



IN THE COURT OF COMMON PLEAS, CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

:

VS.

:

CP 0009-0941

HECTOR HUERTAS

:

PPN 793665

:

ORDER OF COURT

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2002, and upon consideration of the within Motion, said Motion is granted. Application of the death penalty in this matter is barred because the petitioner was less than eighteen years old when the charged criminal act occurred.

BY THE COURT:

Judge

IN THE COURT OF COMMON PLEAS, CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :  
VS. : CP 0009-0941  
HECTOR HUERTAS : PPN 793665  
:

**MOTION TO PRECLUDE THE COMMONWEALTH FROM SEEKING THE DEATH  
PENALTY AGAINST A JUVENILE  
AND  
CONSOLIDATED MEMORANDUM OF LAW**

TO THE HONORABLE CAROLYN ENGEL TEMIN, JUDGE IN THE COURT OF COMMON PLEAS:

Petitioner Hector Huertas, by his attorneys, Marc Bookman, Assistant Defender, Karl Schwartz, Assistant Defender, Mark Scott-Sedley, Assistant Defender, Karl Baker, Assistant Defender, Deputy Chief, Appeals Division, John W. Packel, Assistant Defender, Chief, Appeals Division, and Ellen T. Greenlee, Defender, respectfully files this Motion, and in support thereof avers:

1. Petitioner was born on July 21, 1979. He is incarcerated at SCI-Graterford as inmate No. DZ-5597, and is serving a life term for murder.

2. Petitioner was arrested on April 5, 2000 and was charged in Philadelphia at Information 0009-0941 with two counts of murder, criminal conspiracy, possession of an instrument of crime, and violations of the Uniform Firearms Act. The underlying crime occurred on April 28, 1997, when petitioner was seventeen years

old. Trial is scheduled before your Honor on April 30, 2002.

3. The Commonwealth has given notice that it will seek to impose the death penalty upon Hector Huertas.

4. This Court is now asked to bar application of that extreme punishment in this case. Subjecting petitioner to the death penalty for a crime allegedly committed when he was 17 years old would violate international treaty, including the International Covenant on Civil and Political Rights, and would violate customary international law, the principle of *jus cogens*, and both the federal and Pennsylvania Constitutions.<sup>1</sup>

**A. INTERNATIONAL LAW PROHIBITS THE EXECUTION OF JUVENILE OFFENDERS**

**Treaty Obligation, and the International Covenant on Civil and Political Rights**

5. Under Article VI, section 2, the Supremacy Clause of the United States Constitution, "[a]ll Treaties made, or which shall be made, under the Authority of the United States, shall be Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Law of any State to the contrary notwithstanding".

6. The United States ratified the International Covenant on Civil and Political Rights (hereinafter, "ICCPR"), a multilateral

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<sup>1</sup>The violation of international treaty, customary international law, and *jus cogens* constitute a violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

international treaty, in 1992.<sup>2</sup> Art.6(5) of the ICCPR explicitly provides:

Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out against pregnant women.

7. Upon ratification, the United States Senate purported to reserve for the United States the right "subject to its Constitutional constraints, to impose capital punishment on any person...including such punishment for crimes committed by persons below eighteen years of age". See 31 I.L.M. 645, 653-54 (1992), 138 CONG. REC. S4781-01, § I (2) (daily ed. Apr. 2, 1992). Not one other signatory-nation to the ICCPR filed any objection or reservation to Art. 6.5.<sup>3</sup> See William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?* 21 Brook.J.Int'l.L. 277 (1995) (hereinafter, "Schabas"). The United States put forward this reservation in order to permit the various states to continue to execute juvenile offenders. The reservation is invalid, for a number of reasons.

8. First, the Senate reservation is invalid pursuant to the international treaty that governs treaty interpretation, the Vienna Convention on the Law of Treaties, 8 I.L.M. 679, 1155

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<sup>2</sup> The full text of the ICCPR is set forth at Appendix "1," and can be found along with the other treaties cited herein at <http://untreaty.un.org> (United Nations Treaty Website).

<sup>3</sup> This provides testament to the norm's universal acceptance, except in a few states of the United States, as will be discussed infra.

U.N.T.S. 331 (adopted May, 1969, entered into force January 27, 1980) (hereinafter, "Vienna Convention").<sup>4</sup> A nation-state "may, when signing, ratifying, accepting, approving, or acceding to an international treaty, formulate a reservation *unless...the reservation is incompatible with the object and purpose of the treaty.*" Vienna Convention, Art. 19.3 (emphasis supplied). But by signing a treaty, even prior to its ratification a nation has agreed to bind itself in good faith to ensure that nothing is done that would defeat the treaty's "object and purpose," pending ratification. See Vienna Convention, Art. 18 ("A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when (a) it has signed the treaty...subject to ratification, acceptance, or approval, until it shall have made its intention clear not to become a party to the treaty...."). See also Restatement (Third) of Foreign Relations Law of the United States, Sec. 313(1)(c)(1987); United Nations'

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<sup>4</sup> While the United States has not yet ratified the Vienna Convention, a "treaty designed to govern all other treaties," our Department of State has taken the position that it is the authoritative guide to existing treaty law and procedure. See the Vienna Convention on the Law of Treaties, S. EXEC. DOC. NO. 92-1, 92d Cong., 1<sup>st</sup> Sess. 1 (1974). See also Nicholls, *Too Young To Die: International Law and the Imposition of the Juvenile Death Penalty in the United States*, 5 Emory Int'l.L.Rev. 617, 639 (1991). The Vienna Convention "permeates the whole body of international regulation and creates the fundamental framework within which this regulation operates." Maria Frankowska, The Vienna Convention on the Law of Treaties Before the United States Courts, 28 Va.J.Int'l.L. 281, 286 (1998). And the American Law Institute, in revising the Restatement of the Foreign Relations Law of the United States, took the Vienna Convention as its "black letter" for setting out principles related to the law of treaties. Id.

Human Rights Commission, General Comment No. 24 (52), paras. 6, 10, and 18 (cited and discussed infra, and reproduced herein as Appendix "2").

Article 6.5 is essential to the ICCPR's "object and purpose." The central purpose of Article 6 *in toto*, the "right to life" provision of the treaty, is to impose limitations of the death penalty. One of those express limitations is the prohibition against death sentences for crimes committed by juveniles. See Article 6, and see Schabas, supra. Indeed, the "object and purpose" of the ICCPR as a whole is to create "minimum legally binding standards for human rights, which ... shall extend to all parts of federal States without any limitation or reservation." See the Report of the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (hereinafter, "Report of Special Rapporteur") reproduced as Appendix "3" herein, at para. 17. In fact, in ratifying the ICCPR the Senate Committee on Foreign Relations itself noted:

The (ICCPR) guarantees a broad spectrum of civil and political rights, rooted in basic democratic values and freedoms, to all individuals within the territory or under the jurisdiction of the States Party ...[T]he covenant obligates each state party to respect and ensure these rights, to adopt legislation or other necessary measures to give effect to these rights, and to provide an effective remedy to those whose rights are violated.

Foreign Relations Committee Report on ICCPR, 31 I.L.M. 645, 648-49. The Committee went on to say that "the (ICCPR) is part of the international community's efforts to give the full force of

international law to the principles of human rights embodied in the Universal Declaration of Human Rights and the United Nations Charter." Id., at 649. The United States even jointly sponsored a United Nations General Assembly resolution that Article 6 of the ICCPR (which of course embodies Art. 6.5, the norm that prohibits executing juveniles) establishes a "minimum standard" for all member states, whether or not they had adopted that treaty. G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980).

Because the Senate's "reservation" directly and irreconcilably conflicts with the object and purpose of the ICCPR, the reservation is invalid.

9. The Senate's purported reservation to Article 6.5 of the ICCPR also is a nullity because, under the express terms of Article 4.2 of the ICCPR, any reservation to Article 6 is void ("no derogation from Article() 6 ... may be made under this provision"). See also Vienna Convention, supra, Art. 18a, 8 I.L.M. 679, 1155 U.N.T.S. 331, 336-37 (1979). The ICCPR was signed and ratified by the United States without reservation or objection to Article 4.2. In itself, too, this non-derogation clause is another indicator of how critical Art. 6.5 is to the framework of the ICCPR.

10. The United Nations Human Rights Commission (hereinafter, "HRC") is the international body designated to interpret the ICCPR. The HRC also has determined that the Senate's attempted reservation is a nullity.

By ratifying the ICCPR and participating in the election of officers to the HRC, the United States expressly recognized the HRC's authority.<sup>5</sup> A number of federal courts also have explicitly acknowledged the HRC's authority in matters of the ICCPR's interpretation. See, e.g., United States v. Duarte-Acero, 208 F.3d 1282, 1287 (11th Cir. 2000) (the HRC's guidance may be the "most important()" component in interpreting ICCPR claims); United States v. Benitez, 28 F.Supp.2d 1361, 1364 (S.D. Fla. 1998) (same); United States v. Bakeas, 987 F.Supp. 44, 46, n.4 (D.Mass. 1997) (HRC has "ultimate authority to decide whether a party's clarifications or reservations have any effect"); Maria v. McElroy, 68 F.Supp.2d 206, 232 (E.D.N.Y 1999) (HRC interpretations as "authoritative").

