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Members
Texas Board of Pardons and Paroles
Attn: Executive Clemency Section
8610 Shoal Creek Blvd.
Austin, Texas 78757

Honorable Members of the Texas Board of Pardons and Paroles,

My name is Walter C. Long. I represent Napoleon Beazley, a young African American man who is scheduled to be executed by our state on May 28, 2002, for the capital murder of John Luttig committed by Napoleon in Smith County, Texas, on April 19, 1994. **Exhibit 1.** A prior clemency petition was filed in this unusual case last year, as amended on July 31, 2001. It is attached as **Appendix A** to this petition. **Appendix B** presents a time line summary of significant events relevant to the case that have occurred since July 31, 2001. I consider the former petition to be incorporated in the present petition and respectfully ask that each Board member read (or in the case of many, re-read) the prior petition while considering the current petition and requests which will be developed below. This Board voted 10 to 6 to deny commutation of Napoleon's death sentence last year, but his execution, which had been scheduled for August 15, 2001, was stayed on that date in a 6 to 3 vote by the Texas Court of Criminal Appeals. On April 17, 2002, the Court of Criminal Appeals dismissed the case, again by a 6 to 3 vote. Judges Meyers, Price, and Holcomb dissented from the dismissal order.

One of the more remarkable things that has happened in this case since the Board voted last year is that, on August 15, 2001, Judge Cynthia Stevens Kent, the trial judge in Napoleon's case, sent a letter to Governor Perry in support of commutation of Napoleon's death sentence to life in prison based upon his status as a child at the time of the offense. **Exhibit 2.** On Friday, April 26, 2002, Judge Kent then found herself required by Texas law and her own history of setting execution dates to schedule Napoleon to die on May 28, 2002. Judge Kent nevertheless made a long statement encouraging dialogue on the issue of the rightness of giving the death penalty to child offenders. I will return to her statement and quote some of it, transcribed from video supplied to me by a Tyler TV station, at length below. Since 1997, the American Bar Association has called for a moratorium on the death penalty until the remaining states with codes allowing for the execution of child offenders put an end to it. **Exhibit 3.** Numerous other respected organizations and commissions

have also agreed with Judge Kent's view, as did eighteen Texas legislators who wrote Governor Perry in support of Judge Kent's recommendation. **Exhibit 4.**

The execution of Napoleon Beazley by the State of Texas would decimate his family and community, as well as send a shock wave through other communities in Texas and the world that find the execution of child offenders offensive. I predict that, whether or not Texas continues to kill child offenders, the United States Supreme Court will soon put an end to it. For his sake, the health of his parents and family, and the well-being of his community, I do not want my client to be the last child offender executed by Texas.

1. The imminent change in federal constitutional law protecting child offenders.

It is clear to me now that the Supreme Court granted review to Virginia mentally retarded inmate Daryl R. Atkins last October, because the Court has undergone a shift in perspective on the way in which the Eighth Amendment Cruel and Unusual Punishment [CUP] Clause is to be interpreted. In a relatively short period of time, I believe that shift should bar the execution of persons, like Napoleon, who were 17 at the time of their offense. The Supreme Court addressed the CUP Clause in two pivotal cases in 1989: in *Penry v. Lynaugh* (examining whether those with mental retardation should be exempt as a class from the death penalty) and in *Stanford v. Kentucky* (examining whether child offenders – persons under 18 years old at the time of the offense – should be exempt as a class from the death penalty). The Court has identified the behavior of state legislatures as the most important sign of societal consensus about the permissibility of a punishment for any distinct class. In *Penry*, the Court held, "In our view, the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus" against executing persons with mental retardation. In *Stanford*, the Court observed that significantly more states had statutes barring the death penalty for 17-year-olds. There were 12 such states in 1989. At that time, as noted, 14 states plus the District of Columbia did not have capital punishment. In the face of a majority of states (28) that barred the death penalty for child offenders in 1989 (as opposed to only 16 for persons with mental retardation), the slim majority of five Justices in *Stanford* asserted that the number of non-death penalty states was ***irrelevant*** to the issue. The significant shift that has taken place in *Atkins* is that a probable majority of the Justices on the Court now finds these states relevant.

The Court split so dramatically over *Beazley* last summer (3 to 3 on the stay motion) and accepted review in *McCarver v. North Carolina*, first, and then *Atkins*, because *Stanford* mechanically stands in the way of relief for juvenile offenders in a way that *Penry* does not for persons with mental retardation. In *Penry*, the Court did not reach the question of inclusion of the non-death penalty states. *Penry* therefore does not erect any *stare decisis* bar to a present decision by the Court to include them. *Stanford*, on the other hand, does erect such a bar in the case of a juvenile offender. It is what is known as a "case on point": in this instance against the legal claim that the Eighth Amendment exempts a 17-year-old offender from the death penalty. The Court is

approaching its holding in *Stanford* by indirection. By holding that the non-death penalty states ***are relevant*** in *Atkins*, the Court will undermine the legal basis for the *Stanford* decision. *Stanford* no longer will be good law, and the Court will be free to extend the same analysis it applies in *Atkins* to benefit child offenders. There is no question in my mind that the Court is going to do this.[1] The only question is when. That question is partially answered by the fact that the Court has to produce its opinion in *Atkins* by July 1, 2002, when its term is over, or at the very latest by October 1, 2002, when its next term begins.

Justice Sandra Day O'Connor voted as a member of Justice Scalia's bare majority in *Stanford*, agreeing in 1989 that the non-death penalty states were irrelevant to the determination of a societal consensus. At oral argument in *Atkins*, which occurred on February 20, 2002, she changed course 180 degrees, stating that she now sees no reason why the non-death penalty states would not be included. Justice Ginsberg added that, if they were included, the total number of states barring the death penalty for persons with mental retardation would be 30, which Justice Ginsberg called a "super majority." There has been a rise in states barring the execution of persons with mental retardation from 2 in 1989 to 18 in 2002. However, 18 is not even a majority of *death penalty* states. Thus, it seems that the Court would not have granted review in *Atkins* if not for O'Connor's shift. It likely will grant relief to *Atkins* because of the same shift and the nature of the facts. The New York Times Magazine recently presented an article on Justice Sandra Day O'Connor in which it accurately portrayed her as the center of power on the present Court presided over by Chief Justice William Rehnquist. She has often provided the pivotal vote in capital punishment cases. Her oral argument comments and the Court's behavior (staying Curtis Moore's case) should reflect the course the Court is going to take, barring the death penalty for persons with mental retardation and, then, once *Stanford* is undermined from the side, for child offenders.

If Napoleon is allowed to live until *Atkins* is delivered within the next couple of months, he should receive the benefit of a stay from the United States Supreme Court, even if the Court remains reduced to only 6 Justices in his case. Justices Breyer, Stevens, and Ginsberg voted for a stay in August 2001, without the Court having had the benefit of undertaking review in *Atkins*. Four Justices (a majority) would be all required for a stay on a six Justice court. Assuming Daryl Atkins is granted relief, based upon the oral argument comments, Justice O'Connor should supply the fourth and sufficient stay vote. She should because *Stanford* no longer will be controlling law and the facts more persuasively support a bar on the execution of child offenders than on those with mental retardation:

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[1] The May 1, 2002, execution stay issued by the Supreme Court to Curtis Moore, a mentally retarded Texas inmate who sought certiorari review at the Court of a successor denial by the Court of Criminal Appeals on the *Atkins* issue, strongly indicates that the Court is about to grant relief in *Atkins*.

– Roughly the same number of states currently will be deemed opposed to the execution of juvenile offenders. (28 [J] to 30 [MR]).

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

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

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

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

It takes two decades for the fully functional prefrontal cortex of the brain to be developed. **Exhibit 5** (Daniel Weinberger, *A Brain Too Young for Good Judgment*, New York Times, Mar. 10, 2001; Director, Clinical Brain Disorders Laboratory at National Institutes of Health). Growth of this area of the brain, which controls good judgment and suppression of impulse, quickens in later adolescence. But a 17 year old prefrontal cortex is not fully matured. He simply will not have the capacity of an adult to control impulses that arise from feelings of anger. "[C]ontrolling violent impulses when they are maladaptive can be a very taxing duty for the prefrontal cortex, especially if the desire for action is great or if the brain is weakened in its

capacity to exercise such control." *Id.* Biological immaturity is one of the factors that impairs the capacity of the prefrontal cortex. *Id*. Most school aged shooters do not intend to kill in the adult sense of permanently ending a live and paying the price with their own life. *Id*. "Such intention would require a fully developed prefrontal cortex, which could anticipate the future and rationally appreciate cause and effect." When adolescents are confronted with situations where they feel hurt, ashamed or powerless, they may quickly seek revenge, and if they have a gun, "and it is pointed at a human target, it will very likely go off." *Id.* In the case of juveniles, full development and maturity offer the hope of self-awareness and rehabilitation.

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

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

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

The State will tell you that it is impossible to guess what the Supreme Court is up to in any case. It may be true that it is impossible to know with certainty, but a reasoned examination of what the Court is doing in *Atkins* reveals that relief in that case, and the survival of *Stanford v. Kentucky* as controlling authority, rests upon the inclusion of the non-death penalty states. If relief is granted Atkins, Napoleon will benefit, as well as everyone else in the class of child offenders consigned to die. Dissenting from the dismissal of Napoleon's recent petition for writ of habeas corpus, Judge Tom Price of the Texas Court of Criminal Appeals asserted that he would have held Napoleon's case

for the Supreme Court's issuance of *Atkins* this summer. I encourage this Board to join Judge Price's exercise in reasonable foresight by granting Napoleon a reprieve.

