including (1) the very violent and sustained physical abuse inflicted upon Mr. Williams by his mother who, during one of her many violent attacks, stabbed him in the face with a knife when he was a child; (2) the shooting episodes where Nanon was shot at when he was with his father and uncle; (3) the accident that resulted in Nanon's best friend almost drowning but ultimately surviving to live in a vegetated state when he was only five years old; (4) the death of Nanon's uncle when he was shot in the neck and bled almost to death in front of Nanon after armed men broke into the family home as his mother physically fought with the other armed intruders in their living room; (5) the severe trauma suffered by Nanon when

an FBI raid took both his parents out of his life at age 11; (6) the death of his father in a shoot-out over drug territory resulting in a severe withdrawal by Nanon as an eleven-year-old boy who told people that he wanted to kill himself after learning of his father's death.

Furthermore, Dr. Aitcheson explained the mitigating relevance of trial testimony from Nanon's mother about the drug-dealing she and Nanon's step-father were involved in when he was a child, and which resulted in their incarceration. At trial, Nanon was painted as a privileged child by the prosecutor, and the defense presented no challenge to that characterization. Dr. Aitcheson, however, testified that the fact that Nanon's family periodically had material wealth during periods of his childhood, this did not make Nanon a privileged child. For many weeks at a time, Nanon would be abandoned by both parents, and no adult figure was in the home. At these times, Nanon would retreat into the woods in the remote area where the family was living at that time, and, before he was even 11 years old, live outside for weeks at a time. When he came back, no family adults even knew that he had been gone during that time. When Nanon was eleven, his parents were apprehended when a swat team of 77 armed officers descended upon his parents house from helicopters. Nanon's PSTD was triggered when these armed men broke down the door to gain entry to the home, and his parents were taken down, shackled and forced to lie at gunpoint on the floor. Nanon ran and hid under his bed until the agents, looking for other adults with flashlights, pulled him out and then separated him from his parents as he and his sister clung together and cried.

When Nanon's mother was released from the penitentiary when he was fourteen-years old, she did not stay with her son, but at first left him with his grandparents while she went back to school, sending for him only when she could not cope alone, and needed assistance with finances.

Dr. Aitcheson explained to the Court something that was never made clear to the jury at the sentencing phase of his trial – Nanon has PTSD as a result of the traumas of his early life, and this PTSD was reactivated as a teenager when he was forced to take to the streets himself in order to provide money to help his mother look after her younger children.

Dr. Aitcheson testified that PTSD does not necessarily render a person dangerous, and that incarceration is actually therapeutic for this particular major mental illness. Since his incarceration, Mr. Williams writes poems, produces the monthly "Williams Report," a newsletter from death row discussion issues about incarceration and has demonstrated that he is a sensitive young man who is channeling his feelings a way that is socially acceptable.

Dr. Aitcheson testified about incidents in which Mr. Williams has illogically followed his mother's advice against that of his lawyers, including taking a guilt plea to a burglary that he did not commit when he was a juvenile in California, and in turning down the plea offer for a term of years by the state at the trial stage of proceedings in his capital murder prosecution. Dr. Aitcheson explained that children who have been abused blame themselves, not the person who abused them, and strive even harder to please that person and do what that person wants them to do. Dr. Aitcheson explained that Mr. Williams's resistance to consultation with a mental health professional during the early stages of his case at trial was typical behavior for a person suffering from his mental illness. Dr. Aitcheson testified that had a mental health professional been provided with the social history and other information about Mr. Williams's background and the records provided him for his evaluation at the habeas level, the mental health expert would have known more clearly where to look for the mitigation evidence that was not presented at trial than an his trial attorney (who did not consult with a mental health expert at trial) who was not

qualified to make evaluations of Mr. Williams's mental health. In no uncertain terms, Dr. Aitcheson opined that even the evidence found by trial counsel should have provided "red flags" as to his mental illness and trial counsel should have contacted a mental health expert to assist her.

Dr. Aitcheson concluded by describing how Nanon's PTSD has been moderated by his being in prison. He was in the work program at the Ellis Unit at the time of the evidentiary hearing, and due to his intelligence, his feeling for his fellow man, and his successful channeling of his emotions into socially acceptable pursuits (such as writing poems, stories, articles and producing artwork and the "Williams Report"), demonstrating that he has become less confrontational even in the three years since entering TDCJ.

Dr. Aitcheson confirmed that Mr. Williams was not malingering, and had agreed to a mental health evaluation shortly before trial, but his trial counsel did not have an evaluation conducted at that time.

B. State Habeas Court Decision

After hearing evidence on this claim, the Honorable Joan Campbell of the 248th District Court of Harris County entered findings of fact and conclusions of law recommending that Mr. Williams be denied relief on this issue. Judge Campbell specifically found that Mr. Williams "would not agree to an evaluation by a mental health expert; [Mr. Williams] decided to see the psychiatrist on the eve of trial; defense counsel decided not to present the psychiatrist because she felt it would appear to the jury to be a whitewash or fake and so defense counsel made a trial strategy decision to forego the examination." Findings of Fact ¶76. Judge Campbell also found that "trial counsel did not think that there was a serious mental health issue." *Id*.

C. Court of Criminal Appeals Decision

The Court of Criminal Appeals did not specifically address any of the claims in Mr. Williams petition but simply issued an unpublished two-page order stating "we do not believe, based on our review of the record presented, that some of the crucial fact findings and the recommendation based, at least in part, on them, are supported by the evidence presented at the evidentiary hearing." The CCA made no effort to identify which "crucial fact findings" they disagreed with nor how the legal recommendation "based, at least in part, on them" did not comport with existing precedent.

D. Trial Counsel's Failure to Consult a Mental Health Expert Was Unreasonable Performance

Trial counsel in a capital case has a duty to conduct a complete investigation into relevant mitigating evidence. As the Eleventh Circuit stated in *Elledge v. Dugger*, 823 F.2d 1439, 1445 (11th Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988):

> An attorney has a duty to undertake reasonable investigation or "to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Elledge made his counsel aware of his unhappy and abused past; yet counsel did not even interrogate Elledge's family members to ascertain the veracity of the account or their willingness to testify. He also did not seek out potentially helpful expert witnesses.

Id. In *Collier v. Turpin*, 155 F.3d 1277, 1296 (11th Cir. 1998), the court analyzed a case in which trial counsel had failed to obtain expert input and had overlooked other relevant mitigation, and instead had relied solely on brief testimony from relatives:

> [C]ounsel presented ten separate witnesses, including Collier''s wife, whose relevant testimony consisted almost entirely of one or two word answers as to Collier''s general reputation in the community, his representation for truth or veracity, his reputation for hard work, and his reputation as a man who supports his family. Had counsel presented the wealth of mitigating evidence that they gathered in preparation for the sentencing

> phase of the trial,we believe there is a reasonable probability that consideration of these factors would have led the jury to a different result.

Id.; *see also Williamson*, 110 F.3d 1508, 1516 (10th Cir. 1997) (counsel who "had become aware of some of [his client's] psychiatric history" held ineffective for failing to discover wealth of additional psychiatric documentation which would have been relevant to several trial issues); *Hall v. Washington*, 106 F.3d 742, 749-50 (7th Cir. 1997) ("[T]he attorney [representing a client in a capital punishment phase proceeding] must look into readily available sources of evidence. Where it is apparent from evidence concerning the crime itself, from conversation with the defendant, or from other readily available sources of information, that the defendant has some mental or other condition that would likely qualify as a mitigating factor, the failure to investigate will be ineffective assistance."), *cert. denied*, 522 U.S. 907 (1997); *Antwine v. Delo*, 54 F.3d 1357, 1368 (8th Cir. 1995) (counsel ineffective in capital sentencing phase when he knew of defendant's strange behavior, but failed to obtain expert input which would have revealed defendant's bipolar disorder), *cert. denied*, 516 U.S. 1067 (1996); *Clabourne v. Lewis*, 64 F.3d 1373, 1384-5 (9th Cir. 1995) (trial counsel ineffective for failing to adequately prepare testifying trial expert with recent mental health records which would have changed defense expert's diagnosis, as well as state expert's diagnoses, to schizophrenia instead of antisocial personality disorder); *Blanco*, 943 F.2d at 1450-52 (counsel never spoke to potential witnesses and thus failed to present evidence of childhood poverty, seizures, family history of psychosis, organic brain damage, borderline retardation, epileptic disorders and paranoid and depressive behaviors; counsel also asked for continuance to procure psychiatric exam and then never had one conducted); *Bloom v. Calderon*, 132 F.3d 1267, 1273-74 (1997) (trial counsel ineffective for failing to present expert with copious, readily available mitigating evidence, expert created damaging report based on minimal

information and a brief clinical interview, but revised judgment when provided in post-conviction with additional information about client's background).

Simply because a client refuses to participate in a mental health evaluation, his lawyer is not "absolve[d] . . . of all responsibility for further investigation into a mental health defense." *Douglas v. Woodford*, 316 F.3d 1079, 1085 (9th Cir. 2003). On the contrary, such a refusal makes the necessity of investigating mental health issues all the more crucial: "if a client forecloses certain avenues of investigation, it arguably becomes even more incumbent upon trial counsel to seek out and find alternative sources of information and evidence, especially in the context of a capital murder trial." *Id*. (quoting *Silva v. Woodford*, 279 F.3d 825, 847 (9th Cir.), *cert. denied*, 123 S.Ct. 342 (2002)).

The record clearly demonstrates that trial counsel failed to consult with a mental health professional, who could have examined Mr. Williams, discovered and diagnosed his mental illness, interpreted the effect of traumatic childhood experiences on Mr. Williams's development, and explained this mitigating evidence to the jury at the punishment phase of Mr. Williams's trial. The failure of trial counsel to even seek expert advice regarding Mr. Williams' mental health issues could not have been a strategy on the her part, as counsel could have chosen not to use the results if necessary. This failure alone constitutes performance below the standards of practice.

Moreover, pursuant to current Fifth Circuit precedent, mitigating evidence is only constitutionally relevant if the defendant can, in part,

> demonstrate that there is a nexus between the criminal act and the mitigating evidence presented to explain it. *Turner v. Johnson*, 106 F.3d 1178, 1189 (5th Cir.1997). This requirement echoes the language of *Penry I*, where the Supreme Court found that Penry's mitigating evidence demonstrated that his criminal acts were "attributable to" his

> disadvantaged background and mental problems. *Penry I*, 492 U.S. at 304, 109 S.Ct. 2934. The nexus needs not be a perfectly direct connection; so long as the evidence can "permit a rational jury to 'infer that the crime is attributable,' at least in part, to the defendant's background," the nexus requirement is met. *Russell v. Collins*, 998 F.2d 1287, 1292 (5th Cir.1993) (citing *Graham v. Johnson*, 950 F.2d at 1033).

Smith v. Cockrell, 311 F.3d 661, 681 (5th Cir. 2002). *See also Harris v. Johnson*, 81 F.3d 535, 539 (1996) ("In order to present relevant evidence that one is less culpable for his crime, the evidence must show (1) a uniquely severe permanent handicap with which the defendant is burdened through no fault of his own, . . . and (2) that the criminal act was attributable to this severe permanent condition."). Thus, counsel must do more than simply present evidence that could be construed as mitigating. Under current Fifth Circuit law, counsel must demonstrate the "nexus" between that evidence and the client's reduced culpability. Counsel had no means to establish such a nexus without consulting and/or presenting an expert in the field of mental health.

E. Trial Counsel's Unreasonable Performance Prejudiced the Defense.

The compelling mitigating evidence discovered in habeas investigation through consultations with Dr. Gary Aitcheson, a forensic psychiatrist, and the clinical evaluation conducted by him demonstrates the harm of trial counsel's oversight. Dr. Aitcheson learned many more facts regarding Mr. Williams' childhood than trial counsel, who had no psychiatric training, was able to do. Dr. Aitcheson discovered the following information about Mr. Williams' experiences in his childhood where he was subjected to several violent and traumatic experiences involving the threat of death or serious injury to himself and the violent death of a close family member, all experiences which involved extreme fear, helplessness, and horror:

(1) Mr. Williams and his father were shot at on several occasions as they drove a car.

(2) When Mr. Williams was only seven years old, his uncle was shot to death right in Mr. Williams' presence in doorway to their house, as another man physically fought with his mother. Mr. Williams tried to get to his uncle, and was covered in blood from his uncle's wounds as he tried to revive his dead uncle.

(3) Mr. Williams went into a shocked state when told of the shooting murder of his father.

(4) When Mr. Williams was about 11 years old, the FBI conducted a nighttime raid on the home of Mr. Williams' parents. The raid involved about 30 armed SWAT team officers. The armed men held guns to his head. Mr. Williams believed that he was going to be shot and killed; he then witnessed his parents being handcuffed and taken away at gunpoint.

(5) Mr. Williams was left alone for long periods of time in the home with adult strangers he did not know who were highly intoxicated on illicit drugs. He experienced prolonged periods of the absence of an adult in the home, sometimes for weeks at a time. He was constantly shuffled through a variety of inconsistent, incompetent parent figures and homes while his own parents were incarcerated.

(6) Mr. Williams suffered severe verbal and physical abuse as one of only two African American children first entering a previously all-white school.

(7) Mr. Williams suffered physical punishment from his mother during his childhood, including a time when she knifed him in the face.

(8) The mother of Mr. Williams' cousin was killed and mutilated.

(9) At age five, Mr. Williams was stabbed in the leg by children who attempted to take his tricycle away from him. This is Mr. Williams' earliest memory.

(10) Mr. Williams was never able to partake of the usual activities of childhood, friendship and school because his parental figures were engaging in illegal activities, or were incarcerated.

Exhibit 15 (Affidavit of Dr. Aitcheson).

Thus, Dr. Aitcheson would have testified to the jury that Mr. Williams suffers from all of the features of Post Traumatic Stress Disorder, as currently defined by DSM IV, based upon these events and the noticeable effects they have manifested in Mr. Williams. At the evidentiary hearing held on December 18, 2000, Dr. Aitcheson testified that, in his expert opinion and on the basis of his sessions with Mr. Williams, "Mr. Williams suffers from posttraumatic stress disorder."

EHSF2: 90. Dr. Aitcheson confirmed that this diagnosis was made to a reasonable degree of medical certainty. EHSF2: 112-113.

Dr. Aitcheson testified to the following pertinent facts at the evidentiary hearing:

(1) PTSD manifests itself in Mr. Williams in the form of intense psychological distress caused by triggering of the major traumas of his childhood. EHSF1: 72-74; EHSF2: 100-104, 109-112.

(2) The trial testimony of Mr. Williams' mother glossed over many of the traumatic episodes in her son's life. Dr. Aitcheson had gathered a very detailed social history of Mr. Williams and the circumstances of his family and upbringing which was far more explicit. EHSF1: 74-81. As Dr. Aitcheson testified, "[t]here's undoubtedly a lot of things that I know about Nanon that aren't in his mother's history." EHSF2: 98.

(3) PTSD is a major mental illness in Mr. Williams' case. EHSF1: 81; EHSF2: 99.

(4) PTSD does not make a person who suffers from it dangerous or violent. EHSF1: 81; EHSF2: 113.

(5) It was predictable, based upon his PTSD, that prison would be therapeutic for Mr. Williams. While incarcerated, he has developed from someone prone to violence due to his childhood and pre-arrest lifestyle into someone who understands the consequences of fighting and who has learned creative and socially acceptable ways to channel his feelings, as demonstrated in his essays, articles, poetry, and a monthly report he produces about society on death row. EHSF1: 81-83; EHSF2: 113-115.

(6) Mr. Williams is not a psychopath. EHSF1: 83-84; EHSF2: 115-116.

(7) Mr. Williams' decision to be absent during the testimony of his mother at his trial was in itself a sign of the mental illness he suffers, as was his initial refusal to see a psychiatrist, and then his decision to do so later. EHSF1: 89.

(8) A mental health expert can uncover the facts required to demonstrate Mr. Williams' PTSD for a jury. Lawyers do not have the ability to do this. EHSF1: 88-89.

(9) The facts provided by Mr. Williams' mother to trial counsel were sufficient to have raised a "red flag" to a mental illness, even to an attorney, and prompted a mental health investigation. EHSF1: 90-92; EHSF2: 119-120.

(10) Mr. Williams' PTSD, as it could have been explained to the jury by a forensic psychiatrist, would have provided a basis for mercy and mitigation, as provided for in the "mitigation" instructions given to them. EHSF1: 92-93; EHSF2 : 120.

(11) Mr. Williams' prognosis is good. He has visibly improved since Dr. Aitcheson's clinical evaluation, by becoming part of the work program at Huntsville. He is a remarkably different man from when he entered his incarceration (at age 17) and is likely to continue to support his fellow men within the prison system. He s learning that confrontation with the system is not the best way, but spreads his message through his writing and even reaches people outside the prison with a message to help others. EHSF1: 94-96; EHSF2: 120-121.

Because of defense counsel's failure to consult with a mental health professional to examine the Mr. Williams, discover and diagnose his major mental illnesses, and to explain the meaning of his disturbing childhood experiences as mitigating evidence to the jury, Mr. Williams' jury was deprived crucial evidence necessary to make a reasoned and informed decision regarding his punishment. Funding was provided to trial counsel to undertake a mental health examination of Mr. Williams. However, trial counsel failed to consult with a mental health expert and present such testimony at punishment. This oversight was highly prejudicial to Mr. Williams, whose jury never heard that he suffered from a major mental illness.

Dr. Aitcheson was able to ascertain many important facts about Mr. Williams' traumatic childhood during his habeas investigation. Dr. Aitcheson's testimony at the evidentiary hearing in regards to Mr. Williams' major mental illness and his two sworn affidavits demonstrate how he could have assisted the jury in understanding that the effect of the Mr. Williams's horrific childhood, through no fault of his own, rendered him an unsuitable candidate for the death penalty.

Because the death sentencing decision involves an unpredictable mix of factors, "the law's sensitivity to failures in the [death] penalty phase is a given." *Hendricks v. Calderon*, 70 F.3d 1032, 1044 (9th Cir.), *cert. denied*, 517 U.S. 1111 (1996). Texas law requires jurors to agree

unanimously to both punishment-phase questions in order to hand down a death sentence, and the failure of a jury to reach a unanimous agreement results in the automatic imposition of a life sentence. *See* TEX. CODE CRIM. PROC. Art. 37.071 (Vernon's 1984). Therefore, the proper prejudice analysis is whether one juror would have chosen to vote "no" to either punishment phase special issue had constitutional error not occurred. *See, e.g. Motley v. Collins*, 18 F.3d 1223, 1227 & n.3 (5th Cir.), *cert. denied*, 513 U.S. 960 (1994) (citing *Landry v. Lynaugh*, 844 F.2d 1117, 1120 (5th Cir.), *cert. denied*, 488 U.S. 900 (1988)). The harm standard does not require a petitioner to demonstrate that the outcome of the sentencing phase of the trial would have been different in the absence of constitutional error; it requires only a showing that the error "undermined confidence in the outcome" of the trial. *Strickland v. Washington*, 466 U.S. 668, 693, 694-696 (1984) (rejecting this formulation in favor of one that focuses on whether counsel's performance "undermined confidence" in verdict).

Because trial counsel's omission was deficient and prejudicial under *Strickland* Mr. Williams must succeed under the Sixth Amendment on his claim of ineffective assistance of trial counsel. In light of the traumatic childhood experiences that were placed before the jury, the testimony of a mental health expert would have enabled the jury to make a "reasoned moral response" as required by the Constitution. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 398 (2000); *Penry v. Lynaugh,* 492 U.S. 302, 318 (1989).

X. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF MURDER VIOLATED MR. WILLIAMS' DUE PROCESS RIGHTS.

Because the trial judge refused to instruct the jury on murder, Mr. Williams' jury was deprived the option of convicting of a constitutionally mandated lesser-included offense and thus was forced to make an impermissible decision between convicting of capital murder or acquitting. The Texas Court of Criminal Appeals erred in denying Mr. Williams relief on this claim by both misconstruing facts in the trial record and misapplying pertinent Supreme Court law.

A. Legal Standards

In *Hopper v. Evans*, 456 U.S. 605, 610 (1982), the Supreme Court explained that, as a matter of due process, "the jury [in a capital case] must be permitted to consider a verdict of guilt of noncapital offense in every case in which " the evidence would have supported such a verdict." Failure to instruct on a lesser included offense is therefore an issue cognizable on habeas review. *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382 (1980); *Allen v. Morris*, 845 F.2d 610, 617 (6th Cir. 1988), *cert. denied*, 488 U.S. 1011 (1989).

A defendant is entitled to an instruction on a lesser included offense if the laws of the State define the lesser offense upon which the defendant seeks to have the court instruct the jury and the facts of the case raise an issue as to whether the defendant only committed the lesser crime. *See Andrews v. Collins*, 21 F.3d 612, 629 (5th Cir. 1994). In determining whether the facts raise the issue of a lesser included offense the applicable guiding question is whether "the evidence... leaves some doubt with respect to an element that would justify conviction of a capital offense." *Beck*, 447 U.S.,at 637. As the Fifth Circuit has pointed out, this is equivalent to asking whether a jury "could rationally acquit on the capital crime and convict for the noncapital crime." *Cordova v. Lynaugh*, 838 F.2d 764, 767 (5th Cir.), cert. denied, 486 U.S. 1061 (1988). "Anything

more than a scintilla of evidence is sufficient to entitle a defendant to a lesser charge." *Jones v. State*, 984 S.W.2d 254, 257 (Tex. Crim. App. 1998).

At trial, Mr. Williams requested that the court include an instruction on the lesser included offense of murder on the ground that the evidence concerning robbery warranted such an instruction. S.F. Vol 32: 18-22. Defense counsel's request satisfied *Beck*'s first prong, as murder is obviously a lesser included offense of capital murder.

Review of the record reveals that testimony presented at trial raises a question about whether the evidence supports the contention that Mr. Williams intended to rob the victim. Only because the Texas court relied on the State's version of the offense and erroneous facts did it find that "there was no evidence in the record from which a rational trier of fact could conclude that if appellant was guilty, he was guilty of murder." *Williams v. State*, No. 72,179 (Tex. Crim. App. 1997) (unpublished) (attached as Exhibit 1) (Tex. Crim. App. 1997).

B. Basis of State Court Decision

The facts relied upon by the Texas Court of Criminal Appeals are gleaned almost entirely from testimony of Vaal Guevara and Elaine Winn. Guevara, who it is now known actually shot the victim, was initially charged with capital murder and provided testimony against Mr. Williams in exchange for a plea bargain to Illegal Investment and ten years in prison. The trial court instructed the jury to treat Guevara as an accomplice as a matter of law. Ms. Winn, who the defense suggested actually shot the victim with a shotgun, was Guevara's lover and next-door neighbor. Winn admitted setting up the drug deal in the park and the trial court gave instructions directing the jury to determine if she was an accomplice as a matter of fact.

According to the Court of Criminal Appeals when discussing the sufficiency of Mr. Williams' conviction,

> Viewed in the light most favorable to the verdict, the evidence shows: (1) appellant planned the drug deal for over a week; (2) appellant armed himself with two weapons for the drug deal; (3) appellant laughed when Rasul confirmed the previously agreed-upon price and then appellant shot him; (4) appellant returned to the jeep with a beeper, a cap, and a bag of cocaine rocks; (5) appellant did not previously possess those items; (6) Rasul confirmed that the victim had cocaine rocks on his person at the scene of the instant offense; (7) when appellant returned to the jeep, he stated, "I can't believe this is all we got;" and finally (8) no beeper or cocaine rocks were found on the victim at the crime scene.

Id.

The Court of Criminal Appeals also noted that "[a] baggie containing some powder was found near the victim's body, but no cocaine rocks." *Id*. at n.6.

The Court of Criminal Appeals later expounded upon this description of events in the course of denying his claim for a lesser included offense instruction:

> The evidence establishes that on May 14, 1992, during a drug deal, appellant armed himself prior to the deal and laughed at Rasul when stated the agreed-upon price for the cocaine. Appellant then shot Rasul, shot and killed the victim, and was seen rummaging through the victim's pockets immediately thereafter. Appellant then returned to his transportation with items he did not previously possess and stated, "I can't believe this is all we got."