11. The HRC issued a General Comment in April 1994 that addressed the effects of attempted reservations to the ICCPR:

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

2. "Reservations that offend *peremptory norms* would not be compatible with the object and purpose of the Covenant.... Accordingly, a State may not reserve the right ... to execute ... children."

3. "While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend

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<sup>5</sup> Declarations recognizing the competence of the Human Rights Committee under Article 41, *Multilateral Treaties Deposited With the Secretary General, Status as of 31 December 1994*, U.N. Doc. ST/LEG/SER.E/13 at 133 (1995), at <http://untreaty.un.org>.

against the object and purpose of the Covenant, a State has a *heavy onus* to justify such a reservation."

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

United Nations Human Rights Committee, General Comment No. 24 (52) Relating To Reservations at paras. 5,6,8,10,18, as reported in 15 Hum. Rights Law Journal 465 (1994)(heretofore and hereinafter, HRC General Comment, reproduced as Appendix "2" herein) (emphasis added).

The United States cannot meet the "heavy onus" required to validate a reservation. The Senate justified its reservation to Article 6.5 on the grounds that prompt ratification of the treaty would not be obtained if the non-complying states within the United States had to raise their death penalty eligibility ages first. 31 I.L.M. 645, 650 (1992). This does not approach a remotely acceptable justification for derogation (e.g., national emergency; see ICCPR 4.1). The United States is light years from meeting the "heavy onus" of justification for its reservation to Article 6.5, and the "reservation" would be invalid for this reason alone.

The Senate's reservation is invalid or ineffective under every other of these recited HRC guidelines as well. As outlined, the purported reservation conflicts with the treaty's object and

purpose. It also offends customary international law and the peremptory *jus cogens* norm, detailed infra, against the execution of juvenile offenders. And the reservation is wholly severable, as will also be discussed, so that the entire treaty remains in effect in the United States.

12. For all of these reasons, the HRC expressly concluded that the United States' reservation to Article 6.5 is invalid<sup>6</sup> --as has the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions,<sup>7</sup> and as have eleven of the treaty's European signators.<sup>8</sup> Particularly regarding this last

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<sup>6</sup> See HRC General Comment, at Appendix "2". Additionally, in its first report on compliance, the Human Rights Committee said:

Para. 279. The Committee is ... particularly concerned at reservations to Article 6, paragraph 5, and Article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant.

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Para. 281. [The HRC] "deplores provisions in the legislation of a number of states which allow the death penalty to be pronounced for crimes committed by persons under 18..."

Report of the Human Rights Committee, Official Records of the General Assembly, Fiftieth Session, Supplement No. 40, U.N. Doc. A/50/40 (October 3, 1995), paras. 279, 281.

<sup>7</sup> "The Special Rapporteur wishes to emphasize that international law clearly indicates a prohibition of imposing the death sentence on juvenile offenders. Therefore, it is not only the execution of a juvenile offender which constitutes a violation of international law, but also the imposition of a sentence of death on a juvenile offender..." See "Report of Special Rapporteur, Appendix "3", at para. 55. See also paras. 49, 50.

<sup>8</sup> This unusual step of writing to deplore formally another nation-state's proposed "reservation" to a treaty was undertaken here by Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain and Sweden. *Multilateral*

point it is noteworthy that, despite its attempted "reservation" to Art. 6.5, the Senate explicitly recognized "U.S. acceptance of the jurisdiction of the Human Rights Commission under article 41 in which a State Party claims that another State Party is not fulfilling its obligations under the (ICCPR)." 138 Cong.Rec.S 4783, 4784. The HRC, as detailed, fully concurs with our European treaty partners that the "reservation" is void.

13. The Senate's reservation to Art. 6.5 also is invalid because it conflicts with treaty law as interpreted by the United States Supreme Court. That Court long has held that, "as treaties are contracts between independent nations, their words are to be taken in their ordinary meaning 'as understood in the public law of nations.'" Santovincenzo v. Egan, 284 U.S. 30 at 40 (1931) (citing cases). A Senate "reservation" which is invalid under international law has no independent validity in United States law, as the invalid reservation is not part of a treaty. See Stefan Riesenfeld and Frederick Abbott, The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties, 67 Chi.-Kent L.Rev. 571, 589 (1992).

Indeed, the Supreme Court has held that where the Senate attaches amendments to a treaty which were not part of the treaty and not communicated to the other party as part of the treaty, the treaty remains valid, *without* the purported amendments:

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*Treaties Deposited With The Secretary General, Status as of 31 December 1994, U.N. Doc. ST/LEG/SER.E/13 (1995), at <http://untreaty.un.org>.*

There is something, too, which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power or Indian tribe, a material provision of which is unknown to one of the contracting parties ...

New York Indians v. United States, 170 U.S. 1, 23, 18 S.Ct. 531, 536 (1898). As the Court recently noted, the relevant question "in a treaty case is what the two or more sovereigns agreed to, rather than what a single one of them, or the legislature of a single one of them, thought it agreed to." United States v. Stuart, 489 U.S. 353, 375, 109 S.Ct. 1183, 1195 (1989) (Scalia, J., concurring).

14. The text of the ICCPR, *absent* the Senate's reservation, which is utterly inconsistent with the treaty's clearly-stated terms, is "what the sovereigns agreed to." Our own law requires that the ICCPR be enforced as written, including Art. 6.5, without the Senate reservation, which simply is severable from its ratification of that treaty. This is the lesson of New York Indians and Stuart. Senate amendments and modifications to treaties that violate international law lack legal significance; the treaty remains in effect *absent* the reservation.

15. The HRC General Comment cited at para. 11.4 herein also dictates, and the United Nations Special Rapporteur (Appendix "3", at para. 32, 140) independently also determined, that the United States' reservation to Article 6.5 is severable, so that the treaty is fully operative in the United States.

16. The Senate also did not make its "reservation" an essential condition of United States' accession to the treaty, and

reservations that are not an express condition of accession to a treaty are deemed severable at any rate, and do not implicate a party's intent to be bound. See Belios v. Switzerland, 132 Eur. Ct.H.R. (1998). The fact that the United States subsequently (in 1995) signed another multilateral treaty -- the Convention on the Rights of the Child (hereinafter, the "CRC"), which contains the same juvenile death penalty prohibition -- also evidences that the United States did not consider its "reservation" to Article 6.5 of the ICCPR to be a condition of its ratification.

Thus the entire ICCPR remains in effect in the United States, including Article 6.5, and this nation is obligated to comply with all of the provisions of that treaty in good faith. See Article 53, Vienna Convention (Pacta Sunt Servanda: "Every treaty in force is binding upon the parties to it and must be performed by it in good faith.")

17. The Senate Foreign Relations Committee apparently understood that the Senate's "reservation" to Article 6.5 negated *none of* this nation's obligations under that treaty. Thus, upon adopting the ICCPR the Committee "recognize[d] the importance of adhering to international standard." Regarding "the imposition of the death penalty for crimes committed by persons below the age of eighteen," the Committee stated that change in various states' death penalty laws vis a vis juveniles might be "appropriate and necessary" "to bring the United States into full compliance at the international level." 31 I.L.M. 645, 650 (1992). In turn, the then-current Administration promised our treaty partners that

"judicial means" would be used to guarantee full compliance with the ICCPR. Id. at 657.

18. The Senate's purported "reservation" to Article 6.5 of the ICCPR also violates Article II, Section 2 of the federal Constitution, which vests in the President the exclusive "power, by and with the advice and consent of the Senate, to make treaties, provided that two-thirds of the Senate shall concur." The Senate's authority to provide "advice and consent" and to "concur" does not include the power to modify "by reservation" the provisions of a treaty made by the President. Cf. Clinton v. City of New York, 524 U.S. 417 (1998) (line-item veto invalid because the Constitution does not authorize the President "to enact, to amend, or to repeal statutes.") See also Bowers v. Synar, 478 U.S. 714 (1986); I.N.S. v. Chadha, 462 U.S. 919 (1983).

19. When it ratified the ICCPR, the Senate also enacted a resolution of "understanding" that the treaty's protections are not "self executing." Thus, the Senate purported to require additional legislation before the treaty would be enforceable by the Courts. This also violates not just the treaty's terms, but our federal Constitution.

The Constitution's Supremacy Clause, cited earlier, states that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." The Supreme Court repeatedly has affirmed that,

with or without domestic legislation to implement treaty provisions, they are the law of the land. See, e.g., Owings V. Norwood's Lessee, 9 U.S. (5 Cranch) 344 (1809); Maiorano v. Baltimore & Ohio R.R., 213 U.S. 268, 272-73 (1909) ("a treaty ... by the express words of the Constitution, is the supreme law of the land, binding alike National and state Courts, and is capable of enforcement, and must be enforced by them in the litigation of private rights.")

An express right of action is not necessary to invoke a treaty as a defense, because the treaty nullifies any inconsistent state law. See The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1870); Kolovrat v. Oregon, 366 U.S. 187 (1961) (use of a treaty as defense to the escheatment of property); Cook v. United States, 288 U.S. 102, 118 (1933); Patsone v. Pennsylvania, 232 U.S. 138, 145 (1914). Thus, unless the language of a treaty is muddled, or the treaty's terms "import a contract, when either of the parties engages to perform a particular act," or the treaty itself calls for implementing legislation by its subject nation-states, treaties are deemed to be self-executing. See Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829). See also United States v. Percheman, 32 U.S. (7 Pet.) 51, 89 (1833); United States v. Rauscher, 119 U.S. 407 (1886).