2. The State's resistance to an *Atkins* reprieve.

The State will tell you that it has a right to *finality*, that Napoleon already has made multiple attempts to "delay" a punishment allowed under our state law, culminating most recently with the Court of Criminal Appeals' denial of his second state habeas petition. Certainly, the finality of litigation and exaction of punishment are, from the State's perspective, important interests. But the State's finality interests fall away in the face of a possible miscarriage of justice, the execution of someone not eligible for the death penalty. It is repugnant to speed up the death of such a person so as to avoid the pronouncement of the norm (which already exists) that bars the execution. It should be added that Napoleon only has exercised his statutory rights to seek *review* of issues his appointed state habeas counsel failed to raise. The courts (both federal and state) have allowed the State's *finality* interests to totally trump Napoleon's ability to have these critical issues reviewed on their merits. This Board should not allow itself to be manipulated by the State's use of finality into believing that it serves any just interest to execute Napoleon *now*.

I think that the State's apparent desire to terminate this case quickly has a number of causes. In the creation of Article 11.071 of the Code of Criminal Procedure in 1995, the Legislature expressed a desire for the progress of capital cases, in general, to be sped up. But the statute is only a vehicle. I believe that the Attorney General's office and the prosecutors in this case have fought so hard to end this case in part because there are roughly 29 other child offenders on Texas' death row. They fear having to admit a massive wastage of the state's tax money on all of these cases, should Napoleon or some other child offender be granted relief on his challenge to his eligibility for the death penalty. Interestingly, they have used *finality* as a battering ram against Napoleon (and other Texas child offenders; for example, Toronto Patterson)[2] in order to prevent this misfeasance

[2] Patterson, another Texas child offender, has an execution date in August. When Patterson raised an International Covenant claim against his death sentence for the first time in federal district court, the Attorney General's Office argued, as in Napoleon's case, that he had defaulted it by failing to raise it in the state courts. Certiorari either has not yet been filed or is pending at the Supreme Court for Patterson.

The State hid behind Section Five of Article 11.071, Texas Code of Criminal Procedure, in order to kill Gerald Mitchell last October (2001). Mitchell, who was a child offender, attacked his sentence at the Court of Criminal Appeals only under international law. He was denied certiorari by the United States Supreme Court on the international law issue that is soon to be decided by the Inter-American Commission on Human Rights in the *Domingues* case. *See below*. Unfortunately, Mitchell did not seek review from the Supreme Court on the Eighth Amendment claim raised in *Atkins* and *Stanford* that the Eighth Amendment Cruel and Unusual Punishment Clause barred his execution. Neither Patterson's nor Mitchell's cases provide a window on what the Supreme Court may do with Napoleon's case.

on their part from coming to light. They repeatedly have argued that the State's interest in finality should prevent Napoleon from being able to obtain any merits review on his constitutional, treaty, and international law challenges to his death sentence. They have asserted that, as early as 1995, when the United Nations condemned the United States' use of a reservation to bar the International Covenant from preventing Texas from utilizing the death penalty against child offenders, Napoleon's attorneys should have raised his age-related claims. Because the claims were not raised until we took Napoleon into federal court in 1998, the Attorney General and prosecutors have argued that the claims were defaulted. This amounts to an admission on their part that, if Napoleon's attorneys should have been aware in 1995 that he possibly was ineligible for the death sentence, so should they. Running diametrically counter to the trend in the other states and formerly offending nations in the rest of the world, the State of Texas greatly accelerated its use of the death penalty against child offenders in the period between 1995 and the present. Since January 1995, the State's prosecutors have sent more than 20 of the 30 total child offenders to Texas' death row. Napoleon has been the first of these inmates to reach the "end of his appeals." Toronto Patterson, with an execution date in August, is following closely on Napoleon's heels. After that, a floodgate of executions of child offenders will open, because many of these inmates like Napoleon will have suffered from foreshortened review due to incompetent representation by appointed state habeas counsel and, along with adult offenders in the same unenviable situation, they will killed with dispatch.

3. The State's resistance to review of the substantive issues.

Other reasons for the State to resist any further proceedings in this case may be less savory. I remain convinced that the prosecutors have committed misconduct in this case, and I do not believe they want the case to last, or Napoleon to survive, long enough for the misconduct fully to come to light. I never have seen a capital case so marked by the prosecutors' asserted desire to vindicate private vengeance, and I am certain that it has to do with the status of the victim, and the victim's survivors, in relation to the status of the accused. I do not mean to disparage the survivors, with whom I sympathize, but I believe that the prosecutors were so obsessed with serving the survivors that they cheated in the creation of the jury, causing at least one juror to be seated whom they knew would be biased against Napoleon by her undisclosed association with John Luttig. I also believe that they suppressed a non-formalized arrangement with the Coleman brothers that, in return for damaging and unreliable testimony that they presented aimed at securing the death sentence, they themselves would not be prosecuted for the death penalty.

By finding "retribution" to be a legitimate punishment goal in capital cases, the United States Supreme Court recently has allowed victims to have a greater role in matters relevant to the punishment phase. A purpose, I believe, has been to give survivors of the victims in murder cases a sense that they no longer are completely neglected by the system after the investigation of the crime has begun. The enhanced status of survivors also has allowed some to convince prosecutors not to seek the death penalty. However, the enhanced status of the victim or survivors in relation to diminished status of the accused, based on class or race, also has the potential to warp the fairness of the punishment phase. I believe that the fairness of the punishment phase in this case was

assaulted when the prosecutors engineered the seating of juror Maxine Herbst. I object that the enhanced status of the victim permitted by the law does not give the prosecutors permission to overrun a defendant's constitutional right to a fair and impartial jury.

The fact that Maxine Herbst was a long-time secretary to Robert Henry is uncontested. The fact that her employer Robert Henry was a co-incorporator with John Luttig of Luttig's principle business, Clemco Inc., is uncontested. The fact that Robert Henry's son also had real estate dealings with John Luttig is uncontested. The State also has not meaningfully contested that Herbst knew John Luttig, and suppressed that knowledge at trial when she told defense counsel she was aware of no facts that would suggest she might be biased in the case. (No denial of our accusations on these points has been forthcoming from the prosecutors.) In our pleadings in the federal and, subsequently, state courts, we noted that (1) Mr. Skeen, rather than Mr. Dobbs, conducted voir dire with Ms. Herbst; (2) Mr. Skeen made known that he visited Robert Henry's office and had known Ms. Herbst worked there; and (3) Mr. Skeen pointedly did not ask Ms. Herbst the usual questions about her possible acquaintance with the family of the victim, but asked instead if she might have been acquainted with the *Beazley* family (almost 80 miles away in Grapeland). When accused of assisting the suppression with this unusual mode of questioning, the District Attorney, Mr. Skeen, has only weakly responded that he cannot recall whether, at the time Ms. Herbst took the stand in voir dire, he was aware that Henry and Luttig were business partners or that Ms. Herbst knew Luttig. Mr. Skeen's assertion that he "cannot recall" is dubious. If he had known at the time of trial that Herbst knew Luttig, wouldn't he have revealed it when she was on the stand, if he was behaving ethically? I think so. Therefore, to say now in retrospect that he cannot recall if he knew appears to me to be merely a way of being less than candid under oath. If he knew at the time, he would have revealed it. If he did not know, he would not have revealed it. There's no middle ground that ethically allows for knowing, not revealing, and subsequently forgetting. So, it's strange that the prosecutor says he cannot recall whether he knew.

Ms. Herbst has rebuffed repeated attempts by our investigators to speak with her about the case. We have appealed to the Attorney General's office for assistance in investigating Ms. Herbst, and the Attorney General has declined to help. I am concerned that Ms. Herbst not only could not fairly and impartially sit in the jury that consigned Napoleon to death because she would have been biased toward the victim by her personal connection, but also because of her long time role as President of the Tyler branch of the United Daughters of the Confederacy. Certainly, if I had been trial counsel, and she had not suppressed her activities with that organization as she did, I would have had her removed as a possible juror. As was noted in the prior clemency petition, she was President when she served on Napoleon's jury. In fact, a newsletter of the Tyler branch, Mollie Moore Davis Chapter 217, remarked that Ms. Herbst had been a model juror in the case:

> Mrs. Maxine Herbst has been on jury duty. We all complain about this task. But we are all truly blest to be in a country where we will be judged by a jury of our peers. We can only hope that if an occasion should occur, we are judged by the likes of Maxine. We are truly blest to have her in our chapter. She works tirelessly. Only Charles and our dear Lord knows the number of hours she spends working for our chapter.

Exhibit 6. With all due respect to Ms. Herbst, she was not a "peer" of my client: an African American juvenile who was at risk of the death penalty for the murder of a wealthy white man. To the contrary, as of the date of this writing, Ms. Herbst may be seen at the Mollie Moore website officiating at an award ceremony under the battle banner of the Confederacy, a symbol to African Americans of racial oppression. **Exhibit 7.** She has flown the national flag of the Confederacy from her house. **Exhibit 8.** I am not insensitive to the value of history and I don't want to be insensitive to Ms. Herbst, but Ms. Herbst's over-dedication worries me. I am the great grandson of a Confederate soldier who served in Stonewall Jackson's brigade. My grandfather published my great grandfather's war diary and dedicated it to me. I can love my great grandfather for who he was, but I reject his cause and I have no nostalgia for it. I am appalled by it. I am deeply concerned about Ms. Herbst's participation in the sentencing of my client because, as the flag on her house, the newsletter, and the website photographs show, she so ardently serves the memory of the South. My concern, strikingly enough, may be shared by the Honorable J. Michael Luttig, who recently wrote in a Fourth Circuit case:

> It is the sincerely held view of many Americans, of all races, that the confederate flag is a symbol of racial separation and oppression. And, unfortunately, as uncomfortable as it is to admit, there are still those today who affirm allegiance to the confederate flag precisely because, for them, that flag is identified with racial separation. Because there are citizens who not only continue to hold separatist views, but who revere the confederate flag precisely for its symbolism of those views, it is not an irrational inference that one who displays the confederate flag *may* harbor racial bias against African-Americans.[3]

I believe that, based upon the uncontested evidence about Ms. Herbst, we have proven her to be an unfit juror because of her tie to the victim. We have not proven her to be a racist, but I believe there is sufficient evidence to cause this Board concern, along with me, that Napoleon was not sentenced by a fairly constituted jury. Certainly it is an offense to me that the State continues to contemplate killing him upon the verdict of a body so constituted.