Id. at 12.

The overwhelming bulk of this version of events was taken from the testimony of Guevara and Winn. Only Guevara and Winn testified that Mr. Williams made statements concerning the shooting in Hermann Park. Only Guevara and Winn gave evidence that Mr. Williams was carrying two guns, a fact that was contradicted by Emmade Rasul who testified that Mr. Williams was wearing only a T-shirt and thus could not have been hiding a large shotgun. S.F. Vol 30: 93.

Only Guevara claimed to have seen Mr. Williams searching the victim's pockets and only Guevara and Winn claimed to see Mr. Williams returning to the Jeep with a beeper, cap and cocaine rocks.

It is also important to note that the Court of Criminal Appeals description of the facts is, in part, flatly wrong. First, although on direct examination Sergeant Atchetee did testify to discovering powder cocaine near the body, this testimony was obviously incorrect. S.F. Vol 26: 80. On cross-examination, Sergeant Atchetee confirmed that it was rock cocaine located in 20-25 small baggies. S.F. Vol 26: 90. This description is consistent with the testimony of Stephanie Anderson and Emmade Rasul, the labelling of objects in the police crime scene diagram, Exhibit 16 (Crime Scene Diagram), and the police report written describing the scene. Exhibit 17 (HPD Offense Report) ("Laying on the ground approximately 2' west of the comps left knee was a large baggie containing 20 smaller baggies of possible crack cocaine. Within each of these 20 baggies was about one rock."). Secondly, several days after the offense the victim's step-father called the police to inform them that he found the victim's beeper at his house. Exhibit 12 (HPD Report). Thus, some of the seemingly damning evidence cited by the Court of Criminal Appeals is simply false.

B. Mr. Williams' Jury Could Have Convicted Based on a Constitutionally Impermissible Reason.

Beck provides little guidance as to what light the evidence must be viewed in deciding if a state court erred by failing to instruct the jury on lesser included offenses. However, it goes without saying that the appellate court cannot make credibility determinations in favor of the State. Were that permissible, evaluation of *Beck* claims would approximate review under *Jackson*

v. Virginia, 443 U.S. 307, 314 (1979), for sufficiency of the evidence in support of a verdict of guilty. A *Beck* claim seeks not to establish the sufficiency of the state's case but rather "focuses on the constitutionality of the procedures employed in the conviction of a defendant in a capital trial and is specifically concerned with the enhanced risk of an unwarranted capital conviction where the defendant's life is at stake and a reasonable jury could have convicted on a lesser included offense." *Hogan v. Gibson*, 197 F.3d 1297,1305 (10th Cir. 1999).

In Mr. Williams case a reasonable jury could certainly have convicted him of the lesser included offense of murder, finding a lack of support for the alleged robbery. Guevara and Winn, who were both successfully impeached on cross-examination, provided the sole testimony that Mr. Williams (1) carried a shotgun; (2) shot the victim; (3) searched through the victim's pockets and (4) returned to the car with items he did not previously possess. Moreover, the judge instructed the jury before deliberations that Vaal Guevara was an accomplice and Mr. Williams could not be convicted "unless [the jury] further believe[d] that there is other evidence in the case, outside the testimony of Vaal Guevara tending to connect the defendant with the offense committed." S.F. Vol 32: 38. Likewise, the jury was instructed that if they believed that Elaine Winn "was an accomplice or if [they] ha[d] a reasonable doubt whether she was or not . . . then [the jury] cannot convict the defendant upon the testimony of the said Elaine Marie Winn ... unless [they] further believe[d] that there is other testimony outside the testimony of Elaine Marie Winn tending to connect the defendant with the offense charged in the indictment ..." S.F. Vol 32: 38-9.

It is thus possible that a reasonable jury could have followed the judge's instructions and disregarded Guevara and Winn's testimony regarding the alleged robbery, yet believed that Mr.

Williams was guilty of some crime based on the testimony of Mr. Rasul. The jury would then have been placed in the constitutionally untenable position whereby they were forced to convict of capital murder or allow Mr. Williams to go free. Such a position may have "encourage[d] the jury to convict for an impermissible reason – its belief that the defendant is guilty of some serious crime and should be punished." *Beck*, 447 U.S. at 642. Because the state court's decision is based on both an erroneous and unreasonable interpretation of the facts in Mr. Williams' case and a clear misapplication of *Beck v. Alabama*, Mr. Williams is entitled to relief on this claim.

XI. ARTICLE 37.071(e) & (g)'S PROHIBITION AGAINST INFORMING JURORS THAT A SINGLE HOLDOUT JUROR WILL CAUSE THE IMPOSITION OF A LIFE SENTENCE VIOLATED MR. WILLIAMS' RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Texas' "12-10 rule" violated Mr. Williams' rights under the Eighth and Fourteenth Amendments to the United States Constitution.

The version of TEX. CODE CRIM. PRO. Art. 37.071 in operation at the time of Mr. Williams' trial provided that in order for the trial court to impose a death sentence, all twelve jurors had to answer all of the "special issues" affirmatively; to impose a life sentence, at least ten jurors had to answer any of the special issues negatively. A failure of a capital sentencing jury to garner the requisite number of votes either way resulted in the imposition of a life sentence. However, Mr. Williams' **jurors were not informed that if they failed to reach a collective decision either way -- if one juror answered "no" to any special issue -- the court would impose a life sentence.** Instead, they were instructed by the trial court that the jury must either unanimously agree to answer all of the "special issues" affirmatively (in which case a death

sentence would be imposed), or ten or more jurors were to agree to answer one or more of the "special issues" negatively (in which case a life sentence would be imposed).[18]

The collective operation of these provisions of Article 37.071, upon which Texas capital sentencing jury charges are modeled, has come to be known as the "12-10 rule."[19] This feature of 37.071 creates the potential for considerable confusion among reasonable jurors. The United States Supreme Court has held that, in judging the constitutionality of a capital sentencing statute, a court must ask how a reasonable juror could view his or her role under the statutory scheme. *See California v. Brown*, 479 U.S. 538, 541 (1985); *Francis v. Franklin*, 471 U.S. 307, 315-16 (1985). The Texas statute implicitly informs a juror that, absent similar votes from nine other jurors, his or her "no" vote to a special issue -- e.g. a vote against the imposition of the death penalty -- is meaningless because it alone cannot be sufficient to result in a life sentence.

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[18] The court instructed the jury:

> [I]f at the conclusion of your deliberations at least 10 of your jurors do have a reasonable doubt or does not believe beyond reasonable doubt that there is a probability that the defendant would constitute a continuing threat to society, the foreman would answer the second possible place here where it says: We the jury, because at least ten (10) jurors have a reasonable doubt as to the probability that the defendant, Nanon McKewn Williams, would commit criminal acts of violence that would constitute a continuing threat to society, determine that the answer to this Special Issue is no.
>
> . . .
>
> If, however, at the conclusion of your deliberations, based upon the evidence that has been presented, at least 10 of you believe that the answer to Special Issue No. 2 should be yes, in that event the foreman would sign the second possible verdict form here says: We, the jury, because at least ten (10) jurors find that there is sufficient mitigating circumstance or circumstances to warrant a sentence of life imprisonment rather than a death sentence be imposed, find that the answer to this Special Issue is yes.

S.F. Vol 35: 24-7.

[19] *See* Robert J. Clary, "Voting for Death: Lingering Doubts About the Constitutionality of Texas' Capital Sentencing Procedure," 19 *St. Mary's L. J.* 353, 358-59 (1987).

Texas' 12-10 rule generates the danger that confused jurors otherwise disposed to vote for a life sentence will conform to a "majority rules" mentality. Potential holdout jurors may reasonably believe that their votes in favor of a life sentence are worthless unless nine others join them; if a majority of other jurors are firmly voting "yes," a single juror may feel obliged to vote "yes" since there would appear to be no possibility of a life sentence and the jury has been instructed to return a verdict. *See Mills v. Maryland*, 486 U.S. 367, 383 (1988) ("[C]ommon sense . . . suggest[s] that juries do not leave blanks and do not report themselves as deadlocked over mitigating circumstances after reasonable deliberation . . . unless they are expressly instructed to do so."). Such a belief on the part of a juror is contrary to Texas law, which dictates that if a capital juror is unable to agree on answer to any of the special issues, the court must sentence the defendant to life.

In *Davis v. State*, 782 S.W.2d 211 (Tex. Crim. App. 1989), the Court acknowledged the possibility that "a juror who conscientiously believes that the evidence called for a life sentence might nevertheless vote for the death penalty in order to avoid mistakenly assumed consequences of jury deadlock." *Id*. at 221, quoting *Barfield v. Harris*, 540 F.Supp. 451, 472 n. 17 (E.D.N.C. 1982), *affirmed*, 719 F.2d 58 (4th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984). However, the *Barfield* opinion quoted in *Davis* also speculated that it was just as likely that a life-prone juror would refuse to consider the evidence and the views of her fellow jurors in favor of a death sentence if she knew her steadfastness would result in a life sentence. *Id.* The *Barfield* opinion, cited with approval by the Texas Court of Criminal appeals concluded that:

> Neither scenario results in a "reliable" or desirable process of deliberation, but the court cannot say that the first scenario is significantly more likely to occur as a result of not giving the instruction than is the second as of giving it. *Id.*

Support for the proposition that a juror in the minority may be subject to coercion, and that such coercion results in a constitutionally unreliable sentence, is found in the United States Supreme Court's cases criticizing the practice by trial courts of inquiring into the numerical division of deadlocked juries prior to requiring further jury deliberations. *See, e.g., Lowenfield v. Phelps*, 484 U.S. 231, 239-40 (1988); *Brasfield v. United States*, 272 U.S. 448, 450 (1926). In such cases, the Court has held that "inquiry into the jury's numerical division necessitated reversal because it was generally coercive and almost always brought to bear `in some degree, serious although not measurable, an improper influence upon the jury.'" *Lowenfield*, 484 U.S. at 239 (citing *Brasfield,* 272 U.S. at 450). Put another way, Texas' "12-10 rule" is a built-in impermissible "dynamite charge," which the Supreme Court has recognized as a possible Eighth Amendment violation in the capital sentencing context. *See Lowenfield*, 484 U.S. at 240-41.

In *Kubat v. Thieret*, 867 F.2d 351, 371 (7th Cir. 1989), the United States Court of Appeals for the Seventh Circuit noted that the instructions to Kubat's jury stated both correctly and incorrectly the law as to whether a unanimous verdict was required to find a mitigating circumstance. However, they reasoned that the fact that the jury had heard a correct explanation of the law did not rescue the law's constitutionality:

> At worst, the jury may have retired for deliberations believing it had to reach a unanimous verdict on sentencing just as it had to do on the merits. At best, it may have entered the jury room confused. Indeed, even if only one juror had been confused, the reliability of the verdict is undermined. For if that one juror thought that the death penalty should not be imposed, he or she might have submitted to the views of the other eleven because of the mistaken belief that unanimity was required.

Kubat v. Thieret, 867 F.2d 351, 371 (7th Cir. 1989). As the reasoning of the Seventh Circuit reveals, there is little constitutional difference between a jury being instructed that they must find a mitigating circumstance unanimously, and a jury being instructed that they must answer a special issue unanimously or by a majority of 10 jurors.

The United States Supreme Court has held that the possibility that a jury may be confused about facts important to their capital-sentencing role has constitutional implications. In *Simmons v. South Carolina*, 114 S. Ct. 2187 (1994) the Court held that a criminal defendant must be given the opportunity to inform the jury that he would never be eligible for parole if given a life sentence. *Id.* at 2196 (plurality opinion per Blackmun). The plurality reasoned that "[t]he jury was left to speculate about petitioner's parole eligibility when evaluating petitioner's future dangerousness, and was denied a straight answer about petitioner's parole eligibility even when it was requested." *Id*. at 2195. The information about petitioner's parole eligibility was of "obvious relevance . . . to the jury's formidable sentencing task." *Id*. at 2197. The parallel is obvious: the significance of an **individual** vote of "no" to either of the special issues was of "obvious relevance" to any jury, but they were denied information on this point. Justice Souter's concurring opinion in *Simmons* makes the reliability concerns raised by potential jury confusion even clearer: "Whenever there is a reasonable likelihood that a juror will misunderstand a sentencing term, a defendant may demand instruction on its meaning. . . ." *Id*. at 2198 (Souter, J., concurring). The jurors in petitioner's case were told they could vote "no" to a special issue, but were never told what the result of that single vote would be, as a result, they may have misunderstood the meaning of their vote. Thus, the Texas capital-sentencing scheme

"diminish[ed] the reliability of the sentencing determination." *Beck v. Alabama*, 447 U.S. 625, 638 (1980).

In this way, Article 37.071's "12-10 Rule" injected arbitrariness into the proceedings and created an **unreliable** sentencing determination -- a constitutional violation of the highest order in the capital sentencing context.[20] *See State v. Williams*, 392 So.2d 619, 631 (La. 1980) (on rehearing). In *Williams*, the court stated:

> In the present case the jurors were not fully informed of the consequences of their votes and the penalties which could result in each eventuality. They were not told that, by their failure to decide unanimously, they would in fact decide that the court must impose a sentence of life imprisonment. . . . **Instead, the members of the sentencing body were left free to speculate as to what outcome would be in the event there was no unanimity**. Under these circumstances, individual jurors could rationally surmise that in the event of a disagreement a new sentencing hearing, and perhaps a new trial, before another jury would be required.

Williams, 392 So.2d at 631 (emphasis added). Such a risk of speculation and confusion was held to be a constitutional violation by the Louisiana Supreme Court. *Id. See also State v. Ramseur*, 524 A.2d 188, 284 (N.J. 1987). Like the statute under which Mr. Williams was sentenced, the sentencing statute at issue in *Williams* required the trial court automatically to impose a life sentence if the jury deliberations ended in a deadlock. *See* TEX. CODE CRIM. PRO. Art. 37.071(e)

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[20] *See Lowenfield v. Phelps*, 484 U.S. 231, 238-39 (1988) (noting that capital sentencing proceedings made unreliable by coercion of jurors violate Eighth Amendment); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Stevens, & Powell, JJ.) (holding that mandatory death sentences deprive defendants of reliable, individualized sentences in violation of Eighth Amendment); *Cf. Gardner v. Florida*, 430 U.S. 349 (1977) (plurality opinion) (holding that capital-sentencing procedures which restrict defendant's ability to offer mitigating evidence lead to unreliable capital sentencing proceedings that violate due process clause of Fourteenth Amendment).

(Vernon's 1994). *Williams* deemed constitutionally impermissible the **potential** for speculation and confusion on the part of the jury. Mr. Williams is similarly entitled to relief.

B. Texas' 12-10 Rule Violated Mr. Williams' Rights under the Eighth Amendment to the United States Constitution, as Construed by the United States Supreme Court's Decision in *Mills V. Maryland*[21]

The 12-10 rule also violates the Eighth Amendment principle in *Mills v. Maryland*, 486 U.S. 367 (1988),[22] that it is unconstitutional to instruct capital sentencing jurors in a manner leading reasonable jurors to believe that their individual vote in favor of returning a life sentence based on particular mitigating factors is worthless unless some threshold number of jurors are in agreement a that particular mitigating factor or factors exist. That is, a constitutional violation occurs if a reasonable juror could interpret the jury charge to instruct that there must be a meeting of the minds among some threshold number of jurors[23] as to whether the mitigating evidence offered by the capital defendant warrants a negative answer to at least one special issue, thus resulting in the imposition of a life sentence. *See Mills*, 486 U.S. at 373-75. Unless jurors are informed of the result of a deadlock in such a situation, the risk that one or more jurors will cave into a "majority rules" mentality is too great under the Eighth Amendment. *See Mills*, 486 U.S. at 383 ("[C]ommon sense . . . suggest[s] that juries do not leave blanks and do not report

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[21] 486 U.S. 367, 383 (1988).

[22] *See also McKoy v. North Carolina*, 494 U.S. 433 (1990) (holding that it is a violation of the Eighth Amendment to require a unanimous verdict as to mitigating circumstances in capital sentencing trials).

[23] In *Mills*, the threshold number was twelve; under the Texas statute, the threshold number is ten.

themselves as deadlocked over mitigating circumstances after reasonable deliberation unless they are expressly instructed to do so.").

Under *Mills*, a constitutional violation would occur under the Texas scheme if reasonable jurors who were instructed pursuant to Article 37.071 were led to believe that their votes in favor of a life sentence based on particular mitigating factors would be worthless unless at least nine other jurors joined them.[24] *See Kubat v. Thieret*, 867 F.2d 351, 369-73 (7th Cir.), *cert. denied*, 493 U.S. 874 (1989). In *Kubat*, in finding a *Mills* violation, the Seventh Circuit was faced with a capital sentencing scheme virtually identical[25] to the one at issue in the present case:

> Kubat's jurors were never expressly informed in plain and simple language that even if one juror believed that the death penalty should not be imposed, Robert Kubat would not be sentenced to death. . . . [T]here is a substantial possibility that one or more of Kubat's jurors might have been precluded from granting mercy

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[24] Under the Texas statute at issue here, jurors were not asked to find specific mitigating factors which were to be weighed against specific aggravating factors, as was true in *Mills*. Rather, as this Court is aware, Texas' unique capital sentencing scheme instead only asks jurors to answer three "special issues" -- whether a capital defendant committed the crime "deliberately" and whether the capital defendant would pose a "future threat" to society if given a life sentence. *See* Tex. Code. Crim. Pro. Art. 37.071(b) (Vernon's 1989).

However, as the United States Supreme Court has repeatedly held, Article 37.071(b)'s "special issue" format permits juries to consider and give proper mitigating effect to almost all types of mitigating evidence. *See Johnson v. Texas*, 119 S. Ct. 2658, 2670 (1993) ("A Texas capital jury deliberating over the Special Issues . . . is likely to weigh mitigating evidence as it formulates . . . answers in a manner similar to that employed by capital juries in 'pure balancing' states."); *Adams v. Texas*, 448 U.S. 38, 46 (1980) (in deliberating special issues, jurors answer "on the basis of all relevant evidence not only why the death sentence should be imposed but also why it should not be imposed"). Thus, for purposes of Petitioner's arguments herein, this Court must treat the Texas capital sentencing scheme as one in which jurors weigh mitigating factors against aggravating factors, just as jurors do under a "pure" balancing statute.

[25] In *Kubat*, as in *Mills,* the jury was instructed that the threshold number of jurors required for a life sentence was twelve; in Texas, capital sentencing juries are instructed that the threshold number is ten. The difference is irrelevant since the possibility for one or more jurors "caving in" and not voting for a life sentence based on particular mitigating evidence is identical.

> to Kubat because of a mistaken belief that the sufficiency of mitigating factors had to be found unanimously.

867 F.2d at 373; *cf. Andres v. United States*, 333 U.S. 740, 752 (1948) (reasoning that, in a federal death penalty case, a juror uninformed as to the consequences of a less-than-unanimous verdict "might reasonably conclude that, if they cannot all agree to grant mercy, then the verdict of death must stand unqualified").

The Ninth Circuit has similarly construed the Court's decision in *Mills*. *Mak v. Blodgett*, 970 F.2d 614, 624-625 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1363 (1993). The *Mak* court stated:

> The Supreme Court has held that, where the underlying statute does not require unanimity [in assessing a life sentence], due process will not tolerate instructions that could reasonably be interpreted by a jury to preclude consideration of any mitigating factor unless a such a factor was unanimously found to exist. . . . As in *Mills*, "[u]nless we can rule out the substantial possibility that the jury may have rested its verdict on the 'improper' ground, we must remand for resentencing."

Id. at 625 (citations omitted) (quoting *Mills v. Maryland*, 486 U.S. 367, 377 (1988)).

In *Draughon v. State*, 831 S.W.2d 331 (Tex. Crim. App. 1992) the appellant argued the 12-10 rule could mislead the jury to believe that a sentence less than death was not possible unless ten or more jurors answered one of the special issues in the negative. *Id.* at 337. The *Draughon* opinion recognized that "it is conceivable that. . .[the jury] will surmise later instructions requiring ten votes for a negative answer [to] mean that a life sentence will not be imposed otherwise." *Id.* The Court further acknowledged that is was "troubled" by the implication of Draughon's argument "that. . .[the Texas sentencing scheme], by requiring [a] consensus [of ten votes for a

"no" answer to a special issue], inhibit[s] the free exercise by each juror of his individual judgment about the propriety of a death sentence." *Id*. at 338. However, the Court stated:

> [I]t is the danger that jurors, unaware of the operation of the law, might mistakenly think a sentence other than death to be **impossible** unless ten of them agree that renders the procedure constitutionally suspect. But, because the jury instructions of which Appellant here complains are not reasonably susceptible of such an interpretation, we are satisfied that no juror would be misled by them into thinking that an affirmative answer should be given unless ten or more jurors agree to give a negative one.

Id. at 338. However, the Court of Criminal Appeals failed to consider the possibility that Texas' 12-10 rule would mislead the jury to believe a mistrial would result from the jury's failure to garner 12 "yes" votes or 10 ten "no" votes, resulting in one or more jurors basing his or her determination on an incorrect understanding of the law.

Even before the United States Supreme Court's decision in *Mills*, at least one other state court has recognized the constitutional infirmity in a sentencing determination made after a jury had "thrown away" their dissenting vote because they could not sway a majority of their fellow jurors. In *People v. Durre*, 690 P.2d 165 (Colo. 1984), the jury was instructed according to Colorado law, which called for them to explicitly note any mitigating or "additional mitigating" factors they found and weigh them against the aggravating factors they found. *Id.* at 175-76. The jury was not told how to find the mitigating factors or whether they had to agree on which factor called for leniency. *Id*. The foreman returned a jury form reflecting that they had found aggravating circumstances and had found no mitigating circumstances, and thus that Durre should be sentenced to death. *Id*. at 170. However, the foreman attached a note to the form saying that though they could neither "claim the mitigating circumstances" nor "deny the aggravating

circumstances," nevertheless several jurors had concluded that Durre should not die. *Id*. The trial judge personally interviewed the five dissenting jurors, who told him that even though they felt that Durre should be spared, they agreed with the "verdict." *Id*. at 170 & n.10. The trial judge, however, dismissed their votes against death as the product of mere "conscientious difficulties" and sentenced the defendant to death in accordance with the general verdict. *Id*. at 170.

The Colorado Supreme Court reversed the death sentence, dismissing as "faulty" the state's contention that "jury findings on mitigation and aggravation involve no consideration whatever of the issue of punishment." *Id*. at 171. That court intoned:

> Without such an instruction [on the effect of their verdict], the jury will not only be required to labor in the dark about what it is actually deciding by its verdicts but also, of equal importance, will be ill-equipped to fulfill its function of serving as the vital link between contemporary community values and the propriety of the life-and-death decision which its verdicts necessarily resolve.

Id. at 173. Therefore, the Colorado Supreme Court ruled that jurors must be explicitly informed of the results of their findings of mitigating and aggravating circumstances. *Id*. at 174 & n.15. Here, Mr. Williams' jurors were never informed of the results of any individual juror's decision to stick to his verdict for life. This is no different from not being told what the consequences of the entire jury's verdict would be[26]. Any one of Mr. Williams' jurors may have believed that by holding out for a life sentence, a mistrial would be declared.[27] This aspect of Texas' 12-10 rule is

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[26]This is especially troubling, and constitutionally infirm, given the failure of the trial court to give instructions allowing the jurors to consider mitigating evidence not specifically addressed within the special issues. *See Penry v. Lynaugh*, 492 U.S. 302 (1989).

[27] The Louisiana Supreme Court explained the consequences of leaving the jury in the dark thus:

a *Mills* violation *a fortiori*. That is, a reasonable juror may have believed, contrary to Texas law, that they had no ability to give mitigating effect to **any and all types of mitigating circumstances** unless at least nine other jurors also voted for life.

