BEFORE THE GOVERNOR FOR THE STATE OF TEXAS
AND
THE TEXAS BOARD OF PARDONS AND PAROLES

In re

Glen Charles McGinnis

Applicant

APPLICATION FOR REPRIEVE
FROM EXECUTION OF DEATH SENTENCE AND
COMMUTATION OF SENTENCE TO IMPRISONMENT FOR LIFE

SUBMITTED BY:

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INTRODUCTION

Glen McGinnis was seventeen years old at the time of the offense for which he was convicted. He was, in the eyes of the world, a child. Over the past ten years, international condemnation of the execution of children has increased dramatically. Indeed, that condemnation has risen to such a volume that the United States remains the only country in the world that continues to execute juvenile offenders.[1] The international prohibition rests upon the recognition that children under the age of maturity lack judgment, impulse control, and are not considered fully accountable for their actions. While we recognize these facts when we condition the right to vote or drink on the attainment of the age of eighteen, we have somehow failed to exercise the same judgment in determining when persons are sufficiently accountable for their conduct such that their life can be taken in exchange. The facts of Mr. McGinnis' case highlight the immaturity that characterized his conduct. Unfortunately, this was not information that the jury was permitted to hear. If Texas is to be the leader in the execution of juveniles, it should at least assure that the facts relevant to youth and accountability were considered by the jury.

Texas should not usher in the new Millennium with conduct that is condemned by the rest of the world as barbaric. For this reason, Glen McGinnis respectfully requests that this Board of Pardons and Paroles recommend, and that the Governor grant a commutation of his sentence of death to life imprisonment, and a 30-day reprieve so that the Board may fully consider the merits

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[1] As a legal claim, the prohibition of the execution of juveniles relies upon recent developments in the law that precluded presentation of this matter in Mr. McGinnis' earlier filings in the courts. It will be presented in a successor petition that will be filed with the Court of Criminal Appeals shortly, as well as in a supplemental petition to the U.S. Supreme Court, but the procedural bars to merits consideration of the claim are formidable.

of this application.

STATEMENT OF THE CASE

A. Statements Required by 37 TAC §143.42

1. Name of Applicant

Glen Charles McGinnis

2. Identification of Agents Presenting Application:

Niall A. MacLeod, Patrick J. McLaughlin, Ross C. D'Emanuele, attorneys for Mr. McGinnis

3. Copies of Indictment, Judgment, Verdict, Sentence and Execution Date:

Attached as Exhibits to Appendix A.

4. Statement of the Offense

A Montgomery County Grand Jury indicted Glen Charles McGinnis for the 1990 shooting death of Leta Wilkerson. Mr. McGinnis was seventeen years old in 1990. Mr. McGinnis was found guilty of capital murder, and the jury subsequently found that Mr. McGinnis acted deliberately, that Mr. McGinnis was a continuing threat to society and that there were not sufficient mitigating circumstances to warrant the imposition of life imprisonment. Upon these findings, the trial court imposed a sentence of death.

5. Appellate History

The Texas Court of Criminal Appeals affirmed the conviction and death sentence on direct appeal in an Order dated December 14, 1994. McGinnis v. State, No. 71, 543, slip. op. (Tex. Crim. App., Dec. 14, 1994). Without written order, the Texas Court of Criminal Appeals, on March 1, 1995, denied the motion of Mr. McGinnis for rehearing. Mr. McGinnis petitioned the United States Supreme Court for a Writ of Certiorari. The Petition was denied on October 2,

1995. Glen Charles McGinnis vs. Texas, 116 S. Ct. 126 (1995).

On May 7, 1996 Mr. McGinnis filed his Petition for Writ of Habeas Corpus in the Ninth Judicial District of Montgomery County, Texas. The District Court in Findings of Fact and Conclusion of Law dated July 12, 1996, recommended that the Petition for Writ of Habeas Corpus be denied. The Texas Court of Criminal Appeals denied the Petition for Writ of Habeas Corpus in an En Banc Order dated August 28, 1996. Ex Parte Glen Charles McGinnis, Writ No. 31, 587-01, slip op. (Tex. Crim. App., Aug. 28, 1996).

On January 3, 1997 Mr. McGinnis submitted a Petition for Writ of Habeas Corpus to the United States District Court for the Southern District of Texas requesting that his death sentence be vacated. The United States District Court for the Southern District of Texas had jurisdiction over the parties and the subject matter of this case pursuant to 28 U.S.C. §§ 2241 and 2254. By Order and Judgment entered February 2, 1998, the District Court granted Respondent's Motion for Summary Judgment, denied Mr. McGinnis' Writ of Habeas Corpus and dismissed this matter with prejudice. Mr. McGinnis filed a Motion to Alter or Amend Final Judgment Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure on February 16, 1998. The District Court denied this motion on April 7, 1998.