The racial bias of one juror (Mr. Jenkins) is evident. The race bias of a second (Ms. Herbst) is in question. The prosecutors created an all-white jury, exercising peremptory challenges against 4 out of 5 African American venirepersons. The prosecutors alleged that they struck one of the

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[3] *United States v. Blanding*, 250 F.3d 858, 861 (4th Cir. 2001). Judge Luttig, of course, is the son of John Luttig, Napoleon's victim. I notified Judge Luttig by fax that I would be using his case in this petition in support of my concerns about the service of Ms. Herbst on Napoleon's jury. His words are the only ones I could find by a judge addressing the relationship between a juror and the Confederate flag.

prospective jurors on the theory that he had been acquitted of the criminal offense of Driving While Intoxicated more than 10 years prior to Mr. Beazley's trial while accepting a white juror who had a prior *conviction* for Driving While Intoxicated and had been arrested and fined within the three previous years for public intoxication. The prosecutors alleged that they struck another of the African American prospective jurors because he was a coach, and they expected coaches to testify for the defense. However, I suspect that race was the reason and the fact that the juror was an active member of the local National Association for the Advancement of Colored People (N.A.A.C.P.).

The victim was white and upper-class, and the defendant was a juvenile, lower middle-class African-American male. The crime, as a carjacking, had unfortunate racial connotations. The prosecutors extolled the victim, John Luttig, admonishing the white jury to recognize that the trial was "about" the victim, not the defendant. One of the prosecutors then repeatedly described Napoleon as an "animal," which within the historical and social context, would have been received as a racial metaphor. During closing argument at the punishment phase, Mr. Skeen repeatedly described Mr. Beazley as a predatory animal. He urged:

> "[Mr. Beazley is] not an adolescent when he gets to Tyler. When he gets to Tyler, he is an armed predator. . . . He's an armed predator hunting down prey.
>
> [He] then just happened to see the Luttigs, stalking his prey, just stalking his prey, which happened to be human beings, and falling in behind them like some animal falling in behind their prey . . . .
>
> Because while men like John Luttig is [sic] pulling into his driveway and about to get out with his wife in his garage, the predator is lurking, and he's out, and he's ready, and now the prey is stalked, now the prey is cornered, now the prey is in the garage, not on the road, the human prey.
>
> The prey was in there in the garage, out in a minute, jacked up, here we go, a .45 Haskell, up the driveway, shirt off, it's on, just like the animal about to hunt and comes from behind and gets his prey.
>
> John Luttig get[s] out of his car, and what does the predator do? Confronts him. Confronts him. What does John Luttig do? Unarmed, helpless, he gets thrown down by this Defendant on the garage floor, maybe tried to do something -- I hope he had a chance to. I certainly got the impression he didn't have much chance to do anything. Knowing the type of man he was, if he had any chance to do something to protect his wife, he would have done it. But he gets slammed down on the garage floor."

61 S.F. 937-47. Even if it was not intentional, Mr. Skeen's depiction of Napoleon had the potential to stir racism in an all-white jury: the African American as less than human, animal-like.[4] Notably,

[4] *See United States v. Jones*, 159 F.3d 969, 977 (6th Cir. 1998) (noting the history of racist

Mr. Skeen described Napoleon's alleged "animal" nature in direct contrast to the *humanity* of the white victim. My client, along with Cedric and Donald Coleman, planned a carjacking. He did not "stalk" John Luttig in order to kill him and is not an animal. He is a human being who committed what is unfortunately a very human act: murder in the course of robbery. If he is to be punished, it should be for committing a human crime against a person of equal humanity, not for simply being something less than human in comparison to the victim, which is what the prosecutor invited the all-white jury to punish him for. I believe that an African American defendant should not be executed based upon the verdict of an all-white jury so stirred to think in a racist manner.

I believe that, in addition to manipulating the jury, the prosecutors manipulated the co-defendant Coleman brothers into providing false testimony. This is another issue that the federal and, now, the state courts have refused to review, citing appointed state habeas counsel's failure to raise the issue at the appropriate time. For the state successor petition, which led to the stay on August 15, 2001, an affidavit was secured from Napoleon's state habeas counsel, Mr. Robin Norris, in which he admitted to having provided deficient performance when he represented Napoleon. **Exhibit 9.** In the affidavit, signed three days before the execution date, Mr. Norris attested to the following:

> My own business records reflect that I completed reading the trial record in Mr. Beazley's case sometime between March 19 and March 23, 1997, more than two months before my petitions were due. [The Court of Criminal Appeals had given Norris *six months* to file *five state habeas petitions* and one more shortly thereafter. Thus he did not even begin reading the record until a couple of months before the petition was due.] Shortly afterwards I prepared a file memorandum identifying issues that needed further investigation, which included: "(1) Investigator needs to talk to the Coleman brothers. There had to be unrevealed deals for their testimony,

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stereotypes against African Americans and the "prevalent one of African-Americans as animals"); *Martin v. City of Beaumont, Texas*, 1992 WL 52571 (E.D. Tex. 1992) (complaining that Beaumont, Texas, police officers referred to African Americans in a shelter as "animals"); *Sims v. Montgomery County Commission*, 766 F. Supp. 1052, 1093 (M.D. Ala. 1991) (finding hostile environment where, inter alia, a police supervisor said, "All black people are nothing but animals"); *Salvador v. United States*, 505 F.2d 1348, 1353 n.3 (8th Cir. 1974) (citing objection by defendant to prosecutor's animal reference and explanation by defendant that, during the time of slavery, whites gave African Americans animal names).

even though they repeatedly denied it." . . . .

[I]t does not appear that any actual investigation took place on the case until May 20-22, 1997, a little more than one week before my petition was due [on June 1, 1997]. An investigator . . . seems to have arrived in Tyler on May 20th and spent the afternoon reading the record at the courthouse. My file indicates that, on May 21st, the investigator talked to two jurors, Maxine Herbst[5] and James Jenkins. While in Tyler, he also spoke to the trial investigator and looked at the crime scene. On May 27, 1997, I received his report, wherein he recorded that Mr. Jenkins told him that the "nigger got what he deserved."

I cannot say for certain why I did not raise a claim relating to the racial bias of that juror in the habeas petition filed on Mr. Beazley's behalf. It does seem that the indication of racial bias called for further investigation, but time was very short by then. . . .

I acknowledge that the investigation of Mr. Beazley's case was inadequate to discover all of the potentially important issues affecting the legality of his conviction and death sentence. For example, I did not identify or brief the international law and Eighth Amendment issues, despite my awareness that Mr. Beazley was a juvenile at the time of his offense. Furthermore, although I did identify the critical need to interview the Coleman brothers, Mr. Beazley's codefendants, I was never able to get that done. What little was done by my factual investigator came way too late (one week before filing) and was woefully inadequate to uncover non-record issues. Morever, I have been informed that federal counsel has also located another juror who appears to have suppressed an acquaintance with the victim, John Luttig. This raises, along with the bias of Mr. Jenkins, another juror issue which, had it been discovered, should have been heard on the first round of state habeas.

I strongly suspected, on the basis of the record and from my conversations with trial counsel, Mr. Jeff Haas, that a "wink and a nod" deal had been forged between the Smith County District Attorney's Office and the Colemans. The affidavits (2 each) of those brothers, given to federal habeas counsel, together with the affidavit in response, given by Assistant District Attorney David Dobbs, have been brought to

[5] Herbst revealed nothing of substance to the investigator, who was inexperienced, having never investigated a capital case before. Subsequent to this visit, and (more relevantly) our discovery, during the federal proceedings, of Ms. Herbst's tie to the victim, she has refused to talk to anyone for the defense.

> my attention. I have read these documents and they tend strongly to confirm my suspicions. In my opinion these affidavits clearly raise factual issues material to the legality of Mr. Beazley's conviction and sentence which should be resolved only after an evidentiary hearing. Indeed, the affidavit of Mr. Dobbs alone comes very close to admitting his participation in a clandestine deal because he seems to have "overheard" a conversation between Cedric Coleman and his attorney, Robert Perkins, wherein Perkins told Coleman, "if they testified it might help the Luttig family and law enforcement officials to agree to waive the death penalty at a later time." This statement raises a question about the reason for Mr. Dobbs' presence at a meeting between Mr. Perkins and his client. It makes me wonder whether trial counsel for the Colemans and the District Attorney's office might have had a system whereby they attempted to circumvent the Constitution. In any event, if the information in the Colemans' affidavits from 1998 and 2001 had been available during Mr. Beazley's first round of state habeas, I believe the trial court would have been required to hold a hearing on the factual issues. Furthermore, I have no doubt, based on my memory of the trial record, that, if true, the Colemans' more recent allegations would be sufficient to show harm justifying the reversal of Mr. Beazley's death sentence, especially as that sentence rested largely on the reliability of the Colemans' testimony. Indeed, that is why I targeted the Colemans as my first investigative priority. . . .
>
> The bottom line is that certain issues critical to the fairness of Napoleon Beazley's capital murder trial were not discovered in his state habeas process because the factual investigation necessary to their discovery was never actually completed before the filing deadline. From my review of federal counsels' investigation, I believe that Mr. Beazley was prejudiced by the failure of investigation in his state habeas proceedings, and that he should be allowed to file a "de novo" state application for habeas corpus so that he can have the benefit of one full and fair round of review in the state courts. Denial of such an opportunity would, in my opinion, be a miscarriage of justice.