None of these conditions apply here. The language of Art. 6.5 is perfectly clear; contractual obligations are not at issue; and nothing in the ICCPR anticipates or requires enabling legislation before its terms become effective. To the contrary,

at Art. 2.3(b) the ICCPR specifically says that the Treaty is self-executing: "any person claiming [entitlement to a remedy under the treaty] shall have his right thereto determined by ... competent authority provided for by the legal system of the State."

20. By declaring -- contrary to the treaty's express terms, and despite the clarity of its language -- that this treaty was not self-executing, the Senate illegally interjected the House of Representatives into the treaty ratification process. If given effect, the Senate's "understanding" would deprive individuals of the ability to enforce rights guaranteed by treaty -- the "supreme Law of the Land," pursuant to Article VI -- unless the House passed enabling legislation. The framers of the Constitution excluded the House from the treaty ratification process, yet the Senate's "understanding" here would fully provide the House with *de facto* veto power over the treaty -- i.e., by refusing to pass the appropriate enabling legislation, the House effectively "vetoes" the treaty.

For these reasons, the Senate's declaration that the ICCPR is non-self-executing is simply invalid. Indeed, such an interpretive declaration by the Senate would invade the prerogatives of the judiciary to "say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

#### **Customary International Law**

21. Customary international law encompasses "the customs and usages of civilized nations." Independent of treaty law, it

is federal law, therefore binding upon all courts within the United States despite the existence of state law to the contrary. See The Paquete Habana, 175 U.S. 677, 700 (1900)("International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination"). See also Restatement (Third) of Foreign Relations Law of the United States, Sec. 111, reporters' note 4 (1987) ("matters arising under customary international law also arise under 'the laws of the United States,' since international law is 'part of our law'...and is federal law"); and Sec.702 ("[T]he customary law of human rights is part of the law of the United States to be applied as such by state as well as federal courts.")

22. An international law norm must satisfy a two-pronged test in order to be deemed legally binding "customary international law": (1) the norm must be adhered to in practice by most countries, and 2) those countries that follow the norm must do so because they feel obligated by a sense of legal duty ("opinio juris"). See Barry E. Carter and Philip R. Trimble, International Law (3d ed., 1999), at pp. 134-138.<sup>9</sup> See also

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<sup>9</sup> The International Court of Justice (ICJ), in Nicaragua v USA (merits) (ICJ Rep. 1986, 14, at 97) similarly stated that customary international law is constituted by two elements, the objective, "state practice which is evidenced by the long-term, widespread compliance by many nations;" and the subjective, "opinio juris, in that nation-states believe that the law is not merely desired, but mandatory and required by international law." Connie de la Vega & Jennifer Brown, *Can United States Treaty*

Article 38, Statute of the International Court of Justice, 59 Stat.1005, 1060 (1945)("The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply...(b) international custom, as evidence of a general practice accepted as law..."); Note, *Judicial Enforcement of International Law Against the Federal and State Governments*, 104 Harv.L.Rev.1269, 1273 (1991).

23. Even if the United States was not bound to bar the execution of juvenile offenders due to its recited treaty obligations, customary international law would bar application of the death penalty in the instant matter. Both prongs of the test for "customary international law" are satisfied by the combined weight of the principles and authorities recited herein, to wit:

24. The norm that prohibits the execution of juvenile offenders is embodied in Article 37 of the Convention on the Rights of the Child ("CRC"), a multilateral treaty adopted in 1989 by the United Nations General Assembly and signed without reservation by the Secretary of State as the President's designee in 1995. This treaty, attached as Appendix "4", has been ratified by 191 of the world's 193 nation-states. The only two non-ratifying nations are Somalia -- which has no government -- and the United States. The Report of the Secretary General, UN ESCOR, Economic and Social Council, Subst. Sess., UN Doc E/2000/3 at 21 ¶ 90 (2000); Amnesty International, *Children and the Death*

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*Reservation Provide Sanctuary for the Juvenile Death Penalty?*, 32 USFL Rev. 756 (1998).

*Penalty* (Nov. 2000) ([www.amnesty.org](http://www.amnesty.org)), attached hereto and referred to herein as "Appendix "5". See also Amnesty International, *United States of America, Shame in the 21st Century - Three Child Offenders Scheduled for Execution in January 2000* (December, 1999).

Aside from the ICCPR and the CRC, the international law against executing juvenile offenders also is expressed in at least two other multilateral treaties that the United States has signed and/or ratified: the Convention Relative to the Protection of Civilians in Time of War (Fourth Geneva Convention), at Article 68, paragraph 4 (Art. 68.4), ratified by the United States without reservation in 1949; and the American Convention on Human Rights (ACHR), at Chapter II, Art.4.5, signed by the United States in 1977 but not yet ratified.

25. This norm against executing juvenile offenders has been expressed or agreed to by every international body that has commented upon it. The bodies of the United Nations officially and repeatedly have registered the position that the continued use of the death penalty against juveniles in the United States violates international law. The United Nations General Assembly adopted the United Nations Economic and Social Council's resolution to implement safeguards to prevent the juvenile death penalty, see *Safeguards Guaranteeing Protection of the Rights of Those facing the Death Penalty*, ESC. Res 1984/50, annex, 1984 UN ESCOR Supp. (No 1 ) at 33, UN Doc E/ 1984/84 (1984). In 1985,

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the United Nations General Assembly adopted by consensus the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, which also opposed capital punishment for juvenile offenders. (GA res 40/33, annex, 40 UN GAOR Supp. (No 53) at 207, UN Doc A/40/53 (1985).

In 1998, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions also issued a report which repeatedly acknowledged that customary international law recognizes a "clear...prohibition" to the execution of people who were under the age of 18 at the time of the offense. The report noted that this norm is "reflected in the wide range of international legal instruments." See Report of Special Rapporteur (Appendix "3"), paras. 24, 49, 50, 55.

Since 1997, the United Nations Commission on Human Rights has passed resolutions calling on states to abolish the death penalty in general, but has specifically asked nations "not to impose it for crimes committed by persons below 18 years of age." See *The Question of the Death Penalty*, Comm. on Hum. Rts., 57<sup>th</sup> Sess. Resolution 2001/68, adopted April 25, 2001, E/CN.4/2001/Res/68 (2001); *The Question of the Death Penalty*, Comm on Hum. Rts., 56<sup>th</sup> Sess, Resolution 2000/65, adopted April 27, 2000, E/CN.4/2000/RES/65 (2000); *The Question of the Death Penalty*, Comm on Hum. Rts., 55<sup>th</sup> Sess, Resolution 1999/61, adopted April 28, 1999, E/CN.4/RES/1999/61 (1999); *The Question of the Death Penalty*, Comm on Hum Rts., 54<sup>th</sup> Sess, Resolution 1998/8,

adopted April 3, 1998, E/CN.4/1998/RES/8 (1998); *The Question of the Death Penalty*, Comm. on Hum. Rts., 53<sup>rd</sup> Sess. Resolution 1997/12, adopted April 3 1997, E/CN.4/1997/RES/12(1997).

These resolutions passed with a number of dissenting votes, which can be attributed to the fact that the resolutions call for a general moratorium on the death penalty as a whole; a number of nations still employ capital punishment, which is not prohibited by the International Covenant. However, in 2001 the one Commission resolution which mentions the prohibition of the juvenile death penalty as a *separate* issue passed by consensus, without even the necessity of a vote. See *Rights of the Child*, Comm on Hum. Rts. 57<sup>th</sup> Sess., Resolution 2001/75, adopted April 25, 2001, E/CN.4/2001/RES/75 para. 28 (a) (2001) (Appendix "6"). The United Nations Sub-Commission on the Promotion and Protection of Human Rights has passed similar resolutions. In 1999, The United States was specifically mentioned as one of six nations that had executed juvenile offenders since 1990, and as having accounted for 10 of the 19 executions during that time period. *The Death Penalty particularly in relations to juvenile offenders*, United Nations Sub-Commission on the Promotion and Protection of Human Rights, 52<sup>nd</sup> Sess., Res. 1999/4, adopted August 24, 1999, UN Doc. E/CN.4/SUB.2/RES/1999/4 (1999). One year later, in August, 2000 the Sub-Commission adopted Res. 2000/17, *The Death Penalty particularly in relations to juvenile offenders*, UN Doc. E/CN.4/Sub.2/RES/2000/17 (2000). This

resolution, attached as Appendix "7", also confirms "that the imposition of the death Penalty on those aged under 18 at the time of the commission of the offence is contrary to customary international law." It requests that governments comply with the mandates of Article 37 of the CRC, and Article 6(5) of the ICCPR. Bluntly stating (as did the Special Rapporteur) that "...the imposition of the death penalty upon those aged under 18 at the time of their offense is contrary to customary international law," the resolution goes on to

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

Id.

