

4. Death Penalty Cases

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A. Juvenile Offenders

Introduction – No other nation has executed juvenile offenders at the rate practiced in the United States. In fact, currently the few states in the United States that impose sentences of death to juvenile offenders are among the few remaining organized political entities in the world that continue to execute juvenile offenders. Out of 193 nations in the world, only seven have executed juvenile offenders since 1990. Among those seven nations, all except Iran and the United States have instituted reforms eliminating juvenile offender executions completely. These stark facts suggest that the United States’ current policy is contrary to the standards and policies of almost every other nation in the world. In 2002 alone, the United States executed three additional young men, all of whom committed the crimes of their conviction under the age of 18. In addition to challenging the executions under United States laws, several arguments are being made questioning these sentences under international law.

International Human Rights Arguments In Support of Opposition to Juvenile Death Penalty Sentences

Juvenile Death Penalty Sentences Violate the *Jus Cogens* Norm on International Law Prohibiting the Execution of Juvenile offenders – The prohibition against the execution of persons who were under eighteen years of age at the commission of their crime is

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customary international law and it has attained the status of a *jus cogens* peremptory norm of international law.

The major argument raised by international human rights advocates opposed to the United State’s current policy on juvenile death penalty sentences is that it violates the *jus cogens* norm prohibiting the execution of juvenile offenders. A *jus cogens* peremptory norm is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 53, 1155 U.N.T.S. 331, 352, 8 I.L.M. 679, 698. To be considered a *jus cogens* peremptory norm, the norm must meet four requirements: 1) it is general international law; 2) it is accepted by a large majority of the states; 3) it is immune from derogation; and 4) it has not been modified by a new norm of the same status. The prohibition against the execution of offenders who were under the age of eighteen at the date of commission of their crime clearly meets all four of the abovementioned requirements.

First, several treaties, declarations, and pronouncements by international bodies, as well as laws of the vast majority of the nations serve as evidence that the prohibition is general international law. Second, the United States is the only country in the world that has not accepted the international norm prohibiting the execution of juvenile offenders, proving the prohibition is accepted by a large majority of the states. Third, the norm is non-derogable as the ICCPR expressly provides that there shall be no derogation from Article 6, which prohibits the imposition of the death penalty on juvenile offenders. And finally, there is no emerging norm that contradicts the current norm prohibiting the execution of persons who were under eighteen at the time they committed their crime.

Therefore, the prohibition against the execution of juvenile offenders is a *jus cogens* peremptory norm. In effect, the United States' current policy permitting the execution of juvenile offenders is a clear violation of that norm

International Treaties Binding on the United States and Customary International Law Prohibit Application of the Death Penalty to Juvenile Offenders

– Because, “[t]here can be no question that the law of the nations prohibits the execution of juvenile offenders,”

Blackmun, H. *The Supreme Court and The Law of Nations*, 104 YALE L.J. 39, 47-48 (1994), the United States' current juvenile death penalty policy is in juxtaposition to the law of nations. The United States Constitution as well as International Treaties binding on the United States make the death penalty policies practiced in other countries relevant to the United States' own policy.

The intent of the framers to bind our courts to the law of nations is explicit in our Constitution. For example, Article I, Section 8 Clause 10, of our Constitution grants Congress the power to define and punish offenses against the law of nations. Moreover, the Supremacy Clause, Article VI, Clause 2 deems international treaties to be part of the “supreme law of the land.” Not only does our own Constitution support the notion that the law of nations is relevant to the juvenile death penalty policies of the United States, our country's signatures to the Convention on the Rights of the Child and the American Convention on Human Rights which expressly prohibit the death penalty sentences for juvenile offenders supports this notion as well.

Furthermore, the United States' reservation to Article 6, paragraph 5 of the International Covenant on Civil and Political Rights (ICCPR) is invalid. Article 6(5) of the ICCPR prohibits the death sentence for crimes committed by persons under the age of 18. The United States attached a reservation to the

treaty reserving, “the right, subject to its Constitutional constraints, to impose capital punishment on any person, including such punishment for crimes committed by persons below 18 years of age.” Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, 31 I.L.M. 645, 653-54 (1992). The reservation is invalid because it is incompatible with the purpose of the treaty, offends a peremptory norm against the execution of persons under 18 at the time of the offense, and attempts to reserve a non-derogable provision (the non-derogation clause of the ICCPR prohibits derogation from Article 6).