This failure to instruct each individual juror of the consequences of his or her firmly held beliefs was condemned by the Supreme Court over 100 years ago in *Calton v. Utah*, 130 U.S. 83 (1889). In *Calton*, the Supreme Court reversed a conviction under the Utah territorial statutes where the jury had not been informed of the right to recommend a sentence other than death. The Court wrote that if the jury had their attention called to the alternative sentence then "it may be that they might have made such a recommendation and thereby enable the sentence to be a life sentence." In his opinion for the Court, the first Mr. Justice Harlan adopted the lower court's dissent:

> The prisoner was deprived of a substantial right. The determination of the question as to whether he should suffer death or imprisonment was one of vital consequence to him. The jury, to whom the statute commits the determination of that question, at least in part, were not informed of their duty and responsibility in the matter, so as to require them to exercise their judgment and discretion in relation to it, and by the verdict they rendered the court had none.

Id. quoting *Territory v. Catton*, 16 P. 902, 910 (Utah 1888) *rev sub nom Calton v. Utah*, 130 U.S. 83 (1889).

> Under these circumstances, individual jurors could rationally surmise that in the event of disagreement a new sentencing hearing, and perhaps a new trial before another jury would be required. Such a false impression reasonably may have swayed a juror to join the majority, rather than hold to his honest convictions, in order to avoid forcing the parties, witnesses and court officials to undergo additional proceedings.

State v. Williams, 392 So.2d 619, 634-35 (La. 1980).

Petitioner recognizes that "[a] critical assumption underlying [the] system [of trial by jury] is that juries will follow the instructions given them by the trial judge." *Parker v. Randolph*, 442 U.S. 62, 73 (1979) (plurality opinion). Here, though, the instructions themselves were deficient: they "did not tell the whole truth, because [they] did not tell the jurors what to do in the event of a disagreement." *Gacy v. Welborn*, 994 F.2d 305, 307 (7th Cir. 1993), *cert. denied* 114 S. Ct. 269 (1993). Where one instruction contradicts another instruction, it has constitutional consequences. Contradictory instructions make it impossible to know which instructions jurors used in reaching their verdict. *Cabana v. Bullock*, 106 S. Ct. 689, 695 n.2 (1986). Here, the jurors were instructed that each must be convinced beyond a reasonable doubt, but also instructed that it would take 10 votes to impose a life sentence. Such contrary instructions were constitutionally deficient. In *Boyde v. California*, 494 U.S. 370, 380 (1990), the Court held that the proper inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevent[ed] the consideration of constitutionally relevant [mitigating] evidence." Mr. Williams has demonstrated that there is a reasonable likelihood that the jury applied Texas' 12-10 scheme in an unconstitutional manner resulting in an unreliable sentencing determination.

XII. TEXAS' CAPITAL SENTENCING SCHEME DEPRIVED MR. WILLIAMS OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS BY PERMITTING A JURY TO FIND FACTS BY A STANDARD OF LESS THAN BEYOND A REASONABLE DOUBT.

During the punishment phase of Mr. Williams' trial, there was no burden of proof placed on either the State of Texas or on Mr. Williams. This permitted the jury to be arbitrary and capricious in engaging in the fact finding that was a prerequisite to its imposition of the death

penalty upon Mr. Williams. Accordingly, the punishment phase at Mr. Williams' trial occurred in violation of *Ring v. Arizona*, 122 S. Ct. 2428 (2002), and entitles him to relief.

A. *Ring v. Arizona* Makes Clear That Fact-findings Required to Justify Imposition of the Death Penalty must Be Made: (1) by a Jury and 2) Subject to the Beyond a Reasonable Doubt Standard.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court considered a New Jersey statute which permitted a judge add a "hate crime" enhancement to the ordinary sentence for a defendant's crime upon finding, by a preponderance of the evidence, that the crime was motivated by racial animus. *Id*. at 469-470. The Court held New Jersey's "hate crime enhancement" unconstitutional, because it permitted a judge, acting alone and using only a preponderance standard, to enhance the possible punishment for a crime outside the normal statutory range. The "hate crime enhancement," the high Court found, was not merely a sentencing factor but an "element of the crime." *Id*. at 477. The Court drew on its earlier statement in *United States v. Jones,* 526 U.S. 227, 243 n.6 (1999), that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." The Court dismissed New Jersey's argument that the hate-crime finding was merely a "sentencing factor" as semantics: "Merely using the label 'sentence enhancement' to describe the [finding] surely does not provide a principled basis" for treating it differently than the substantive elements of the crime. *Id*. at 476.

In *Ring v. Arizona*, 122 S. Ct. 2428 (June 24, 2002), the Supreme Court applied *Apprendi* to the capital sentencing context. The court drew a simple rule from *Apprendi*: "If a State makes an increase in a defendant's authorized punishment contingent on a finding of fact, that fact–no matter how the State labels it–must be found by a jury beyond a reasonable doubt." *Id*. at *9 (citing *Apprendi*, 530 U.S. at 482-83). This Court accordingly struck down the Arizona statute, which permitted a judge alone to make fact findings essential to the imposition of the death penalty. *Apprendi* and *Ring* teach that courts must look not to the "form" but the "effect" of statutory aggravating factors. The *Ring* Court stressed that there was simply no difference between a substantive element of the offense and a "sentencing factor," so long as that sentencing factor served to elevate the maximum permissible punishment. *Id*. at *10 (quoting four sections of *Apprendi* opinion to this effect, including a concurring opinion by Justice Thomas). Therefore, a "sentencing factor" which makes the defendant eligible for a more severe punishment than "the maximum authorized by a guilty verdict standing alone" is simply "the functional equivalent of an element of a greater offense" and therefore must be proven in accordance with the procedures developed for ensuring a fair and impartial decision as to the defendant's guilt. *Id*. at *11, *12 (quoting *Apprendi*, 530 U.S. at 494 n.19).

Under *Ring* and *Apprendi*, both of the factual findings set out in TEX. CODE CRIM. PROC. art. 37.071 are not mere sentencing factors. When a defendant is convicted of capital murder in Texas, the maximum punishment authorized by law is life imprisonment. The State may announce, before trial, whether it intends to pursue the death penalty. If it does not, the defendant, upon conviction, simply receives a life sentence identical to what he would have received had the State sought the death penalty unsuccessfully. TEX. CODE CRIM. PROC. art.

37.071(1). If the State seeks death, it must prove future dangerousness, and must also prove that the defendant's mitigation facts are insufficient to justify a life sentence.

The *Ring* Court noted in passing that Ring raised "no Sixth Amendment claim with respect to mitigating circumstances." *Id*. at 2437 n.4. However, the *Ring* Court cited the following passage in *Apprendi*, which describes a situation in which a mitigation finding could permissibly be made by a judge alone:

> If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone.

Apprendi, 530 U.S. at 490 n.16. In this example, the jury, as demanded by the Constitution, made all fact-findings necessary to determine the upper limit of the potential sentence for the defendant. If the judge afterward decided to reduce the sentence because of mitigation, there is no constitutional barrier to his doing so. It is permissible for a judge to "ratchet down" the defendant's punishment after the jury has properly made the fact-findings necessary to determine its upper limit; it is not permissible for a judge to "ratchet up" the punishment beyond that authorized by the jury's fact-finding.

Thus, a state may require a jury to make a finding of future dangerousness–*immediately* rendering the defendant eligible for the death penalty–then permit a judge to decide whether mitigating evidence was sufficient to "ratchet down" the punishment.

However, Texas did not pursue this course: Under the Texas scheme, the jury must answer the mitigating special issue *in order to determine the upper range of the punishment* the

defendant will receive. Although its subject matter is "mitigation," what is important, as the Supreme Court emphasized, is the "effect" of the fact-finding, not its form. Functionally, the mitigation special issue operates precisely like an element of the crime – that is to say, it determines what sentence the defendant will receive. It must be determined by a process that meets relevant Constitutional standards, and *Ring* holds that this includes a jury that is convinced beyond a reasonable doubt.

B. Mr. Williams' Sixth Amendment Rights Were Violated When the Jury Was Permitted to Make a Finding That the Mitigating Evidence He Presented Was Insufficient to Warrant a Life Sentence by a Standard of less than "Beyond a Reasonable Doubt"

The requirement that juries find every element of a crime beyond a reasonable doubt "reflect[s] a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968); *see also id*. at 151-54 (tracing deep historical roots of "beyond a reasonable doubt" standard). Because a jury finding increasing a defendant's maximum punishment performs a function identical to an element of a crime, a criminal defendant's Sixth Amendment right to an "impartial jury" requires that any fact-finding that makes possible "an increase in a defendant's authorized punishment" be "found by a jury beyond a reasonable doubt." *Ring*, 122 S. Ct. at 2439.

In Mr. Williams' case, the jury did not finish with its task of determining the upper limit of Mr. Williams' "authorized punishment" until it answered *both* of the punishment-phase special issues. Therefore, each of these special issues should have been subjected to the reasonable doubt standard. The sentencing scheme under which Mr. Williams was sentenced–which assigned to

him the burden of production, and assigned no burden of proof to the jury's question–does not satisfy the Constitutional requirements of the right to trial by jury as articulated in *Ring*.

C. Mr. Williams' Fourteenth Amendment Rights Were Violated When the Jury Was Permitted to Find That the Mitigating Evidence Was Insufficient to Warrant a Life Sentence by a Standard of less than "Beyond a Reasonable Doubt"

The Due Process Clause of the United States Constitution and the corresponding clause of the Texas Constitution require that a jury find, beyond a reasonable doubt, the defendant's guilt of all elements of a criminal offense. In re *Winship*, 397 U.S. 358, 364 (1970). Fact findings that increase a defendant's authorized punishment are in all constitutional respects identical to elements of a crime, and therefore themselves must be found by a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 476-77 (2000). Because the finding of "insufficient mitigation" required by art. 37.071 determines the upper range of authorized punishment for a Texas capital murder defendant (i.e., whether he will live or die), it must be made by a jury that is instructed under the beyond a reasonable doubt standard.

D. The Constitutional Requirement of Heightened Reliability in Capital Sentencing Was Diminished When the Jury Was Permitted to Find That the Mitigating Evidence Was Insufficient to Warrant a Life Sentence by a Standard of less than "Beyond a Reasonable Doubt"

The 8th Amendment of the United States Constitution, which requires "heightened reliability" in capital sentencing, independently requires this exacting standard. *See, e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 604, (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); *see also Strickland v. Washington*, 466 U.S. 668, 704 (1984)

(Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of fact finding").

Several judges of the Supreme Court have declared that the Eighth Amendment requires jury sentencing in all capital cases. *See, e.g.*, *Ring*, 122 S. Ct. at 2446 (Breyer, J., concurring) ("[T]he Eighth Amendment requires that a jury, not a judge, make the decision to sentence the defendant to death."); *Harris v. Alabama*, 513 U.S. 504, 515-526 (1995)(Stevens, J., dissenting) (holding that Eighth Amendment requires jury sentencing in capital cases). Because the Texas capital sentencing scheme permits a jury to make a fact-finding essential to the imposition of the death sentence by a standard of less than a reasonable doubt, it violates the Eighth and Fourteenth Amendments of the United States Constitution, Mr. Williams' death sentence must therefore be reversed.

XIII. MR. WILLIAMS' DEATH SENTENCE VIOLATES THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT, BECAUSE HE WAS UNDER 18 AT THE TIME OF THE OFFENSE.

The Eighth Amendment Cruel and Unusual Punishment Clause bars Williams' execution for an offense that occurred when he was under eighteen years old. The Fifth Circuit Court of Appeals last visited this Eighth Amendment issue in a published decision in the case of Napoleon Beazley, wherein it simply held that the issue was barred by *Stanford v. Kentucky*, 492 U.S. 361, 370-73 (1989). *Beazley v. Johnson*, 242 F.3d 248, 268 (5th Cir. 2001). The Court maintained that Beazley could not complain of miscarriage of justice or claim "novelty" to avoid procedural default where *Stanford* controlled and its standard was of more than ten years duration. *Id.* The

Court similarly applied *Stanford* to reject Beazley's juvenile-status claims based on rights found in the International Covenant on Civil and Political Rights and a norm of *jus cogens*. *Id*. at 266-67. Things have changed.

Since *Beazley* was decided, two critical developments have occurred that require relief for Williams. The United States Supreme Court overturned *Stanford v. Kentucky* by recognizing the relevance of world opinion (and certainly international law) to Eighth Amendment jurisprudence, and further undermined *Stanford* by making clear that American conceptions of human decency as reflected in the opinions of professional organizations, religious groups, and polling were also relevant. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002). As will be developed *infra*, the Court also fairly radically revamped Eighth Amendment jurisprudence in other ways that would have been difficult to anticipate. Second, the Inter-American Commission on Human Rights' decision in *Domingues v. the United States* in October 2002 demonstrates that a *jus cogens* norm exists which is both valid and reliable, contrary to the finding of the district court in *Beazley*, 242 F.3d at 268 (unaddressed by the Fifth Circuit), and one other federal circuit court. Inter-American Commission on Human Rights, Report No. 62/02, Merits Case 12.285, *Michael Domingues v. United States*, October 22, 2002) [hereinafter "*Domingues*"; Exhibit 18; *Hain v. Gibson*, 287 F.3d 1224, 1243-44 (10th Cir. 2002) (finding, erroneously, that countries have abandoned the juvenile death penalty for moral or political, rather than legal, reasons).[28] The *jus*

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[28] *Hain* misinterprets *Stanford* by finding it controlling on the *jus cogens* issue. The Court comments:

> Although the dissent in *Stanford* argued that, "[w]ithin the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved," [*Stanford v. Kentucky,* 492 U.S. 361], 390 (1989) . . . (Brennan, J.,

cogens finding reinvigorates all of the claims raised by Beazley, because the existence of a reliable and valid *jus cogens* norm independently should bar Williams' death sentence and also is *dispositive* in relation to an Eighth Amendment or Covenant bar. Simply put, the combination of *Atkins* and the *jus cogens* norm found in *Domingues* trips the scales in favor of relief under the Eighth Amendment, overturning the legal and factual basis for denial of relief in *Stanford*. *Atkins* removes *Stanford* as a decision: (1) in conflict with a finding of an Eighth Amendment bar based in part upon a strong international law norm; (2) in conflict with norms found in treaties or in customary international law (including, of course, *jus cogens* norms).

A. Introduction to the Dispositive Legal and Factual Bases for Relief

Three dispositive factual and legal bases that determine the outcome of this issue:

1. Williams was 17 years old at the time of the offense for which he has been sentenced to death.

2. In June 2002, in *Atkins v. Virginia*, the United States Supreme Court unequivocally recognized the relevance of world opinion to any finding regarding evolving standards of human decency in our society under our constitution,

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dissenting), the majority implicitly rejected this argument in holding the practice constitutional and in noting that "no modern societal consensus" forbids the imposition of the death penalty on individuals age sixteen or seventeen.

Hain, 287 F.3d at 1244. The Tenth Circuit failed to realize that the *Stanford* majority rejected international law and opinion as *relevant* to the Eighth Amendment issue. *Stanford*, 492 U.S. at 369 n.1 (four Justices joined by Justice O'Connor) ("We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* (accepted by the dissent, see *post*, at 2984-2986) that the sentencing practices of other countries are ***relevant***.") (emphasis in original, except for last italics). The *Stanford* Court made this very clear by adding that the practices of other countries might help shed some light on whether a practice uniform among Americans was not founded on historical accident, but "*cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people*." *Id*. (emphasis added).

> rejecting the contrary view held by a majority of Justices in *Stanford v. Kentucky*, which formerly raised an insuperable impediment to relief for Williams. Because *Stanford* was controlling precedent governing federal constitutional relief, this change constitutes provision of a newly available ***legal authority*** for Williams' Eighth Amendment challenge to his punishment.
>
> 3. In October 2002, the Inter-American Commission on Human Rights recognized that the international customary law bar on the death penalty for crimes committed by 17-year-olds has achieved the status of *jus cogens*, and the Commission upheld its decision with solid factual development and analysis,[29] providing this Court with newly available persuasive ***legal and factual authority***, disposing of the United States' counter-arguments to *jus cogens*.[30]

Williams' age at the time of the offense, when viewed in light of the Atkins shift in the legal norm and the jus cogens bar, renders him actually innocent of the death penalty, and a legal rule barring the death penalty for juvenile offenders[31] is fully retroactive, as class protection from a particular punishment. *Sawyer v. Whitley*, 505 U.S. 333, 345 (1992) (defining "actual innocence of the death penalty" as a showing that a condition of eligibility is not met; in this instance, 18 years of age); *Penry v. Lynaugh*, 492 U.S. 302, 329-30 (1989) (finding bar on death penalty for certain classes of defendants because of their status to be retroactive rule).

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[29] International human rights law jurists already have commented on the thoroughness of the *Domingues* opinion. *See* Richard J. Wilson and Jan Perlin, *The Inter-American Human Rights System: Activities From Late 2000 through October 2002*, 18 Am. Univ. Int'l L. Rev. 651, 725-26 (2003) ("The Commission found that the imposition of the death penalty on children under eighteen at the time of their conduct violates both customary international law and jus cogens norms. To justify this conclusion, the Commission exhaustively reviewed international law and standards, as well as the law and practice of nations.").

[30] A petition raising the same issues on behalf of former Texas inmate Napoleon Beazley remains pending at the Inter-American Commission and should eventuate in a decision in 2003. Toronto Patterson also filed a petition at the Commission raising identical grounds.

[31] Throughout, "juvenile offender" will be used to refer to a defendant charged or convicted for an offense that occurred when he or she was under 18 years old. The term is employed for convenience, and no conclusion as to guilt or innocence of the offense is intended.

On June 20, 2002, the United States Supreme Court rendered its decision in *Atkins v. Virginia*, 122 S. Ct. 2242 (2002), wherein it held that contemporary standards of decency bar the use of the death penalty for mentally retarded offenders. Significantly, the Court found as ***relevant*** to its decision, although not "dispositive," the overwhelming disapproval in the world community of the death penalty for persons with mental retardation. *Atkins*, 122 S. Ct. at 2249 n.21. This finding is highly significant for all of Williams' claims based upon his juvenile status at the time of the crime, because it implicitly overrules the controlling precedent of *Stanford v. Kentucky*, 492 U.S. 361 (1989), wherein a majority of the Court completely rejected the sentencing practices of other countries as ***relevant*** to American conceptions of decency. *Stanford*, 492 U.S. at 369 n.1; 382 (O'Connor, J., concurring in part and concurring in judgment).[32] Although world opinion may not have been dispositive for the Court's decision in *Atkins*, a much stronger case exists that it should be not only ***relevant*** but ***dispositive*** in regard to the juvenile death penalty.[33]

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[32] *See Beazley v. Johnson*, 242 F.3d 248, 266 (5th Cir. 2001) (quoting *Austin v. Hopper*, 15 F. Supp. 2d 1210, 1260 n.222 (M.D. Ala. 1998) ("[A]lthough international jurisprudence interpreting and applying the ICCPR would appear to assist this court, two sources preclude reliance on such precedent: the Supreme Court's directive in *Stanford v. Kentucky* [492 U.S. 361, 369 n. 1, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989) (American conceptions of decency are dispositive)]; and the reservations attached to the ICCPR.")).

[33]With regard to both the mental retardation and juvenile offender issues, the facts have changed so dramatically and, in the case of the juvenile issue, have "come to be seen so differently" (as supporting a *jus cogens* norm) that the *Stanford* rule against consideration of the practices of other countries has been robbed of justification. *Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992).

On October 22, 2002, the Inter-American Commission on Human Rights issued its decision in the case of Michael Domingues, a Nevada inmate sentenced to death for an offense that occurred when he was 16 years old. *Domingues*, *supra*. The Commission held that the customary international law bar on the death penalty for crimes committed by persons under age 18 has attained *jus cogens* status. *Domingues*, at para. 112. That means, succinctly, that the Commission found the United States (and Texas implicitly in Williams' case) to be violating a "superior order of legal norms" derived from "fundamental values held by the international community," the breach of which "shock the conscience of humankind," and which "bind the international community as a whole, irrespective of protest, recognition or acquiescence." *Id*. at para. 49. Unlike the practice of seeking the death penalty for persons with mental retardation, Texas' use of the death penalty for juvenile offenders is not only inconsistent with international ***practice***, but with the most fundamental of international law peremptory ***norms***. *Id*. The Commission's decision is the first by any international court, commission, or other international body responsible to interpret and apply international human rights norms that has held the bar on the juvenile death penalty to meet the *jus cogens* definition. The Commission's decision at the very least should be persuasive authority for this Court's treatment of the issue, constituting a significant fact in itself that was not available to Williams until his most recent state court filing. The well-reasoned *Domingues* decision undermines the unsupported factual assertions made by federal courts reviewing the *jus cogens* issue. *Beazley*, 242 F.3d at 268 ("The district court also found that the norms Beazley referenced were *not* shown to be either valid or reliable. Beazley asserts that the district court abused its discretion by refusing a hearing on whether the norms he

referenced were valid. Because we deny a COA, we do *not* reach the norms' reliability.");[34] *Hain*, 287 F.3d at 1243-44 ("It is far from certain that abolition of the death penalty for juveniles is a customary norm of international law that has 'risen to the level that the international community as a whole recognizes it as *jus cogens,* or a norm from which no derogation is permitted.' Instead, it appears the countries that have abolished the death penalty in these instances have done so for 'moral' or 'political' reasons (as opposed to any 'sense of legal obligation.'") (quoting *Buell v. Mitchell*, 274 F.3d 337, 373 (6th Cir. 2001)).

The Commission's decision in *Domingues* is more than persuasive authority, flowing as it does from the treaty based authority of the Inter-American Commission to decide human rights disputes arising within nations in the Organization of American States. The decision should be binding upon the United States and Texas. *See infra* more detailed discussion.

This Court now should accept, as a newly-available aspect of the "floor" of constitutional protection, the United States Supreme Court's recognition of the relevance of world opinion to federal constitutional considerations. The alignment of *Atkins* and the *jus cogens* norm (whether directly applied via an original factual/legal decision by this Court or through recognition by this Court of the Inter-American Commission decision as binding upon Texas) should require this Court to relieve Williams of his death sentence. The step taken by *Atkins* to reinstate the significance of world opinion frees this Court from the confines of *Stanford* as binding authority, opening the door to a searching inquiry of the bases for a bar on the juvenile death penalty found

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[34] As part of his prayer for relief, *infra*, Williams requests an evidentiary hearing where the factual basis of his *jus cogens* issue may be established through expert testimony and the presentation of data. The Tenth Circuit's failure in *Hain* to find *opinio juris* is discussed *infra*.

in the Eighth and Fourteenth Amendments, the International Covenant on Civil and Political Rights, and, independently, in the strong evidence of a fully developed norm of *jus cogens*.

B. Mr. Williams' Issues Related to his Juvenile Status at the Time of the Offense are not barred by the Doctrine of Adequate and Independent State Grounds

Trial counsel did not object to the State seeking the death sentence in Williams' case as a violation of the Eighth Amendment, the International Covenant, customary international law, or *jus cogens*. Neither did appeal counsel treat any of these issues. However, state habeas counsel did amend her petition to include a claim that Williams' death sentence violates Article 6(5) of the International Covenant as applied to the state of Texas through the Supremacy Clause of the United States Constitution. *See* Applicant's First Amendment to His Original Application for Postconviction Writ of Habeas Corpus, By a Person Sentenced to Death, filed on July 31, 1998, at 7ff. The original state petition contained thirteen claims and the amendment two additional ones, as reflected by the Court of Criminal Appeals' order denying relief on April 24, 2002 ("Applicant presents fifteen allegations, some with multiple sub-parts. . . ."); Exhibit 2. It would appear that the Covenant decision was decided on the merits, because there is no mention of any state law ground for the decision. However, to the best of Mr. Williams' knowledge, the Court left not a trace of factual findings or legal conclusions on the issue.