26. In continuing to execute juveniles, the United States thus acts in defiance of substantial international consensus and law. The universal nature of this prohibitive, customary international law norm is evident from the ratification by 191 nation-states of the CRC, and from the widespread ratification of the ICCPR and other treaties that prohibit juveniles from being subjected to the death penalty. It is apparent from many (traditionally supportive) nation-states' condemnation of the ongoing execution of juveniles in the United States (see footnote 8, supra). And it is evidenced by the virtual cessation of juvenile executions throughout the world, except in a few states of the United States.

27. Every organized nation in the world, *except the United States*, now officially prohibits the execution of minors.<sup>10</sup> Since 1990 only six countries other than ours are known to have executed children who were less than eighteen years old at the time of their crime: Iran (6), Pakistan (2), Nigeria (1), the Democratic Republic of Congo (DRC) (1), Saudi Arabia (1), Yemen (1). Since 1990 the United States has executed *fifteen*. Even in these few other cited countries, the practice has become nearly extinct. Since 1997 only three juvenile executions are known to have taken place outside of the United States, two in Iran and one in DRC. In fact, of the six foreign nations that have reportedly executed juvenile offenders since 1990, all have either changed their laws, or the governments have denied that the executions took place.<sup>11</sup>

It is beyond cavil that the overwhelming majority of known

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<sup>10</sup> The list includes countries whose human rights records are often criticized, such as Russia, China, Afghanistan, Iran, Iraq, Pakistan, Yugoslavia, and Syria. See "Appendix 5".

<sup>11</sup>Yemen and Pakistan have since abolished the death penalty for juvenile offenders, and the DRC has instituted a moratorium on executions. According to OMCT-World Organization Against Torture, four other juvenile offenders sentenced to death in the DRC in a military court were granted stays and the sentences were commuted following an appeal from the international community (World Organization Against Torture, 2001). Moreover, Saudi Arabia and Nigeria deny that they have executed any juveniles (UN Commission On Human Rights, Summary Record, 2000). It appears that, even in a time of war, the military intends to comply with the international norm against the execution of juveniles. See Appendices "2" and "5". See also Amnesty International, *The Death Penalty Worldwide: Developments in 1999* at 18-20 (April 2000); Human Rights Watch, World Report 2001 ("Children in Conflict with the Law"; [www.hrw.org/wr2k1/children/child4.html](http://www.hrw.org/wr2k1/children/child4.html)).

executions of children are in the United States,<sup>12</sup> where a few states stand alone in the world as governmental entities which defy this norm, which is adhered to in practice by most nations due to a sense of legal duty. Demonstrably, it is rule of customary international law.

28. A nation-state may avoid being bound by a rule of customary international law only if it has been a "persistent objector" to the norm or rule. Objection to the norm must be "consistent" and, irrespective of disagreement, if an objecting state even has simply signed a treaty that covers the issue to which it then objects, it is not a "persistent objector." See The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework, 2 U.C. Davis J.Int'l.L.& Pol'y. 147, 163 (1996).

The United States' objection to the international law norm at issue here certainly has not been consistent, *and* this nation has signed numerous international instruments that embody the norm. Thus, the United States ratified the Fourth Geneva

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<sup>12</sup> Even in this country, of the 39 jurisdictions that retain capital punishment (38 states and the federal government), 16 explicitly prohibit the execution of juveniles. Of the remaining 23 jurisdictions, 16 have never actually executed a juvenile offender and, of those, seven have never even put a juvenile on death row. Since 1993, all juvenile executions in the United States have been carried out either in Texas (5), Virginia (3), or Oklahoma (1). Victor Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes January 1, 1973--December 31, 2000* (February, 2001)([www.law.onu.edu/faculty/streib/juvdeath.htm](http://www.law.onu.edu/faculty/streib/juvdeath.htm)). [Since Mr. Streib's Report was published listing four Texas executions of juvenile offenders during the relevant time period, Texas executed a fifth juvenile offender in November, 2001.]

Convention without objecting to the norm. It signed the American Convention on Human Rights without objecting to the norm. It signed the Convention on the Rights of the Child without objecting to the norm. It participated in the framing of the ICCPR and signed it without objecting to the norm; indeed, it even jointly sponsored a United Nations General Assembly resolution that Article 6 of the ICCPR, which embodies the norm, establishes a "minimum standard" for all member states, whether or not they had adopted that treaty! G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980).

The Senate's purported "reservation" to Art. 6.5 of the ICCPR during its ratification process notwithstanding, the United States certainly may not now make any "persistent objector" claim. As is every other nation of the world, the United States is bound by this recited customary rule of international law.

### **Jus cogens**

29. Even if the United States would or could claim that it had been a "persistent objector" to the norm, it still could not exempt itself from the prohibition against executing juvenile offenders. This is now a peremptory, *jus cogens* norm.

Under Article 53 of the Vienna Convention, a *jus cogens* norm is "a norm accepted and recognized by the international community as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." The Restatement (Third) of the Foreign Relations Law agrees with this standard, asserting that

the norm is established where there is acceptance and recognition by a "large majority" of states, even if over dissent by "a very small number of states" (Restatement (Third) of Foreign Relations Law, §102, and reporter's note 6 (1986), citing Report of the Proceedings of the Committee of the Whole, May 21, 1968, UN Doc. A/Conf. 39/11 at 471-72).

In other words, the norm describes such a bare minimum of acceptable behavior that *no* nation may derogate from it.

30. The overwhelming application of the norm against executing juvenile offenders has rendered it a *jus cogens* norm. The treaties, pronouncements, and practices cited in the foregoing paragraphs demonstrate that, particularly in light of the dramatic movement of nations over the last decade, the prohibition has become as widespread and unquestionable as have the prohibitions against slavery, torture, and genocide. There are no contrary expressions of opinion by any country, nor by agency charged with the enforcement and interpretation of the within-cited international accords. Except for a handful of States within these United States, the global consensus on this point is absolute.

31. The norm is non-derogable not only because it is a *jus cogens* norm. Its non-derogable nature also is expressed in Art. 4.2 of the ICCPR (discussed supra), and has been reiterated by numerous international bodies, and individually by numerous sovereign nations to which the United States is bound by treaty and legal tradition (see paragraph 25 and footnote 8, supra).

32. When it recently reminded member nations that "the imposition of the death penalty upon those aged under 18 at the time of their offense is contrary to customary international law," the United Nations Sub-Commission on the Promotion and Protection of Human Rights urged each member state -- the government, and so here the prosecution -- "to remind their judges that the imposition of the death penalty against such offenders is in violation of international law." (Appendix "7," paragraph 3).

The Commonwealth, self-evidently, is asking this Court for precisely the opposite; i.e. it is asking the Court to *ignore* both non-derogable international law, and the express terms of a ratified multilateral treaty.

But as the "supreme Law of the Land," treaties preempt any existing state law. See United States v. Pink, 315 U.S. 203, 230-31 (1942)("state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement"). Beyond our treaty obligations, to whatever extent possible any Court within these United States must construe United States law so as to avoid violating principles of international law. See Murray v. The Schooner Charming Betsy, 6 U.S. 64 (1804). See also Zschernig v. Miller, 389 U.S. 429, 440 (1968); Missouri v. Holland, 252 U.S. 416 (1920). Thus this Court has the power, and indeed the obligation, to ensure that the rights guaranteed by international treaty and international law are given effect within this Commonwealth.

33. It is no small irony that this nation, which in many respects properly holds itself out as the paragon of civil and individual rights, is the only nation on earth where governmental authorities openly endorse and engage in this universally condemned practice. But just as South Africa could not overcome the prohibition against apartheid, the United States can not overcome the prohibition against killing children.

For all of these recited reasons, this Court is urged to determine that the death penalty may not be applied in this case because, in the first instance, executing a person who was less than eighteen years old at the time of his alleged crime violates settled treaty and international law.

**B. EVOLVING STANDARDS OF DECENCY DICTATE THAT EXECUTION OF JUVENILE OFFENDERS VIOLATES THE UNITED STATES CONSTITUTION**

34. International law also is relevant as an objective source of standards for construing the United States Constitution. Thus, for the past 50 years the United States Supreme Court has cited international law when it has had occasion to analyze the Eighth Amendment.

In its landmark decision in Trop v. Dulles, 356 U.S. 86 (1958), the Court determined that denationalization is cruel and unusual punishment for military desertion. Holding that the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society," the Court stated that international law and the practices of other

countries provide the Court with a source for determining those standards. Id., at 101. As evidence that denationalization constitutes "cruel and unusual punishment," the Court cited the fact that only two nations permit denationalization as a penalty for military desertion. Id., at 103.

35. Since Trop was decided, the Supreme Court has continued to follow it as precedent, using Trop's "evolving standards" analysis, including international law and practice, to construe the Eighth Amendment. Thus, in holding that the death penalty for rape violates the Eighth Amendment, the plurality noted that the Court must take into account the "climate of international opinion concerning the acceptability of a particular punishment." Coker v. Georgia, 433 U.S. 584, 596 n. 10 (1977). Similarly, in holding that the death penalty for an accessory to robbery violates the Eighth Amendment, the Court referred to international law standards in determining that the punishment is disproportionate. See Enmund v. Florida, 458 U.S. 782, 796 n. 22 (1982).