Although the Texas Code of Criminal Procedure, Article 11.071, Section 3(a) *requires* that "[o]n appointment, counsel shall investigate expeditiously . . . the factual and legal grounds for the filing of an application for a writ of habeas corpus," Robin Norris admits that no such thing happened in Napoleon's case and that his failure to expeditiously investigate (indeed, almost to investigate at all) caused the waiver of very serious issues casting doubt on the fairness of Napoleon's sentence. The rushed petition filed by Mr. Norris on June 1, 1997, asserted only *direct appeal* claims (one of the claims raised as ineffective assistance, but requiring no expansion of the record). It neglected to include the nine available issues that were only later discovered in the federal process. The federal courts bounced those issues, finding them procedurally defaulted and barred from merits review. In its order on April 17, 2002, the Court of Criminal appeals likewise found them waived and refused any merits review.

When setting the execution date at the hearing held on April 26, 2002, Judge Kent correctly

observed that the Court of Criminal Appeals "did not consider the merits or demerits of the application . . . the allegations of the 11.071 subsequent writ." This bears noting, because it shows that, when Judge Kent has offered in the past (for example in her letter to Gov. Perry) that she found Napoleon's trial to be fair, she has not been able to include in that assessment the issues that we have repeatedly raised related to juror bias, prosecutorial misconduct, and juvenile status. No court has allowed the kind of review that would allow the truth to be developed in regard to these serious allegations of misconduct and bias. The history of the case shows that is because of the failure of state habeas counsel to perform. It is critical that the Board understands that when Judge Kent previously may have set out the evidence in letters she has submitted to the Board (e.g., a letter dated July 31, 2001) this is only a summary recitation of the evidence presented at trial, absent the recantations by the Coleman brothers, absent a merits finding on their credibility by any court.[6]

[6] At a minimum, the Coleman brothers have recanted their testimony that Napoleon said, prior to the offense, that he "wanted to see what it was like to kill somebody." (Paragraph g. of Judge Kent's letter) They have recanted their assertions that Napoleon was remorseless after the crime, describing not what is reflected in paragraph m. of Judge Kent's letter, but rather that Napoleon was overcome with remorse and suicidal all the way back to Grapeland from Tyler. They have recanted everything in paragraph n.: that Napoleon might have subsequently referred to the offense in flip manner or that he specifically said he wanted to kill someone else who reminded him of John Luttig. In my opinion, this is all embellishment by the Coleman brothers at trial in order to avoid the death penalty and it does not reflect what my client said or did. I do not trust at all the jury's reliance on the Coleman brothers' "detailed descriptions of the occurrences and discussions before, during and after the Defendant shot Mr. Luttig." (Paragraph p. 8. of Judge Kent's letter.) I do not trust the State's psychologists' reliance on the Colemans' "descriptions" to find that Napoleon would pose a risk of future danger. Judge Kent never has received the case again in a stance wherein she could inquire into the Coleman brothers' credibility and determine whether, if false, their trial testimony had an affect on the sentencing of Napoleon to death and the outcome of Napoleon's case on direct appeal.

Indeed, the court to determine their credibility would be the one enabled to receive evidence – Judge Kent's court – and she still has not been granted the opportunity by the appellate courts because they have all held the issues waived by state habeas counsel's neglect.

The seriousness of the issues – the fact that, timely raised, they might have led to relief -- is indicated by the Court of Criminal Appeals' stay of execution last August and maintenance of the stay for eight months. Had Napoleon presented the Court with frivolous claims, Robin Norris' affidavit, wherein he admitted incompetent representation of Napoleon in his first state habeas application, would have availed for nothing and Napoleon likely would now be dead. This admission by the state habeas attorney, plus the substantive nature of the claims *that should have been presented by the state habeas attorney but were not*, got the stay. The serious quality of those claims – which included challenges regarding the biases of Jenkins and Herbst, intentional prosecutorial misconduct in regard to suppression of Herbst's connection to John Luttig, intentional prosecutorial misconduct in the suppression of a deal for the Coleman brothers' testimony, false testimony by the Coleman brothers, and the Eighth Amendment, treaty, and *jus cogens* issues related to Napoleon's juvenile status – undoubtedly is why, even though the Court ultimately dismissed the case, there were *three dissenting judges*. The Court majority concluded that the aforementioned issues could not be reviewed, because they were all tied to the court-appointed state habeas attorney's failure to be diligent to raise them. Conversely, had the Court of Criminal Appeals held in Anthony Graves' or Napoleon's case that a capital inmate has a right to effective assistance of counsel or a due process right to be afforded competently performing counsel in state habeas, the Court would not have dismissed Napoleon's case and Napoleon would not now face an execution date. Rather, these issues would be under review in the trial court on remand from the Court of Criminal Appeals.

The strength of Napoleon's substantive issues is reinforced again by the fact that the Court of Criminal Appeals dismissed at least one other case that was granted a stay on the basis of *Graves* long before it released its opinion in *Graves* on January 2, 2002. In Michael Moore's case, court-appointed state habeas counsel had raised five claims, all of which had been raised and rejected on direct appeal. He later signed an affidavit stating "I do not believe that I understood, at the time, the importance of investigating and presenting facts outside of the trial record in a habeas corpus proceeding." Moore's subsequent counsel filed a successor petition asserting that prior state habeas counsel had missed two issues: (1) ineffective assistance of trial counsel for failing to explain how the evidence of childhood abuse (that trial counsel did present) caused serious mental impairments that contributed to the crime; and (2) ineffective assistance of trial counsel for failing to challenge the prosecution's misleading portrayal of records at sentencing. He asserted that the court-appointed habeas attorney's failures violated the statutory guarantee of "competent counsel" and due process. The Court of Criminal Appeals granted a stay to Moore in March 2001, but vacated it on November 21, 2001. By releasing *Moore*, who was executed in January, before *Graves* or *Etheridge* and *Beazley*, the only other cases granted *Graves* stays, the Court seemed to have found the merits on the substantive issues in Moore wanting in comparison.

4. The effect of *Graves:* total denial of meaningful appellate review.

Due to the total failure of review in Napoleon's case, the *Graves* opinion constitutes another ground for which commutation or a reprieve should be granted. In *Ex parte Graves*, 2002 WL 4528 (Tex. Crim. App. Jan. 2, 2002), the Court of Criminal Appeals looked into whether a capital inmate had a constitutional right to effective assistance of appointed state habeas counsel, and what the parameters of such a right might be. The Court held that the federal constitution affords no such right. Additionally, the Court held that, although the state statute created a right to competent counsel, a capital inmate could not complain to the Court in state habeas corpus that he had been deprived of the right. Since there is no other procedural stance within the state system from which a capital inmate can complain of violation of a right to competent counsel in state habeas proceedings, the Court effectively foreclosed defendants from being able to raise any such claim in Texas courts. This has the legal consequence of preventing them from complaining in the federal district and appellate courts of substantive issues defaulted by counsel in the state courts. The practical consequence of *Graves* is that issues which go to the heart of whether a capital defendant had an impartial jury and a fair trial – juror bias, suppressed deals for testimony, false testimony, prosecutorial misconduct, ineffective assistance of trial counsel, and *actual innocence of the offense or the death penalty* – will never be reviewed nor remedied in scores of capital cases. The courthouse doors have been slammed shut.

In the last couple of days, our newspapers have carried articles pointing out that Texas is on a pace to outstrip the record 40 executions-in-one-year that occurred a couple of years ago. The number of execution dates soon may be staggering. In December 1996, Napoleon received one of the first appointments of habeas counsel by the Court of Criminal Appeals under newly created Article 11.071 of the Texas Code of Criminal Procedure. Other inmates similarly situated are now coming to the end of their appeals. A great many of them will have slid through the system without any appropriate legal review, because they have been appointed incompetent attorneys that have defaulted the most serious issues and have carried the cases on to the federal courts where they have provided the same level of nearly or actually non-extant representation. Even where the level of representation may go up in federal court, the federal courts refuse review to all issues defaulted in the state system, as they did in Napoleon's case. The following state petitions, among others of similar quality filed in the Court of Criminal Appeals, convince me that we face a systemic lack of meaningful appellate review, not just confined to Napoleon's case:

> *Ex parte Anibal Garcia Rousseau*, 185th Judicial District, Harris County (raising 2 claims within the space of 4 pages; 10 pages total); *Ex parte Gayland Bradford*, 265th Judicial District, Dallas County, No. 72,163 (turning 8 record issues into Eighth Amendment claims, alleging in some violation of the "Eighth Amendment right to due process"); *Ex parte Kenneth DeWayne Thomas*, 194th Judicial District, Dallas County, Texas (alleging two direct appeal errors and one ineffective assistance of appellate counsel claim in the course of 8 pages total); *Ex parte Craig Neil Ogan*, 230th Judicial District, Harris County, Texas, No. 549893-A (alleging one very insufficiently briefed ineffective assistance punishment issue in the course of 9 pages total); *Ex parte Gustavo Julian Garcia*, 366th Judicial District, Collin County (asserting 1 5th Amendment and 5 6th Amendment violations, very inadequately pleaded in the course of 6 pages total); *Ex parte Joe Lee Guy*, 242nd Judicial District,

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

I have copies of all of these petitions. One additional petition in my and the Court of Criminal Appeals' files, which is four pages long, notably raises one cursory issue: that the death penalty itself violates the Eighth Amendment prohibition on cruel and unusual punishment. *Ex parte Ramiro Rubi Ibarra*, Cause No. 96-634-CA, 54th Judicial District Court, McLennan County, Texas, June 21, 1999. Indeed, almost half (44) of 103 state habeas applications filed under Article 11.071 between 1995 (when the statute went into effect) and 2000 fail to include any extra-record evidence, indicating that the appointed attorneys for capital inmates in state habeas proceedings are not conducting the expeditious investigation into the facts and law required by the statute. *See* Texas Defender Service, A State of Denial: Texas Justice and the Death Penalty 107. The result of this scenario is that this Board should have to play more of a fact gathering role, providing evidentiary hearings in Napoleon's and many other cases, or face existence within a system that kills almost summarily.