On May 7, 1988 Mr. McGinnis filed a timely Notice of Appeal to the United States Court of Appeals for the Fifth Circuit, along with a Motion for Certificate of Appealability of the District Court's denial of the Petition for Writ of Habeas Corpus. The District Court issued an Order Granting a Certificate of Appealability on June 1, 1998.

On July 20, 1999, the United States Court of Appeals for the Fifth Circuit affirmed the District Court's denial of Applicant's Writ of Habeas Corpus. McGinnis v. Johnson, 181 F.3d 686 (5th Cir. 1999). The United States Court of Appeals for the Fifth Circuit denied Mr.

McGinnis' petition for panel rehearing on August 25, 1999.

On November 23, 1999, Mr. McGinnis filed a Petition for Writ of Certiorari with the United States Supreme Court asking that the Supreme Court issue a Writ of Certiorari to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit, which, on Mr. McGinnis' appeal, affirmed the dismissal of his petition for habeas relief. That petition is still pending.

Mr. McGinnis is in the process of filing a Subsequent Petition for Writ of Certiorari with the United States Supreme Court presenting to the Court for the first time the claim that a treaty to which the United States is a party -- the supreme Law of the Land, U.S. CONST. art. VI -- prohibits his execution, as does customary international law, because he was a child under the age of eighteen at the time of the offense.

6. Statement of the Legal Issues Raised on Appeal

In his appeal from his conviction, Mr. McGinnis asserted that the trial court's sua sponte dismissal of every African-American from his venire violated his right to a fair and impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution.

In his appeal from his conviction, Mr. McGinnis also contended that the trial court excluded evidence which provided the basis for the expert psychologist's opinion related to Mr. McGinnis' intent and future propensity for dangerousness, and in doing so denied him due process in violation of the Fourteenth Amendment to the United States Constitution.

In a Petition for Writ of Certiorari to be filed with the United States Supreme Court, Mr. McGinnis will also contend that a treaty to which the United States is a party -- the supreme Law of the Land, U.S. CONST. art. VI -- prohibits his execution, as does customary international law, because he was a child under the age of eighteen at the time of the offense.

7. Effect on the Family of the Victim

When Leta Ann Wilkerson, then 30, was shot and killed, she left behind a husband and two young children. Out of respect for their privacy and loss, no attempt has been made to contact them, but their loss and pain are unfathomable.

REASONS WHY CLEMENCY OR 30 DAY REPRIEVE SHOULD BE GRANTED

A. Mr. McGinnis' sentence should be commuted to life imprisonment in light of the nearly universal international condemnation of the execution of persons who were children at the time they committed the offense for which they are punished, particularly in light of the fact that the jury was not allowed to hear evidence crucial to a fair determination of his sentence.

1. The Execution of children is condemned by the rest of the world.

The execution of people for crimes they committed while children is unacceptable in a civilized society, irrespective of guilt or innocence. Virtually every nation in the world prohibits the practice. Even within the United States, the federal government and fifteen of the thirty-eight states that impose capital punishment prohibit the death penalty for crimes committed while under the age of 18. Since 1990, only the Islamic Republic of Iran, Nigeria, Pakistan, Saudi Arabia, Yemen, and the United States of America have executed prisoners who were under the age of eighteen at the time of the crime. See United Nations, Report of the Special Rapporteur to the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/1998/68. Yemen has since outlawed the practice, leaving the United States in even more exclusive company. In practice, since 1997, the United States is the only nation in the world to have executed juveniles. See Amnesty International, United States of America: Shame in the 21st Century – Three Child Offenders Scheduled for Execution in January 2000, (Dec. 1999). In addition, more than 120 nations currently prohibit the execution of juveniles by legislation or treaty. See Amnesty International, Juveniles and the Death Penalty (Nov. 1998).

At least four major human rights treaties prohibit the imposition of the death sentence on juveniles under the age of eighteen at the time of the crime. See Julian 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). These treaties include the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, and the United Nations Convention on the Rights of the Child. See id. The vast majority of States have ratified these treaties and agreed to be bound by the prohibition against the imposition of the death sentence on juveniles offenders.