36. The Supreme Court last visited the question of the constitutionality of the death penalty for juvenile offenders in 1988 and 1989. In Thompson v. Oklahoma, 487 U.S. 815 (1988), the Court held that the Eighth Amendment prohibits the execution of a person who was 15 years old at the time of his offense. The Court acknowledged that "(w)e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual." Id. at 830, n.31. The lead

opinion<sup>13</sup> most specifically embraced the views of "other nations that share our Anglo-American heritage," and "leading members of the Western European community," as indicators of "evolving standards of decency," noting too that juvenile executions were prohibited in the Soviet Union. Id., at 830.

A year later, in Stanford v. Kentucky, 492 U.S. 361 (1989) the Court held that the execution of a 16 year old for murder did not violate the Eighth Amendment. In a footnote, Justice Scalia wrote for the Stanford plurality (Stanford was decided by a 4-1-4 vote) "[w]e emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* ... that the sentencing practices of other countries are relevant" to Eighth Amendment analysis. Id., at n. 1 (emphasis in original).

Dissenting, Justice Brennan noted the precise contrary. In line with settled Eighth Amendment jurisprudence -- with Trop, Thompson v. Oklahoma, Coker v. Georgia, Enmund v. Florida -- he wrote that "(o)ur cases recognize that objective indicators of contemporary standards in the form of legislation in other countries is also of relevance to Eighth Amendment analysis." Id., 492 U.S. at 389. More recently, Justice Breyer noted that the Supreme Court's "willingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a 'decent respect to the opinions of mankind.'" Knight v. Florida, 528 U.S. 990, 997 (1999) (dissenting from denial of

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<sup>13</sup> Thompson was decided by a 4-1-3 vote.

cert).

37. From its earliest days the Supreme Court confirmed the Framers' intention to incorporate international law and standards into our jurisprudence.<sup>14</sup> Chief Justice Jay asserted in Chisholm v. Georgia, 2 Dall. 419, 474 (1793) that the United States "had, by taking a place among the nations of the earth, become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed." In 1804, in Murray v. Schooner Charming Betsy, supra, 6 U.S. at 119, the Court held that laws of the United States "ought never to be construed to violate the law of nations," if any other possible construction exists. In The Paquete Habana, supra, 175 U.S. at 700, the Court acknowledged that "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending on it are duly presented for their determination."

Our present-day law, our "evolving standards of decency," likewise should not be -- indeed, *must* not be -- construed as being at odds with the "law of nations." See Justice Harry A. Blackmun, The Supreme Court And The Law Of Nations, 104 Yale L. J. 39, 47-48 (1994) ("There can be no question that the law of nations prohibits the execution of juvenile offenders....Under the principles set forth in the Paquete Habana, interpretation of the

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<sup>14</sup> Article I, Section 8, Clause 10, of the Constitution gives Congress the power to define and punish offenses against the Law of Nations. The Supremacy Clause, Article VI, Clause 2, deems international treaties to be part of the "supreme Law of the

Eighth Amendment, no less than interpretations of treaties and statutes, should be informed by a decent respect for the global opinions of mankind").

However it might be interpreted or argued, Justice Scalia's plurality footnote certainly did not, nor could it, undo the Constitutionally-required deference that the Supreme Court has paid, since its inception, to the "Law of Nations." Sentencing practices of other nations necessarily become relevant to constitutional analysis when those practices produce or reflect binding international law. For that reason alone, the referenced Stanford footnote cannot be said to categorically reject international standards for interpreting the Eighth Amendment.

38. That international standards may not blithely be ignored, or swept aside in a footnote, is most glaringly evident from the fact that international law on the issue before this Court has solidified since Stanford was decided. The prohibition against executing juvenile offenders has become a non-derogable, *jus cogens* norm. See discussion supra. *Jus cogens* shapes and limits the legislative powers of otherwise sovereign nation-states. In particular, the principle restrains nations from transgressing upon those interests deemed basic and fundamental to the international order.

A dramatic international consensus, of considerable strength prior to and irrefutable subsequent to 1989, serves to bar the death penalty for juveniles in every nation of the world,

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Land. "

including the United States. Constitutional analysis of this issue cannot be separated from the *jus cogens* norm that now prohibits the practice.

When it considers not just the international law issue but Hector Huertas' constitutional claims, too, this Court must recognize that the prosecution is seeking to apply Pennsylvania law so that this state becomes one of the tiny handful of United States' states that are the only organized political entities in the world to execute juvenile offenders under a claim of legal right.

39. Even if there was no customary international law standard or *jus cogens* norm at issue, pursuant to the Supremacy Clause the Eighth Amendment must be interpreted in a manner consistent with our treaty obligations. Justice Brennan noted in his Stanford dissent that "three leading human rights treaties ratified or signed by the United States explicitly prohibit juvenile death penalties."<sup>15</sup> As discussed supra, at para. 8, simply having signed the treaties that contain the prohibition requires the United States to enforce this prohibition.

40. Aside from the fact that Justice Scalia's 1989 Stanford footnote is non-binding dicta, then, and aside from the fact that it did not purport to overrule Thompson's 1988 analysis of

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<sup>15</sup> Per Stanford, 492 U.S. at 390, n.10, Justice Brennan was referring to the Geneva Convention of 1949 as signed and ratified, and to the ACHR and the ICCPR as signed. Since Stanford, our ratification of the ICCPR in 1992 (albeit with a "reservation") and our signature to the CRC, without reservation, makes the case even stronger.

"evolving standards of decency," his comments do not trump *jus cogens*; they do not negate the Supremacy Clause; they do not overturn the Court's centuries-old respect for, and adherence to, international law; and they do not reverse a half-century tradition of the Court's looking to international law as an aid in determining "evolving standards" for purposes of Eighth Amendment analysis.

41. Execution of juvenile offenders is contrary to fundamental principles of American justice in other respects, too. Our system punishes according to the degree of culpability. It reserves the death penalty for the "worst of the worst" offenders. And it historically recognizes the lack of adult reasoning and judgment in those under age eighteen. Family dysfunction and mental impairment -- such as that experienced by Hector Huertas -- of course exacerbate the vulnerabilities of youth.

Adolescence is a transitional period of life when cognitive abilities, emotions, judgment, impulse control, identity -- even the brain, *see, e.g.,* Giedd, J.N. et al., *Brain Development During Childhood and Adolescence: a Longitudinal MRI Study*, Nature Neuroscience, Vol.2 No.10 (Oct. 1999) -- are still developing. Due to the very nature of their being, teenagers are less mature, and therefore less culpable, than adults who commit similar acts but have no such explanation for their conduct.

42. In cases that preceded Stanford -- and so prior to the recent physiological research that confirms unfinished brain development in adolescents -- the Supreme Court explicitly

recognized this very point. See, e.g., Schall v. Martin, 467 U.S. 253, 265, n.15, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984) ("Our society recognizes that juveniles in general are in the earlier stages of their emotional growth, that their intellectual development is incomplete, that they have had only limited practical experience, and that their value systems have not yet been clearly identified or firmly adopted....Perhaps more significant is the fact that in consequence of lack of experience and comprehension the juvenile does not view the commission of what are criminal acts in the same perspective as an adult...."); Thompson v. Oklahoma, supra, 487 U.S. at 825, n. 23 (acknowledging "this basic assumption that our society makes about children as a class: we assume that they do not yet act as adults do, and thus we act in their interest by restricting certain choices that we feel they are not yet ready to make with full benefit of the costs and benefits attending such decisions. It would be ironic if these assumptions that we so readily make about children as a class -- about their inherent differences from adults in their capacity as agents, as choosers, as shapers of their own lives -- were suddenly unavailable in determining whether it is cruel and unusual to treat children the same as adults for purposes of inflicting capital punishment. Thus, informing the judgment of the Court today is the virtue of consistency, for the very assumptions we make about our children when we legislate on their behalf tells us that it is likely cruel, and certainly unusual, to impose on a child a punishment that takes as its predicate the

existence of a fully rational, choosing agent, who may be deterred by the harshest of sanctions and toward whom society may legitimately take a retributive stance").

43. Justice Brennan's Stanford dissent, in which he was joined by three other justices, flatly opined that "juveniles so generally lack the degree of responsibility for their crimes that is a predicate for the constitutional imposition of the death penalty that the Eighth Amendment forbids that they receive that punishment." Id., 492 U.S. at 394. Those four dissenting justices interpreted the Eighth Amendment as prohibiting the execution of any offender less than eighteen years old at the time of the crime. Id., 492 U.S. at 405.

44. Significantly, Justice O'Connor joined Justice Scalia's Stanford plurality because she saw no "national consensus" in 1989 that prohibited executing sixteen and seventeen year-old offenders. She took pains to note, however, that "proportionality analysis," the Court's assessment of an offender's relative blameworthiness, must play a role in Eighth Amendment analysis.

45. Aside from the prohibitive international norm, then, a growing body of objective factors support the Supreme Court's pre-Stanford recognition of the debility of youth, and point to a "modern societal consensus" that obviates the Stanford Court's reluctance to categorically invalidate capital punishment for juvenile offenders above 15 years of age. See id., 109 S.Ct. at 2980 ("We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any

person who murders at 16 or 17 years of age.")