This past week I heard of a capital inmate who is on a hunger strike because his appointed state habeas attorney so far has refused to come see him. I do not think that this failure of the lawyer to approach the client in this system is uncommon. Napoleon's attorney visited him, but did no suitable habeas work for him. He got to know Napoleon enough to appreciate him, as all his attorneys have, but he failed to *work*, overlooking all of the habeas issues that could have saved his client. The effect has been to deny Napoleon access to the courts to raise his most serious claims. This should be unacceptable in a case wherein the death penalty has been imposed. The Court of Criminal Appeals has created a downhill slide from trial to execution with no safeguards to protect against miscarriage of justice.

5. The potential execution within the context of communities, local and international, within the same world.

Napoleon's home community in Grapeland loves him. *See* **Exhibit 10** (Texas Monthly Article, April 2002). This Board should assess the needs of that community for compassion and justice. The Mt. Zion Missionary Baptist Church where Napoleon was raised has held constant prayer vigils for him and his family over the years. Numerous other Missionary Baptist churches in the area have joined in. I have been to a number of community gatherings. When the people gather, they never forget to start out by offering supplications for the family of John Luttig and its comfort. They are mindful of the great harm caused by Napoleon's offense and try to cross the chasm it caused with folded hands. They pray equally and fervently for the survivors of the crime and their own wayward child. They view themselves as responsible, in part, for the child's unlawful act on April 19, 1994, because he was a son, not only of Rena and Ireland Beazley, but of Grapeland. They raised him as much as his parents. At the same time that this community takes responsibility on itself for the crime, it suffers the pangs of a deeper wound. If this Board wonders how I found out about the Ivan Holland case, it was from this community. (I've been educated by this community; not the other way around.) It is a community that deeply senses a gulf that Napoleon's crime only exacerbated, a historical wrong not yet made right. It is painfully aware of the inequity of justice between white and black in East Texas. Therefore, when Judge Kent's courtroom filled to overflowing ten days ago, when she set the execution date for May 28th, the community was there in numbers for many reasons. It was there, in all earnestness, to support the Luttig family. It was there to express acceptance of its own responsibility. It was there to abide with its beloved offspring in one of his worst moments. And, finally, as the solemn faces revealed, it was there to bear witness to what it believes to be an injustice.

Members of the Grapeland community gave testimonies which I recorded on tape one month after Napoleon's execution date was stayed last summer, describing what it was like for them to have his life spared. One, Ricky Walker, stated, "I was at work. I was preparing to go to be with his parents in Huntsville and I got a telephone call at work. And it was just a terrible rejoicing. It was the best news I'd heard in a long time. Me and, well, as soon as the word started getting around the office, we started rejoicing. People was just jumping up shouting, everybody was just in a real happy mood." Edward Lomax, who works at Vulcraft where Napoleon's father is employed, described a work shutdown at the plant for Napoleon:

> I believe from my heart that the young man is truly sorry for what he has done and he's not the monster that he has been made out to be. He's a good kid. We was, I was at work the day he got his stay. And before he got the stay our line supervisors came around and told us that at his execution hour, this division here in Grapeland would shut down during that time in respect for his parents and in respect for Napoleon. So, when you got a whole division like that and a whole community that will shut down for something like this, that tells me that there's something good in this young man. . . . Because people in the place knew the young man and they knew his background and at that time everybody was kind of down and out on the job. When we received

> the news that he got his stay, everyone that worked there of all races . . . seemed like they was, their spirit was lifted . . . .

Robbie Dickson, a registered nurse with a degree in sociology, described our culture as "barbaric": "We want to kill who we want to, we want to pick and choose who we want to. And if you will check and see, all the ones that have been killed have been minorities. A white can kill a black, there's nothing done about it. A white can kill a whole family of black, there's nothing done about it. But you let one black even be accused of killing a white . . . . Anytime there has been anybody white that a black has killed, or they think you killed, you just know that you're gonna die." She expressed anger that, when Napoleon was granted the stay, she heard the news media saying this was the "second time" that a black had killed a white and "got off."

Napoleon responded to the setting of the execution date before his family and dozens of supporters by issuing a tearful public apology addressed to the *Tyler* community. His statement recognized the damaging effect of his crime on everyone involved, starting with Bobbie Luttig, John Luttig's wife and the survivor of the offense:

> I wanted to say something to certain people. As I see, it was, first and foremost, to Mrs. Luttig and her family. As I see, none of them are in the courtroom today. I want to say it anyway, and hopefully, maybe, they will hear it. Eight years ago, I involved myself in a crime I instantly regretted. I knew it was wrong. I know it is wrong now. I've been trying to make up for it ever since that moment. I've apologized ever since that moment, not just through words, but through my acts. If I didn't care about what happened to John Luttig, then I wouldn't have cared enough to change. Nobody is going to win in this situation, and if we all lose, then I know all of those losses start with me. There's a lot of people involved in this – not just me. The Luttig family, the D.A.s, Tyler, Grapeland, my family, a whole bunch of other people involved. People against the death penalty, for it, everybody involved. I want everybody to know, those people, the reason you all are here is because of me. It's my fault. I violated the law. I violated this city, and I violated a family – all to satisfy my own misguided emotions. I'm sorry. I wish I had a second chance to make up for it, but I don't. And if nothing else, I ask for everybody's forgiveness. That's all.[7]

Indeed, from the epicenter of the crime that has aligned two families and two communities in an uneasy relationship, the effect of the crime and the punishment assessed has radiated out to larger, more distant communities: Texas legislators (18 of whom wrote a letter to Governor Perry asking him not to allow Napoleon's execution before they can change the law); federal judges (notably including at least three on the Supreme Court) who may feel themselves more close to crime and to victims of violent crime than before; national opinion setting organizations like the Constitution Project, the NAACP, the American Bar Association, the American Academy of Child and Adolescent Psychiatry; and, lastly, but not really more distant (due in part to an internet world),

[7] Copies of the videotaped statement will be supplied to the Board by May 13, 2002.

the communities of other nations: in particular, an amazed Europe which cannot comprehend the continued execution of juvenile offenders. Our constitution indeed recognizes this world community (the source of the "law of nations") as generating law that becomes a part of our law. Like the English common law, international customary law evolves over time. Binding norms are created, just as they are in the common law, as more and more entities begin to recognize those norms by statute and practice. It is the task of courts and other official bodies to discern and apply this law. As much as some of our conservative commentators would like to isolate us from international responsibility, our founding generation explicitly observed that the law of nations would always press us and, in some cases, require of us dutiful response.

6. The potential execution within the context of our duty as members of the world community to avoid abuse of fundamental human rights.

The Nuremberg Tribunals that judged the war criminals of Nazi Germany at the end of the second world war marked an important milestone in the evolution of international human rights law. For the first time in those tribunals, certain crimes were recognized as so fundamentally against the law of nations that the alleged perpetrators could be formally accused, arrested, and tried for them, whether or not their nations recognized those crimes or the procedure for bringing the violators to justice. The Tribunals also made clear that civilians, as well as governments, could be held accountable for such crimes against the law of nations. Civilians, therefore, were particularly charged with upholding fundamental human rights when their governments failed or refused to respect them. The universal and fundamental rights of human beings against genocide, enslavement, and "other inhumane acts" recognized by the Tribunal are the direct ancestors of principles now recognized in international law as *jus cogens* norms. Unlike customary international law in general, which relies upon the consent of nations, *jus cogens* "embraces customary laws considered binding on all nations and is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations."[8] Customary international law is the "general and consistent practice of states followed by them from a sense of legal obligation." A *jus cogens* norm is a customary international law norm from which no derogation (no dissent) is permitted. It is marked by an extraordinary consensus. You and I are bound by the norm to do all we can as civilians to prevent its infraction.

[8] *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992).

The United Nations repeatedly has recognized that the law of nations, customary international law, prohibits the death penalty for offenses committed by persons under the age of 18. Napoleon has joined several other juvenile offenders from other states (Michael Domingues, Nevada; Alexander Williams, Georgia; Chris Simmons, Missouri) in seeking an opinion from the Inter-American Commission on Human Rights, an adjudicatory body of the Organization of American States, as to whether the indisputable customary international law norm has *jus cogens* status. Texas and a few other states within the United States are *totally alone* in the world in insisting that they can continue executing child[9] offenders under *any legal pretense*. Every other country that formerly offended the norm has fully ratified the United Nations Convention on the Rights of the Child, which bars the death penalty for child offenders. Iran, the last dissenting nation in practice other than a few states within the United States, told the United Nations Human Rights Commission last year that it no longer applies the death penalty to juvenile offenders. (These points are developed much more in depth in the attached brief filed on behalf of Napoleon at the Inter-American Commission. **Exhibit 11.**) Texas' isolation in the face of the recognition of the norm and domestic practice of more than 190 other nations demonstrates the existence of the *jus cogens* norm. It strongly suggests that the worldwide prohibition on the death penalty for child offenders has joined torture, genocide, systemic racial discrimination, murder and disappearance of individuals, slavery, and prolonged arbitrary detention as a violation of human rights that the international order will not tolerate.