The Eighth Amendment and *jus cogens* issues were presented together in the successor state habeas petition which the Court of Criminal Appeals ordered dismissed on April 23, 2003, for failing to satisfy the requirements of Article 11.071 § 5, Texas Code of Criminal Procedure. Exhibit 3. The per curiam dismissal, however, was not unanimous, with Judge Holcomb noting that he "would file and set" the petition for merits review. This leads to some ambiguity as to

whether the Court ruled on the merits because, with regard to the Eighth Amendment/jus cogens issues, the question of merit was integrally tied to recognition of new law and facts and avoidance of the procedural bar under subsections (a)(1) and (a)(3) of Section 5.[35] If a Judge believed that *Atkins* may have overruled *Stanford*, a matter of substantive merit making the claim newly available, he or she would reasonably conclude that review should be granted under § 5(a)(1). As *Beazley*, inter alia, make abundantly clear, the legal basis of the Eighth Amendment claim, indeed, was "unavailable" as that term is defined by the statute, because it "was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of [Texas] on or before [the date the previous application was filed]." Tex. Code Crim. Proc. art. 11.071 § 5(d). Additionally, the substantive claims (Eighth Amendment and *jus cogens*) assert that Williams is ineligible for the death sentence, potentially complying with the "innocence of the death penalty" provision in Section 5(a)(3).

Although the Covenant issue had been pled earlier in Williams' amended first state habeas application, arguably *Stanford* rendered all three issues (Eighth Amendment, International

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[35] Subsection (a)(1) allows merits review of a successor application upon demonstration of "sufficient specific facts establishing that . . . the current claims and issues have not been and could not have been presented previously in a timely initial application . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." Subsection (a)(3) allows merits review if the applicant shows "sufficient specific facts establishing that, by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in applicant's trial under Article 37.071 or 37.0711." Tex. Code Crim. Proc. art. 11.071 § 5 (a) (1) and (3).

Covenant, and peremptory norms of customary international law[36]) legally unavailable until the Supreme Court issued *Atkins* in the summer of 2002. *Beazley*, 242 F.3d at 266 (5th Cir. 2001) (quoting *Austin v. Hopper*, 15 F. Supp. 2d 1210 (M.D. Ala. 1998) (finding that *Stanford* precluded reliance on international jurisprudence interpreting and applying the International Covenant because the *Stanford* Court held "American conceptions of decency" to be dispositive); *Gisbert v. United States Attorney General*, 988 F.2d 1437, 1448 (5th Cir. 1993) (holding that "international law does not require [relief where] legislative, executive, or judicial decisions exist to the contrary" and citing a Supreme Court case to the contrary as a judicial decision sufficient to meet the test of *The Paquete Habana*[37] and, thus, prevail over international law); *see Ex parte Pressley*, 770 So. 2d 143, 148-49 (Ala. 2000) (relying upon *Stanford* to deny relief on Covenant claim, asserting that in *Stanford* "the United States Supreme Court rejected the argument that international law should influence rulings under the federal Constitution pertaining to the death penalty," a position clearly overruled by *Atkins*); *Domingues v. State*, 961 P.2d 1279, 1280 (Nev. 1998) (relying in part upon *Stanford* holding that death penalty is constitutional to defeat Covenant claim).

The *novelty* of Atkins provides clear cause for this Court to overlook the potential issues of adequate and independent state grounds or procedural default. The legal basis for these claims

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[36] *Jus cogens* is the highest form of customary international law. The Supreme Court has not addressed its relationship of *jus cogens* norms to its own decisions and which would "control." Thus, the caveat "arguably," *supra*.

[37] *The Paquete Habana*, 175 U.S. 677, 700 (1900). Courts must construe domestic law so as to avoid violating principles of public international law – *Murray v. the Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 102, 118 (1804); *Lauritzen v. Larson*, 345 U.S. 571, 578 (1958) – however, the *Paquete* test maintains that public international law is *controlling* only "where there is no treaty and no controlling executive or legislative act or judicial decision." 175 U.S. at 700.

was not reasonably available beforehand, and *Atkins*' logic was unforeseeable. *Reed v. Ross*, 468 U.S. 1, 15 (1984) ("It is in the nature of our legal system that legal concepts, including constitutional concepts, develop slowly, finding partial acceptance in some courts while meeting rejection in others. Despite the fact that a constitutional concept may ultimately enjoy general acceptance, . . . when the concept is in its embryonic stage, it will, by hypothesis, be rejected by most courts. Consequently, a rule requiring a defendant to raise a truly novel issue is not likely to serve any functional purpose.."). *See infra*. Prejudice is evident in the fact that, but for the constitutional, treaty, and/or *jus cogens* violations, Williams would not be sentenced to death.

In the alternative, the Eighth Amendment and other two issues[38] clearly fall within the narrow exception to procedural default for "miscarriage of justice" or "actual innocence of the death penalty." *Sawyer v. Whitley*, 505 U.S. 333, 345 & n.12 (1992) (allowing federal review where petitioner can show by clear and convincing evidence that but for constitutional error, no reasonable juror would find petitioner eligible for the death penalty); *Beazley*, 242 F.3d at 265-66 (2001) (maintaining that where condition of eligibility -- age -- is not satisfied, miscarriage of justice would be found) (citing *Sawyer*, *supra*). The finality and comity concerns underlying the procedural default doctrine have no force when the constitution "deprives the State of the power to impose a certain penalty." *Penry v. Lynaugh (Penry I)*, 492 U.S. 302, 300 (1989) (citing *Thompson v. Oklahoma*, 487 U.S. 815 (1988)) (showing that a new blanket rule protecting persons under 18 at the time of offense from the death penalty would fall into the first *Teague*

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[38] The International Covenant and *jus cogens* issues have a constitutional element. *Beazley*, 242 F.3d at 266 ("Application of state law in conflict with a valid treaty would violate the Supremacy Clause, creating a constitutional error."). Additionally, the right to be protected from violation of a *jus cogens* norm is a matter of due process. *See infra* at XV.

exception); *see McKenzie v. Day*, 57 F.3d 1461, 1470, 1479 (9th Cir. 1995) (Norris, C.J., dissenting from panel decision) (noting that justifications underlying the relevant *Teague* exception and those for miscarriage of justice exception are indistinguishable) (citing *Prihoda v. McCaughtry*, 910 F.2d 1379, 1385-86 (7th Cir. 1990); *Sawyer v. Butler*, 881 F.2d 1273, 1293-94 (5th Cir. 1989) (en banc), *aff'd*, 497 U.S. 227 (1990)).[39]

C. New Recognition by Four United States Supreme Court Justices of an Eighth Amendment Bar on the Juvenile Death Penalty

On October 21, 2002, four Supreme Court Justices dissented from denial of review of Kevin Stanford's original petition for writ of habeas corpus, concluding:

> [O]ffenses committed by juveniles under the age of 18 do not merit the death penalty. The practice of executing such offenders is a relic of the past[40] and is

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[39] The Seventh Circuit noted in *Prihoda* that the "exceptions in *Teague* deal with changes so substantial, or so strongly suggesting factual innocence, that they would allow collateral relief under the 'fundamental miscarriage of justice exception.'" 910 F.2d at 1386 (opinion by Easterbrook, C.J.). The Fifth Circuit itself recognized the same in *Butler*. 881 F.2d at 1292-93 (describing *Teague* as a "radical extension of the procedural default rule").

[40] Article 37 of the original Texas Penal Code and Code of Criminal Procedure of 1856 [the "Old Code"] contains the first record of an eligibility age for the death sentence in Texas, and it is seventeen:

> A person for an offence committed before he arrived at the age of seventeen years, shall in no case be punished with death, but may, according to the nature and degree of the offence be punished by imprisonment for life, or receive any of the other punishments affixed in this Code, to the offence of which he is guilty.

Article 40 of the same Code, *see* Exhibit 19, states, "The word minor, as here and elsewhere used in this Code, signifies a person under the age of 21 years." The statutory 17-year-old eligibility age was a vast improvement on the common law that otherwise prevailed where there was no statute to cover a matter. *Hyde v. State*, 16 Tex. 445, at *5 (Tex. 1856) ("In the administration of the criminal law, the common law, where not modified by the constitution or statutes, has been held to furnish the rule of decision, as well in matters of practice as principle.");

> inconsistent with evolving standards of decency in a civilized society. We should put an end to this shameful practice.

In re Stanford, 123 S. Ct. 472, 475 (Oct. 21, 2002) (Mem.) (Stevens, J., joined by Ginsberg, Breyer, and Souter, J.J., dissenting) [hereinafter *Stanford II*].[41] The Justices pronounced in no uncertain terms that Stanford should have been granted relief on the merits. They suggested that *Atkins* has so transformed the Court's analysis of the Eighth Amendment that, *despite Stanford*, relief should be forthcoming to juvenile offenders as a class.

Indeed, *Atkins* undertook radical changes in direction from *Stanford* and other prior Eighth Amendment jurisprudence. Not only did *Atkins* resurrect and firmly establish the relevance of world opinion (and international law) to constitutional discernment of evolving standards. As Justice Scalia and others strongly noted in dissent, the six-Justice *Atkins* majority also rejected the Supreme Court's prior requirements that evidence supporting an Eighth Amendment standard be deeply rooted in time and broadly accepted. *Atkins*, 122 S. Ct. at 2259, 2261 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) ("The Court . . . miraculously extracts a `national consensus' forbidding execution of the mentally retarded . . . from the fact that 18 States--less

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Case of James Terry Roach and Jay Pinkerton, Resolution 3/87, Case No. 9647, Inter-American Commission on Human Rights, Sept. 22, 1987, at para. 59 (noting that the common law allowed the death penalty for children between the ages of seven and fourteen).

[41] Stanford did not carry his Eighth Amendment issue to the Court on certiorari because, following the Supreme Court's review of the issue on certiorari from direct appeal, the Eighth Amendment claim was not included in his initial and only federal petition. The Supreme Court is very reluctant to take original petitions. The Justices comment, however, that there now are no valid procedural objections to re-consideration of the issue, and that, given *Atkins*, review should be granted. 123 S. Ct. at 472. There now are sufficient Justices (4) aligned to grant certiorari review, and they obviously believe that *Atkins* has wrought such a change that the rule of *stare decisis* (perhaps the preeminent "procedural" rule) does not protect *Stanford*.

than *half* (47%) of the 38 States that permit capital punishment (for whom the issue exists)--have very recently enacted legislation barring execution of the mentally retarded. . . ."); 2262 ("That bare number of States alone--*18*--should be enough to convince any reasonable person that no "national consensus" exists."); 2263 ("[A] major factor that the Court entirely disregards is that the legislation of all 18 States it relies on is still in its infancy. The oldest of the statutes is only 14 years old."). In short, the Court has endorsed finding a standard in the process of evolution, whereas before it would have required itself to wait until the evidence of the standard was fully evolved.

There was an air of mystery while *Atkins* was pending, because it seemed as though the Court was going to grant relief, and it could only do so if it found either (1) that the number of non-death penalty states was relevant (and could be added to death penalty states with statutory bans on execution of persons with mental retardation in order to discern a "consensus" – or, at least a majority!) <u>or</u> (2) that a *trend*, rather than complete and total acceptance of a standard, would be sufficient. Neither of these concepts was consistent with prior Eighth Amendment jurisprudence. In the end, the Court seems to have relied upon *both* in its shift away from *Stanford*. *Atkins*, 122 S. Ct. at 2248-49 (2002) (mentioning the concept of factoring in non-death penalty states, which is outright rejected by the *Stanford* majority; and yet holding, "It is not so much the number of states that is significant, but the consistency of the direction of change.").

It was most startling to see the Court disparage the lack of a *trend* in reduction of states with the death penalty for juvenile offenders comparable to the *trend* it found in the reduction of states allowing the death penalty for persons with mental retardation. *Id* at 2249 n.18. This overlooked the fact that many of the states illustrating the *trend* toward barring the death penalty

for persons with mental retardation had already had statutes, for many years, that barred it for crimes committed by persons under age 18. As the *Stanford* dissenters may hint, the Court also ***erred*** by failing to note new juvenile execution bars in *three* states additional to the two recognized as having changed since 1989. *Id*.; *Stanford II*, 123 S. Ct. at 472-73.

Given the *Atkins* multi-layered shift of emphasis in consideration of what is relevant for finding "consensus" for Eighth Amendment purposes, the two-state difference between states barring the death penalty for persons with mental retardation and for juvenile offenders, respectively, is unimportant, as the *Stanford* dissenters recognize. Indeed, they find that the "reasons supporting [the *Atkins*] holding, with one exception, apply with equal or greater force to the execution of juvenile offenders." *Stanford II*, 123 S. Ct. at 472-73. They opine that the exception -- that two fewer states bar the death penalty by statute for juvenile offenders – should be overcome by (1) the fact that it is not a legitimate basis for disparate treatment of the two classes and (2) the fact that, since 1989, five additional states [***not*** two, as alleged in *Atkins*] had barred the death penalty for offenses committed by persons under 18. *Id*. at 472-73.

The recognition by the *Stanford II* Justices of the merit of Williams' Eighth Amendment issue in a post-*Atkins* setting, along with explicit recognition by the three dissenting Justices in *Atkins* that a surprising and strong jurisprudential shift has taken place – including a rejection of the *Stanford* majority opinion on the relevance of world opinion and practice – strongly supports relief for Williams on this issue.

D. Post-*Atkins* Actions Taken by State Authorities For Juvenile Offenders

On May 28, 2002, the Missouri Supreme Court granted a stay of execution (for a date that had been set for June 5th) in the case of Christopher Simmons, a Missouri capital inmate. The Court stayed the date in order to await the issuance of the Supreme Court's decision in *Atkins* so that it might determine whether *Atkins* might have relevance to Simmons' claims, raised in a state successor habeas petition, that his death sentence as a juvenile violated the Eighth Amendment Cruel and Unusual Punishment Clause, Missouri Constitution Article 1 § 21 ("cruel and unusual punishment"), Sixth and Fourteenth Amendment protection of due process, and Missouri Constitution Article 1 § 10 (similarly protecting due process). Petition for Writ of Habeas Corpus, *State of Missouri ex rel. Christopher Simmons v. Al Luebbers*, no number, May 2, 2002 (brief and stay order in possession of undersigned counsel). On November 26, 2002, the Court issued the writ of habeas corpus, which generated briefing and will ensue in a ruling on the merits. For the court to have granted this merits review, it had to find satisfied a standard more stringent than Section 5(a) of Article 11.071, Texas Code of Criminal Procedure. *See Brown v. State*, 66 S.W.3d 721, 731 (Mo. 2002) (en banc) (citing *Clay v. Dormire*, 37 S.W.3d 214 (Mo. 2000) (en banc) and *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. 2001) (en banc)) (as quoted in the Missouri Attorney General's response in opposition to the petition) ("This Court has allowed state habeas corpus review of procedurally defaulted post-conviction relief claims in extremely narrow circumstances, including "if the petitioner can assert either: (1) a claim of actual innocence or (2) a jurisdictional defect or (3) (a) that the procedural default was caused by something external to the defense – that is, a cause for which the defense is not responsible – and (b) prejudice resulted from the underlying error that worked to his actual and substantial disadvantage."). Missouri Attorney General, Suggestion in Opposition to Petition for Writ of

Habeas Corpus, *State of Missouri ex rel. Christopher Simmons v. Al Luebbers*, No. SC84454, May 9, 2002, at 4 (brief in possession of undersigned counsel); Order, Writ of Habeas Corpus, *State of Missouri ex rel. Christopher Simmons v. Al Luebbers*, No. SC84454, September Session 2002 (Mo. Nov. 26, 2002)). Actual innocence of the offense and jurisdictional defect not being relevant, it appears that the Missouri Supreme Court has granted merits review on the basis that the unavailability of *Atkins* at the time of the prior post-conviction petition which was decided upon in 1997 (*see State v. Simmons*, 944 S.W.2d 165 (Mo. 1997) (en banc)) and that *Atkins*, as it may affect both federal and state law claims, may provide a rule for decision that would provide retroactive relief. *See Penry*, *supra*, 492 U.S. at 329-30.

In Mississippi, Governor Ronnie Musgrove granted an indefinite reprieve to juvenile offender Ronald Chris Foster on January 6, 2003, after the Mississippi Supreme Court split 4-4 on pleadings by Foster alleging, on the basis of *Atkins*, that the Eighth Amendment barred his execution due to his juvenile status at the time of the offense and a new concern about mental retardation. Riva Brown, *Governor Cites Questions: Okays Execution Stay*, Jackson Clarion-Ledger, January 7, 2003; Matt Volz, *Musgrove Says Reprieve for Foster to Stand*, Jackson Clarion-Ledger, March 4, 2003. The United States Supreme Court previously had denied certiorari from a Fifth Circuit panel decision that did not consider the question of a blanket Eighth Amendment bar to the juvenile death penalty. *High Court Refuses Teen Death Row Case*, Associated Press, December 2, 2002 (noting the position of the Mississippi Attorney General that the issue was not before the court).

In Kentucky, after the United States Supreme Court refused to review Kevin Stanford's original habeas petition asserting that, following *Adkins*, the Eighth Amendment barred his

execution, the state attorney general requested an execution date to be set on January 7, 2003. The Governor of Kentucky, Paul Patton, allowed the date to pass without signing a death warrant. Patton had previously announced his support for legislation raising the eligibility age for the death sentence to 18. Charles Lane, *For Justices, Doubts on Death Penalty*, Washington Post, Oct. 22, 2002, at A3.

E. Post-Atkins Actions Taken by State Authorities Against Juvenile Offenders

Texas and Oklahoma, two of the three states to have actually executed a juvenile offender in the last ten years, predictably[42] have resisted the impact of *Atkins* on Eighth Amendment protection of juvenile offenders and have continued executions. Texas executed juvenile offender T.J. Jones on August 8, 2002. Jones had instructed his attorney not to file anything on his behalf and, thus, did not challenge his execution under *Atkins* in any forum. *See* http://www.abanet.org/crimjust/ juvjus/jones.html (American Bar Association webpage on case). Texas executed juvenile offender Toronto Patterson on August 28, 2002, following denial of certiorari by the United States Supreme Court from dismissal by the Texas Court of Criminal Appeals (for abuse of the writ under Article 11.071 § 5, Texas Code of Criminal Procedure) of a successor state petition raising an *Atkins* Eighth Amendment challenge. Patterson's state

[42] Texas has expressed defiance toward federal or international intervention in regard to its treaty duties. *See* Kris Axtman, *U.S. Death Penalty Creates International Snarl*, Christian Science Monitor, February 24, 2003 (quoting Gene Acuna, announcing Texas' intent to ignore International Court of Justice order for stays of execution due to alleged violation of the Vienna Convention on Consular Relations: "According to our reading of the law and the treaty, there is no authority for the federal government or this World Court to prohibit Texas from exercising the laws passed by our legislature.").

successor and Supreme Court certiorari petitions were accompanied by amicus briefs from the Texas Catholic Conference (state only) and Texas Impact.

Oklahoma executed juvenile offender Scott Hain on April 3, 2003. The Supreme Court had denied Hain's petition for writ of certiorari from the Tenth Circuit Court of Appeals on January 27, 2003, without comment, deciding not to review challenges to Hain's execution based upon the Eighth Amendment, International Covenant, and *jus cogens* bars to the death penalty for juvenile offenders. *Hain v. Mullin*, 123 S. Ct. 993 (Jan. 27, 2003) (Mem.). The certiorari petition had been accompanied, as in Patterson's case, with an amicus filed by the Oklahoma Conference of Churches, Oklahoma Impact, and other religious organizations.[43] On March 26, 2003, a Tenth Circuit panel held that Hain was not entitled to federal funding for his appointed federal habeas counsel to continue to represent him in state clemency proceedings. *Hain v. Mullin*, 2003 WL 1698924 (10th Cir. Mar. 26, 2003). However, on April 2, 2003, motion for en banc review was granted, along with a stay of execution. On April 3, 2003, at the request of the Oklahoma Attorney General, the United States Supreme Court vacated the stay, with the *Stanford II* Justices dissenting. *Mullin v. Hain*, 123 S. Ct. 1654 (Apr. 3, 2003) (Mem.) (Application to Vacate Stay of Execution Granted) (Stevens, Souter, Ginsberg, and Breyer, JJ., noting that they would deny the application to vacate the stay). The juvenile issues were not expressly before the Supreme Court in the final round of litigation.

F. Materially Relevant Actions Taken by Other Nations in Conformity with the Jus Cogens Norm too Recent for Inclusion in *Domingues*

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[43] The Texas-based amicus brief was written by counsel for Williams (Long). The Oklahoma brief was written by attorney Rex Friend. Copies of both can be made available to the Court and opposing counsel upon request.

At present, other nations clearly have recognized the international law norm to require not only amendment of domestic statutes but retroactive application to populations sentenced to death. Particularly dramatic steps in conformity with the norm were taken by the governments of Pakistan and the Philippines in 2002.

Pakistan, having already eliminated the juvenile death penalty by statute, commuted the death sentences of 74 juvenile offenders on July 25, 2002. *74 Get Relief Against Death Sentence*, Pakistan News Service, http://paknews.org/flash.php?id=5&date1=2002-07-25; *see also* Amnesty International, United States of America: Indecent and Internationally Illegal, The Death Penalty Against Child Offenders, AMR 51/143/2002, September 2002, at 97 ("2002–USA [Texas alone] executes three more child offenders. Pakistan takes 74 child offenders off death row.") [hereinafter "Amnesty Report"].[44] This should leave Texas with the largest population of juvenile offenders on death row in the world.

In the Philippines, intervention by the Development Officer of the Philippine Jesuit Prison Service led to an order on July 30, 2002, by the Philippines Supreme Court commuting the sentences of 12 juvenile offenders. Regarding the twelve, the Court reasoned as follows:

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[44] This is illustrative of the fact that the *jus cogens* right to life of juvenile offenders is being protected even in countries that are otherwise struggling to amend troublesome human rights records. *See* Munir Ahmad, Rights Group: 461 Pakistani Women Killed, Associated Press, December 11, 2002 (describing the "honor killings" of women in Pakistan as reported by the Human Rights Commission of that country: "women are murdered to protect the `family honor' for immoral behavior ranging from sex outside marriage, dating, talking to men, being raped or even cooking poorly").

> Apparently they were all below 18 years old at the time they supposedly committed their respective offenses. Nevertheless, after trial, the different trial courts hearing their respective cases found all of them guilty of capital offenses and sentenced them to the supreme penalty of death. Under Article 68, The Revised Penal Code, in relation to P.D. 603, as amended, minority is a privileged mitigating circumstance which prevents the imposition of the death penalty.

Resolution of the Court En Banc, Luzviminda Puno, Clerk, Supreme Court of the Philippines, O.C. No. 01-20, *Re: Letter of Ma. Victoria S. Diaz, Program Development Officer, Jesuit Prison Service*, dated July 30, 2002, filed Aug. 1, 2002, at 1.

On May 9, 2002, Somalia, which had not had a working central government for more than a decade, *signed* the United Nations Convention on the Rights of the Child. At the United Nations General Assembly Special Session on Children, Somalia also stated its intention to ratify the Convention. Amnesty Report at 96. When it does so, it will be the 192nd state party, and the United States will be the only country not to have adopted the norm against juvenile execution through ratification of the treaty. At the special session, the US government nevertheless described itself as "the global leader in child protection."[45] *Id*. Somalia's action, which came too late for inclusion in the Inter-American Commission's decision, only enhances the Commission's finding that "the extent of ratification of this instrument alone constitutes compelling evidence of a broad consensus on the part of the international community repudiating the execution of offenders under 18 years of age." *Domingues* at para. 57.

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[45] Recently, in contrast, at a briefing for NGOs (Non-Governmental Organizations) in Geneva, Switzerland, given by the United States Delegation to the United Nations Commission on Human Rights, Ambassador Jeanne Kirkpatrick asserted that the juvenile death penalty was confined to "only one or two" states in the United States and, thus, was a small problem unworthy of serious concern. Exhibit 20 (Declaration of Prof. Connie de la Vega); *see* Connie de la Vega, *Amici Curiae Urge the U.S. Supreme Court to Consider International Human Rights Law in Juvenile Death Penalty Case*, 42 Santa Clara L. Rev. 1041 (2002).

