No. 03-633
(CAPTIAL CASE)

In the
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner

v.

CHRISTOPHER SIMMONS,
Respondent

On Writ of Certiorari
To the Supreme Court of Missouri

BRIEF FOR PETIIONER

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QUESTIONS PRESENTED FOR REVIEW

(Capital Case)

1. Once the Supreme Court holds that a particular punishment is not "cruel and unusual", can a lower court reach a contradictory opinion based on its own analysis of "evolving standards of decency"?

2. Is the imposition of the death penalty on a person who commits a murder at the age of 17 years "cruel and unusual" and thus prohibited by the Eighth and Fourteenth Amendments?

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OPINIONS BELOW

The August 26, 2003 decision of the Supreme Court of Missouri is reported at 112 S.W.3d 397 (Mo. Banc 2003) and is published in the Joint Appendix ("App.") at A-107

JURSDICTION

The Judgment of the Missouri Supreme Court was entered on August 26, 2003. (App. at A-107, A-151). The petition for writ of certiorari was filed on October 24, 2003, and was granted on January 26, 2004. This court has jurisdiction under 28 U.S.C. § 1257 (a) (2000).

CONSTITUTIONAL AND STATUTORY PROVISONS INVOLVED

Constitution of the United States, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Constitution of the United States, Amendment X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Constitution of the United States, Amendment XIV:

> [N]or shall any state deprive any person of life, liberty or property without due process of law.

Constitution of Missouri, Article XII, § 1:

> All laws in force at the time of the adoption of this constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly.

SUMMARY OF THE CASE

Before the crime was committed and the murder done, Christopher Simmons considered it for weeks, possibly months, stating on many an occasion, in callous terms, of his plans to rob and brutally kill a stranger, "just for the fun of it"; by "breaking and entering their house, tying them up, and throwing them off of a bridge." He wanted to include his friends in this plot, telling them that they would "get away with it, because they were minors." His two friends, Charles Benjamin and John Tessmer, were uneasy about the plan but relented, as Christopher had convinced them that they were untouchable because of their age.

The three met at about two o'clock A.M. on the night of the murder, but Tessmer dropped out. Tessmer later testified against Simmons in order to clear him of the charge of conspiracy from the State. After reaching through a window and opening the back door, Simmons and Benjamin were inside the home of Mrs. Shirley Crook, whose husband was away on an overnight trip. Simmons turned on a hallway light, which woke Mrs. Crook. Simmons then entered the bedroom of Mr. and Mrs. Crook, and was recognized. Unfortunately for them both, Mrs. Crook and Simmons had been in a car accident eight months before the murder. Simmons later stated that this strengthened his resolve to murder her. Simmons and Benjamin placed duct tape over the eyes and mouth of Mrs. Crook, and bound her hands. The two criminals then threw Mrs. Crook into her minivan and drove to a state park, all while under the influence of alcohol and marijuana.

When they reached the bridge at the site of the killing, Simmons placed a towel around Mrs. Crooks' face, reinforced the bindings, and enlisted the help of Charles Benjamin once again, this time to carry Mrs. Crook to the middle of the bridge, on a railroad trestle, where there Simmons bound her hands and feet together, hog-tie fashion, with the electrical cable taken from Mrs. Crooks' house and covered Mrs. Crook's face completely with duct tape. Simmons then pushed her off the railroad trestle into the river below, brutally beaten, but alive and conscious. Simmons and Benjamin then took the purse of Mrs. Crook and drove her van back to her mobile home park, across from the subdivision in which she lived. The body of Mrs. Crook was found later that afternoon by two fishermen, and Simmons was arrested the day after, at his high school.

ARGUMENT

I.

The Missouri Supreme Court ruling is illegal and therefore, the original sentence should be affirmed, death.

The reason that this court proceeding is taking place is because the Missouri Supreme Court ruled to overturn the death sentence in Roper v. Simmons in lieu of the U.S. Supreme Courts ruling in *Atkins v. Virginia*, 536 U.S. 304 (2002), it is legal to sentence the mentally retarded to death. By citing similarities in *Roper v. Simmons*, they ruled that executing a minor violated the Eighth Amendment's prohibition of "cruel and unusual punishments." The Missouri Supreme Courts ruling violated the Missouri Constitution by effectively changing Missouri State Law which allowed the sentencing of minors over sixteen to death. Chap. 565, Offences against the Person, Sect. *565.020*:

> "…the punishment shall be death…except that, if a person has not reached is sixteenth birthday at the time of the commission of the crime…"

Yet, under the Missouri Constitution, only the General Assembly can amend any existing law, Article XII, Amending the Constitution, Sect. 12 Effect on existing laws, Sect. 2:

> "All laws in force at the time of the adoption of this constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly."