Evidence of the universal rejection of the death penalty for juvenile offenders has come before this Board last year and this year in the form of strongly worded letters and other kinds of communiques from, among others, the European Union, the Council of Europe, Switzerland, Norway, and Mexico. Evidence was received by the prosecutors in Smith County when Amnesty International organized a letter writing campaign to their address. Their response was interesting. Edward Marty, Assistant District Attorney for Smith County, objected to the letters coming from Europe. Upon remarking that he had collected a file about a third or one half inch thick of letters, he said he was particularly irked by the letters coming from Germany: "I find it particularly odious that a German should write that we shouldn't execute a child. . . . I don't recall them apologizing for Dachau and Auschwitz and all those other places." **Exhibit 12.** Mr. Marty is so very wrong about Germany. In 1996, Germany declared January 27th (marking the date that the Russians liberated Auschwitz in 1945) as the "Day of Remembrance of the Victims of National Socialism." As far back as 1971, West German Chancellor Willy Brandt made an official visit to Poland where he knelt at a monument to Polish victims of the Nazis. The Germans are writing us now because of Auschwitz and a sense of awareness and urgency created by their own past to assure that no other nation, especially a great democracy like our own, might slip as Germany did in the observance of fundamental human rights norms. From another perspective, however, Mr. Marty's comparison is revealing. He seems to chastise the Germans for hypocritically criticizing a human rights violation here that, on a scale compared to the Nazi abuses, would seem small from his perspective. Mr. Marty may reasonably object that his comments to the Tyler paper are out of context, but they suggest a concession on his

[9] The prosecutors in this case repeatedly have asserted that a 17-year-old is an "adult" under Texas law. That is an inaccurate assessment of the law. Under Texas law, a 17-year-old is a child or "legal infant" in the Attorney General's phrase. *See* **Appendix C** to this petition.

part that, indeed, Napoleon's execution would be a human rights abuse.

At the execution date setting hearing on April 26, 2002, Judge Kent urgently sought from counsel on both sides any case law, any decision by a domestic court anywhere in which the court had declined to set an execution date on the basis of the *jus cogens* norm. Although the law and practice of nations strongly indicates the presence of the norm, the existence of the norm is not a domestic issue for any other country in the world, because every other country has fully adopted the norm by treaty. It's only a domestic issue here among the few states in the United States (principally Texas) that continue to fight the norm. Therefore, the body of courts that would produce the kind of decision Judge Kent sought, in order to stay her hand in setting a date, is exceedingly small. As mentioned, only three states have executed juvenile offenders in the last nine years. Except in Texas, the frequency wherewith state courts could have visited this issue has been very minimal. As far as I know, even if the United States Supreme Court decides to take Napoleon's case, the decision issued by the Inter-American Commission, which is expected in December 2002, will be the first by an adjudicatory body declaring whether the *jus cogens* norm now is in place. There is every indication that it will rule that the norm exists. **Exhibit 13.**

7. This Board's power to protect the principled discussion, to assist in determining "what the law should be," and/or otherwise provide relief.

Judge Kent repeatedly alluded to this Board's power to participate in determination of "not what the law is (in terms of published decisions), but what it should be" in light of the facts. I quote Judge Kent at some length, so that you may understand her reliance upon you to correct, in justice and equity, what she found beyond her authority to do:

> The state execution of . . . youthful murderers is an important dialogue, discussion, debate, and a subject of scholarly evaluation, and the Supreme Court has in the past discussed, addressed this issue. So it's not a question of what the law is. What the law is is clear. It is a discussion of what the law should be and that is an important discussion for legislators and people that make those type of decisions. Since 1988 (?), Mr. Skeen knows this, there have been in Smith County five executions and I set all five of those dates of execution. Four of them I tried. One I did post-conviction work and set a date of execution. Before that, a capital case had not been affirmed and an execution carried out in Smith County. So it is not that this Court is some weak-kneed judge. The letter to the Governor was based on principled objection. If I were a judge who did not follow the law, I have many chances to be intellectually dishonest and cause actions that would result in a case being reversed and no execution date being set, and findings of fact and conclusions of law that were different than the ones I made, etc. etc. etc. . . . In my opinion, philosophically, a trial judge has to be mindful – though not a slave to – but obedient to the law. But we don't have to be silent about it. We still have First Amendment free speech rights. Thank goodness we all have the opportunity to say what we believe and to have a professional, reasonable dialogue and debate about who we are and about punishment for people who threaten society – what is appropriate. And that is a protection we have to

> constantly remind us that [things] can change. **I am also always mindful looking back in history about judges that *blindly* followed the law when the law was *so* fundamentally inappropriate. Shall we go to Nazi Germany? Shall we talk about judges in and around that country that enforced and followed laws that were so atrocious? And in retrospect we are appalled. And I struggle with that issue on select cases and *this is one of them***. It is the law. The Texas Legislature has said it is. The Courts have consistently upheld it as being correct, sound and not in any way depriving the defendant of his Eighth Amendment rights. So throughout this case, I have followed the law with principled concern about the execution of youthful offenders and what I do today is follow the law. . . .
>
> I think the courts are very bound by the constraints of the law. When it comes to mercy I do not see it within the purview of the courts to individually dole that out as if we were gods. We're not. We're just people. Just like Mr. Luttig. Just like Mr. Beazley. We're just people.
> But the law does provide for the Executive Branch without the constraints of the law to consider and evaluate justice and mercy. Any clemency decisions. Those are the checks and balances that I see in the system. I have looked at the history of the case and throughout the history on behalf of Mr. Beazley the lawyers have said – let me paraphrase, to be a little inarticulate – "Don't kill him." Just putting it down in simple terms. "Don't kill him."

In also saying "Don't kill him" I and David Botsford join, inter alia, all of Napoleon's other attorneys (Jeff Haas, Tom McLain, Don Killingsworth, and Robin Norris), the many members of Napoleon's home community in Grapeland, Napoleon's parents (Ireland and Rena Beazley), Napoleon's sister (Maria Beazley), Napoleon's 18-year-old brother (Jamal Beazley), Napoleon's extended family, Napoleon's home church (Mt. Zion Missionary Baptist Church in Grapeland), other churches in the Grapeland/Crockett area (including notably the Progressive Missionary Baptist Church in Crockett), Napoleon's trial judge (Judge Cynthia Stevens Kent), the District Attorney of Napoleon's home county (Cindy Garner), a former warden of death row (George Pierson), at least 18 members of the Texas House of Representatives (Sylvester Turner, Lon Burnam, Robert Puente, Paul Moreno, Senfronia Thompson, Domingo Garcia, Helen Giddings, Michael Villareal, Glen Maxey, Elliott Naishtat, Harryette Ehrhardt, Ignacio Salinas, Jr., Carlos Uresti, John Longoria, Ruth Jones McClendon, Manny Najera, Glenn Lewis, and Juan Hinojosa), the Texas branch of the National Association for the Advancement of Colored People [NAACP], Nancy Rapaport (Dean of the University of Houston Law Center), Juan Sanchez and Cathy Kyle of Southwest Key Inc. (a regional Texas based organization supporting at-risk youth), the Friends Meeting of Austin, the Texas Criminal Defense Lawyers Association, the National Criminal Defense Lawyers Association, the United Nations High Commissioner for Human Rights, the Inter-American Commission on Human Rights, Amnesty International, Human Rights Watch, Human Rights Advocates, Minnesota Advocates for Human Rights, the American Bar Association, the Bar of England and Wales, the Law Society of England and Wales, the Law Society of Northern Ireland, the Canadian Bar Association, the American Academy of Child and Adolescent Psychiatry, the National Mental Health Association, the American Civil Liberties Union, the Children's Defense Fund, the Child Welfare League of

America, the Juvenile Law Center, the Mid-Atlantic Juvenile Defender Center, the Constitution Project, the European Union, the 43 nation Council of Europe, the Governments of Norway, Switzerland, and Mexico, the editorial staffs of the state of Texas' major newspapers, the editorial staffs of major foreign newspapers, and the Washington Post.

There are numerous reasons why, in evaluating this case in light of justice and equity, you should not allow Napoleon to be executed. Although you may, you do not have to explain your reasons for a favorable vote on commutation or reprieve. Please consider recommending a reprieve or commutation to Napoleon on the following bases:

– Reprieve for 120[10] days (until October 28, 2002): A reprieve for this period would allow Napoleon to live until the release of *Atkins v. Virginia* (which must be by October 1, 2002, the beginning of the Supreme Court's next term) and would grant the United States Supreme Court sufficient time to carefully review and make a decision as to whether to grant certiorari on his (or another juvenile offender's) petition in light of its *Atkins* ruling. When this Board votes this time, it may find itself in a similar situation wherein the Supreme Court has not rendered a decision regarding certiorari. A reprieve would protect the Supreme Court's opportunity to grant certiorari and ultimately relief to Napoleon. It would allow Napoleon to live.

A reprieve for 120 days also would allow this Board to hold an evidentiary hearing (hopefully with full procedural protections) on the issues defaulted by court-appointed state habeas counsel. The Board may not be able to draw conclusions of law, but it should be able to make findings of fact on these issues, and then act appropriately within its own sphere.