The Convention on the Rights of the Child has been ratified by 191 countries. See Amnesty International, United States of America: Shame in the 21st Century – Three Child Offenders Scheduled for Execution in January 2000, (December, 1999). The United States has signed the Convention, but, with Somalia, is one of two nations who have failed to ratify it. See Id. Over 150 nations have ratified the International Covenant on Civil and Political Rights, which expressly prohibits executions for offenses committed by juveniles in Article 6, Paragraph 5. See Multilateral Treaties Deposited With the Secretary General: Status as of 31 December 1994, ST/LEG/SER.E/13 (1994). The United States has ratified the convention, but is the only nation to have entered reservations to Article 6, Paragraph 5. See Id. Whether the reservation is of any effect is for the courts[2] to decide, but the overwhelming international adoption of the ban

[2] The question of the validity of the reservation was recently the subject of a petition to the United States Supreme Court for a writ of certiorari from a decision of the Nevada Supreme Court in Domingues v. State, 961 P.2d 1979 (1998). In connection with that petition, the United States Supreme Court found the question of sufficient interest to invite the United States Solicitor General to submit a brief.

is a measure of the scope of world opinion.

When Glen McGinnis committed the offense for which he has been sentenced to death, he could not vote, could not serve on a jury, and could not enter into legally binding contracts. Children are not permitted to conduct these activities because they are believed to lack a full appreciation of the consequences of their actions. Yet, it is the very capacity to understand consequences that drives the degree of culpability which provides any moral or legal justification for taking a human life in retribution for a crime. A child simply cannot be held to the same degree of culpability, because a child lacks the accountability for its actions to which an adult is held. To the extent that the death penalty is viewed as a deterrent, it is not served by the execution of juveniles, in light of the characteristics typically associated with childhood - impulsiveness, lack of self-control and poor judgment. Given these characteristics, other children cannot be expected to be deterred by the execution of Mr. McGinnis. The execution of Glen McGinnis thus lacks any legal, moral or practical support.

2. The trial court excluded evidence crucial to a fair determination of his sentence.

At the punishment phase of his trial, Mr. McGinnis called Dr. Walter Quijano to provide the jury with his professional opinion regarding Mr. McGinnis' intent during the crime, future dangerousness, and remorse, all factors that are highly relevant to the jury's decision whether to impose the death penalty. Dr. Quijano attempted to inform the jury of the foundation for his opinion regarding Mr. McGinnis' dangerousness and state of mind. At the State's hearsay objection, however, the trial court refused to permit Dr. Quijano to provide the jury with any supporting basis for his opinions.

Denied an opportunity to hear the fundamental basis for Dr. Quijano's opinions, the

sentencing jury heard Dr. Quijano's bare opinion only. Dr. Quijano testified that: (a) Mr. McGinnis did not commit the crime deliberately; (b) Mr. McGinnis would not pose a future danger to society in a penitentiary setting; and (c) Mr. McGinnis was capable of remorse.

The jury subsequently found that there were insufficient mitigating circumstances to warrant the imposition of a sentence of life imprisonment. Upon these findings, the trial court imposed a sentence of death.

The Supreme Court has held that the "sentencer, in all but the rarest kind of capital case, [must] not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis added). In such circumstances, the rules of evidence "may not be applied mechanistically to defeat the ends of justice."

During the punishment phase of Mr. McGinnis' trial, Dr. Quijano sought not only to state his conclusions, but, of course, to provide the jury with some context and rationale for them. The primary basis for his opinions was his interview of Mr. McGinnis.

At the State's hearsay objection, a bill of exception outside of the hearing of the jury was held. There, Dr. Quijano told the trial judge the following:

> [McGinnis] told me that he approached the laundry facility with the thought of robbing the facility and getting some money. He hesitated and left. He did that twice [and] only the third time, he brought a gun with him from his aunt's house and some clothes and pretended to conduct some legitimate business. When he got inside, he demanded . . . money. However, the lady did not have a key so, he says, became panicked and hysterical, yelling and hollering at which time *he wanted to prove to her that the gun he had was a real gun and he fired towards the floor* at which time the lady gave him the keys. *He went back out to the cash register, got some money and went back to the back and fired towards the direction of the lady to scare her* and then went back, got some more money and took the van with him. *The initial target by the way was not the money, it was the*

van that he initially wanted . . . .

The trial court refused to let the jury hear this evidence. The excluded testimony was highly relevant to the critical issues in the punishment phase of Mr. McGinnis' trial. In order to find a death sentence warranted, a Texas jury must find that defendant was a continuing threat to society and that there are insufficient mitigating circumstances to warrant the imposition of a sentence of life imprisonment. The excluded testimony bore directly on both of these critical issues.

Among the characteristics typically associated with childhood are immaturity, impulsiveness, lack of self control and poor judgment. The testimony that Glen McGinnis' jury was not allowed to hear explained how these attributes contributed to the killing and were the basis of the witnesses expert opinion that Glen McGinnis was not likely to be a continuing threat to society, especially when held in the structured environment of prison, and that he had the capacity for remorse. The witness sought to support his opinion with testimony from an interview he had conducted with Glen McGinnis, in which the teenager had told him that he had become "panicked and hysterical" when Leta Wilkerson told him that she did not have the key to the cash register and that he fired the gun in her direction "to prove to her that it was real" to scare her. It is a cruel irony that the sentence of death was imposed on a juvenile on the recommendation of a jury that was not allowed to hear the very evidence that would connect Mr. McGinnis' immaturity to the offense and provide significant evidence against the imposition of the death penalty. The jury was allowed to hear only one side of the story, and it is hardly surprising that it reached the conclusions it did.