Cases Raising These Arguments:

These international human rights arguments were made on behalf of the defendants in all of the following cases.

Stanford v. Kentucky – The above arguments were made on behalf of Kevin Stanford, a black, male, juvenile offender indicted for murder in November of 1981. Despite these compelling arguments, the Supreme Court in *Stanford v. Kentucky*, 492 U.S. 361 (1989), noted in its plurality decision that the United States' current practices with regard to the juvenile death penalty does not violate evolving standards of decency.

Stanford's own attorneys and Professor Constance de la Vega from the University of San Francisco School of Law made international human rights arguments on his behalf. In an amici curiae brief, Professor de la Vega urged the Supreme Court to consider international human rights law in juvenile death penalty cases. The brief argued that prohibition of juvenile death sentences is a *jus cogens* norm of international law and by allowing execution of juvenile offenders, the United States effectively violates that norm. For a more detailed version of the argument see, Amici Curiae Urge the U.S. Supreme Court to

Consider International Human Rights Law in Juvenile Death Penalty Case, 42 Santa Clara L. Rev. 1041(2002).

Unfortunately, Stanford's petition for writ of habeas corpus was denied on October 21, 2002. However, Justice Stevens wrote a powerful dissenting opinion joined by Justice Souter, Justice Ginsburg and Justice Breyer expressing disdain for the United States' current policy allowing executions of juvenile offenders. In the dissent, Stevens wrote, "The practice of executing such offenders is a relic of the past and is inconsistent with evolving standards of decency in a civilized society. We should put an end to this shameful practice." 2002 WL 984217 (Mem).

Arizona v. Aguilar (CR 1997-009340)

– On March 8, 2001, Defendant Tonatihu Aguilar, represented by Robert L. Storrs and Bruce E. Blumberg, was found guilty of Count II, Murder in the First Degree in the Superior Court of Arizona, Maricopa County, for the death of Sandra Imperil. Following the guilty verdict, the Court conducted a hearing pursuant to ARS § 13-703. Pursuant to the hearing, the Court found that the State proved beyond a reasonable doubt the existence of two aggravating factors: 1) factor ARS § 13-703 (F) (6) that, based on the circumstances surrounding it, the killing of Sandra Imperial was especially cruel; and 2) factor ARS § 13-703 (F) (8) which relates to the conviction by the killing of Hector Imperial, represented in Count I.

Additionally, the Court found that the Defendant proved by a preponderance of the evidence two statutory mitigating factors. First, the Defense proved the existence of the mitigating factor ARS § 13-703 (G) (1) which exists when the Defendant's capacity to appreciate the wrongfulness of his conduct or conform his conduct to requirements of law is significantly impaired but not so impaired as to constitute a defense. Secondly, the Defense proved by a preponderance of the evidence the existence of mitigating factor ARS § 13-703

(G) (5) as Defendant's chronological age was 16 years, 8 months and he was an individual with a significant lack of intelligence and maturity, as proved by the testimony of two doctors.

Ultimately, the Court found that the mitigating factors were sufficient to call for a leniency in sentencing. In a challenge to the death penalty, Professor Victor Streib testified about the practice of other western states regarding the juvenile death penalty. Professor Connie de la Vega testified regarding the international standards. The court ignored the international human rights arguments that were made on behalf of the defendant.

Arizona v. Petronas-Cabanas (CR 199-004790)

– Felipe Pertona-Cabanas plead guilty to count 2 murder in the first degree of Officer Marc Atkinson on July 19, 2002. Felipe was 17 years old at the time of his offense. He was represented by Vikki Liles of Phoenix, Arizona. Evidence presented proved that Felipe was born into extreme poverty in Cerrito de Oro, Guerrero, Mexico. Despite these impoverished conditions Felipe was provided with love and moral support from his family and community. In effort to escape the poverty he grew up in, Felipe came to the United States to find work. It is in the United States that Felipe got caught up in selling drugs and carrying a weapon. Felipe, who had no prior record, expressed remorse for his act very early on. He accepted full responsibility for his act and plead guilty knowing that his pleas would not save him from a life sentence, which is what he received. Sandra Babcock filed an amicus brief on behalf of the Mexican Government challenging the death penalty. Professors Streib and de la Vega also testified.