– Reprieve for 180 days (until December 28, 2002): A reprieve for this period would substantially comply with the Inter-American Commission on Human Rights' request that Texas take "precautionary measures" not to execute Napoleon until it has issued its decision in his case. **Exhibit 14.** Substantial compliance would be met if the reprieve is granted only until December 28, 2002, because the Commission is scheduled to release its report on a companion case regarding Nevada juvenile offender Michael Domingues. Napoleon did not file recently at the Commission in order to delay his case in the Texas process, but rather to obtain the opportunity for "precautionary measures" to be taken only until Domingues, which has been pending before the Commission for a couple of years, is issued. The report in Domingues will hold that the United States is in violation of international law by seeking to execute juvenile offenders. *See* **Exhibit 13.** (Supplement to Defendant Beazley's

[10] This Board is empowered to grant reprieves in any number of 30 day installments under 37 Tex. Admin. Code § 143.42 (7).

Submission). The Commission considers such requests for "precautionary measures" binding on countries within the Organization of American States (OAS). It has stated, "In the Commission's view, OAS member states, by creating the Commission and mandating it through the OAS Charter and the Commission's Statute to promote the observance and protection of human rights of the American peoples, have implicitly undertaken to implement measures of this nature where they are essential to preserving the Commission's mandate. Particularly in capital cases, the failure of a member state to preserve a condemned prisoner's life pending review by the Commission of his or her complaint emasculates the efficacy of the Commission's process, deprives the condemned persons of their right to petition in the Inter-American human rights sytem, and results in serious and irreparable harm to those individuals, and accordingly is inconsistent with the state's human rights obligations. *Juan Raul Garza v. United States*, Report No. 52/01, Case No. 12,243, April 4, 2001, para. 117.

– Reprieve for 480 days (until after September 1, 2003): A reprieve for this period would reasonably allow the Texas Legislature to enact, during the 2003 Legislative Session, a bill that would raise the eligibility age for the death sentence to 18, and apply it retroactively upon its effective date. This would prevent Texas from committing what would widely be viewed as abuses of fundamental human rights while the law is in the process of change. The effective date of most legislation is the first day of September in the legislative year. In considering whether to grant such a lengthy reprieve, this Board should bear in mind that T. J. Jones, Toronto Patterson, and probably considerably more juvenile offenders will be scheduled for execution over the course of the next year.

– Commutation of the sentence of death to life in prison (40 calendar years before any consideration of parole): This decision would respect international customary law (as recognized, inter alia, by the United Nations Sub-Commission on the Promotion and Protection of Human Rights; **Exhibit 15**), the United States' treaty obligations (compliance with Article 6(5) of the International Covenant on Civil and Political Rights), and an international norm of *jus cogens* that is in place, and should be recognized for the first time by an international adjudicatory body with the issuance of the Domingues report by the Inter-American Commission on Human Rights in December 2002. It would correct the image Texas currently projects to Europeans, Canada, Mexico, and other close allies of indifference to a fundamental human rights norm. The decision, however, would not necessarily rest upon any finding regarding rights and juvenile status. This Board can recommend commutation of a death sentence for any reason at all. There are numerous reasons for such recommendation in this case: remaining concerns about juror racial bias, juror personal bias, violation of equal protection in the prosecutor's exercise of peremptory challenges against African American venirepersons, prosecutorial misconduct in the suppression of juror bias during the voir dire process, prosecutorial misconduct in suppression of an implied deal with the co-defendants, prosecutorial misconduct in the advancement of

false testimony by the co-defendants, prosecutorial misconduct in closing argument, and finally, perhaps, abuse of discretion by the prosecutors in seeking the death penalty against an African American child with an exemplary background.

The formal requirements for the above requests for reprieve and commutation have been met in the incorporated 2001 clemency petition (**Appendix A**). *See* 37 Tex. Admin. Code §§ 143.42, 143.43; 37 Tex. Admin. Code § 143.57; Tex. Const. art. 4, § 11; *see also* **Exhibit 1** to this current petition ("Third Formal Sentencing").

As was requested in 2001, pursuant to 37 Tex. Admin. Code Sections 143.43(d) and 143.57(e), **I respectfully request that a member of the Board of Pardons and Paroles go to the Polunsky Unit in Livingston, Texas, to interview Napoleon**. I would ask that a different member go this time, merely so that more than one or two Members have an opportunity to speak personally to Napoleon.

A supplement will be filed on Monday, May 13, 2002, containing copies of letters on Napoleon's behalf to which I will wish the Board will give special attention, as well as additional materials, including videotape of Napoleon's open court apology, given on August 26, 2002.

In sum, I would ask this Board to recognize the *jus cogens* prohibition, the imminent change in domestic constitutional law favorable to Napoleon and other child offenders, the Court of Criminal Appeals' decision to slam the courthouse doors in the face of indigent capital defendants, who for no fault of their own suffer from an abominable absence of counsel in state habeas proceedings, the really strong issues that never have received appropriate merits review by the courts (state or federal), and all the residual doubts those issues raise regarding the fairness of Napoleon's punishment phase. Napoleon's commission of the crime is not contestable. The evidence locks him in to two shots to the head of John Luttig. In light of the Coleman brothers' recantations and the inherent unreliability of their initial testimony under Texas law, the evidence should not lock Napoleon into the theory pushed by the State that he premeditated *the killing*. The second shot does, however, indicate an intentional act. The offense to the survivors created by that intentional act needs radical healing. The killing of Napoleon won't heal it. The killing of Napoleon won't save any additional lives, because he poses no risk to anyone now, as evidenced in the last clemency petition (inter alia, his status as a death row "trustee"). Killing Napoleon to deter *others* from killing would serve no genuinely moral purpose. Such general deterrence (sacrifice of the one for the many) runs counter to a genuinely moral humanity which strives to create a world in which there are no victims nor executioners. Killing Napoleon for the sake of revenge (or more politely worded, "retribution") would create numerous collateral victims (his brother, sister, and parents mainly, with reverberations starting in Grapeland and moving out). The Roman Catholic catechism says that the death penalty should be avoided because it does not serve the concrete conditions of the common good when an alternative punishment (life in prison) is available. Please recommend to the Governor that he spare Napoleon for the sake of the common good.

Sincerely,

Walter C. Long

cc: Governor Rick Perry
Jack Skeen, Smith County District Attorney
David Dobbs, Ex-Smith County District Attorney
Hon. Cynthia Stevens Kent, 114th District Court, Smith County, Texas
J.B. Smith, Smith County Sheriff
John Cornyn, Attorney General of Texas

APPENDIX A

2001 PETITION FOR CLEMENCY

APPENDIX B

TIME LINE OF SIGNIFICANT NEW EVENTS IN THE CASE SINCE JULY 31, 2001.

The following significant events have occurred in this case since Napoleon Beazley's first clemency petition was filed on July 31, 2001:

(1) At the time the last clemency petition was filed on July 31, 1001, Napoleon had a certiorari appeal pending at the United States Supreme Court, along with a motion for stay of execution. A couple of days prior to the execution date on August 15th, the Supreme Court denied the stay motion in a 3 to 3 vote. In an unprecedented act, three of the Justices recused themselves from taking part in the case because of their relationship to the son of the victim, Hon. Judge J. Michael Luttig of the federal Fourth Circuit Court of Appeals in Virginia.

(2) On August 12, 2001, Robin Norris, Napoleon's appointed state habeas attorney provided an affidavit admitting that he provided incompetent representation that resulted in the default of issues very relevant to the fairness of Napoleon's trial, especially the punishment phase wherein the death penalty was returned.

(3) On August 15, 2001, a second state petition for writ of habeas corpus was filed on Napoleon's behalf in the 114th Judicial District Court in Smith County, Texas, and at the Texas Court of Criminal Appeals, alleging ten claims for relief. Most of these issues were raised as having been defaulted by Mr. Norris' failure to "expeditiously investigate" the law and facts of the case, which is required by the Texas Code of Criminal Procedure. The substance of most of these issues was addressed in Napoleon's 2001 clemency petition.

(4) On August 15, 2001, the Texas Court of Criminal Appeals stayed Napoleon's execution date roughly four hours before he was due to be executed. The Court gave no immediate, express reason for the stay, but it was apparent that the stay had been granted in good part because of the constitutional issues about state habeas counsel performance pending before the Court in *Ex parte Anthony Graves*.

(5) On August 15, 2001, the Honorable Cynthia Stevens Kent, District Judge for the 114th Judicial District Court of Smith County, Texas (in Tyler), who presided over Napoleon's trial and sentencing faxed a letter to Governor Perry asserting that she favored commutation of Napoleon's death sentence based solely upon his age at the time of the offense. "[I]t is my recommendation that due to [Napoleon's] age at the time of the offense (17 years of age) you consider carefully and grant his request that his sentence be commuted . . .."

(6) On September 17, 2001, eighteen members of the Texas House of Representatives

sent a letter to Governor Perry in support of Judge Kent's recommendation that Napoleon's death sentence be commuted. These included Representatives Lon Burnam, Sylvester Turner, Robert Puente, Paul Moreno, Senfronia Thompson, Domingo Garcia, Helen Giddings, Michael Villareal, Glen Maxey, Elliott Naishtat, Harryette Ehrhardt, Ignacio Salinas, Jr., Carlos Uresti, John Longoria, Ruth Jones McClendon, Manny Najera, Glenn Lewis, and Juan Hinojosa. The letter closes as follows: "We join Judge Kent in her request for a commutation of Napoleon Beazley's death sentence because we are greatly disturbed by the fact that Texas is now almost the sole executioner of child offenders in the world. . . . Had Napoleon been processed for the same offense (indeed *any* serious offense) in any other government in the world, he could not (and would not) have been sentenced to death. As a trial judge, Judge Kent is sworn to uphold the laws of our State. As legislators, we make the laws. We find that the ongoing execution of child offenders by our state is intolerable by civilized norms and, during the next legislative session, we will again support legislation designed to rectify Texas' sad record in this regard. Napoleon Beazley cannot wait that long. Governor Perry, we urge you to commute his sentence upon recommendation by the Board of Pardons and Paroles."