One such factor is the new research proving that the brain of even an eighteen-year-old is not yet fully formed. It appears that adolescent brain development was not a consideration placed before the Stanford Court. Even if it had been, when Stanford was decided scientists still believed that the brain was fully developed before puberty. It was only in the following decade, through studies such as Dr. Giedd's, that scientists learned that the brain is not fully formed until an individual is in his early 20's. See Brownlee, B. et al., *Inside the Teen Brain*, U.S. News & World Report, August 9, 1999. This research lends new, scientific validity to our traditionally protective attitude toward young people, and as a component of relative blameworthiness is a factor that a *majority of* the Stanford Court would have deemed relevant to Eighth Amendment analysis.

46. Additionally, the ICCPR was ratified by the United States (albeit with an attempted "reservation") in 1992, and the CRC was signed by this nation, *without* reservation, in 1995. As outlined supra, both of these treaties require that signatory nations refrain from executing juvenile offenders. The United States' post-Stanford actions with regard to these treaties indicate a growing awareness not just in the entire world beyond our borders, but also within this nation, that juvenile executions are no longer tolerable.

47. Execution of juvenile offenders also is uniformly rejected by children's organizations throughout the United States.

Thus the Child Welfare League of America, the Children's Defense Fund, the Youth Law Center, the Juvenile Law Center, the Coalition for Juvenile Justice, the American Society for Adolescent Psychiatry, the American Academy for Child and Adolescent Psychiatry, and the National Mental Health Association all urge that these executions are unacceptable in a civilized society. The American Bar Association and the American Law Institute also have reaffirmed their opposition to any continuation of this practice.

48. The federal government, and a majority of Pennsylvania's sister states, restrict the application of the death penalty to juvenile offenders. Of the 38 states that permit the death penalty, only 23 permit the execution of juvenile offenders. Among these 23 states, only 16 have juvenile offenders on their death rows; only 7 have carried out actual executions of juveniles since the death penalty was reinstated in 1973; and only three have done so since 1993. See footnote 12, supra, and the authority cited therein.

Since Stanford, there is other legislative and judicial movement within the United States toward eradicating juvenile executions. When the federal death penalty statute was expanded in 1995, juvenile offenders remained excluded from its reach. In 1993, in Washington v. Furman, 122 Wa. 2d 440, 858 P.2d 1092 (1993), Washington's Supreme Court invalidated the death penalty for juveniles, on state constitutional grounds. In 1999, Montana abolished the juvenile death penalty, while the Florida Supreme Court raised the age of eligibility (albeit from 16 to 17, not 18)

in Brennan v. State, 754 So.2d 1 (1999). The number of states considering legislation to abolish the execution of juvenile offenders continues to grow, and includes Arizona, Indiana, Kentucky, South Carolina, Nevada, Mississippi, and Arkansas. A.C.L.U. *Death Penalty Campaign: In The States* ([http://www.aclu.org/death-penalty/in\\_the\\_states.html](http://www.aclu.org/death-penalty/in_the_states.html)); Victor Streib, *The Juvenile Death Penalty Today*, supra. And a recent national poll conducted by the Houston Chronicle (reported on February 6, 2001) indicated that solid support for the capital punishment of juvenile offenders has fallen to only 26%.

49. The combined weight of authority yields that, since Stanford was decided, "standards of decency" have evolved to the extent that they now prohibit the execution of juvenile offenders. In practice, while there are a few hold-out states, the standard within the United States now complies with *jus cogens*.

**C. PENNSYLVANIA'S CONSTITUTION PROHIBITS THE EXECUTION OF JUVENILE OFFENDERS, EVEN IF THE FEDERAL CONSTITUTION DID NOT.**

50. If a death sentence against Hector Huertas, who was seventeen years old at the time of this alleged offense, did not violate the Eighth Amendment to the United States Constitution, it still would be forbidden as "cruel punishment" under Article 1, Section 13 of the Pennsylvania Constitution.

51. The Pennsylvania Supreme Court "has long emphasized that, in interpreting a provision of the Pennsylvania Constitution, we are not bound by the decisions of the United

States Supreme Court which interpret similar (yet distinct) federal constitutional provisions." Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887, 894 (1991) (citing cases). "The federal constitution establishes certain minimum levels which are 'equally applicable to the [analogous] state constitutional provision.' However, each state has the power to provide broader standards, and go beyond the minimum floor which is established by the federal Constitution." Id. (citations omitted). The Edmunds Court went on to say:

Here in Pennsylvania, we have stated with increasing frequency that it is both important and necessary that we undertake an independent analysis of the Pennsylvania Constitution, each time a provision of that fundamental document is implicated. Although we may accord weight to federal decisions where they "are found to be logically persuasive and well reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees," we are free to reject the conclusions of the United States Supreme Court so long as we remain faithful to the minimum guarantees established by the United States Constitution....[I]t is essential that courts in Pennsylvania undertake an independent analysis under the Pennsylvania Constitution.

Id., 586 A.2d at 894-95 (citations omitted).

52. Edmunds established four factors that our Courts must consider when analyzing whether Pennsylvania's Constitution provides greater protection than the "minimum floor" of a federal constitutional provision:

- 1) text of the Pennsylvania constitutional provision;
- 2) history of the provision, including Pennsylvania case-law;
- 3) related case-law from other states;
- 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.

Id., 586 A.2d at 895. An analysis of these factors yields that, if the Eighth Amendment of the federal Constitution still can be interpreted to permit execution of juvenile offenders, then Article 1, Section 13 of Pennsylvania's Constitution prohibits such executions in this state.

### **The Text Of Article 1, Section 13**

53. Article 1, Section 13 bars the infliction of "cruel punishments": "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." The Eighth Amendment to the United States Constitution forbids the imposition of punishments that are "cruel and unusual." ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.")

This difference in wording favors an independent interpretation of Article 1, Section 13 for at least two reasons. First, Pennsylvania's Framers rejected the Eighth Amendment's language, indicating an intent not to be bound by Eighth Amendment analysis.<sup>16</sup> Second, on its face Article 1, Section 13 prohibits

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<sup>16</sup> Pennsylvania's Constitution of 1776 did not include a prohibition against "cruel punishments," instead, requiring simply, at Section 29, that "excessive bail shall not be exacted forailable offenses and that all fines shall be moderate." Present-day Article 1, section 13's "cruel punishment" language first appeared in Pennsylvania's Constitution of 1790, while the Eighth Amendment, and its prohibition of "cruel and unusual" punishment, was adopted the year after, in 1791. Yet when Pennsylvania revised its Constitution in 1838, it continued to prohibit "cruel punishment," and the language has remained unchanged to this day. Pennsylvania never adopted the federal requirement that, to trigger constitutional safeguards, punishment also must be "unusual."

any "cruel" punishment, while the Eighth Amendment prohibits only those punishments which are *both* "cruel and unusual." See Harmelin v. Michigan, 501 U.S. 957, 967 (1991), where after detailed analysis the United States Supreme Court hinged its opinion on precisely this point, permitting as a matter of Eighth Amendment law punishments that "may be cruel" because they are not also "unusual."

Pursuant to Harmelin, it is inescapable that the plain language of Pennsylvania's Constitution provides protection against more varied types of punishments than does that of the Eighth Amendment. See, e.g., People v. Bullock, 440 Mich. 15, 485 N.W.2d 866 (1992), where the Michigan Supreme Court interpreted its constitutional prohibition against "cruel **or** unusual" punishments to prohibit a punishment that Harmelin's Eighth Amendment analysis would have permitted.

The Commonwealth might point out that, to date, legislation within the various states has not eradicated the practice of executing juvenile offenders within the United States. The prosecutor might argue that this is "proof" that, as a nation, "standards of decency" have not yet evolved sufficiently to trigger constitutional protection against that practice. At least as regards Pennsylvania's Constitution, though, that argument is unavailing. If juvenile executions are not "unusual" enough to trigger federal constitutional protections, they are nevertheless "cruel" under Pennsylvania's Constitution, and so trigger its

independent protections, for the reasons discussed herein.

### Historical Perspectives and Pennsylvania Case Law

54. The history of capital punishment in Pennsylvania, and this state's traditional approach to the status of minority, confirm that Pennsylvania has played a leading role both in narrowing the application of capital punishment *and* in recognizing the relative debility of minority. This confluence also favors an interpretation of Article 1, Section 13 independent of the Eighth Amendment.

55. Pennsylvania's leading role in narrowing the application of capital punishment dates back to pre-Independence times, when the colony drastically limited the number of crimes for which the death penalty could be imposed. "In the late seventeenth century, ... only eleven crimes in Pennsylvania were punishable by death, while in England the number was fifty, and [in England] that number expanded over the next century to more than two hundred. Moreover, of the eleven capital crimes [in Pennsylvania], only murder and treason mandated capital punishment." Kermit L. Hall, *The Magic Mirror: Law In American History*, at 31 (1989).

Of all American colonies, Pennsylvania "broke most fully" with the English tradition of widespread application of capital punishment. Id. at 34. "In 1682, [Pennsylvania] developed a criminal code that prefigured later developments in the late eighteenth and early nineteenth centuries. The code emphasized the use of prisons and fines, and it forbade capital punishment," id. at 34, in all cases except where murder was "premeditated" or

"with malice." Increased British control over the colony undermined these reforms, and application of the death penalty was again expanded. Id.