Inter-American Commission Cases:

Alexander Williams – Alexander Williams, who has been diagnosed with severe schizophrenia, was sentenced to death for a crime he committed as a juvenile. Williams

was represented by Brian Mendlesohn of Atlanta, Georgia. The U.S.F. Law Clinic also represented Mr. William in a petition to the Inter-American Commission on human rights. (See 2001 ACLU Report). When Mr. Williams was scheduled to be executed, Lindsay Hortsman wrote a letter to the Inter-American Commission on Human Rights updating the status of the case and requesting immediate assistance on the case. In response to the letter, the Inter-American Commission on Human Rights re-issued a precautionary measure request in his pending case which was forwarded to the Georgia Board of Pardons and Paroles. On February 25, 2002, hours before the execution of Alexander Williams was to be carried out, the Georgia State Board of Pardons and Paroles commuted his sentence to life without parole. This was a success story of the many efforts that were made by so many different people.

Michael Dominguez (Report No. 62/02 Case no. 12.285) – Michael Dominguez was convicted and sentenced to death for two homicides that occurred in Nevada in 1993. Michael was 16 when he committed the crimes. He was represented by Mark Blaskey. The international argument made on his behalf before the Inter-American Commission on Human Rights was that the United States’ current death penalty policy with respect to juvenile offenders is in violation of an international *jus cogens* norm prohibiting executions of such offenders. The argument was also made that the current death penalty scheme in the United States has resulted in the arbitrary deprivation of life and inequality by the law.

The Commission held that prohibition of executions of offenders under the age of 18 is a *jus cogens* norm and, accordingly, Michael’s death sentence was in violation of that norm. The Commission took into account several factors in coming to this decision. First, it found that since its decision in 1987 in the Pinkerton and Roach cases several

developments have occurred including new international agreements and a broadened ratification of existing treaties to explicitly prohibit executions of juvenile offenders who were under 18 years of age at the time of the crime. Second, The United Nations bodies responsible for human rights and criminal justice have consistently supported international human rights agreements prohibiting the execution of offenders who were under the age of 18 at the time of the crime. Third, the international practice over the past 15 years evidences an almost unanimous trend toward prohibiting juvenile offender executions. This trend isolates the United States as the only country that continues to execute such offenders. Fourth, among the states of the United States 38 states and the federal and military civilian jurisdictions authorize the death penalty for capital crimes. Of those 38, 16 have chosen 18 (at the time the crime was committed) as the minimum age for eligibility. Fifth, declaring 18 as the minimum age for death eligibility is consistent with developments in other fields of international law that require 18 as the minimum age for the imposition of serious and fatal obligations and responsibilities. For example, those under age 18 are not allowed to be involved in hostilities as members of the armed forces. Taking all of these factors into account the Commission decided that prohibiting executions of offenders under the age of 18 at time of their offense is a *jus cogens* international norm.

The Commission also noted that in light of this decision governments are obligated to respond by assuring their current death penalty procedures are not in violation of this *jus cogens* norm. Accordingly, the Commission made the following recommendation to the United States:

1. Provide Michael Domigues with an effective remedy, which includes commutation of sentence.

2. Review its laws, procedures and practices to ensure that capital punishment is not imposed upon person who, at the time their crime was committed were under 18 years of age.

The Commission also emphasized the obligation that OAS member states have to respond to its communications, including those pertaining to petitions that complain of human rights violations attributable to a member State.

In a concurring opinion, Helio Bicudo expressed his own opinion and understanding of the lawfulness of the death penalty in the Inter-American System. In that opinion he expressed his belief that the death penalty brings suffering to the individual who is sentenced. In effect, he argues that there is a contradiction among the articles of The American Convention on Human Rights which reject torture, cruel, inhumane, or degrading punishment or treatment. He also argued that the death penalty is supposed to be inflicted on those guilty of only the most serious crimes. Ultimately, he argues in his concurring opinion that there is a tendency toward restricting application of the death penalty and ultimately it should be abolished.