Finally, it bears mentioning that on September 3, 2002, a court in China sentenced two teenagers to life imprisonment for an act of arson that killed 25 people, and that the defendants were spared the death penalty because of their age at the time of the crime. Amnesty Report at 83 (citing Associated Press, Sept. 4, 2002). China, the world-leader in executions, eliminated the juvenile death penalty by statute some years ago. *See generally* Amnesty Report at Appendix ("A selected chronology of how the international consensus has evolved.") (Exhibit 21).

G. The Inter-American Commission's Development of the Facts in Support of Jus Cogens

The Inter-American Commission held the United States to be violating Article I of the American Declaration by sentencing Michael Domingues (and others similarly situated) to the death penalty in violation of a *jus cogens* norm absolutely protecting the right to life of juvenile offenders accused of committing capital offenses prior to their eighteenth birthday. *Domingues* at paras. 85 and 112. The Commission's analysis followed the definition of *jus cogens* in the Vienna Convention on the Law of Treaties. *Domingues* at paras. 45 n.34[46] and 49. *Jus cogens* is derived from ancient law concepts of a "superior order of legal norms, which the laws of man or nations may not contravene" and as the "rules which have been accepted, either expressly by treaty or tacitly by custom, as being necessary to protect the public morality recognized by them." *Id*. at para. 49. The "principal distinguishing feature" of *jus cogens* norms is their "relative indelibility,

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[46] *Domingues* at para. 45 n.34 (quoting the Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969), at art. 53) ("[a] treaty is *void* if at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted, and which can be modified only by a subsequent norm of general international law having the same character") (defining *jus cogens* norm).

in that they constitute rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect." *Id*. (citing, inter alia, Vienna Convention on the Law of Treaties, arts. 53, 64). Pointedly, a *jus cogens* norm derives its "status from fundamental values held by the international community, as violations of such peremptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole, irrespective of protest, recognition or acquiescence." *Id*. (citing Barcelona Traction Case (Second Phase), ICJ Reports (1970) 3 at 32, sep. op. by Judge Ammoun (indicating that obligations of *jus cogens* "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination")). If a *jus cogens* norm is violated as a matter of state policy in an international agreement, that agreement is *void*. [47] *Domingues* at para. 49 n.43 (describing position of the Restatement of Foreign Relations Law of the United States at § 702 and comment n). The Commission correctly maintains that, while based on sources of customary international law, a *jus cogens* norm is more rigorous, "requiring evidence of recognition of the indelibility of the norm by the international community as a whole," which "can occur where there is acceptance and recognition by a large majority of states, even if over dissent by a small number of states." *Domingues* at para. 50 & n.45 (citing Restatement, *supra*, at § 102 and report's note 6 (1986)) (additional citation omitted).

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[47] Thus, for example, the *jus cogens* norm voids the United States' reservation to Article 6(5) of the International Covenant on Civil and Political Rights. *See Domingues* at para. 61 (setting out reservation).

In light of Domingues' allegation that the United States was violating *jus cogens*, the Commission determined that it needed to "evaluate whether the provisions of the American Declaration, when interpreted in the context of pertinent developments in customary international law and the norms of *jus cogens*, prohibit the execution of individuals who committed their crime when they were under the age of 18." *Domingues* at paras. 53-54. In particular, the Commission found that Article I of the Declaration provided the vehicle for this consideration because, while not precluding the death penalty altogether, it prohibits the application of the death penalty "when doing so would result in an arbitrary deprivation of life or would otherwise be rendered cruel, infamous or unusual punishment." *Domingues* at paras. 51-52. As sources for determining the existence of the *jus cogens* norm, the Commission looked to "recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of the United Nations and other international governmental organizations, and the domestic legislation and judicial decisions of states." *Id*. at para. 54.

The Commission made the following findings, *inter alia*, supporting the *jus cogens* norm:

> 1. The extent of ratification of the United Nations Convention on the Rights of the Child over the decade from 1990 to 2001, wherein 191 state parties adopted the treaty without any explicit reservation to Article 37(a), "alone constitutes compelling evidence of a broad consensus on the part of the international community repudiating the execution of offenders under 18 years of age." *Domingues* at para. 57.[48] Only the United States and Somalia are not full parties to the treaty. *Id*.

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[48] UN Convention on the Rights of the Child, G.A. Res. 44/25, UN GAOR, 44th Sess., Supp. No. 49, at 167, UN Doc. A/44/49 (1989), reprinted in 28 I.L.M. 1448 (1989), art. 37(a) ("No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.").

2. Ratification by 147 nations of the International Covenant, which in Article 6(5) bars the death penalty "for crimes committed by persons below eighteen years of age," increased by 64 countries since 1986. *Id* at para. 58. The Commission noted that, of all parties, only Thailand and the United States presently have provisions modifying their acceptance of Article 6(5), with Thailand explaining that its modifications do not alter its compliance with Article 6(5). *Id*. at paras. 59, 60. The Commission found significant the condemnation within the international community over the United States' reservation to Article 6(5). *Id*. at para. 62 (noting objection that the reservation was invalid by eleven European parties primarily on the ground that the reservation was contrary to the aims and purposes of the Covenant). The Commission also noted the United Nations Human Rights Committee's rejection of the reservation as contrary to the object and purpose of the treaty and recommendation that the United States withdraw the reservation. *Id*.

3. Ratification by 24 nations of the American Convention on Human Rights, which in Article 4(5) bars the death penalty "for persons who, at the time the crime was committed, were under 18 years of age," increased by 5 countries since 1986. *Id*. at para. 63. The Commission found the "broad hemispheric adherence" to the Convention without reservation to Article 4(5) to constitute "compelling evidence of a regional norm repudiating the application of the death penalty to persons under 18 years of age even amongst those states such as Guatemala, Jamaica and Grenada that, like the United States, have retained the death penalty." *Id*. at para. 64.[49]

4. Initiatives to prohibit the death penalty altogether have increased dramatically. Since 1990, eight nations have signed and ratified the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, and similarly since 1985, thirty-nine European nations have done the same in regard to Protocol No. 6 to the European Convention on Human Rights, abolishing the death penalty except for in times of war. *Id*. at 65.

5. From 1986 to 2001, the number of nations ratifying the Fourth Geneva Convention, which at Article 68, Paragraph 4, bars the death penalty for a "person who was under eighteen years of age at the time of the offence," in situations of military occupation, rose from 162 to 189 (like the Child Convention, including almost every nation in the world). *Id*. at para. 67. The Commission noted that the

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[49] By the end of 2001, 26 nations had ratified the African Charter on the Rights and Welfare of the Child, which prohibits the death penalty for persons under 18 at the time of the crime. Amnesty Report at 84.

United States had ratified the Convention, with no reservation to Article 68, Paragraph 4, and that the provision "corresponds to similar provisions in the penal codes of many countries, and is based on the idea that a person who has not reached the age of 18 years is not fully capable of sound judgment, does not always realize the significance of his actions and often acts under the influence of others, if not under constraint." *Id*. (quoting International Committee of the Red Cross, Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (J.S. Pictet ed., 1958), at 346-347).

6. Nearly all of the nations in the world have recognized, without reservation, through concordant and widespread development and ratification of treaties, a norm prohibiting the execution of persons under 18 at the time of committing their offense. *Id* at para. 68. This recognition has been accompanied by similar, long-term, and widespread United Nations identification and development of the standard, with more recent insistence that nations adhere to the standard, along with strong language of condemnation of its violation. *Id*. at paras. 69-71.

7. As of 2001, 109 nations have abolished the death penalty by law or practice. *Id*. at para. 72. The Commission found widespread domestic practice in retentionist nations barring the death penalty for juvenile offenders, with only a small minority of nations persisting in the execution of persons under 18 at the time of the crime. *Id* at para. 74. In a ten year period from 1990 until about 2000, of 25 documented executions, 14 were carried out by the United States, 6 were by Iran, and one each were undertaken in five other countries. *Id*. at para. 74. Since 1998, only Iran, the Congo, and the United States have executed juvenile offenders. *Id*. The Commission reasonably concluded that domestic practice over the last 15 years indicated "a nearly unanimous and unqualified international trend," crossing ideological and political lines, that "***has nearly isolated the United States as the only country that continues to maintain the legality of the execution of 16 and 17 year old offenders, and then . . . only in certain state jurisdictions***." *Id*. (emphasis added). In 2002, Texas was the only documented jurisdiction in the world to carry out the execution of a juvenile offender (*three such executions*). This year (2003), Oklahoma bears that solitary distinction (execution of Scott Hain).

8. Within even the United States, "judicial determinations and legislative initiatives over the past 20 years have also demonstrated a trend towards lack of acceptance of the application of the death penalty to those offenders under the age of 18 years." *Id*. at para. 77. The Commission noted the rise to 16 states from 10 in 1986 that set the minimum age of eligibility for the death sentence at 18. *Id*. at para. 79. It found the United States' federal standard of 18 significant, because the

> federal government "is the authority responsible for upholding the State's obligations under the American Declaration and other international instruments." *Id*.
>
> 9. The standard barring the death penalty for persons under 18 at the time of the offense is completely consistent with corresponding developments utilizing 18 as the cutoff for participation in armed conflict and the right to vote, and the Commission found it "difficult to rationalize, much less justify, why a lesser standard should apply in the implementation of capital punishment." *Id*. at para. 83.

The Commission reasonably concluded that the United States "*stands alone amongst the traditional developed world nations and those of the inter-American system*" and has become increasingly isolated within the entire global community. *Id*. at para. 84. The Commission's further conclusion that the United States (as the only dissenting nation in the world) is bound by *jus cogens* is well-founded in fact and law. *Id* at paras. 85-87. "Interpreting the terms of the American Declaration in light of this norm of *jus cogens*," the Commission concluded that the United States had "failed to respect the life, liberty and security" of Domingues by sentencing him to death for crimes he committed at age 16, contrary to Article I of the American Declaration. *Id*. at 86.

The strength of the Commission's *jus cogens* holding is reinforced, uniquely, by the fact that the United States put up a merits defense to Domingues' charges. In the few federal court cases that have treated the *jus cogens* issue, the states seem to have emphasized procedural and constitutional defenses (e.g., non-self-execution, separation of powers) and have not really answered the charge that a *jus cogens* norm is being violated. The United States' most significant attacks on the merits, and Commission's answers, may be summarized as follows:

1. The United States contended that the Commission's reliance on the treaties (American Convention, International Covenant, and Convention on the Rights of the Child) was misplaced because the negotiating histories of those treaties indicated that the inclusion of the provision barring the juvenile death penalty was not based upon custom or consensus. *Domingues* at para. 95. The United States also contended that treaty provisions prohibiting use of the death penalty were not sufficient to establish state practice, because it was "common knowledge" that many States ratify treaties and fail to implement their obligations. *Id*.

In brief, the Commission responded that, notwithstanding views that might have been expressed by some States when the treaties were negotiated, "nearly all world states, abolitionist and retentionist alike, have through acts of ratification or accession accepted this proscription unconditionally." *Id* at para. 105. Both the Covenant and Child Convention prescribe "as part of the nonderogable right to life," which itself had been recognized as a norm of *jus cogens*, a clear and unambiguous prohibition on the execution of persons who were under 18 at the time of their crimes. *Id*. Significantly, the Commission noted that the United States itself had recognized that "***all but 14 of the 191 states parties to the Children's Convention have enacted laws that conform with Article 37(a)***, and between 1994 and 1998 only four states, including the United States, are reported to have executed at least one person who was under the age of 18 at the time of their offense." *Id*. The irrefutable conclusion: "State practice has therefore been remarkably consistent with these underlying international obligations." *Id*.

2. The United States contended that United Nations organs had through their negotiating processes recognized that there is no customary international law prohibition on the execution of juvenile offenders. *Id*. at paras. 96-97. The main point was that in various resolutions or reports, United Nations bodies had called upon nations to comply with relevant provisions in treaties under which they had assumed obligations rather than asserting that nations simply needed to comply with a customary international law bar against the death penalty for juvenile offenders. *Id*. The Commission's answer to this argument seems relatively subsumed under its answer to the United States' next objection. *See below.*

3. The United States contended that, "in focussing on the domestic practice of states, the Commission's report ignored *opinio juris* as a necessary element of customary international law," complaining that the report failed to "establish that states have discontinued the process of executing juvenile offenders out of a sense of legal obligation rather than, for example, out of courtesy, fairness or morality." *Id*. at para. 99.

The Commission answered this at length, noting that the United States had failed to consider several factors relating to the nature and development of *jus cogens* norms as well as the manner in which the *opinio juris* of states may be evidenced and expressed. *Id* at para. 106. *Opinio juris* is not always necessary to determine the existence of a *jus cogens* norm, which might arise by several means, "including state practice as well as through treaty provisions that are viewed as being of a peremptory nature." *Id*. The Commission described genocide as being of the latter character, condemned as a crime in the Genocide Convention, and therefore lacking a need for proof of state practice flowing from a sense of legal obligation. *Id.* The execution of children is similarly condemned. In light of this, the Convention on the Rights of the Child and other treaties set the age of 18 as the absolute standard for the protection of this norm. *Id*. The Commission found that any additional proof of *opinio juris* "beyond the widely accepted and absolute prohibition" in these treaties might not be necessary. *Id.* Human rights treaties are particularly significant in this respect, because they are considered to recognize and build upon rights that "already exist by reason of the attributes of the human personality and which therefore may not be abrogated by the state." *Id*. at para. 107. Human rights instruments, furthermore, cause states to assume obligations, not in relation to other states, but to all individuals in their jurisdictions. *Id*. The Commission concluded that, understanding the quality of the specific prohibition at issue – that states may not apply their domestic law to deprive individuals of their most fundamental right, the right to life – there could be no "**more compelling evidence of states' views as to the legally binding nature of international prescriptions than the amendment of their domestic criminal laws to comply with those obligations**." *Id*. at para. 108 (emphasis added).

4. The United States contended that the prohibition on children participating in armed conflict was not absolute and also was irrelevant to the bar on the death penalty for juvenile offenders. *Id* at para. 100. The Commission responded that other areas of international law and practice, such as the bar on children in armed conflict, were directly relevant to the bar on the juvenile death penalty, because all were motivated by the "common precept" that "age 18 is the threshold that society has generally drawn at which a person may reasonably be assumed able to make and bear responsibility for their judgments, including and in particular those by which they may forfeit their lives." *Id.* at 109. The Commission concluded that, "To deprive individuals of their lives based upon acts taken by them before they reached the age of 18 is therefore regarded by the international community as a disproportionate punishment that violates contemporary standards of humanity and decency and is therefore prohibited in all circumstances." *Id*.

5. Finally, the United States rested upon the idea that it had been a consistent dissenter from the developing norm, asserting that it was implausible to find a *jus*

> *cogens* norm now when only 15 years ago the Commission had found in *Roach and Pinkerton* that the United States was not bound by such a rule. The United States essentially complained of the "novelty" of the norm, asserting that the Commission's finding that ongoing execution of juveniles in the United States "shock[s] the conscience of humankind" was specious, and that Domingues' own acts should shock the conscience of humankind. *Id* at para. 101.
>
> The Commission found a norm of *jus cogens* to exist in its 1987 *Roach and Pinkerton* decision. *Id*. at 103. The principle issue raised in *Domingues* was whether that norm had now evolved to delimit 18 as the defining age of a child for the norm. *Id*. The "formidable evidence of international developments" since 1987 indicates that it has. Treaty norms may crystallize new principles or rules of international law, and it is possible for a new rule to form even over a short period of time. *Id*. at para. 104.

The Commission's answers to the United States' objections satisfactorily cover many of the arguments made by the most trenchant critics of the *jus cogens* norm on the question of its existence. *See* Curtis Bradley, *The Juvenile Death Penalty and International Law,* University of Virginia School of Law, Public Law and Legal Theory Research Paper Series, Research Paper No. 02-10, December 2002 (http://ssrn.com/abstract_id=348501). Although it may not be unreasonable[50] to argue that the United States has been a consistent dissenter to the developing customary international law bar on the death penalty for crimes committed by persons under age 18, ***the fact of the United States' total isolation in dissent to a norm protecting the fundamental right to life that is manifest in the domestic practice of states*** creates a credibility problem for arguments against the *jus cogens* norm. Certainly, concern about how such norms are formed and how their content is assigned is very well placed. Bradley, *supra*, at 61. The

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[50] Williams is not conceding that the United States has been a consistent dissenter to the norm, but merely is recognizing that reasonable arguments may be made on both sides of the point. The Inter-American Commission found in *Domingues* that the United States was *not* a consistent dissenter.

content of this particular norm against juvenile execution, however, should dispel concern that its assertion merely "masks a power arrangement." *Id*. It is, after all, a norm that protects what everyone should agree is the most fundamental right (life) of some of the more powerless individuals in our societies (our children). That it might be cynically employed should be deemed out of the question. The existence and general definition of *jus cogens* is unquestioned now in United States courts, starting with the Second Circuit's opinion in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). *Contra* Bradley, *supra*, at 61. If it would "shock the conscience" to execute someone now who suffered from mental retardation -- an act that in fact has not been found by any court, commission, or other adjudicatory body to violate *jus cogens* -- how unreasonable is it to maintain that it "shocks the conscience" to execute juvenile offenders? *Contra* Bradley, *supra*, at 62; *Stanford II*, 123 S. Ct. at 475 (referring to juvenile execution as a "shameful practice"). To suggest otherwise diminishes the value placed on the lives of children in every society. Indeed, the bar on the juvenile death penalty stands well together with the bars on genocide, slavery, and torture, because it concerns the fundamental right to life which, as a bedrock principle in international law and United States domestic law, is protected from arbitrary taking.

The bar on the juvenile death penalty has the ***advantage*** of being "limited and qualified." *Contra* Bradley*, supra*, at 63. This diminishes problems in defining the norm that are endemic to other recognized *jus cogens* norms (for example, the norm against cruel and unusual punishments – and other concepts sometimes hard to confine). Other very similar norms also are "qualified," yet unproblematic in recognition and respect, such as the *jus cogens* norm against summary execution, which "shocks the conscience" despite the possible capital guilt of its victim. The

international consensus against execution of persons for crimes they committed at age 17 is the product of the debate and discussion of half a century, at least since the standard was first placed in the Fourth Geneva Convention. It is hardly a new or arbitrary standard. It may be arbitrary in the sense that the 18-year-old age limit is under-inclusive of the class of persons who should be protected, which is suggested by the brain-scanning results over the last decade, showing prefrontal cortex growth and development into the early to mid-20s. *Contra* Bradley, *supra*, at 63.

Any court should be exceedingly careful with a decision that might lead to enforcement of a norm against the government to which the Executive and Legislative branches have not manifested express consent. However, that is what courts do, all the time, when adjudicating rights under the federal and state constitutions. In the last analysis, that is all this Court should have to do in this instance, because the "law of nations" is a part of our law (federal and state) and *Atkins* has made clear that it informs our constitutional rights to due process and to be free of cruel and unusual punishments.

H. The Binding Nature of the Domingues Decision

Although, upon making an original finding of violation of the *jus cogens* norm, this Court is empowered to grant Williams relief via the Supremacy Clause, the International Covenant, and the Eighth and Fourteenth Amendments, it should also find that the United States' treaty obligation under the Charter of the Organization of American States requires the United States and Texas to respect Commission decisions evaluating rights within the OAS System.[51]

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[51] *But see Garza v. Lappin*, 253 F.3d 918, 926 (7th Cir. 2001) (opining that non-binding recommendations of the Commission are best addressed to the executive and legislative

The United States was a founding member of the Organization of American States (OAS) and an active participant in the 1948 conference at which both the OAS Charter and the American Declaration on the Rights and Duties of Man were adopted.[52] Since that time, the United States has participated in each step of the development of the Inter-American system of human rights. The Inter-American system of human rights enforcement and promotion is central to the role of the OAS, and the Commission and the American Declaration are integral parts of that system. The United States ratified the OAS Charter in 1951.[53] In particular, the preamble provides that the State Parties entered into the Charter:

> [c]onfident that the true significance of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man.

The Inter-American Commission was created in 1959 as an autonomous entity of the OAS to promote and protect human rights. In 1960, the OAS members incorporated the American Declaration into the Statute for the new Inter-American Commission. Statute of the Commission,

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branches).

[52] The OAS Charter was adopted at the Ninth International Conference of American States (Bogotá, Colombia, April 30, 1948) and entered into force on December 13, 1951, 119 U.N.T.S. 3, 2 U.S.T. 2394, T.I.A.S. No. 2361. The American Declaration was adopted pursuant to Resolution XXX, Ninth International Conference of American States (Bogotá 1948), and is reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc. 6 rev. 1 at 17 (1992).

[53] 2 U.S.T. 2349, T.I.A.S. No. 2361, 119 U.N.T.S. 3. Also available at www.oas.org/juridico/english/charter.html. The United States ratified the OAS Charter subject to one reservation which is not relevant here.

art. 2 (1960).[54] In 1965, the Commission's functions and powers were expanded to "give particular attention . . . to the observance of the human rights referred to in Articles I through IV, XVIII, XXV, and XXVI of the American Declaration," and the Commission was authorized:

> to examine communications submitted to it and any other available information, to address to the government of any American State a request for information deemed pertinent by the Commission, and to make recommendations, when it deems this appropriate, with the objective of bringing about more effective observance of fundamental human rights.

Res. XXII, "Expanded Functions of the Inter-American Commission on Human Rights," Second Special Inter-American Conference (Rio de Janeiro, Brazil, Nov. 17-30, 1965).

In 1967, *amendments to the OAS Charter* made the Commission a principal organ through which the OAS was to accomplish its purposes. Amended Charter, art. 51.[55] The amended OAS Charter specifically provided that "[t]here shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters." *Id*. at art. 112.[56] The United States signed the amendments to the OAS Charter in 1967 and ratified them without reservation in 1968. 721 U.N.T.S. 324, 21 U.S.T. 607, T.I.A.S. No. 6847.

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[54] The current Statute of the Commission, which contains the same article 2, can be found at http://www1.umn.edu/humanrts/oasinstr/zoas4cms.html.

[55] The OAS Charter was amended pursuant to the Protocol of Buenos Aires, 721 U.N.T.S. 324, 21 U.S.T. 607, T.I.A.S. No. 6847, entered into force Feb. 27, 1970 (the "Amended Charter").

[56] The amended Charter further provided that "[u]ntil the Inter-American convention on human rights, referred to in Chapter XVIII, enters into force, the present Inter-American Commission on Human Rights shall keep vigilance over the observance of human rights." *Id*. at art. 150.

Thus, with the full consent and ratification of the United States, the Commission acquired an express role under the OAS Charter to promote and protect human rights within the Inter-American system. In the view of international law scholars, "the effect of this change of status was to incorporate the Commission's Statute into the Charter, thus enhancing the authority of the American Declaration and creating an obligation to respect the rights contained therein." 1 Human Rights: The Inter-American System, Booklet 5, at ii (Thomas Buergenthal & Robert E. Norris, eds., 1982). In addition, the United States consented to the Commission's power to hear individual petitions against OAS member states and to determine whether human rights protected by the American Declaration have been violated.[57] As a consequence, the United States has recognized the Commission's authority to promote and protect the human rights that the United States is treaty-bound not to infringe. It would be contrary to the treaty – in this case the OAS Charter – for the United States (and/or Texas) to undermine the Commission by refusing to give effect to its findings that the American Declaration has been violated in the case of Domingues

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[57]The United States has acknowledged and consented to the Commission's authority to adjudicate disputes involving member States' adherence to the Inter-American system of human rights, including specifically the Article of the American Declaration found to have been violated in *Domingues*. *Domingues* at para. 112 (the jus cogens norm as reflected in Article I, protecting the right to life). The federal government has admitted that:

> under the Charter of the OAS, the Commission has of course the competence and responsibility to promote observance of and respect for the standards and principles set forth in the [American] Declaration. The United States has consistently displayed its respect for and support of the Commission in this regard, *inter alia*, by responding to petitions presented against it on the basis of the Charter and the Declaration.