(7) December 13, 2001, President Musharraf of Pakistan announced that he would commute the death sentences of all child offenders on death row in his country (approximately 100). Pakistan already had changed its domestic law to bar the death sentence prospectively for child offenders.
See http://www.amnesty.ie/news/2001/pakistan4.shtml

(8) On January 2, 2002, the Texas Court of Criminal Appeals released its opinion in *Ex parte Graves*, finding that it had no jurisdiction under Article 11.071, Texas Code of Criminal Procedure to consider claims that appointed state habeas counsel did not provide competent representation. It also found that capital inmates had no Sixth Amendment right to effective assistance of counsel in state habeas representation.

(9) On February 19, 2002, we filed on Napoleon's behalf a petition at the Inter-American Commission on Human Rights in Washington D.C., which is set up under the Charter of the Organization of American States to adjudicate claims made by individuals within OAS countries that their human rights as guaranteed under the Charter and the American Declaration of Human Rights are being abused.

(10) On February 20, 2002, oral argument was held by the Supreme Court in *Atkins v. Virginia*, No. 00-8452, 2002 WL 341765 (Feb. 20, 2002). Justice Sandra Day O'Connor asserted forcefully during argument that she saw no reason why the non-death penalty states would not be included with states having explicit bars on the death penalty for persons of a particular class in the Court's process of discerning the existence of a societal consensus against a punishment for the class. This dramatic shift in reasoning suggests that *Stanford v. Kentucky*, wherein the Court holds the opposite, will soon be overturned.

(11) In a letter dated February 27, 2002, the President of the Organization of American States made known that the OAS had asked the United States and Texas to take precautionary measures not to execute Napoleon before the Commission had a chance to review and rule on his claim of human rights violation. The Texas Attorney General's office has responded for the United States that it is relying on the courts to deal with Napoleon's case.

(12) On March 26, 2002, the Governor of Indiana signed a bill raising the eligibility age for the death sentence in Indiana to 18. Similar bills were before six other state legislatures during the 2002 legislative season.

(13) In April 2002, Texas Monthly issued a feature article on Napoleon that examines in some depth the race issues in the case and the causes underlying the commission of the offense. It portrays how closely the Grapeland community of both white and black families holds Napoleon.

(14) On April 17, 2002, the Texas Court of Criminal Appeals dismissed Napoleon's second petition for writ of habeas corpus and lifted the stay of execution. Judges Price, Holcomb, and Meyers dissented from the dismissal. Judge Price would have held the case for *Atkins* to be decided by the Supreme Court. Judge Holcomb dissented against the Court's failure to recognize a right to effective assistance of counsel in state habeas. Judge Meyers offered no reason for his dissent

(15) On April 26, 2002, Judge Kent set the execution date for May 28, 2002.

APPENDIX C

UNDER TEXAS LAW, A SEVENTEEN YEAR OLD IS A "CHILD"

The prosecutor, Mr. Jack Skeen, wrote a letter to Governor Rick Perry on August 17, 2001, opposing commutation for Napoleon Beazley and, in particular, criticizing Judge Cynthia Stevens Kent's recommendation of commutation based upon Napoleon's age at the time of the offense. Mr. Skeen noted that Judge Kent wrote, "At the current time, Texas law allows for the execution of a child under the age of 18 but at least 17 years of age at the time of the capital murder." Mr. Skeen protested:

> Napoleon Beazley is not a "child" to use Judge Kent's term. He was an adult under Texas law at the time he committed the crime, and all the facts in the case show he was an adult in his calculated, planned, cold-blooded execution of John Luttig in front of Mr. Luttig's wife.

Id. (emphasis in original).

The District Attorney's characterization of the offense as a "calculated, planned, cold-blooded execution" depends solely upon the inherently unreliable, and now retracted, testimony of Donald and Cedric Coleman.

Mr. Skeen boldly misstates Texas law. The Texas Attorney General, in fact, maintains that a person under 18 years of age is a "legal infant." Tex. Att'y Gen. Op. 1975, No. H-546. The age of majority in Texas is 18. TEX. CIV. PRAC. & REM. CODE § 129.001 ("The age of majority in this state is 18 years."); Tex. Att'y Gen. Op. 1973, No. H-85 (finding that after the effective date of § 129.001 persons at least 18 years old would not be "legal infants"); Tex. Att'y Gen. Op. 1973, No. H-82 (finding that § 129.001 emancipated all persons aged 18 or more from "disabilities of infancy"). No one may execute a will, execute a contract, marry without permission, serve on a jury, vote in a public election, or be held solely liable for a tortious act against property if under 18 years old. TEX. PROBATE CODE § 57 ("Every person who has attained the age of 18 years . . . shall have the right and power to make a last will and testament . . . ."); TEX. ELECTION CODE § 11.002 ("[A] qualified voter . . . is 18 years of age or older . . . ."); TEX. FAMILY CODE § 41.001 ("A parent or other person who has the duty of control and reasonable discipline of a child is liable for any property damage proximately caused by . . . the wilful and malicious conduct of a child who is at least 12 years of age but under 18 years of age."); *Kargar v. Sorrentino*, 788 S.W.2d 189, 190 (Tex. App. -- Houston [14th Dist.] 1990) (finding sales contract with 17 year old void ab initio). A person must be 18 years old to determine his or her place of residency in the same manner and with the same legal result as an adult. Tex. Att'y Gen. Op. 1974, No. H-301.

Texas statutes repeatedly refer to anyone under 18 as a "child" meriting special protections or disabilities under the law. TEX. GOV. CODE § 615.001 ("`minor child' means a child who, on the date of the death of an individual listed under Section 615.003, is younger than 18 years of age"); TEX. ELECTION CODE § 253.158 (defining a contribution by the child of an individual as a

contribution by the individual and defining "child" as "under 18 years of age"); 64.002 ("A child under 18 years of age may accompany the child's parent to a voting station."); TEX. FAMILY CODE § 264.501 (for child fatality investigation, "child" means a person younger than 18 years of age); § 154.001 ("The court may order either or both parents to support a child . . . until the child is 18 years of age . . ."); § 153.004 ("in determining whether to appoint a party as a sole or joint managing conservator, the court shall consider evidence of the intentional use of abusive physical force by a party against . . . any person younger than 18 years of age . . ."); § 152.102 ("`child' means an individual who has not attained 18 years of age"); § 101.003 (in suit affecting parent/child relationship, "child" or "minor" means a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes); § 55.18 (procedure when child is discharged from mental health care facility before reaching 18); § 55.15 (terminating court ordered mental health care for child who reaches 18 years of age); § 54.031 (requiring outcry statement by child abuse victim to be made to someone 18 years of age or older); § 6.505 (requiring specific counseling for divorcing parents of child under 18 years of age); § 6.406 (noting in context of suit for dissolution of marriage that child under 18 is entitled to support); TEX. HEALTH CODE § 161.004 (statewide immunization required for "children," defined as those under 18 years of age); § 109.001 ("child" means an individual younger than 18 years of age); TEX. HUMAN SERVICES CODE § 42.002 (for regulation of child care services, "child" is person under 18 years of age); TEX. LABOR CODE § 51.002 (for protection of children under labor laws, "child" is defined as an individual under 18 years of age); § 408.183 (child eligible for death benefits because a minor on date of employee's death is entitled to benefits until age 18); TEX. TAX CODE § 11.22 (exemption from taxation for veterans' surviving children under 18 years of age); TEX. TRANSPORTATION CODE § 521.458 (forbidding person from knowingly allowing child under 18 to operate motor vehicle on highway in violation of chapter 521 of the code); TEX. INSURANCE CODE art. 27.03 (granting health benefit plan coverage only to children younger than 18 years of age); art. 3.77 (defining "dependent" as child under 18, etc., for Health Insurance Risk Pool).

When ***protection of children*** is at issue, the Texas Penal Code and Code of Criminal Procedure treat a "child" as someone younger than 18 years of age. TEX. PENAL CODE § 71.02 (Engaging in Organized Criminal Activity); § 46.06 (Unlawful Transfer of Certain Weapons); § 43.26 (Possession of Child Pornography); § 43.25 (Sexual Performance of a Child); § 43.251 (Employment Harmful to Children); § 25.08 (Sale or Purchase of Child); § 25.06 (Harboring Runaway Child); § 25.05 (Criminal Nonsupport); § 25.04 (Enticing a Child); § 25.03 (Interference with Child Custody); § 25.031 (Agreement to Abduct from Custody); § 9.61(a) ("*The use of force, **but not deadly force**, against a child younger than 18 years is justified . . . [under certain conditions]*); TEX. CODE CRIM. PROC. art. 63.001 (defining "child" as a person under 18 years of age in the context of missing persons or missing child actions); art. 56.32 (defining "child" as an individual younger than 18 years of age for purposes of crime victim compensation law); art. 24.011 (subpoenaing the person having custody of a witness that is younger than 18 years old); art. 19.25 (excusing from grand jury service a "person responsible for the care of a child younger than 18").

Judge Kent did not err when she referred to Beazley as a "child." The vestigial remnant of the first penal code reflected in Article 8.07(c), Texas Penal Code, is an anomaly in relation to the rest of Texas law as it affects juveniles. It greatly predates the first juvenile court act (in Illinois in 1899)

and the first juvenile code in Texas (in 1943). *See Hidalgo v. State*, 983 S.W.2d 746, 750 n.8 (Tex. Crim. App. 1999). It conflicts with the age of minority as set by the Legislature and Attorney General in 1973, *supra*, and the worldwide progress in the protection of children under 18 represented in the United Nations' human rights treaties and the codes and practices of literally almost all nations.