Juvenile Executions 2002 – Despite the compelling international human rights arguments made in opposition to juvenile offender death penalty sentences, the United States executed three juveniles this year. The three juvenile offenders executed in Texas this year are Napoleon Beazley, Toronto Patterson and T.J. Jones. These have been the only executions of juvenile offenders in the world in 2002.

Napoleon Beazley – Napoleon Beazley was an African American convicted by an all-white jury for killing a white man during a car jack gone bad. Although he demonstrated extreme remorse and had no prior criminal

history he was sentenced to death and executed in May, 2002. On the eve of his execution Napoleon Beazley said to Janet Elliott of the Houston Chronicle, “[i]f I was the last juvenile executed then I would be pleased with that because I’d know that what I’ve done for the last eight years mattered.” Unfortunately, with the United States’ current policy on death penalty sentences for juvenile offenders it appears as if Napoleon Beazley will not be the last juvenile executed. Mr. Beazley was represented by Walter Long and David Botsford of Austin Texas.

For more information on Napoleon Beazley’s case *see* 2001 ACLU Report.

T.J. Jones – In this case, the State’s evidence alleged that on February 2, 1994, four youths, including T.J., who was armed with a pistol, approached Mr. Willard Davis. Allegedly T.J. ordered Mr. Davis to get out of his car, Mr. Davis complied, and then T.J. shot him in the forehead and drove away with his accomplices in Mr. Davis’s car. T.J. took full responsibility for his actions.

T.J. was evaluated by Dr. Craig Moore who diagnosed T.J. with schizoid personality disorder, which renders him unable to relate to people and unable to properly participate in the give and take of relationships. Dr. Moore also observed that T.J. might have suffered from a neurological problem indicated by his sudden acts of violence. Despite T.J.’s age of 17 years old, according to Dr. Moore psychologically T.J. was more like a ten or twelve year old. In addition, T.J.’s full scale IQ was tested at 78 (a score below 70-75 classifies one as mentally retarded according to the American Association of Mental Retardation), and Dr. Moore testified that T.J. was borderline retarded.

Not only did T.J. have psychological and possible mental retardation issues, he suffered physical abuse at home and estrangement from his parents with may have intensified his psychological problems. T.J.’s mother was beaten by his father when she was

pregnant with T.J. T.J. was an only child and had to deal with his mother's various male partners. At least one such partner was violent towards his mother. His mother testified that when the violence between she and her partner commenced T.J. would hum, shake, and rock stopping only when the violence stopped.

T.J. was executed on August 8, 2002.

Toronto Patterson – Toronto Patterson was an African American who was 17 years old at the time of his offense. On June 6, 1992 Valerie Brewer discovered the body of her sister and her sister's two daughters in her house. No valuables were taken from the house, but the wheels on a BMW in the garage were found to be missing. Valerie knew that her cousin, Toronto Patterson, had recently had his wheels stolen and she immediately thought of him as a suspect. Patterson told police that two Jamaican men forced he and his girlfriend at gunpoint to assist one of the men in removing the wheels from the BMW, while the other distracted Kimberly. Toronto consistently maintained this account of the events of June 6, 1995 and asserted he did not commit the murders. The identity of the killer was a highly contested issue at the trial.

Toronto was raised by his teenage mother, with the help of his grandmother. He was profoundly neglected in his childhood and received regular whippings from his mother. Drug and alcohol abuse were prevalent in Toronto's home life. At the young age of 9, he became the sole caretaker for his terminally ill baby sister, whose death strongly impacted him. Sadly, these mitigating factors were never presented to the jury. Thus, the jury was never given the opportunity to consider a more human and vulnerable side to Toronto. Toronto was executed on August 28, 2002.