Therefore, this makes the Missouri Supreme Courts ruling invalid and the sentence shall be returned to the original sentence sought by the first court. For the first court found applicable evidence to sentence the respondent to death under Missouri Law for murder in the first degree which under Missouri Law is punishable by death. Chap 565, Sect. *565.020*:

> "A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter," and Sect 2: "Murder in the first degree is a class A felony, and the punishment shall be either death or imprisonment for life…"

Secondly, the Missouri Supreme Court went against *stare decisis* by not adhering to the precedent set forth in *Standford v. Kentucky*, 492 U.S. 361 (1989), where a sixteen year old was convicted of murder and sentenced to death, wherein the U.S. Supreme Court affirmed the sentence, "rejecting his contention that his sentence violated the Eighth Amendment."

II.

The Respondent cannot seek shelter under precedents that overturned the death penalty for minors that were criminally insane or mentally retarded.

When the Missouri Supreme Court ruled to overturn Simmons's death, they cited similarities in *Atkins v. Virginia*, 536 U.S. 304 (2002), saying that the developing adolescent mind prevents rational thinking and therefore less culpability in crimes. In *Atkins*, Daryl Renard Atkins committed abduction, armed robbery, and capital murder, in August was sentenced to death. Atkins had an IQ of 59, making him legally retarded. The U.S. Supreme Court ruled that the death sentence was "cruel and unusual punishment" therefore prohibited by the Eighth Amendment. As cited by Justice Stevens,

> "…because of their impairments…they have diminished capacities to understand and process information."

This would then allow them to be coerced into making false statements. The respondent cannot seek shelter under this precedent due to the fact that he is not mentally retarded. Under the definition of the American Association of Mental Retardation,

> " '*Mental retardation* refers to substantial limitations in present functioning…existing concurrently with related limitations in communication, self-care, home living, social skills, community use, self-direction, health, safety, functional academics, leisure or work.'"

As common sense applies, the respondent can physically take care of himself, communicate effectively enough to convince two other people to participate in the murder, function in society, and appropriately guide his mental functions to make choices.

The respondent has pleaded, under writ of habeas corpus that the Court takes into consideration certain mitigating conditions, like his childhood. Citing the ruling in *Eddings v. Oklahoma* 455 U.S. 104 (1982), where a sixteen year old boy was sentenced to death, after shooting a police officer. The boy, run away from home and drove through a turnpike in Oklahoma, where he was pulled over by a police man. As the officer approached the window of Edding's car, he shot the officer killing him. The U.S. Supreme Court overturned the ruling citing that his troubled youth and manifestation of his hatred for his father, who was a police officer, led him to pull the trigger. Again, the respondent cannot seek safety in this precedent due to several circumstances. In *Eddings*, the boy shot the police officer because he felt the officer was his father and the boy shot the officer out of nowhere, in a sudden impulse. If the officer did not stop Eddings, the boy would not have shot anyone. In the respondent's case, weeks to months before the actual murder, Simmons openly talked of wanting to "brutally rob and kill a stranger, 'for the fun of it.'" The respondent planned to carry out his mission no matter what circumstances arose, the actual murder was not a sudden impulse, it was a cold, calculated thought. Also, the respondent killed a person with whom no reasonable explanation can be reached. There was no psychological manifestation as in *Eddings*. Therefore, the respondent forfeits the right of the precedent set forth in *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

III.

Brain scans and neuroscience tests are not adequate proof that adolescents are less culpable for serious crimes. One cannot place all adolescents into on class of people in criminal cases.

The respondent has also sought protection under the false pretense that adolescents are not mature enough to be put to death. The defense cites factors of reduced brain activity, telling how the absence of some gray matter leads adolescents to be impulse driven, and irrational. As Stephen J. Morse put it, "Brains do not commit crimes; people commit crimes." At the current moment in time, neuroscience is not advanced enough to be used as scientific evidence, Morse says. The court must also look at how MRI studies are fatally flawed. The subjects are so careful screened; that studies need to be extremely small and therefore cannot accurately represent a huge group of people. Further, once a study is complete, overlap between control and experimental subjects will skew test results as Stephen Morse outlines,

> "For example, suppose that experimental hypothesis is that X will cause brain region Y to be activated. After controlling for other variables that might cause Y to be activated in both the experimental and control conditions, the investigators discover that there is still a difference: Y is activated statistically significantly more in the experimental subjects. Nonetheless, some experimental subjects will not have Y activated by X and some control subjects will. Therefore, one could not predict perfectly from the brain image whether the subject was an experimental or a control." (Morse)

Any brain imaging study of adolescents is inherently flawed and not an accurate representation of all adolescents. This is supported by a quote from Jerome Kagan, a Harvard University Psychologist,

> "The brain data doesn't show that adolescents typically have reduced legal culpability for crimes."