But during the Revolution and in the early years of Independence, Pennsylvania again took a leading role in constricting capital punishment; it "was a hub of reform activity." Id., at 170. The Pennsylvania Constitution of 1776 "direct(ed) future legislators to compose a new and more humane criminal code 'as soon as may be.'" Id. By 1786 the Commonwealth had abolished the death penalty for robbery, burglary, and sodomy. Eight years later the Commonwealth implemented "an even more radical proposition," distinguishing two separate "degrees" of murder, with only first-degree murder punishable by death. Id.

After Independence, some of the Commonwealth's leading statesmen argued that capital punishment should be abolished. Benjamin Rush, a renowned Philadelphia physician and one of the signers of the Declaration of Independence, "was the strongest voice for reform [and abolition] in the new nation." Id. In 1788 Pennsylvania Attorney General William Bradford also became a death penalty abolitionist. Negley K. Teeters, *Hang By The Neck": The Legal Use Of Scaffold And Noose, Gibbet, Stake, And Firing Squad From Colonial Times To The Present* (1967). While the death penalty avoided abolition, the abolitionist movement succeeded in narrowing its use, and in other reforms, such as the abolition of public executions. Id.

In short, Pennsylvania "was a model of the moderate purposes

of law reform" regarding capital punishment, and led the new nation in narrowing the application of the death penalty. Hall, supra, at 170; see also Lawrence M. Friedman, *Crime and Punishment In American History*, at 73 (1993) (also describing Pennsylvania's "leading role" in limiting capital punishment).

56. Pennsylvania also long has been a leader in providing special protections to juveniles. "Institutional efforts to change the system of juvenile justice began in New York, Boston and Philadelphia in the 1820's" with the creation of "houses of refuge" for juveniles. Friedman, supra, at 163; accord, John N. Kane, Jr., Dispositional Authority And Decision Making In New York's Juvenile Justice System: Discretion at Risk, 45 Syracuse L. Rev. 925, 930-31 (1994).

Pennsylvania's houses of refuge for juveniles constituted a sharp break with the criminal justice system. Their aim was rehabilitative rather than punitive, and the treatment of juveniles derived from the common law doctrine of parens patriae ("the state is the father"), rather than from criminal law. Kane, supra, at 930. Although Pennsylvania has adopted legislation that allows criminally-charged juveniles in some instances to be treated presumptively as adults, our Juvenile Act continues to embody rehabilitative aims. See e.g., 42 Pa.C.S. §6301(b) ("Purposes. -- This chapter shall be interpreted and construed as to effectuate the following purposes: (1) ... to provide for the care, protection, and wholesome mental and physical development of children ... (2) ... to provide for children committing delinquent

acts programs of supervision, care and rehabilitation ... and the development of competencies to enable children to become responsible and productive members of the community").

57. At the same time, Pennsylvania law historically has observed the sharp distinction between adults' and juveniles' capabilities for appropriate and sensible decision-making. Aside from creating separate courts, defining different goals, and developing different treatment modalities for juveniles, our legislature has enacted numerous laws that recognize the debility of adolescent judgment. These include mandatory education statutes, child labor laws, and prohibitions against underage drinking and driving. Minors also may not vote or marry. They may not obtain an abortion without parental consent or court sanction. They may not purchase tobacco. A cursory overview of these enactments yields that the legislature continues to provide special protections to juveniles for a simple reason: they do not have the facility for good judgment that adults enjoy.

58. In Commonwealth v. Zettlemyer, 500 Pa. 16, 454 A.2d 937 (1982), nearly a decade before Edmunds was decided our Supreme Court undertook an historical analysis of Article 1, Section 13, and decided that the death penalty *per se* is not "cruel punishment" under the Pennsylvania Constitution. The Court opined that Eighth Amendment protections were "coextensive" with those of Article 1, Section 13. Concurrently, the Court recognized that "...the Pennsylvania prohibition against 'cruel punishment,' like its federal counterpart's prohibition against 'cruel and unusual

punishment,' is not a static concept," and went on to quote Trop's "evolving standards" language. Id., 454 A.2d at 967-968.

59. Zettlemyer was decided in the context of an adult defendant's claim that "imposition of the death penalty is inevitably `cruel punishment' under Article 1, Section 13," Id., 454 A.2d at 967 (emphasis added). In Commonwealth v. Means, 773 A.2d 143 (2000), our Supreme Court recently acknowledged that death penalty questions other than that posed in Zettlemyer certainly might implicate the protections of Article 1, Section 13:

Contrary to the decision of the trial court, we do not find the statutory subsections at issue violative of the (Eighth Amendment). However, this does not end our analysis, we must now turn our attention to appellee's argument, and the trial court's conclusions, under the Pennsylvania Constitution....Appellee recognizes that in Commonwealth v. Zettlemyer (cite), after a thorough historical review, this Court rejected the argument that Article 1, Section 13 provided greater protection against the imposition of a sentence of death than the Eighth Amendment. Appellee distinguishes Zettlemyer, arguing that the question in that case focused on whether death is per se cruel and unusual punishment. In this case, appellee asserts, it is not the penalty itself, but rather the decision-making process by which the jury chooses to impose death that is at issue. Appellee is correct; Zettlemyer is distinguishable on that basis...."

Id., 773 A.2d at 150-51.

60. Thus the Means court determined that a question concerning victim impact testimony was sufficiently "distinguishable" from Zettlemyer's analysis that, the "answer" under the Eighth Amendment notwithstanding, a separate Edmunds

analysis of Article 1, Section 13 was required.<sup>17</sup>

Pursuant to Means, and even without considering the impact of "evolving standards" or of Harmelin v. Michigan, supra, the question of whether a *juvenile* offender can be executed consistent with Pennsylvania's prohibition against "cruel punishment" also is wholly "distinguishable" from Zettlemyer's inquiry concerning an adult. The question is distinct, far more narrow, and of at least equal gravity as Means' question concerning victim impact testimony.

61. The Zettlemyer Court also said in passing that it was "implicit" in an earlier case, Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1959) that the death penalty as applied to a fifteen year old did not violate the state or federal Constitution. Zettlemyer, 454 A.2d at 969. Initially, it is noteworthy that Thompson v. Oklahoma, supra, which prohibits execution of fifteen-year-old offenders, undercuts Zettlemyer's interpretation of Green. But scrupulous study of Green also discloses that it does not say what the Zettlemyer Court attributed to it. Counsel did not raise, and the Court did not address, *any* constitutional question in Green. Yet Zettlemyer's misstatement of Green has become self-referential, repeated verbatim in Commonwealth v. Edwards, 521 Pa. 134, 555 A.2d 818, 831-32 (1989), and in Justice Larsen's dissent in Commonwealth v. Aulisio, 514 Pa. 84, 522 A.2d 1075, 1086 (1987), without analysis

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<sup>17</sup> Ultimately, the Court denied Means' challenge to victim impact testimony under the Pennsylvania Constitution.

or context.

It is significant that, writing for Aulisio's majority five years after Zettlemyer (and a year before Thompson), Justice Flaherty said that, because Aulisio's death sentence was overturned on other grounds, "we need not address at this time the issue of the constitutionality of the execution of children." Id., 522 A.2d at 1080. Obviously, Justice Flaherty understood that Green did not answer that question, nor did Zettlemyer with its (faulty) reference to Green. Perhaps it also is significant that of Zettlemyer, Green, Edwards, and Aulisio, only Green and Aulisio actually involved juveniles, and in *both* of those cases the Supreme Court *reversed* the juvenile's death sentence.

It is probably of greater consequence, though, that Zettlemyer was decided in 1982 -- ten years before Harmelin, and well before standards of decency had evolved as they now have. Thus the question at issue here arises in an entirely different context than that addressed in Zettlemyer's cited dicta. In other words, even if Zettlemyer had accurately assessed Green, developments over the last twenty years -- and the more than *forty* years since Green was decided -- necessarily have changed the answer to the constitutional question.

62. In pronouncing that Article 1, Section 13's protections are "co-extensive" with the Eighth Amendment, the Zettlemyer Court did not predict the United States Supreme Court's decision in Harmelin, in which the Court explicitly held that the "cruel and unusual" language of the Eighth Amendment demanded a result

vastly different, and more punitive, than would the word "cruel" standing alone. Given Harmelin's analysis, as well as that of Michigan's Supreme Court in People v. Bullock, supra, it is inescapable that Article 1, Section 13's prohibition of "cruel punishments" constricts the state's power in a way that the Eighth Amendment does not.

63. As detailed herein and fully in line with Zettlemyer's recognition of Trop, "standards of decency" regarding *juvenile* executions, at least, certainly have "evolved" since Zettlemyer was decided. The state here attempts to apply society's most extreme penalty to a juvenile offender, a member of a unique and vulnerable minority toward which not only Pennsylvania, historically, but now also every organized foreign nation on earth, has taken a protective posture. Surely this is sufficient to provoke the independent protections embodied within our state Constitution.

64. Thus, even assuming *arguendo* that Zettlemyer's analysis of Article 1, Section 13 was impeccable, Means, Harmelin, and our "evolving standards of decency" each would require independent analysis of our state Constitution in this case, and a result different from that obtained in Zettlemyer. If the federal Constitution did not prohibit the execution of juvenile offenders, our state Constitution would.