The decision in Toronto's case is particularly significant to the overall issue of juvenile death penalty because of a dramatic dissenting opinion issued by 3 justices. Normally U.S. Supreme Court orders upholding

executions are very tightly written and give little explanation beyond permission to carry out the sentence. However, in Toronto's case, three Justices, John Paul Stevens, Ruth Bader Ginsburg and Stephen Breyer issued a dissenting opinion. This unusual procedure was a dramatic commentary on the current state of juvenile executions in the United States. The justices expressed reservations about the propriety of executing Toronto in light of the fact that he committed his crime at the young age of 17. They pointed out that the United States is one among only a handful of the world's nations that allow the execution of people who were juveniles when they committed their crime. In an opinion lending hope that the court might reconsider the current policy regarding execution of juvenile offenders, Justice Steven wrote, "Given the apparent consensus that exists among states and in the international community against the execution of a capital sentence imposed on a juvenile offender, I think it would be appropriate to revisit the issue at the earliest opportunity." 2002 WL 1986618 (Mem) (2002).

Not only have members of the Supreme Court spoken suggesting that the United States current policy of allowing death sentences to those who committed their crime of conviction under the age of 18 must be reexamined, several organizations and lady Rosalyn Carter has spoken out on the issue as well. An overwhelming number of groups asked for clemency in all three cases. For example, the ABA, ACLU, Amnesty International USA, Child Welfare League of America, Human Rights Advocates, Murder Victims Families for Reconciliation, and Youth Law Center all sent letters asking for clemency for the young men. Furthermore, in August, Lady Rosalyn Carter expressed her opposition to the execution of juvenile offenders saying, "[I]t should be an embarrassment to every American that we execute children. The United State is the only country in the industrialized world that still executes anyone, and executing children puts us

in the company of Somalia – only Somalia.” She went on to argue that, “We don’t take care of children in our country the way we should, and then when they get into trouble we punish them severely.” Stephen Krupin, *Former First Lady Call for Halt to Executions*, *The Atlanta Journal and Constitution*, Aug. 13, 2002, at A12. With such compelling arguments and so many people and organizations joining forces to speak out against the execution of juvenile offenders, hopefully our leaders will listen. The United States’ current policy allowing sentences of death to juvenile offenders is a blatant violation of international law. The international human rights arguments in opposition to juvenile offender executions are powerful and it appears that the arguments are not going unnoticed.

Speaking out against the execution of juvenile offenders is not done to minimize the excruciating grief suffered by the family and friends of the juvenile offenders’ victims. Certainly, the crimes committed were tragic and terribly wrong. However, it is a basic standard of decency in America that only the most culpable criminals shall be put to death for their crimes. By their very nature, adolescents who are not fully developed physically, cognitively, or emotionally cannot be considered among the very worst of all criminals. It is absurd that currently in the United States, juveniles are too young to serve in the military or vote, but they are not too young to die for their crimes. The United States must join with practically every other nation in the world and eliminate juvenile offenders from the possibility of execution.

MENTALLY RETARDED OFFENDERS

Atkins v. Virginia, 122 S.Ct. 2242 – In this recent Supreme Court decision (decided June 20, 2002) the Supreme Court held that the Constitution prohibits the application of the death penalty to mentally retarded persons. In the decisions, Justice Stevens wrote that executions of mentally retarded persons

constitute cruel and unusual punishment prohibited by the Eighth Amendment.

This decision is relevant to the issue of executions of juvenile offenders because some of the same international human rights issues were raised. For example, it was argued on behalf of Atkins that because other countries have disapproved imposition of the death penalty for crimes committed by mentally retarded persons the United States should also disapprove such executions. Furthermore, in the dissenting opinion written in *In re Kevin Nigel Stanford*, 2002 WL 984217, Stevens (joined by Souter, Ginsburg, and Breyer) wrote that the reasons supporting the holding in *Atkins* apply with equal or greater force to the execution of juvenile offenders.

In a related case, *McCarver v. State of North Carolina*, a brief of *amici curiae* was filed in support of Petitioner, Ernest Paul McCarver, raising important international human rights arguments relevant to the juvenile death penalty issue. The brief argued that United States’ policy of executing mentally retarded offenders was inconsistent with evolving international standards of decency. Furthermore, it argued that under the jurisprudence of the Eighth and Fourteenth Amendments, the Court cannot evaluate evolving standards of decency without considering international as well as domestic opinions. Finally, it argued that the growing international consensus opposing the execution of mentally retarded offenders has increasingly isolated the United States diplomatically. All of these arguments are relevant to the juvenile death penalty issue because, like executions of the mentally retarded, the international consensus is against the execution of juvenile offenders.