C. Mr. McGinnis is Worthy of this Board's Mercy.

Glen McGinnis was born in 1973. His mother worked as a prostitute out of the one-

bedroom apartment that she shared with her son. She was addicted to crack cocaine and spent periods in jail on drug-related charges. The young boy was often left alone to fend for himself. He suffered severe abuse, including beating with an electric cord, by his stepfather, who lived in the apartment for two years. The Texas Child Protective Services (CPS) intervened three times, once after the boy was raped by his stepfather when he was 10, a second time when he was beaten on the head with a baseball bat, and again after his mother and stepfather burned his stomach with hot sausage grease. Each time the CPS returned him home after treatment, and each time he ran away, only to be caught shoplifting and returned home again by the authorities. He ran away from home for good when he was 11, and his formal schooling ended around this time. He alternated between the streets of Houston and state juvenile facilities, where he was sent when he was caught stealing cars. When on the streets, he lived in cars and empty apartments, and sometimes with adult friends. He continued to shoplift clothing and food. He was on probation following a car theft at the time of the 1990 murder. Prior to the 1990 shooting, Mr. McGinnis had never been arrested or charged with any offense involving a weapon. Indeed, his prior troubles with the law (shoplifting, stealing cars) evince a juvenile, childlike state of mind, not a hardened unremorseful criminal.

The defense presented evidence of the defendant's childhood of abuse and neglect, as well as his capacity to flourish in a structured environment. Employees at a juvenile detention facility where he had been held testified that he had a good disciplinary record, and that he was respectful to adult staff. They stated that he was not aggressive, even in the face of repeated taunting and aggression from other juveniles in the facility aimed at his open homosexuality. One of the staff members told the jury that she had considered adopting Glen McGinnis after working with him in detention.

Glen McGinnis has spent nearly a decade in prison following his arrest. His behavior in prison strongly indicates that he has been and will continue to be a productive human being in the structured environment of prison. Mr. McGinnis' unfortunate childhood and lack of repeated assaultive behavior make him an outstanding candidate for the Board's mercy.

The world consensus against putting child offenders to death for their crimes reflects a universal recognition of a child's capacity for growth and change, and the determination that a life of a child should never be written off, no matter what he or she has done. Execution is the ultimate denial of this principal. In the last ten years, Glen McGinnis has demonstrated his capacity to grow into a productive person within the structured environment of prison. That capacity, and his youth at the time of the offense, merit the Board's mercy and recommendation of commutation of a sentence to life imprisonment.

CONCLUSION

Today, Texas stands isolated from most of the rest of the United States and virtually all of the rest of the world in its willingness to execute individuals who were children at the time they committed the offenses for which they are punished. Whether or not Texas has the legal right to put children to death is a matter for the courts to decide. However, Applicant Glen McGinnis respectfully submits that, if Texas is prepared to take an action that the rest of the world universally condemns, it should do so only following a trial that is fair beyond question.

Glen McGinnis was sentenced to death without the benefit of such a trial. Whether it violated the United States Constitution for the Court to exclude from the jury evidence crucial to a determination of whether Mr. McGinnis should be sentenced to death is a question for the Court to decide. However those legal issues are resolved, the fact remains that his trial was substantially less just and less fair than it could have been. This Board cannot restore the fairness

that would have existed had the jury been allowed to hear all of the evidence relevant to a determination of his sentence. However, in the face of world condemnation for the execution of children, it can address these unique circumstances by recommending a commutation of Mr. McGinnis' death sentence to life in prison.

REQUEST FOR RELIEF

On behalf of Glen McGinnis, undersigned counsel respectfully petitions the Texas Board of Pardons and Paroles for a recommendation to the Honorable George Bush, Governor for the State of Texas, to commute Mr. McGinnis' sentence of death to life imprisonment, and respectfully petition the Board and the Governor for a 30-day reprieve of Mr. McGinnis' January 25, 2000 execution date to allow the Board to convene a hearing to consider evidence and argument in support of this application. In processing this clemency application, Mr. McGinnis requests that the Board of Pardons and Paroles comply in all respects with the Texas Constitution, art. 4 §11, and the Texas Open Meetings Act, Tex. Gov't Code §551.101 et. seq.

Dated: November 17, 2000

Respectfully submitted,

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