#### **Law From Other Jurisdictions**

65. In Harmelin, supra, the United States Supreme Court held that punishments that "may be cruel" are not prohibited by the

Eighth Amendment prohibition against "cruel and unusual" punishments. In People v. Bullock, supra, Michigan's Supreme Court interpreted its constitutional prohibition against "cruel or unusual" punishments to require a result contrary to, and protections more expansive than, what the Eighth Amendment requires, as interpreted in Harmelin. Pursuant to the reasoning of both Harmelin and Bullock, Article 1, Section 13's prohibition against "cruel" punishments also should be read to provide broader protections than the Eighth Amendment.

66. Law from other jurisdictions within the United States (*beyond* our nation's borders, the ban on juvenile executions is worldwide and absolute, as documented herein) also otherwise weighs toward a Pennsylvania constitutional ban on execution of juvenile offenders.

Of the six states that adjoin Pennsylvania, only one -- Delaware -- permits the execution of juvenile offenders. A ban on these executions is enforced in Maryland, New Jersey, New York, and Ohio, and West Virginia has no death penalty. Indeed, as detailed previously a majority of states, and the federal government, bar the death penalty for juvenile offenders. Only 23 states permit such executions, and among that number only 7 have carried out actual executions of juveniles since the death penalty was reinstated in 1973, and only three states have done so since 1993. See footnote 12, supra, and the authority cited therein.

67. Moreover, aside from the burgeoning movement re-evaluating and pushing for a moratorium on the death penalty

generally, there is ongoing legislative and judicial movement within the United States toward eradicating juvenile executions, in particular, and popular sentiment increasingly decries the practice. As noted previously, although the federal death penalty statute was expanded in 1995, juvenile offenders may not be executed under that law. In 1999, Montana abolished the juvenile death penalty, and the Florida Supreme Court raised the age for death penalty eligibility, although only to 17, not 18. Arizona, Indiana, Kentucky, South Carolina, Nevada, Mississippi, and Arkansas are among the growing number of states considering abolition of the death penalty for juveniles offenders. Victor Streib, *The Juvenile Death Penalty Today*, supra; A.C.L.U. *Death Penalty Campaign: In The States*, supra. The Houston Chronicle reports (February 6, 2001) that, nationwide, solid support for capital punishment of juvenile offenders has fallen to 26%. And in Washington v. Furman, 122 Wa.2d 440, 858 P.2d 192 (1993), Washington's Supreme Court invalidated the death penalty for juveniles.

68. The Furman decision adds another dimension supporting a Pennsylvania-law ban on death sentences for minors. Furman was convicted and sentenced to death for a murder that he committed two months before he turned eighteen. On appeal, he argued that execution of juvenile offenders violates Washington's Constitution, which like Pennsylvania's bars the imposition of "cruel punishments."

Washington's Supreme Court never reached the state

constitutional argument. Interpreting state statutes that track Pennsylvania's in every salient detail, the Court held that execution of a defendant who was a minor at the time of the offense was not authorized by statute. The Court explained:

Our criminal laws apply to children as young as 8 years old....The juvenile court may decline jurisdiction and transfer any case for prosecution to adult court, if the appropriate legal criteria are satisfied, regardless of the age of the juvenile.... The penalty for aggravated murder, in cases prosecuted in adult court, is either death or life imprisonment without the possibility of release or parole....Thus, *if these statutes authorize imposition of all adult penalties against juveniles transferred to adult court, a child as young as 8 could...be tried as an adult and sentenced to death...*

Admittedly, it is unlikely the State would see, or the jury would return, a death sentence against an extremely young defendant. The significant factor, however, is that such verdicts would be possible if our statutes were interpreted to authorize imposition of the death penalty for crimes committed by juveniles. [Applying the United States Constitution, the United States Supreme Court], in Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L. Ed.2d 702 (1988) concluded that the death penalty cannot be imposed against defendants who were 15 or younger when the crime occurred...[Therefore], *our statutes would clearly be unconstitutional as applied to defendants 15 or younger if interpreted to authorize imposition of the death penalty following decline of jurisdiction in juvenile court.* [State law] authorizes juveniles to be tried as adults, but does not mention the death penalty. [State law] authorizes imposition of the death penalty, but does not refer to crimes committed by juveniles. Most critically, neither statute sets any minimum age for imposition of the death penalty.

...[W]herever possible, it is the duty of this Court to construe a statute so as to uphold its constitutionality....We cannot rewrite the juvenile court statute or the death penalty statute to expressly preclude imposition of the death penalty for crimes committed by persons who are under age 16 and thus exempt from the death penalty under Thompson....Nor is there any provision in either statute that could be severed in order to achieve that result. *The statutes*

*therefore cannot be construed to authorize imposition of the death penalty for crimes committed by juveniles. Absent such authorization, appellant's death sentence cannot stand. ....*

Furman, 858 P.2d at 1102-03 (emphasis supplied; citations, footnotes and internal quotation marks omitted).

69. Every piece of the Washington Supreme Court's reasoning applies in Pennsylvania. Like Pennsylvania law (42 Pa. C.S.A. § 9711), Washington's law set no minimum age for imposition of a death sentence. As in Washington, a juvenile in Pennsylvania may be tried for a murder as an adult, regardless of the juvenile's age. See, e.g., Commonwealth v. Kocher, 529 Pa. 303, 602 A.2d 1308 (1992) (state law allows murder trial of 9 year old as adult). In Pennsylvania then, as in Washington, "if these statutes authorize imposition of all adult penalties against juveniles transferred to adult court, a child as young as 8 could ... be tried as an adult and sentenced to death." Furman, 858 P.2d at 1103. In Pennsylvania as in Washington, "our statutes would clearly be unconstitutional [under Thompson v. Oklahoma] as applied to defendants 15 or younger if interpreted to authorize imposition of the death penalty following decline of jurisdiction in juvenile court." Id., 858 P.2d at 1102-03. In Pennsylvania as in Washington, the courts "cannot rewrite the juvenile court statute or the death penalty statute to expressly preclude imposition of the death penalty for crimes committed by persons who are under age 16 and thus exempt from the death penalty under Thompson....Nor is there any provision in either statute that

could be severed in order to achieve that result." Id., 858 P.2d at 1103.

The conclusion in Pennsylvania should be the same as it was in Washington: "The [Juvenile Act and death penalty] statutes therefore cannot be construed to authorize imposition to the death penalty for crimes committed by juveniles." Id. Accordingly, the state may not seek the death penalty against Hector Huertas, who was seventeen when the charged criminal act was committed.

### **Policy Considerations**

70. The negative public policy implications of applying the death penalty to juvenile offenders are referred to throughout the body of this Motion. Killing juvenile offenders under a claim of state authority is prohibited in every organized nation on earth, except in the United States. Even standing alone, this international prohibition could not counsel more strongly as a prohibitive policy consideration within this Commonwealth. Founded upon the beliefs and practices of William Penn, Pennsylvania surely cannot join the few rogue states within the United States that would continue to defy the absolute international ban.

Myriad organizations that deal with youth and the law condemn the execution of juvenile offenders, and continue to seek its total ban. See paragraph 47, supra. To petitioner's knowledge not a single organization that deals specifically with young people has urged the contrary. The protective statutes adopted in this state have long recognized what each cited organization -- and most every adult, and certainly every parent -- knows: that

adolescents are particularly vulnerable to poor judgment. Now, new scientific research shows that this natural debility is not due only to lack of experience, but to physiology too, as the brain is not fully developed until after age twenty. These facts also counsel forcefully against this state re-instituting such an archaic practice.

Even the modern capital sentencing practice of Pennsylvania's juries supports a state constitutional ban on the death penalty for juvenile offenders. Only three Pennsylvania death-row prisoners were less than eighteen years old at the time of the offense, and only one death sentence has been imposed on a juvenile offender in Pennsylvania since 1990. In fact, since the death penalty was re-instituted in the United States in 1973, not one juvenile offender has been executed in Pennsylvania. See Victor Streib, *The Juvenile Death Penalty Today*, supra.

If the federal Constitution still can be interpreted to permit juvenile offenders to be executed, then considering these circumstances, and through this Court, Pennsylvania's Constitution cannot be so interpreted. The text of Article I, Section 13; Pennsylvania's long history and tradition of leading the nation in the reform and narrowing of the application of capital punishment, and in the establishment of a humane, rehabilitation-oriented juvenile justice system; the practice of Pennsylvania's juries; the international law prohibition against executing juveniles; the practices and laws of our sister states; and current sociological and scientific knowledge, cumulatively direct an interpretation of

Article 1, Section 13 that bars application of the death penalty to a defendant who was seventeen years old at the time of the offense. If juvenile executions are not "unusual" enough to trigger federal constitutional protections, they are nevertheless "cruel" under Pennsylvania's Constitution, and so trigger its independent protections, for the reasons discussed herein.

WHEREFORE, for the foregoing reasons, petitioner respectfully requests this Court prohibit the imposition of the death penalty in this case or, in the alternative, set this matter for an evidentiary hearing, and grant any other just and proper relief.

Respectfully submitted,

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