Andrews v. United States, Case 11.139, Inter-Am. C.H.R. 570; OEA/ser. L/VI/II.98, doc. 7 rev. (1996); *see also Roach & Pinkerton v. United States*, Case 9647, Inter-Am. C.H.R. 147, OEA/ser. L/V/II.71, doc. 9 rev. 1 (1987).

and identically situated inmates. As noted in *Domingues*, the Commission has determined that "the American Declaration of the Rights and Duties of Man is a source of international obligation for the United States and other OAS member states that are not parties to the American Convention on Human Rights." *Domingues* at para. 30 ("Commission's Competence") & n.14 (citing Commission decisions).

The OAS Charter, in turn, having been ratified, is the "supreme law of the land," incorporated into our domestic law by the federal constitution's Supremacy Clause. U.S. Const. art. VI, cl. 2. Having been in full force and effect since ratification in 1951, the Charter is "binding on the United States." *United States v. BCCI Holdings (Luxembourg) S.A.*, 73 F.3d 403, 405 (D.C. Cir. 1996). "Treaties" include executive agreements and international compacts. *Weinberger v. Rossi*, 456 U.S. 25, 36 (1982); *United States v. Belmont*, 301 U.S. 324, 331 (1937). State law inconsistent with a treaty, executive agreement, or international compact must yield. *United States v. Pink*, 315 U.S. 203, 230-31 (1942). State law should yield where the United States is bound under the OAS treaty to respect the Commission's rulings on obligations owed by the United States under the American Declaration.

I. Direct Application of Atkins to Williams' Eighth Amendment Issue

Construing and applying the Eighth Amendment in the light of "evolving standards of decency," this Court should hold that the death penalty is excessive as punishment for crimes committed by persons under age 18, and "places a substantive restriction on the State's power to take the life" of such juvenile offenders. *Atkins v. Virginia*, 122 S. Ct. 2242, 2252 (2002). *Stanford* poses no *stare decisis* impediment to this Court on the juvenile offender issue. The

question has become how, within the legal framework of *Atkins*, the facts compare between evidence of a societal consensus against the execution of persons with mental retardation and evidence of the same in relation to juvenile offenders. *See* attached Exhibit 22 (Declaration of Ruben C. Gur, Ph.D.) (fully incorporated within this petition for all purposes). The facts are *very close*, with the exception that the world-wide prohibition on the execution of juvenile offenders is unquestionably stronger than the comparable rejection of the death penalty for persons with mental retardation. Without mention in any treaty, the latter arguably lacks even a customary international law foundation[58] In contrast, the *jus cogens* norm regarding juveniles is dispositive

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[58] *See* Amnesty Report, *supra*, at 82:

> In an *amicus curiae* brief filed in the [Supreme] Court, nine former senior U.S. diplomats argued that the USA's use of the death penalty against people with mental retardation had "become manifestly inconsistent with evolving international standards of decency." Continuing to execute such defendants, the brief asserted, would "strain diplomatic relations with close American allies, provide ammunition to countries with demonstrably worse human rights records, increase US diplomatic isolation, and impair the United States' foreign policy interests."

Ernest Paul McCarver v. State of North Carolina, Brief of Amici Curiae, Diplomats Morton Abramowitz, Stephen W. Bosworth, Stuart E. Eizenstat, John C. Kornblum, Phyllis E. Oakley, Thomas R. Pickering, Feliz G. Rohatyn, J.Stapleton Roy, and Frank G. Wisner in support of Petitioner.

See id. at 90 (emphasis added):

> In a welcome development, the six Justices in the *Atkins* majority acknowledged that "within the world community, the imposition of the death penalty for crimes committted by mentally retarded offenders is overwhelmingly disapproved." The international disapproval is even more manifest in the case of child offenders. **The execution of people with mental retardation is not expressly mentioned in any international treaty**, [but] only in the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. With the almost universal ratification of the Convention on the Rights of the Child, the international picture has become even clearer since 26 June 1989. It is time for the USA to come in from the cold.

because, through the prism of the new rule in *Atkins*, it informs the Eighth Amendment standard with a non-derogable "substantive restriction" on the State of Texas' "power to take the life" of persons sentenced for crimes committed when they were 17 years old. *Atkins*, 122 S. Ct. at 2249 n.21, 2252.

The *Atkins* majority ultimately found the "large number of States prohibiting the execution of mentally retarded persons [to] provide[] powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." *Atkins*, 122 S. Ct. at 2249.[59] As noted, the Court also recognized the importance of a consistent *trend* as reflecting upon the Eighth Amendment. *Id*. at 2248-49 & n.18 (noting "The Texas Legislature unanimously adopted a similar bill, and bills have passed at least one house in other states, including Virginia and Nevada"). Following this approach, there are 28 states now barring the death penalty for juvenile offenders, plus the District of Columbia and the federal system.

The mental retardation and juvenile offender issues are very close, as analyzed consistently with the lens of *Atkins*.

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[59] At *Atkins* oral argument on February 20, 2002, Justice O'Connor made a clear and dramatic break with the reasoning of the slim majority in *Stanford* that the non-death penalty states cannot be counted in discernment of the legislative basis for finding "evolving standards of decency." *Atkins v. Virginia*, No. 00-8452, 2002 WL 341765 (Feb. 20, 2002), at *42 [*Atkins* Oral Argument]; *Stanford*, 492 U.S. at 371 n.2. Four Justices indicated in *Stanford* that they *would* consider the non-death penalty states and the District of Columbia. *Id*. at 383, 384 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting). Justice Ginsberg asserted during *Atkins* argument that the 30 states barring the death penalty for persons with mental retardation (combining states with statutes and states with no death penalty) was a "super-majority" akin to the percentage required to block a filibuster in the Senate. *Atkins* Oral Argument, *supra*, at *41.

In *Atkins*, the Court reasserted that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins*, 122 S.Ct. at 2247 (quoting *Penry*, 492 U.S. at 331). The *Atkins* Court noted also that it's own judgment is brought to bear in addition to such "objective evidence." *Id*. (citing *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

> – Roughly the same number of states are opposed to the execution of juvenile offenders, with the two-state difference deemed of minimal significance by at least four Justices (28 [J] to 30 [MR]); *Stanford II*, 123 S. Ct. at 473.[60]

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[60] Twelve states have no death penalty. Eighteen states now bar execution of persons with mental retardation by statute. (Georgia, Maryland, Arizona, Arkansas, Colorado, Connecticut, Florida, Indiana, Kansas, Kentucky, Missouri, Nebraska, New Mexico, New York, North Carolina, South Dakota, Tennessee, and Washington, along with the federal government; the District of Columbia also bans the practice). Sixteen states now bar the execution of juvenile offenders by statute. California (California Penal Code § 190.5); Colorado (Col. Stat. 16-11-103); Connecticut (Conn. Gen. Stat. 53a-46a (h)); Illinois (Ill. Stat. Ch. 720 § 5/9-1 (b)); Indiana (Senate Bill 426 signed by the Governor on March 26, 2002; effective July 1, 2002); Kansas (Kansas Stat. 21-4622); Maryland (Md. Code 1957, art. 27, § 412 (g)); Montana (law passed in 1999); Nebraska (Neb. Stat. § 28-105.01 (a)); New Jersey (N.J. Stat. §§ 2A:4A-22(a); 2C:11-3(g)); New Mexico (New Mex. Stat. 31-18-14); New York (N.Y. Penal Code § 125.27); Ohio (Oh. Stat. 2929.023; 2929.03); Oregon (Or. Stat. 137.707); Tennessee (Tenn. Stat. 39-13-204); and Washington (by court decision; *State v. Furman*, 858 P.2d 1092 (Wash. 1993)).

The federal government bars the death penalty for juvenile offenders, along with the District of Columbia. E.g., 18 U.S.C. § 3591 (federal); D.C. Code 22-2104 (life sentence for first degree murder; those under 18 at time of offense must be eligible for parole).

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

Twenty-eight states, therefore, currently bar the execution of juvenile offenders. Thirty bar the execution of persons with mental retardation.

– Roughly the same number of states have explicit bars on the execution of juvenile offenders. (16 [J] to 18 [MR]).

With regard to the objective evidence, the *Atkins* Court asserted that consistency in the direction of change was a more significant indicator than the number of states barring a practice. *Atkins*, 122 S. Ct. at 2249.

– As noted by the *Stanford II* Justices, since 1989, 5 states have forbidden the execution of persons who were under 18 at the time of their offense (Indiana, Montana, New York, Kansas, and Washington). *Stanford II*, 123 S. Ct. at 472-73. None have lowered the eligibility age.

– At least ***thirteen*** states recently have been considering legislation that would raise the death penalty eligibility age to 18 (and it was signed into law in Indiana in 2002).[61]

The *Atkins* Court found that where the practice of actual execution of members of the alleged protected class was "uncommon," there would be little need to pursue legislation barring the practice. *Atkins*, 122 S. Ct. at 2249. It found that, "even among those States that regularly

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[61] The following information, supplied to undersigned by the American Bar Association, is current as of April 28, 2003. In the 2003 legislative year, these state legislatures have been considering bills that would raise the eligibility age for the death penalty to 18: Arizona (HB 2337; not proceeding); Arkansas (HB 1632; not proceeding); Delaware (SB 70; pending); Florida (SB 1070; passed the Senate Judiciary Committee 7-1; on calendar for a vote); Kentucky (HB 180; not proceeding); Mississippi (HB 216; not proceeding); Missouri (SB 312; on calendar for a vote); Nevada (HB 118; passed House 36-6, pending in Senate committee); Oklahoma (HB 1405; not proceeding); Pennsylvania (SB 15; pending); South Dakota (SB 141; passed Senate 20-13, died in House committee by 7-6 vote); Wyoming (HB 192; pending). Bills were introduced in seven states in 2002. In 2001, bills were introduced in three states: South Carolina, Arkansas, and Texas. Four identical bills have been filed in the 2003 Texas Legislative session. HB 127 (Rep. Lon Burnam–Tarrant County); HB 372 (Rep. Harold Dutton–Harris County); HB 1048 (Rep. Ruth Jones McClendon–Bexar County); SB 218 (Sen. Rodney Ellis–Harris County). On March 4, 2003, a public hearing was held on the House bills before the Committee on Criminal Jurisprudence. At present, the three bills remain pending in that committee.

execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since we decided *Penry*." *Id*. The Court concluded that the practice had become "unusual." *Id*. It is even more unusual in regard to juvenile offenders, despite Texas' heavy influence on the statistics (13 of the 21 juvenile executions in the United States since *Furman*).

> – Six states have actually executed juvenile offenders over the same time period referenced in *Atkins* (since 1989). In the last ten years, only ***three states*** have executed juvenile offenders. For five years, between 1993 and 1998, no juvenile offenders were executed. Since 1998, Texas has executed 8 juveniles, Virginia 3, and Oklahoma 2. Amnesty Report, *supra*, at Table 3 (as supplemented by recent Hain execution). In the same time period, from 1993 to the present, Amnesty International reports that ***eight states*** executed persons with IQs that had measured 70 or below. *Id*. at Table 4.
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> – Since 1972 (covering the period of the "modern" death penalty, post-*Furman*), a total of 21 juvenile offenders have been executed nationwide – Texas executing the last 6 – and 40 persons with mental retardation. *See* Amnesty Report, *supra*, at Table 3 and Table 4.
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> – As of January 1, 2003 there were 3,692 persons under a sentence of death in the United States. Of that number, 82 (all males) are juveniles. Death Row, U.S.A. (Winter 2002-2003; adjusted from 83 for Hain); http://deathpenaltyinfo.org/ DEATHROWUSA recent.pdf . Thus, juvenile offenders comprise approximately 2.24 percent of the death row population. ***If Texas is removed from the calculation***, the percentage of juvenile offenders on the other death rows in the country combined is only 1.43 percent. This also supports the conclusion that contemporary sentencing juries generally reject the death penalty as a sentencing option for a 17-year-old defendant.
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> – Roughly the same percentage of the overall population resides in states that have not executed juvenile offenders over the last nine years. (approximately 90 percent; 89 [J] and 93 [MR]).[62] Hypothetically, ***if Texas were added to the states***

[62] The percentage of the total population represented by the states not conducting executions of persons with mental retardation may represent a *consensus*. *Atkins* Oral Argument at *41 (a Justice noting that the two states that had executed persons with mental retardation represented 7 percent of the population). The percentage of total population represented by

that did not execute juvenile offenders in the last nine years, the percentage of the population not executing juvenile offenders would leap to ***96 percent***, because Texas comprises 7 percent of the national population. This again supports the conclusion that contemporary sentencing juries generally reject the death penalty as a sentencing option for a 17-year-old defendant. *See generally*, Amnesty Report, *supra*, at 48 ff. ("The distorting effect of Texas").

– Texas' distorting effect was graphically described in an amicus brief filed by the World Organization Against Torture USA on behalf of Ronald Chris Foster:

"There have been 13 executions of juveniles in Texas since 1976, and only 8 in the remaining 19 states, meaning that 61.9 percent of the juvenile executions have taken place in Texas. The extent of this distortion, and indicator of arbitrariness, is far greater for juveniles than for adults. The comparable statistics for adults indicate that 272 adult offenders have been executed in Texas since 1976, while 784 adult offenders have been executed nationwide, leaving Texas as responsible for 34.6 percent of adult executions as compared with the 61.9 percent figure for juveniles. This means that the disproportionate nature of the likelihood of an individual committing a capital crime being executed in Texas as opposed to any other state is twice as great in the case of a juvenile offender as an adult. This geographic disparity can not be explained or justified on any reasonable or rational basis, and provides a very strong indicator of the arbitrariness, unfairness and inequity that is present in how the juvenile death penalty is applied nationally."

Foster v. Johnson, No. 02-6655, Brief *Amicus Curiae* of the World Organization Against Torture USA In Support of the Petitioner, Oct. 28, 2002, at 19-20. These facts support a finding that the juvenile death penalty, from a national perspective, is "wantonly and freakishly imposed" in violation of the Eighth Amendment. *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., opinion).

– In a recent resolution against the juvenile death penalty, the national NAACP noted that, on a national level, fifty-five percent of adult offenders in death penalty cases are Hispanic or African American and fifty percent of the juvenile offenders sentenced to death are African American and sixteen percent are Hispanic

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states executing juvenile offenders over the last nine years is 11 percent. *U.S. Bureau of the Census*, 2000 Census (Total population of the United States, 281,421,906; Texas, 20,851,820; Oklahoma, 3,450,654; Virginia, 7,078,515). Thus, roughly 93 percent of Americans are disassociated from states executing persons with mental retardation, and roughly 89 percent are similarly separated from states executing juvenile offenders over nearly a decade.

American. *See infra*. Amnesty International reported that, as of August 2002, out of 82 juvenile offenders on death row in the United States, forty-seven percent were African American, fourteen percent were Hispanic, twenty-nine percent were white, and there was one Asian. Amnesty Report, *supra*, at 106 (chart: "Child Offenders on Death Row in the USA, August 2002"). Thus, "[n]early two thirds of the 80 plus child offenders on death row in the USA are from ethnic or racial minorities." Amnesty International, *United States of America: Death By Discrimination–The Continuing Role of Race in Capital Cases*, AMR51/046/2003, April 24, 2003 (section on "Race and Juvenile Injustice") [hereinafter *Death by Discrimination*]. Amnesty reports that, as of April 3, 2003, the United States had carried out 19 of 33 executions of juvenile offenders worldwide since 1990. *Id*. Six of the nineteen were executions of African American juvenile offenders under sentence by all-white juries. Seventy-seven percent of juvenile offenders executed in the United States since 1977 (17 of 22) were convicted of killing white victims. *Id*. In Texas, the juvenile death penalty is more racially skewed than nationally: of 27 remaining juvenile offenders, 8 are African American, 11 are Hispanic, 1 is Asian, and 7 are White. Amnesty Report, *supra* (chart at p. 106). Seventy-four percent, therefore, are of minority race. The minority percentage would be far greater, but for the fact that Texas, unlike other states, has been carrying out executions. The last six juvenile offenders executed by Texas have been African American. Eleven African-American juvenile offenders have been executed by Texas since the reinstatement of the death penalty (the first in 1985). Nine White juvenile offenders have been executed by Texas in the same time frame and, so far, only one Hispanic. Amnesty Report, *supra*, at 100 (Table 3; "Juvenile Executions in the USA since 1977"). Racial discrimination is supported statistically and anecdotally. Juan Sanchez, President of Southwest Key Program, Inc., an authority on Texas juvenile offenders, wrote to the Board of Pardons and Paroles in a letter dated July 20, 2001, "Not only are white children [in Texas] less likely to be arrested for the same or similar crimes, but they are also far more likely to receive a more lenient sentence, assuming that they are even tried. In addition, district attorneys generally seek a plea bargain with white youth rather than taking the case to trial." *See also*, current anecdotal accounts in *Death by Discrimination*, *supra.*

The racial disparity in Texas' practice of the juvenile death penalty (and the national practice) may also violate *jus cogens* norms against systematic racial discrimination and gross violations of human rights. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702. The entrenched nature of this disparity violates the Eighth Amendment. *Furman*, 408 U.S. at 250-51 (Douglas, J., opinion) (reporting a Texas study on racial distribution of the death penalty, which made findings on the kinds of discriminatory sentencing patterns that continue unabated and concluded "Application of the death penalty is unequal: most of those executed were poor, young, and ignorant.").

Atkins found polling data relevant and to show a widespread consensus among Americans, "even those that support the death penalty, that executing the mentally retarded is wrong." *Atkins*, 122 S. Ct. at 2249 n.21.

> – A study in 2001 concluded that "while 62 % back the death penalty in general, just 34 % favor it for those committing murder when under the age of 18." Tom W. Smith, *Public opinion of the death penalty for youths*, National Opinion Research Center, University of Chicago, prepared for the Joyce Foundation, p.2 (December 2001) (cited in Amnesty Report, *supra*, at 35-36 n.105).
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> A Gallup poll found in 2002 that 69 percent in the United States oppose the practice of executing child offenders. *Slim majority of Americans say death penalty applied fairly*. Gallup News Service, 20 May 2002 (asking "Do you favor or oppose the death penalty for Juveniles?").
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> In July 2000, the Behavior Research Center released the findings of an Arizona poll which showed that 42% of Arizonans opposed the death penalty if the convicted murderer was a juvenile offender, while only 37% supported such use. Death Penalty Information Center, http://www.deathpenaltyinfo.org/article.php?scid =23&did=210#Arizona.
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> A University of Georgia Peach State poll found in January 2003 that 60 percent of Georgians favored rehabilitating juvenile offenders (children under 18) rather than executing them, with only 23 percent asserting that court's should be allowed to give children the death penalty. Walter C. Jones, *State is Opposed to Death for Youth*, Augusta Chronicle, January 16, 2003.
>
> In May and June 2000, the University of Kentucky Survey Research Center conducted a poll in which 79.5 percent of those polled stated that they would prefer a punishment other than death for a 16 or 17 year old offender convicted of aggravated murder. *See* http://www.kcadp.org/pdf% 20files/Juvenile.pdf.
>
> Shortly before Scott Hain was executed in Oklahoma, a poll of Oklahomans conducted by the University of Oklahoma, wherein 400 were interviewed between March 17 and 27, 2003 (with a 5 % margin of error), indicated that "62.8 percent of those surveyed would favor legislation that banned executing juvenile offenders if a life-without-parole sentence were offered as an alternative. Twenty-five percent of those polled said they would oppose such legislation." Robert E.

Boczkiewicz and Bob Doucette, *Condemned Man Gets a Last-Minute Delay*, The Oklahoman, April 3, 2003.

> Public opinion polling in Texas indicates that even in the most retributive of states, the public may be opposed to the death sentence for juvenile offenders. In a poll conducted by the Houston Chronicle in February 2001, only 34 percent of Texans responded that they would support the death penalty for a guilty defendant who was a juvenile when the crime was committed. Steve Brewer, *Juvenile Cases: Just 1 in 4 in County Thinks Death Appropriate*, Houston Chronicle, February 7, 2001.[63]

Atkins found the kind of consensus inherent in the *unusualness* of the application of the death penalty to persons with mental retardation to reflect "widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and penological purposes served by the death penalty." *Atkins*, 122 S. Ct. at 2250. It is widely recognized that the same considerations are involved in society's judgment about how to treat juvenile offenders. Moreover, some of the same and other very similar kinds of diminished capacities affect the criminal responsibility of each group. *Atkins*, 122 S. Ct. at 2250-51 ("to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of

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[63] Twenty-five percent in Harris County supported the juvenile death penalty. 52 percent were opposed, and 23 percent were "not sure/no answer." Thirty-four percent in Texas supported the juvenile death penalty. 42 percent were opposed, and 23.5 percent were "not sure/no answer." The national response revealed 26 percent in support of the juvenile death penalty, 48 percent opposed, and 25.5 percent "not sure/no answer."

In Spring 2002, a Scripps Howard Texas Poll put the question in terms of whether or not respondents *supported or opposed the existing state law*, and got a more conservative response: "Current law in Texas allows for the execution of a person who committed capital murder at the age of 17. Do you favor or oppose this law?" 51 percent responded in favor, 37 percent opposed, 8 percent neutral, and 4 percent "don't know/no answer."

others") (persons with mental retardation); *Stanford II*, 123 S. Ct. at 473 ("more vulnerable, more impulsive, and less self-disciplined than adults. . . without the same capacity to control their conduct and to think in long-range terms . . . particularly impressionable and subject to peer pressure . . . prone to `experiment, risk-taking, and bravado' . . . lack[ing in] `experience, perspective, and judgment'") (juveniles). The dissenters in *Stanford II* point out that the evidence is stronger now than in 1989 that these traits should require a bar on the death penalty for persons under 18 at the time of the offense, due in part to scientific discoveries made through brain scan technology in the last five years. "Neuroscientific evidence of the last few years has revealed that adolescent brains are not fully developed, which often leads to erratic behaviors and thought processes in that age group. . . . Scientific advances such as the use of functional magnetic resonance imaging-MRI scans-have provided valuable data that serve to make the case even stronger that adolescents " 'are more vulnerable, more impulsive, and less self-disciplined than adults.'" *Stanford* II, 123 S. Ct. at 474 (quoting *Stanford I*, 492 U.S., at 395).

> --There are strong reasons related to brain capacity for exempting persons with mental retardation and juvenile offenders as classes. In neither category is the brain as fully developed as an adult brain. *See* Declaration of Ruben C. Gur, Ph.D. (Exhibit 22). Since *Stanford* in 1989, research has shown that the adult brain is not fully developed until the early 20s. *Id.* The brain of *any* 17-year-old, as a result, has a greater tendency toward impulsiveness, lesser reasoning skills, and less awareness of the consequences of decisions or actions. Similar attributes are examined in mentally retarded persons to determine their "mental age." *Id.* The question whether these populations "know the difference between right and wrong" is a false issue. Of course they should be presumed to know the difference – except in the cases of the extremely young or persons with very severe mental disabilities. (Reflecting this simplistic notion of "right and wrong," under the common law, only children under the age of *seven* were conclusively presumed to have no criminal capacity and for children from age 7 to 14, the presumption was

> rebuttable and such children could be convicted of a crime and executed.)[64] However, due to actual brain development or mental age, persons in these categories are developmentally unable to problem-solve and control their actions as a mature adult would. Accordingly, they cannot be among the "worst of the worst" for whom the death penalty is designed, in service to the retributive function of punishment, and as a class they are unable to respond to the death penalty as a deterrent in the way that adults can.[65] *See* Gur (Exhibit 22); D. Keating, *Adolescent Thinking*, in "At the Threshold," 54-89 (S. Feldman et al. eds., 1990); W. Overton, *Competence and Procedures*, in "Reasoning, Necessity and Logic," 1-32 (W. Overton ed. 1990); National Institute of Mental Health, *Teenage Brain: A Work in Progress*, 2/6/01, http://www.nimh.nih.gov/publicat/teenbrain.cfm; "Physical Changes in Adolescent

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

[65] Although the affidavit in Exhibit 22 was prepared for Toronto Patterson's case, Williams can make Dr. Gur available for an evidentiary hearing on the Eighth Amendment issue. He draws conclusions in the affidavit relevant to the Eighth Amendment analysis that are critical for this Court's consideration of the issue. *See* Gur Affidavit paragraphs t through x, with particular attention to w and x:

> "The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable. Therefore, a presumption arises that someone under 20 should be considered to have an underdeveloped brain. Additionally, since brain development in the relevant areas goes in phases that vary in rate and is usually not complete before the early to mid-20s, there is no way to state with any scientific reliability that an individual 17-year-old has a fully matured brain (and should be eligible for the most severe punishment), no matter how many otherwise accurate tests and measures might be applied to him at the time of his trial for capital murder."