MRIs cannot read brain cell activity since the brain cell responses are to fast to be registered, as B.J. Casey, a professor in Cornell Medical College.

Maturity itself is very vague. Abigail A. Baird says that the brain does not mature completely in till one is twenty-five or twenty-six. So should all murders between eighteen and twenty that have committed heinous crimes receive a lesser sentence since they have not yet reached maturity? No. Even more, girls' brains mature at a different rate than do males. Should a separate law be passed allowing males to be convicted, but not females do to the difference in maturity level. The brain scans and science behind maturity is not yet ready for legal purposes, says Elizabeth Sowell, a UCLA brain-development researcher. A great reality check Kagan says,

> "If incomplete brains automatically reduced adolescent's capacity to restrain their darker urges we would be having Columbine incidents every week."

IV.

Death Penalty does not violate the Eighth or Fourteenth Amendments

The greatest reason to sentence the respondent to death is the precedent set forth in *Standford v. Kentucky*, 492 U.S. 361 (1989). The Supreme Court affirmed the death sentences for a seventeen year old and a sixteen year old. Citing Justice Scalia,

> "…the imposition of capital punishment on an individual for a crime committed at sixteen or seventeen does not constitute cruel and unusual punishment under the Eighth Amendment."

It was further said that the Eighth Amendment pertains to punishments considered cruel and unusual at the time the Bill of Rights was created. In *Gregg v. Georgia*, 428 U.S. 153 (1976), Justices Stewart, Powell, and Stevens agreed, "The punishment of death for the crime of murder does not, under all circumstances violate the Eighth and Fourteenth Amendments."

The Eighth Amendment only bars punishments that are completely disproportionate to the crime committed. In the case of the Respondent, he broke into Mrs. Cook house and dragged her from her bed. He the proceeded to beat her into unconsciousness and then tied her wrists with duck tape and threw her into the back of her van. The Respondent took her to a bridge over the Meramec River. As he took her from the van, she broke and Simmons proceeded to bind her with her robe, electric cables and her own purse string. Finally, stuffing her mouth with a towel and covering her face with duct tape. Then, he threw Mrs. Cook, while she was alive, into the river where she drowned. If the sentence was exactly what was done to the victim, it would be considered cruel and unusual, for drowning it very cruel and unusual. This leaves the death penalty as the only human way of dealing out justice, for even then; it will not be in proportion to the crime committed. In a concurring opinion in *Furman v. Georgia*, 408 U.S. 238 (1972), Justice Brennan stated that,

> "…punishments are cruel and unusual when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of the word as used in the Constitution. It implies there is something inhuman and barbarous, something more than the mere extinguishment of life."

Using that precedent, death for the respondent is a fair punishment for what was done to the victim.

In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), the U.S. Supreme Court ruled that the Eighth Amendment barred the execution of people under the age of sixteen, but made no precedent prohibiting trying adolescents sixteen and older as an adult ands therefore capable of receiving the death penalty. In an opinion by Justice Powell, "…statues do provide, however, that a 16- or 17-year old charged with murder and other serious felonies shall be considered and adult." Therefore, a minor tried as an adult can get the death penalty and not e in violation of the Eighth Amendment.

V.

Judicial Law allows for the death of someone in a capital felony

Under U.S. Law, Title 18, Part 1, Chapter 51, Section 1111:

> "Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse, or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a patterned or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree…Whoever is guilt of murder in the first degree shall be punished by death or by imprisonment."

All things together, the respondent is guilty of murder in the first degree, and by law allowed to be out to death, for no law is in place to prevent a seventeen year old from being put to death. The respondent had the appropriate *mens rea* of murder, by direct intention to kill. Further, by attempted robbery, places murder in the first degree. Due to the fact that the respondent thought about and spoke of wanting to kill, makes the murder premeditated, and not a "heat of passion" murder. Using *Locket v. Ohio*, 438 U.S.