Gur Affidavit at para. w. The State has the burden to prove, beyond a reasonable doubt, that a capital defendant is death-eligible. The State should have to meet that burden by rebutting the presumption of incapacity Dr. Gur attests to exist, because a defendant with an underdeveloped brain in those areas that affect criminal responsibility cannot be deemed to belong to the class of the most culpable reserved for the death penalty. In any event, the State cannot rebut the presumption and neither can the defense prove that an individual defendant should fall in the class of those *excluded* from the punishment, because sufficient proof in either instance would require brain scanning around the time of the offense and a repeat scan when the defendant is in his or her mid-20s, around 8 years later. This would be practically impossible.

Brains May Account for Turbulent Teen Years, McLean Hospital Study Reveals," http://www.mclean.harvard.edu/Public Affairs/TurbulentTeens.htm; Daniel R. Weinberger, "A Brain Too Young for Good Judgment," *New York Times*, March 10, 2001 (by Director, Clinical Brain Disorders Laboratory, National Institutes of Health). Because children are still in development, our system generally recognizes that they are more capable of rehabilitation than adults.

The heightened opposition against the juvenile death penalty since *Stanford I* in 1989 finds deep and wide representation in American professional organizations and religious groups, which *Atkins* now finds unequivocally relevant to Eighth Amendment analysis. *Atkins,* 122 S. Ct. at 2249 n.21.

– The organizations and institutions opposed to the death penalty for juvenile offenders include the American Academy of Child and Adolescent Psychiatry, American Academy of Pediatrics, American Baptist Churches USA, American Bar Association, American Civil Liberties Union, American Federation of Teachers, American Friends Service Committee, American Human Association, American Humanist Association, American Jewish Committee, American Jewish Congress, American Medical Association, American Orthopsychiatric Association, American Psychiatric Association, American Psychological Association, American Society for Adolescent Psychiatry, American Youth Work Center, Amnesty International (London), Amnesty International USA, Baptist General Convention of Texas (Christian Life Commission/Southern Baptist Denomination), Center on Juvenile and Criminal Justice, Child Welfare League of America (Juvenile Justice Division), Children's Defense Fund, Christian Church (Disciples of Christ), Church of the Brethren, Coalition for Juvenile Justice, Common Cause Texas, The Constitution Project, Corpus Justice, Defense for Children International–USA, Education Austin, Gray Panthers, Human Rights Advocates, Human Rights Watch USA, Justice Policy Institute, Juvenile Law Center, Mennonite Central Committee, Mid-Atlantic Juvenile Defender Center, Minnesota Advocates for Human Rights, Mission Presbytery (Presbyterian Church USA; southern half of Texas), National Association for the Advancement of Colored People (NAACP–Texas and National branches),[66] National Association of Criminal Defense Lawyers, National

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[66] The Board of the national NAACP recently passed the following resolution:

Action Item in opposition to Juvenile Death Penalty

February 15, 2003

Association of Social Workers, National Black Child Development Institute, National Center for Youth Law, National Council of Churches, National Council of Juvenile and Family Court Judges, National Council on Crime and Delinquency, National Education Association, National Legal Aid and Defender Association, National Mental Health Association, National Parents and Teachers Association, National Youth Advocate Program, Pax Christi, Physicians for Human Rights, Presbyterian Church USA (General Assembly), Reformed Church of America,

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Whereas 22 states still allow people who committed their offenses when they are under the age of 18 to be executed; and

Whereas every other nation in the world has joined international agreements prohibiting the execution of juvenile offenders, with only the United States refusing to abandon laws permitting the juvenile death penalty; and

Whereas, while 55% of adult offenders in death penalty cases are Hispanic or African American, 50% of the juvenile offenders sentenced to death are African American and 16% are Hispanic American; and

Whereas, almost all of the teenage offenders have had terrible childhoods, and given their youth they have not yet had the opportunity of age to work through some of the traumas; and

Whereas, young people, as a whole, do not have the same level of impulse control as adults; and

Whereas, the American Society for Adolescent Psychiatry recently found that the brain does not physically stop maturing until age 20 or so, and maturation can be slowed by abuse and neglect; and

Whereas, the threat of capital punishment does not deter teenagers who tend to have little realistic understanding of death and instead tend to see themselves as immortal; and

Whereas, harsh punishments for violent juvenile crimes are only temporary, band-aid solutions, with the only effective long-term solutions coming from cleaning up the neighborhoods, schools and societal structures that continue to generate violent children and adults.

Therefore be it resolved that the NAACP opposes the juvenile death penalty and calls on the 22 states that currently allow offenders who commit their crimes while under the age of 18 to abolish this practice.

South Central Yearly Meeting of Friends (Quakers), Southern Christian Leadership Conference, Southwest Key Program, Inc., Southwest Regional Juvenile Defender Center, Texas Catholic Conference, Texas Conference of Churches, Texas Criminal Defense Lawyers Association, Texas Federation of Teachers, Texas Impact, Texas League of Women Voters, Texas Network of Youth Services, Texas Society of Child and Adolescent Psychiatry, Texas State Teachers Association, Union of American Hebrew Congregations, Unitarian Universalist Association, United Church of Christ, United Methodist Church, United States Catholic Conference, Urban League, World Organization Against Torture USA, and Youth Law Center.[67]

– As an illustration of the depth of religious opposition, earlier this year Texas Impact, which lobbies the Texas legislature on behalf of most of the major Christian church denominations in Texas, Catholic and Protestant, and Jewish groups, submitted amicus curiae briefs to both the Texas Court of Criminal Appeals and the United States Supreme Court in opposition to the death penalty for juvenile offenders. The Texas Impact board consists of representatives from the various judicatories and other organizations, as well as representatives from colleague organizations – the Texas Baptist Christian Life Commission, the Texas Conference of Catholic Bishops, Austin Presbyterian Theological Seminary, Episcopal Theological Seminary of the Southwest, and the Texas Conference of Churches. The organizational members include the following: American Jewish Committee, American Jewish Congress, Arlington Ministerial Association, Austin Metropolitan Ministries, Christian Church (Disciples of Christ) in the Southwest Region, Church Women United in Texas, Episcopal Church Dioceses in Texas (Diocese of Rio Grande, Diocese of West Texas), Greater Dallas Community of Churches, Greek Orthodox Church, Interfaith Ministries of Greater Houston, Port Arthur Board of Missions, Presbyterian Church (U.S.A.) Presbyteries in Texas, San Antonio Community of Churches, South Central Yearly Meeting of Friends (Quakers), United Church of Christ in Texas, and United Methodist Church Conferences in Texas. Texas Impact's positions on social policy issues, including policies related to capital punishment, reflect consensus positions of mainline Christian and Jewish organizations and are established by a unanimous vote of the Texas Impact board.

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[67] Almost all organizations listed are American. Documentation supporting the position of these organizations is available upon request by this Court. Many of these organizations have been amici in juvenile cases. Some have lobbied the Texas legislature for a change in the law. Two maintain an official position in favor of ratification by the United States of the Convention on the Rights of the Child only (the American Medical Association and the American Academy of Pediatrics). Of course, ratification without reservation would eradicate the juvenile death penalty.

As aforementioned, in 2002, Oklahoma religious organizations filed a Supreme Court amicus brief in the case of Scott Hain. Amici were the Oklahoma Conference of Churches, Oklahoma Impact, the Episcopal Diocese of Oklahoma, the Kansas-Oklahoma Conference of the United Church of Christ, the Oklahoma City Religious Society of Friends, the Russian Orthodox Christian Church, Holy Temple Baptist Church, Catholic Charities, Joy Mennonite Church, Bruce Blake (Bishop of the Oklahoma Conference, United Methodist Church), the Oklahoma City Catholic Archdiocese, and the Eastern Oklahoma Presbyterian Church.

The United Church of Christ (UCC), adopted a resolution in 1999 calling for the abolition of the death penalty, with an immediate focus on ending the execution of juvenile offenders. Again in 2001, the UCC General Synod adopted a Resolution on Juvenile Justice dedicated to support for legislation barring the juvenile death penalty, recognizing that the United Nations Subcommission on the Promotion and Protection of Human Rights found in August 2000 that the execution of persons under 18 at the time of the offense is contrary to customary international law. Minutes of General Synod XXIII, Resolution on Juvenile Justice; *see* http://www.ucc.org/synod/resolutions/res10.htm .

The General Conference of the United Methodist Church issued a statement in opposition to capital punishment in 2000 that appears in the Book of Resolutions of the church, wherein one ground is that "[t]he United States is the world leader in sentencing children to death. Since 1990, only Iran, Pakistan, Yemen, Saudi Arabia, Nigeria and the U.S. are known to have executed persons for crimes they committed as children. Of these, the U.S. has executed more juvenile offenders than any other nation. This practice has been condemned in nearly every major human rights treaty." http://umns.umc.org/backgrounders/capitalpunishment.html .

The Mission Presbytery of the United Presbyterian Church, which represents 157 churches and approximately 300 pastors in south and central Texas, passed a resolution within the past couple of months opposing the juvenile death penalty and supporting legislation in Texas that would raise the eligibility age for the death sentence to 18.

– Several blue-ribbon commissions in the last couple of years have recommended that the remaining states that have the death penalty for juvenile offenders amend their statutes. The Constitution Project Death Penalty Initiative, a task force including, among others, the Honorable William Sessions, ex-Director of the FBI and former Chief Judge of the United States District Court for the Western District of Texas, recommended in a comprehensive study last year eighteen death penalty

reforms, which included raising the eligibility age in all jurisdictions in the United States to 18. The Constitution Project, Mandatory Justice: Eighteen Reforms to the Death Penalty 2001 (http://www.constitutionproject.org/dpi/MandatoryJustice.pdf). Similarly, the Attorney General of Arizona, Janet Napolitano, has presented an Interim Report by an Arizona Capital Case Commission that recommends raising the minimum age for capital punishment to 18. (http://www.ag.state.az.us/CCC/IntRpt.html). The recent Report by the Governor's Commission on Capital Punishment in Illinois makes no recommendation on juvenile offenders, because Illinois already bars their execution by statute, but it does recommend barring the death penalty for persons with mental retardation. George H. Ryan, Governor, Report of the Governor's Commission on Capital Punishment (April 2002).

– On March 4, 2003, fifty-six law professors from every accredited law school in the state of Texas wrote Rep. Terry Keel, strongly endorsing four bills in the 2003 session of the legislature that would raise the eligibility age for the death penalty in Texas to 18, finding the Inter-American Commission's *jus cogens* ruling very reasonable, and asserting that the "great weight of international law and the practice of nations, as well as treaties to which the United States is signatory, support passage of the legislation." Letter from Prof. Steven R. Ratner (for ad-hoc committee of Texas law professors for human rights) to Rep. Terry Keel, Mar. 4, 2003 (Exhibit 23). This included at least a dozen professors from every school but one (Texas Wesleyan) who specialize in international law, including at least one renowned international jurist (Prof. Jordan Paust, University of Houston School of Law).

– In 2002, seven Nobel Peace Prize winners publicly opposed Texas' imposition o the death penalty on juvenile offenders in relation to the case of Napoleon Beazley: the Dalai Lama, Archbishop Desmond Tutu, President Fredrik Willem de Klerk, Amnesty International, Mairead Corrigan-McGuire, Betty Williams, and Jodie Williams. The 2002 recipient of the prize, President Jimmy Carter, spoke in his acceptance speech of the "global standards" the United Nations had striven to negotiate, including "prohibition of the death penalty, at least for children." Carter advocated, "Those agreements already adopted must be fully implemented, and others should be pursued aggressively." *See* Jimmy Carter, 2002 Nobel Peace Lecture: The Complete Text, December 10, 2002; http://www.cartercenter.org/viewdoc.asp?docID=1233&sub menu=news. Rosalynn Carter long has been a staunch opponent of the juvenile death penalty.

– During the afternoon session of the United Nations Commission on Human Rights on April 25, 2003, the United States spectacularly lost a vote in an attempt

to remove language calling for abolition of the juvenile death penalty from a resolution supporting the Convention on the Rights of the Child. *See* United Nations Press Release, Commission on Human Rights Adopts Resolution on Situation in Iraq; Concludes Substantive Work, Commission on Human Rights, 59th Session, April 25, 2003, at pages 8-10;[68] Exhibit 24. The 51-1 vote[69] to retain operative paragraph 35(a)[70] in Resolution E/CN.4/2003/L.105 ("Rights of the Child")[71] and the record responses from various nations portray the absolutely stark and sad isolation of the United States on this issue. Calling deletion of paragraph 35(a) "unacceptable," Ireland, speaking on behalf of the European Union, publicly regretted that a vote had been "demanded." Press Release*, supra*, at 10. Uruguay, speaking on behalf of the Group of Latin American and Caribbean Countries (GRULAC) supported the European Union statement, and asserted that the "administration of the death penalty to minors" was "against the norms of international society." *Id*. Syria also supported the statement of the European Union that the resolution should have been adopted by consensus. *Id*. The United States also objected to paragraph 22 of the Resolution,[72] which called upon nations

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[68] Located at http://www.unhchr.ch/huricane/huricane.nsf/view01/25DAA35602A875C1C1256D160025C42B?opendocument

[69] Voting against retention of paragraph 35(a) was the United States. Voting for retention were: Algeria, Argentina, Armenia, Australia, Austria, Bahrain, Belgium, Brazil, Burkina Faso, Cameroon, Canada, Chile, China, Costa Rica, Croatia, Cuba, Democratic Republic of the Congo, France, Gabon, Germany, Guatemala, India, Ireland, Japan, Kenya, Libyan Arab Jamahiriya, Malaysia, Mexico, Pakistan, Paraguay, Peru, Poland, Republic of Korea, Russian Federation, Saudi Arabia, Senegal, Sierra Leone, South Africa, Sri Lanka, Sudan, Sweden, Syrian Arab Republic, Thailand, Togo, Uganda, Ukraine, United Kingdom, Uruguay, Venezuela, Viet Nam, and Zimbabwe.

[70] Paragraph 35(a) of the Resolution reads: "All States, in particular States in which the death penalty has not been abolished, to comply with their obligations as assumed under relevant provisions of international human rights instruments, including in particular articles 37 and 40 of the Convention on the Rights of the Child and articles 6 and 14 of the International Covenant on Civil and Political Rights, keeping in mind the safeguards guaranteeing protection of the rights of those facing the death penalty and guarantees set out in Economic and Social Council resolutions 1984/50 of 25 May 1984 and 1989/64 of 24 May 1989; and calls upon those States to abolish by law as soon as possible the death penalty for those aged under 18 at the time of the commission of the offence."

[71] Located at http://www.ohchr.org/news/L105%20item%2013%20unedited%20e.doc.

[72] Paragraph 22 reads: "[The Commission on Human Rights] [c]alls upon all States to take all appropriate national, bilateral and multilateral measures to prevent, and to protect children

> to take measures to protect children from physical violence, because it included violence by "juridical persons or the State." *Id*.

The *dispositive* factor in this Court's calculation regarding the strong evidence of unconstitutionality should be the *Atkins* Court's reversal of *Stanford* by its clear acceptance of the opinion of the world as relevant to our Eighth Amendment standard. If this Court is convinced of the evidence that the *jus cogens* norm exists, it should grant relief finding that the Eighth and Fourteenth Amendments bar Williams' execution. Indeed, the other nations of the world look upon us in shock as we continue to seek the death penalty against those who were our most vulnerable, unformed citizens at the time of the crime. The tenor of that amazement has not been lost upon the conscience of some Texas judges. Judge Holcomb, of the Texas Court of Criminal Appeals, would have filed and set Williams' successor petition raising the Eighth Amendment claim for merits review. Order, April 23, 2003 (Exhibit 3). In Napoleon Beazley's case, when the Hon. Judge Cynthia Stevens Kent set the final execution date, she commented as follows on her decision to support a commutation in the case and on the dilemma she faced without having the enlightenment of the *Atkins* opinion in hand:

> The letter to the Governor was based on principled objection. If I were a judge who did not follow the law, I have many chances to be intellectually dishonest and cause actions that would result in a case being reversed and no execution date being set, and findings of fact and conclusions of law that were different than the ones I made, etc. etc. etc. . . . In my opinion, philosophically, a trial judge has to be mindful – though not a slave to – but obedient to the law. But we don't have to be silent about it. We still have First Amendment free speech rights. Thank goodness we all have the opportunity to say what we believe and to have a professional, reasonable dialogue and debate about who we are and about

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from, all forms of physical, sexual and psychological violence, including violence occurring, inter alia, in the family, in public or private institutions, in society, or perpetrated or tolerated by private individuals, juridical persons or the State."

> punishment for people who threaten society – what is appropriate. And that is a protection we have to constantly remind us that [things] can change. I am also always mindful looking back in history about judges that *blindly* followed the law when the law was *so* fundamentally inappropriate. Shall we go to Nazi Germany? Shall we talk about judges in and around that country that enforced and followed laws that were so atrocious? And in retrospect we are appalled. And I struggle with that issue on select cases and *this is one of them*. It is the law. The Texas Legislature has said it is. The Courts have consistently upheld it as being correct, sound and not in any way depriving the defendant of his Eighth Amendment rights. So throughout this case, I have followed the law with principled concern about the execution of youthful offenders and what I do today is follow the law. . . .

Transcript of hearing dated April 26, 2002, in the 114th Judicial District Court, Smith County, Texas (videotape in possession of undersigned counsel). With *Atkins*, the law has changed. This Court no longer is bound, as was the Fifth Circuit and Judge Kent, by *Stanford*, which otherwise represents a standard repugnant and incomprehensible to the rest of the world, most Americans, almost all relevant professional and religious associations, and modern science.

Accordingly, this Court should reverse Mr. Williams' death sentence.

XV WILLIAMS' DEATH SENTENCE VIOLATES THE SUPREMACY CLAUSE OF THE FEDERAL CONSTITUTION AND ARTICLE 6(5) OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, BECAUSE HE WAS UNDER 18 AT THE TIME OF THE OFFENSE.[73]

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[73] The Court of Criminal Appeals order of April 24, 2002, is silent as to this issue, which was presented in the amendment to the initial state petition. As urged *supra*, in introductory remarks on the absence of fact findings by the State court, no deference should be paid by this Court to any implied State court decision. If there is a merits decision by the State court, this Court's treatment of the issue nevertheless should be *de novo*. If it is assumed that the State court decided the Covenant issue on adequate and independent state law grounds, this Court's treatment of the issue also should be *de novo*. As discussed in detail, *supra*, adequate and independent state grounds pose no bar to review where the Covenant and/or *jus cogens* norms set the threshold age for the death sentence at 18 at the time of the offense, rendering Beazley ineligible through the Supremacy Clause, and as those norms inform the Eighth and Fourteenth Amendments. *Beazley*, 242 F.3d at 265-66 (citing *Sawyer*, 505 U.S. at 345 & n.12) (where condition of eligibility -- age -- is not satisfied, miscarriage of justice is found).

Williams was indicted under Section 8.07(d) [now (c)] of the Texas Penal Code, setting the age of eligibility for the death penalty at seventeen. TEX. PENAL CODE § 8.07(d) (1994). Through the Supremacy Clause (Article 6, Clause 2, of the United States Constitution), Article 6(5) of the International Covenant on Civil and Political Rights [ICCPR] voids § 8.07(d). *Hauenstein v. Lynham*, 100 U.S. 483, 488-89 (1879); *Ware v. Hylton*, 3 U.S. 199, 236-37 (1796) (Chase, J., opinion); *id*. (Iredell, J., opinion); *Galveston, Harrisburg & San Antonio Railway Co. v. State*, 34 S.W. 746 (Tex. 1896) (concession by Texas Attorney General that a treaty voids an inconsistent state statute).

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

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

> 2. "Reservations that offend **peremptory norms** would not be compatible with the object and purpose of the Covenant. . . . Accordingly, a State may not reserve the right . . . to execute . . . children."
>
> 3. "While there is no automatic correlation between reservations to **non-derogable provisions**, and reservations which offend against the object and purpose of the Covenant, a State has a **heavy onus** to justify such a reservation."
>
> 4. "The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that **the Covenant will be operative for the reserving party without benefit of the reservation**."

GENERAL COMMENT 24, U.N. GAOR Human Rights Comm., 52d Sess., paras. 5, 6, 8, 10, 18, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 1994) [hereinafter GENERAL COMMENT 24] (emphasis added).

The reservation to Article 6 ***falls into every criterion for an unacceptable[74] reservation***: it is incompatible with the object and purpose of the treaty, offends a ***jus cogens norm*** against the execution of persons under 18 at the time of offense, and attempts to reserve a non-derogable provision. The United States has not come close to meeting the "heavy onus" of justification for its reservation to Article 6.[75] In its first report on United States compliance, the HRC found the

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

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

United States' reservation to Article 6(5) of the ICCPR contrary to the "object and purpose" of the treaty. Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40*, U.N. DOC. A/50/40 (October 3, 1995), para. 279 [hereinafter *Official Records*]. The HRC added at the same time that it "**deplore[d]** provisions in the legislation of a number of states which allow[ed] the death penalty to be pronounced for crimes committed by persons under 18 and the actual instances where such sentences have been pronounced and executed." *Id*. at para. 281 (emphasis added).

An unacceptable reservation to a multilateral human rights treaty, and to the Covenant in particular, "generally" is void. GENERAL COMMENT 24 at para. 18. When viewed from the

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

In fact, the United States jointly sponsored a General Assembly resolution in 1980 that Article 6 established a "minimum standard" for all member states, whether or not they had adopted the ICCPR. G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980). This indicates that the United States was aware of the centrality of Article 6 to the object and purpose of the treaty long before it ratified it.

The Child Convention appears to have been designed to avoid repetition of this kind of permanent abuse of the right to enter a reservation, by incorporating a provision barring reservations contrary to the object and purpose. Child Convention at Article 51(2) ("A reservation incompatible with the object and purpose of the present Convention shall not be permitted.") This prevents a country like the United States from becoming a party to the treaty, while wilfully violating one of its principal sections and asserting, nevertheless, that it is not barred from doing so by the "object and purpose" provisions in the Vienna Convention on the Law of Treaties or customary international law.

perspective of the HRC's jurisprudence (and that of international courts which have addressed similar issues), the reservation to Article 6(5) unquestionably is void.[76]

Suggestions by the HRC and others that the reservation be withdrawn are based upon the unacceptability, severability, and voidness of the reservation.[77] The United States' treaty partners consider the reservation severable and void.[78] The United Nations Special Rapporteur on

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[76] The Fifth Circuit panel in Beazley's case unfairly described this process of interpretation as "piggyback[ing] several HRC statements," when it really is a matter of appropriately evaluating the HRC's findings about United States' compliance with the ICCPR in light of the HRC's norms, tracing the legal sources of those norms, and applying those norms in light of the Senate's expressions of intent regarding the reservation to Article 6. *See Beazley*, 242 F.3d at 264.

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

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

The government of Switzerland wrote in 2001 in the Beazley case, "Although Switzerland is aware of the reservation related to Article 6 of the Covenant made by the United States, [the] Government ***fully shares the view of the other Parties to the Covenant*** that this reservation is contrary to the object and purpose of the Covenant and should therefore, in accordance with the principles of international law, ***have no effect*** and be withdrawn." Letter from Ambassador Alfred Defago regarding "Execution of Mr. Napoleon Beazley" to Governor Rick Perry, July 16, 2001. The Swiss further emphasized that "Article 6 of the Covenant reflects the minimum rules under customary international law for the protection of life regarding juveniles, which cannot be altered through unilateral declarations." *Id.* Mexico, likewise, in 2002 appealed to Texas to stop Beazley's execution, citing the fact that the United States and Mexico are both parties to the International Covenant. Letter from Ambassador Juan Jose Bremer to Texas Board of Pardons and Paroles, dated May 3, 2002 (noting that "[w]ithin the international community, the execution of juvenile offenders is widely regarded as contrary to established norms of customary international law. In addition, the execution of a juvenile offender . . . would violate Article 6 of the International Covenant on Civil and Political Rights, a treaty to which the United States is a

Extrajudicial, Summary, or Arbitrary Executions considers the reservation void.[79] In addition, numerous respected human rights organizations and jurists find the reservation unacceptable and void. *E.g.*, WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 125 (Cambridge 1997) (finding that the United States is the "principal, if not the sole, offender of the prohibition on juvenile executions" found in Article 6(5) of the International Covenant).

President George Herbert Walker Bush created a legitimate expectation among our treaty partners by promising them that the United States would use "judicial means" to guarantee full compliance with the objective obligations created by the Covenant. 31 I.L.M. 645, 657 (1992). The well-established jurisprudence of European courts and commissions interpreting the European Convention on Human Rights (the first international human rights treaty, completed in 1950, and a model for the Covenant) and the Inter-American Court on Human Rights interpreting the American Convention holds that multilateral human rights treaties create "objective obligations" rather than a network of mutual, bilateral undertakings. *Ireland v. United Kingdom*, (1979-80) 2 E.H.R.R. 25 at para. 239; App.No. 788/60 *Austria v. Italy*, 4 Yearbook 116 at 140; *France (et al.) v. Turkey*, (1984) 6 E.H.R.R. 241; *The Effect of Reservations on the*

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party"). Mexico was apologetic but firm: "It is important to recognize that Mexico has great respect for the judicial system of the United States. Nevertheless, as a responsible member of the international community and as a party to the International Covenant on Civil and Political Rights, Mexico has a legitimate interest in promoting respect for norms of international law." *Id*.

[79] In 1998, the United Nations Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions "suggested" (as the HRC had) that the United States "lift the reservations, particularly on Article 6." However, he made this "suggestion" based upon his assessment that the reservation actually was "**void**." REPORT OF THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS, MISSION TO THE UNITED STATES OF AMERICA, Jan. 22, 1998, E/CN.4/1998/68/Add.3, at paras. 140, 156(k).

Entry into Force of the American Convention (Arts. 74 and 75), Advisory Opinion OC-282, 2 Inter-Am. Ct. H.R. (ser. A) (1982), at 15-16. The European Court of Human Rights has eloquently explained why, for example, the European Union, The Council of Europe, Switzerland, Norway, Sweden, Mexico and other countries have intervened in Texas juvenile offender cases, even though the defendants are ***United States citizens***:

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

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

Given that treaty law fundamentally rests upon consent, a court may sever a reservation to a multilateral human rights treaty if: (1) the reserving Party recognizes the competence of the treaty monitor to judge Parties' compliance (*see* 31 I.L.M. 645, 649-50, 658-59 (1992); GENERAL COMMENT at para. 11; *United States v. Duarte-Acero*, 208 F.3d 1282 (11th Cir. 2000)); (2) the competent treaty monitor declares the reservation unacceptable and its consequence deplorable (*Official Records*, *supra*); and (3) the Party was aware or merely *should have been* aware that its reservation might be deemed unacceptable (31 I.L.M. 645, 650 (1992); the Senate **was** aware, observing that the "internationally recognized standard of human rights" in Article 6 might render

domestic legal change necessary, putting the onus on the states like Texas to make the change). *Loizidou v. Turkey*, (1995) 20 E.H.R.R. 99, at paras. 94-95 (allowing severance of invalid restrictions where "respondent Government *must have been aware* . . . that the impugned restrictive clauses were of questionable validity under the Convention system and might be deemed impermissible by the Convention organs"); *Belilos v. Switzerland*, (1988) 10 E.H.R.R. 466, at para. 60 (allowing severance of invalid declaration where it was "beyond doubt that Switzerland [was], and regard[ed] itself as, bound by the Convention irrespective of the validity of the [challenged] declaration [and] the Swiss Government recognized the Court's competence to determine the . . . issue"); *Power Authority v. Federal Power Comm'n*, 247 F.2d 538, 541 (D.C. Cir. 1957) (holding that federal court could determine acceptability of and sever a "reservation" that, like the instant "reservation," was "merely an expression of domestic policy which the Senate attached to its consent").

Separation of powers doctrine is no impediment to this Court's ability to exercise the "judicial means" promised by President Bush to guarantee the United States' compliance with the objective rights contained in the Covenant. Consistent with the international courts and HRC jurisprudence, the severability of the United States' reservation was recognized by the Senate during its period of advice and consent, as well as at the time of ratification. The Chair of the Senate Foreign Relations Committee pointedly observed that the Covenant reservations were purely domestic statements, not a part of the treaty, and, therefore, *not binding upon the judiciary* in the way a traditional treaty reservation might be.[80] Upon ratification of the Covenant, the

[80] The Chair of the Senate Foreign Relations Committee, Sen. Claiborne Pell, held that the Covenant reservations were "purely domestic statement[s] . . . not part of the treaty contract and

Senate Foreign Relations Committee characterized the reservation to Article 6 in particular as non-binding and subject to removal (and, therefore, not a part of the treaty contract).[81] The record makes clear that, if this Court were to declare the reservation void, it would not invade the Senate's or Executive's treaty making powers. The reservation is severable. It is not a constituent part of the treaty, but rather a direction regarding domestic implementation of the treaty.

The evidence is strong of the existence of a fully-developed *jus cogens* norm that bars the death penalty for offenses committed by persons under 18: in short, worldwide adherence to the norm by treaty (minus the United States and Somalia, which has promised to ratify) and also essentially universal compliance with the norm (minus *only two or three states within the United States* alone). A reservation to a treaty that violates such a *jus cogens* norm is void (just as a treaty that conflicts with the norm would be void). From this perspective, among many, the State

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

[81] The non-binding character of the reservation to Article 6 finds expression in the Senate Foreign Relations Committee's comments upon adoption of the Covenant recognizing that the necessity to remove the reservation might arise. The Committee "recognize[d] the importance of adhering to internationally recognized standards of human rights," and observed that, because Article 6 represented an "internationally recognized standard of human rights," change in domestic law might be "appropriate and necessary." 31 I.L.M. 645, 650 (1992). The Bush Administration, in turn, promised our treaty partners that "**judicial means**" would be used to guarantee full domestic compliance with the Covenant. *Id*. at 657.

of Texas has violated Article 6(5) of the Covenant and the rights owed Williams under that provision. Yet, courts around the country that have interpreted the Covenant, including the Fifth Circuit in *Beazley*, have run into the non-self-execution declaration and have interpreted it as a roadblock to a remedy.

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

The doctrine of "self-execution" itself "masks a variety of issues." Carlos Manuel Vazquez, *Treaty Based Rights and Remedies of Individuals*, 92 Columbia L. Rev. 1082 (1992). The *declaration* of non-self-execution, in addition, has obscured, altered, and sometimes improperly replaced proper evaluation of whether the Covenant itself is self-executing. The Covenant seems obviously self-executing because it "in and of itself create[s] rights which are justiciable between individual litigants." *People of Saipan v. U.S. Dep't of Interior*, 502 F.2d 90 (9th Cir. 1974) (Trask, J., concurring); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). Senate testimony on the Covenant largely supports this interpretation. Indeed, if it were not deemed likely that the Covenant is intrinsically self-executing, there would be no purpose in

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

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

(1927) (same); *United States v. Rauscher*, 119 U.S. 407 (1886) (government violated treaty by trying defendant on charge differing from that forming basis of extradition grant); *see United States v. Pink*, 315 U.S. 203, 230-31 (1942) ("[S]tate law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty."); Connie de la Vega, *Amici Curiae*, *supra*, at 1056 ("The defensive use of a treaty is a judicially accepted means by which litigants have been successful in enforcing treaty provisions without having courts make a determination regarding whether the provisions are self- executing."). Another approach would be to hold that the federal habeas statute affords an individual a private right of action to raise Covenant claims. Jordan Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 Mich. J. Int'l Law 301, 327 (1999) (maintaining that "even if the Covenant cannot be used directly to create a cause of action, other federal law may provide a cause of action and allow implementation or "execution" of treaty-based human rights. 42 U.S.C. § 1983 is such a statute. 28 U.S.C. §§ 2254(a) has a similar effect since it provides what is equivalent to a "cause of action" when mandating that a relevant federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court . . . on the ground that he is in custody in violation of . . . treaties of the United States.") ; *see Abebe-Jira v. Negewo*, 72 F.3d 844, 846-47 (11th Cir. 1996) (noting that a majority of courts hold that 28 U.S.C. § 1350 provides a private right of action for aliens complaining of international law violations). In *Abebe*, the Eleventh Circuit noted that, by providing an implementing statute, it was not affording new rights to aliens, but merely "opening the federal courts for adjudication of rights already recognized by international law." *Id*. at 846-47 (relying on treatment of the Covenant in *Abebe-Jira v. Negewo*, 1993 WL 814304, *4 (N.D. Ga. 1993)).

Alternatively, this Court has the power under Article III of the Constitution to find that the non-self-execution declaration violates the constitution and international law and, therefore, should be ignored. Jordan Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DePaul L. Rev. 1257, 1270-72 (1993);[82] *see also* Jordan Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 Mich. J. Int'l Law 301, 322-23 & n.106 (1999) ("[S]uch declarations function as reservations that are fundamentally inconsistent with the objects and purposes of the treaties and, under international law, are thus void ab initio and can have no legal effect."). The declaration breaches the Supremacy Clause, because it violates the intent of the framers that ratified treaties would automatically become the law of the land:

> Article VI of the Constitution provides expressly for lawmaking by treaty: treaties are declared to be the supreme law of the land. The Framers intended that a treaty should become law ipso facto, when the treaty is made; it should not require legislative implementation to convert it into United States law. In effect, lawmaking by treaty was to be an alternative to legislation by Congress. Nothing in the Constitution or in the history of its adoption suggests that the Framers contemplated that some treaties might not be law of the land. That was a later suggestion by John Marshall, because he found that some promises by their character could not be "self-executing": when the United States undertook to do something in the future that could be done only by legislative or other political act, the treaty did not--could not--carry out the undertaking. Marshall did not contemplate that treaty undertakings that could be given effect as law by the Executive and the courts, or by the states, should not be carried out by them, but

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[82] Paust concludes, "Article III of the Constitution establishes federal judicial jurisdiction over treaty-based cases, yet the non-self-executing declaration purports to tell courts not to apply a treaty in cases that could otherwise properly come before them. This deviation from the normal mode of treaty implementation cannot be justified in view of the respective roles of the Senate and the judiciary concerning treaties. The Framers explicitly contemplated judicial enforcement of treaties; they did not envision any role for the Senate in treaty implementation, beyond giving advice and consent to ratification, and they certainly did not expect the Senate to stand in the way of the courts' discharge of a constitutionally-established function."

> might be converted into promises that Congress would legislate. Surely, there is no evidence of any intent, by the Framers (or by John Marshall), to allow the President or the Senate, by their ipse dixit, to prevent a treaty that by its character could be law of the land from becoming law of the land.

Lewis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am. J. Int'l Law 341, 346-47 (1995); Paust, *Customary International Law*, *supra*, at 324.

The declaration has chilled the Judicial and Administrative branches (federal and state) from implementing ICCPR treaty rights that are not already protected under our Constitution or existing law. It has operated like a reservation which undermines the "supportive guarantees" of the ICCPR and, thus, violates the object and purpose of the ICCPR. GENERAL COMMENT 24, *supra*, at para. 11. "A reservation to the obligation to respect and ensure the rights, and to do so on a non-discriminatory basis (article 2 (1)) would not be acceptable. Nor may a State reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant (article 2 (2))." *Id*. at para. 9. The declaration on self-execution has become more than the means for fast treaty ratification initially sought by the Carter Administration.[83] The

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[83] The 1979 Senate hearings record indicates that the reservations, understandings, and declarations were primarily conceived by the State Department as vehicles to obtain prompt ratification and ultimate treaty compliance, without waiting for the states to amend their laws. The State Department maintained that the reservations were not intended to subvert the object and purpose of the ICCPR, nor ultimately to confine the treaty's impact to the existing status quo of domestic protection. State Department Legal Advisor Roberts Owen argued that the purpose of the reservations was "*not to evade the minimum standards imposed by the treaties whenever they touch our system. . .* [but rather to demonstrate] that we take our international legal obligations seriously, and therefore will commit ourselves to do by treaty only that which is constitutionally and legally permissible within our domestic law." HUMAN RIGHTS TREATIES, *supra*, at 31 (Prepared Statement of Roberts B. Owen) (emphasis added). Department of Justice Advisor Jack Goldklang also asserted that the reservations were recommended so as to "harmonize the treaties with existing statutes and common law." *Id*. at 35 (Statement of Jack Goldklang). Goldklang explained that the reservations were not meant to be permanent derogations from the treaty provisions:

declaration has become a bar to relief – an illegal "entitlement" – and, absent good faith legislation by the states (e.g., prohibiting the execution of children who were under 18 at the time of offense), the declaration must be discarded, at least as to Article 6(5), so that the United States can comply with the ICCPR and *jus cogens*.

Having become a permanent obstacle to enforcement of the law, the declaration has taken on the character of a reservation, even though it was never so intended by the Executive and Senate. *See e.g.*, John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287, 1303 (1993). The declaration now stands in the way of good faith enforcement of the Covenant:

> That fact should weigh heavily on the courts when they address the question of whether the Covenant is self-executing. A court cannot lightly presume that the United States adhered to the Covenant in such a way that it would be violating it. A State adhering to a treaty has an obligation to fulfill its obligations in good faith.

Quigley, *supra*, at 1301 (citing VIENNA CONVENTION ON THE LAW OF TREATIES, *opened for signature* May 23, 1969, art. 26, 1155 U.N.T.S. at 339, 8 I.L.M. at 690; on obligation of good faith). Because the declaration is now creating an "entitlement" to ignore protection of Williams' very fundamental human right to life, it must be abandoned. The declaration is contrary to the object and purpose of the Covenant.

> We are not suggesting that the only possible policy for the United States and its future legislation is what is represented in our reservations. We thought, however, that rather than get into the collateral issues of whether specific aspects of domestic law should be changed, the best policy would be to recommend these reservations.

Id. at 36 (emphasis added). The reservations were intended to be domestic signposts of areas where U.S. practice fell short of harmony with the treaty. *Id*. at 26 (Statement by Roberts Owen).

There is obvious violation of treaty and international law by the State of Texas in Williams' case. The federal courts are somewhat uniquely charged with interpreting treaties and "decid[ing] on human rights." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133 (1810) (Marshall, CJ). This Court respectfully should take on the task of figuring out how to "open the federal courts for adjudication" of citizens' (like William's) rights under a multilateral human rights treaty and, then, reverse his sentence.

XV. MR. WILLIAMS' DEATH SENTENCE VIOLATES THE SUPREMACY CLAUSE, THE EIGHTH, NINTH, AND FOURTEENTH AMENDMENTS, AND A JUS COGENS NORM, BECAUSE HE WAS UNDER 18 AT THE TIME OF THE OFFENSE.

The "law of nations" is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction." *The Paquete Habana*, 175 U.S. 677, 700 (1900). As developed at length above in Williams' Eighth Amendment issue,[84] *jus cogens* norms occupy the highest rung in the "law of nations," voiding all inconsistent international law norms and/or treaty provisions. Given that the United States Constitution generally affords its citizens strong protection in areas corresponding to fundamental human rights, there has been little occasion for the federal courts to need to decide whether a *jus cogens* norm would supersede inconsistent domestic law, or control in the determination of a federal constitutional norm. *See Gisbert v. United States Attorney General*, 988 F.2d 1437, 1448 (5th Cir. 1993) (mentioning question, in passing, whether *jus cogens* norms supersede domestic law); *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 941, 943-44 (D.C. Cir. 1988) (noting that some

[84] Williams expressly incorporates the entire *jus cogens* discussion in the Eighth Amendment issue in the instant Claim for Relief.

jus cogens norms "may well restrain our government in the same way that the Constitution restrains it").

The Supreme Court, however, has held that, where at all possible, domestic law should be legislated and interpreted in accord with public international law. *E.g.*, *Charming Betsy*, *supra*, 6 U.S. (2 Cranch) at 102, 118. By determining that world opinion is *relevant* to constitutional considerations (thereby *eliminating* any conflict, in principle, between domestic and international law and, thus, between *jus cogens* and our Constitution), *Atkins* has restored a constitutional regime hospitable to having the Eighth and Fourteenth Amendments provide a vehicle for application of some *jus cogens* norms within our domestic constitutional system. For example, complaint of a Fourteenth Amendment (e.g., substantive due process or privileges and immunities)[85] violation, in some very limited circumstances as in the instant case, should be a viable means to vindicate one's protection by an applicable *jus cogens* norm. *Jus cogens* norms that protect the most fundamental life and liberty interests from use of governmental power that reasonably "shocks the conscience of humankind" [terms used interchangeably for *jus cogens*, substantive due process, and cruel or unusual punishment violations] cannot conflict with our Constitution, whose scope of protection of individual rights should not conceivably be less extensive.

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[85] *See* S. Gifford, *Jus Cogens and Fourteenth Amendment Privileges or Immunities: A Framework of Substantive, Fundamental Human Rights in a Constitutional Safe-Harbor*, 16 Ariz. J. Int'l & Comp. L. 481, 538 (1999) ("Cases like *Brown*, *Griswold*, and *Roe*– cases, that is, where the Supreme Court finds and affords constitutional protection to an unenumerated 'fundamental' right– accept, albeit often without acknowledgment, the premise of *jus cogens*: an unenumerated fundamental right functions as a peremptory norm to invalidate governmental acts that are repulsive to our Kantian sense of right and our Burkean sense of moral obligation.").

The Eighth and Fourteenth Amendments at the very least should be interpreted to convey *jus cogens* norms designed to protect individuals from "acts that the laws of all civilized nations define as criminal." *Siderman de Blake v. Argentina*, 965 F.2nd 699, 715 (9th Cir. 1992) (describing the history of *jus cogens* norms and the legitimacy of the Nuremberg prosecutions being founded upon this principle). Indeed, as reflected in *Domingues* at para. 105, "all but 14 of the 191 states parties to the Children's Convention [now] have enacted laws that conform with Article 37(a)." The execution of juvenile offenders, therefore, is almost universally banned in domestic law. Infraction of the norm would be *criminal*, unjustified intentional homicide (probably chargeable as murder) in the vast majority of the world's domestic jurisdictions.

For a couple of decades following the American Revolution, our "courts relied heavily upon international law and endeavored to establish fundamental international law principles that reflected natural law as inviolable and binding upon the fledgling government." Gifford, *supra*, at 503 (citing Lobel, *supra*, at 1096). As they are applied in our domestic courts, *jus cogens* norms call for a return to this originalist conception of natural rights incorporated in our Constitution. *Jus cogens* acts as a "natural law that is so fundamental that states . . . cannot avoid its force." Gifford, *supra*, at 485 (quoting Mark W. Janus, *The Nature of Jus Cogens*, 3 Conn. J. Int'l Law 359, 362 (1988)). "Unlike ordinary international law rules, . . . fundamental norms deprive nations of the legal power to commit certain acts." Jules Lobel, *The Limits of Constitutional Power: Conflicts between Foreign Policy and International Law*, 71 Va. L. Rev. 1071, 1075 (1985). This accords with the esteem the drafters of our Constitution held for certain peremptory natural rights "antecedent and superior to governments and constitutions." *Id*. at 1082. Justice Marshall characterized the "law of nations" incorporated in our Constitution as "a law founded on

the great and immutable principles of equity and natural justice." *The Venus*, 12 U.S. 253 (1814). As has been developed *supra*, *jus cogens* norms rose in prominence, similarly, out of an awareness at Nuremburg that certain very basic rights concerning life and liberty are antecedent to statute and constitution.

The current rule that an act of Congress could supersede the "law of nations," raised first in dicta by Justice Marshall in *The Nereide*, 13 U.S. 388 (1815), has no bearing on *jus cogens* norms. The rule specifically arose and developed within the context of cases concerning bilateral treaties and initially related to the right of Congress to denounce a bilateral treaty for material breach or other reasons. Lobel, *supra*, at 1147. It has no place within the modern multilateral human rights treaty process, which involves the development of non-negotiable objective human rights, *see supra* (discussion in relation to the International Covenant), and therefore should have no hold whatsoever on norms that transcend the ability of nations to debate or proscribe. *Id*. The Senate declaration of non-self-execution, which is not a full act of Congress in any event, should have no hold on the *jus cogens* norm. Neither should *Stanford*'s restrictive interpretation of the Eighth Amendment – excluding international law – which is now rejected by *Atkins*.

Jus cogens norms invariably relate to fundamental rights of life or liberty and, thus, in many cases should be deemed self-executing. The norm barring the death penalty for crimes committed by persons under 18 certainly bears all the necessary characteristics to be deemed self-executing. Christian A. LeVesque, *The International Covenant on Civil and Political Rights*: *A Primer for Raising a Defense Against the Juvenile Death Penalty in Federal Courts*, 50 Am. U. L. Rev. 755, 780-81 (2001); *see Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-17 (9th Cir. 1992) (finding torture to be specific enough violation to create a private right of

action). It imposes a clear and unambiguous obligation on the State of Texas and vests personal rights. However, by recognizing the relevance of world opinion and laying the groundwork for the incorporation of *jus cogens* norms within Eighth and Fourteenth Amendment jurisprudence, *Atkins* removed need for inquiry into the self-executing character of a given international law norm if it corresponds to a constitutional right. The constitutional provision bears the right of action.

Upon recognition of the existence of the *jus cogens* norm, therefore, this Court should conclude that the *jus cogens* norm is a directly enforceable right through the Supremacy Clause, or that, as a matter of Eighth Amendment protection, substantive due process, privileges and immunities, or even unenumerated rights, the Eighth, Ninth, and/or Fourteenth Amendments bar Williams' execution. Such a conclusion would be commensurate with the original understanding of incorporation of the law of nations within our Constitution and the development of *jus cogens* norms in modern international law human rights jurisprudence.

PRAYER FOR RELIEF

WHEREFORE, Mr. Williams prays that this Court:

1. Issue a writ of habeas corpus that he may be discharged from his unconstitutional confinement and restraint and/or relieved of his unconstitutional sentence of death;

2. Grant him further discovery and an evidentiary hearing at which he may present evidence in support of these claims, and allow him a reasonable period of time subsequent to any hearing this Court determines to conduct, in which to brief the issues of fact and of law raised by this petition or such hearing;

3. Direct that under Habeas Corpus Rule 7 the record in this case be expanded to include the "additional materials relevant to the determination of the merits of the petition" which are found in the volume of exhibits filed with this Petition.

4. If this Court chooses to dismiss this petition for failure to exhaust state remedies, protect the Petitioner's right to meaningful federal habeas review either by entering an order specifically holding this cause in abeyance pending exhaustion and/or entering an order specifically finding that the federal statute of limitations contained in the Antiterrorism and Effective Death Penalty Act will be equitably tolled for the entire duration of the time it takes Petitioner to prepare and file a petition for writ of habeas corpus in state court.

5. Grant such other relief as law and justice require.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May 2003, a true and correct copy of the foregoing was served upon opposing counsel by U.S. Mail to:

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