586 (1978), the death penalty can only be changed if one of three circumstances is present;

> "(1) The victim induced or facilitated the offense; (2) it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation; (3)the offense was primarily the product of the offender's psychosis or mental deficiency."

Looking at those circumstances, none apply to the respondent; Mrs. Cook did not induce or provoke her murder, and as stated in Argument I, the respondent was mental sufficient and capable of understanding his actions and their consequences. This is supported by the respondent saying that he and his friends would not be punished because they were juveniles. This shows that the respondent had innate knowledge of the U.S. Legal system and the Juvenile Rehabilitation System.

VI.

The U.S. Supreme Court cannot rule that the death penalty is illegal for minors or anyone in all cases.

The Federal Government and all its subparts are prohibited, by the Constitution from making any change or law regarding the death penalty and all things pertaining to it. The Tenth Amendment forbids this, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The States have the right to make any decisions on allowing or forbidding the death penalty and the execution of minors. All branches of the Federal Government have no right written in the Constitution regarding the power of the death penalty. The U.S. Supreme Court can rule that a person cannot be executed on a case by cases basis along with weighing the evidence at hand, but it cannot ban the death penalty for all cases collectively.

VII.

To find a punishment "cruel and unusual," there must be a "*unanimous condemnation*" of the penalty and it must violate, "the evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86 (1958).

In a concurring opinion by Justice Brennan in *Furman v. Georgia*, 408 U.S. 238 (1972), he stated that,

> "If the judicial conclusion that a punishment is "cruel and unusual" depend[ed] upon virtually unanimous condemnation of the penalty at issue."

In this case, the penalty at issue is whether the execution of minors is "cruel and unusual" and thus barred by the Eighth Amendment. This "virtual unanimous condemnation" must come from the national. In *Standford v. Kentucky*, 492 U.S. 361 (1989), Justice Scalia appropriately affirmed,

> "In determining whether a punishment violates evolving standards decency, this Court looks not to its own subjective conceptions, but, rather, to the conceptions of modern American society as reflected by objective evidence. The primary and most reliable evidence of national consensus—the pattern of federal and state laws…"

In the following statement, Justice Scalia openly says a national consensus come from state statues. Any judgments concerning the Eighth Amendment cannot be the subjective views of the Justices alone, as cited in *Coker v. Georgia*, 433 U.S. 584 (1977),

> "Eighth Amendment judgments should not be, o r appear to be, merely the subjective views of individual Justices; judgments should be informed by objective factors to the maximum possible extent."

One source is present that accurately represents the values of the nation without the variations present in poll data: state legislatures. As *Penry v. Lynaugh*, 492 U.S. 302 (1989), state legislatures represent the "clearest and most reliable objective evidence of contemporary values." The members of state legislatures are elected by citizens who share their beliefs. Therefore, there can be little doubt that the values of the citizens

are reflected in the legislation enacted by the state legislatures. Turning to *Thompson v. Oklahoma*, 487 U.S. 815 (1988), in an opinion by Justice Powell,

> "Most state legislatures have not expressly confronted the question of establishing a minimum age for the imposition of the death penalty. In 14 states capital punishment is not authorized at all and in 19 others capital punishment is authorized, but no minimum age is expressly states in the death penalty statute…When we confine our attention to the 18 states that have expressly established a minimum age in their death penalty statutes we find that all of them require that the defendant have attained at least the age of 16 at the time of the capital offense."

One source is present that accurately represents the values of the nation without the variations present in poll data: state legislatures. State legislatures represent the "clearest and most reliable objective evidence of contemporary values", *Penry v. Lynaugh*, 492 U.S. 302 (1989). The members of state legislatures are elected by citizens who share their beliefs. Therefore, there can be little doubt that the values of the citizens are reflected in the legislation enacted by the state legislatures.

Citing Justice Powell's opinion, there is no clear opposition to the death penalty for adolescents sixteen and up. When you remove the fourteen states with no capital punishment, there are thirty-two states left, with over half having no minimum age. Therefore, the death penalty for minors cannot be considered "cruel and unusual," and thus not prohibited by the Eighth Amendment.

Further support comes from *Trop v. Dulles*, 356 U.S. 86 (1958), where it was ruled by the U.S. Supreme Court that revoking a person's citizenship was "cruel and unusual punishment" since "evolving standards of decency" opposed it. Again, this is where a national consensus was against the imposition of the sentence. Going back to *Thompson v. Oklahoma*, 487 U.S. 815 (1988), there is no national consensus against the death penalty for criminals sixteen and up.

VIII.

International Government standards cannot be applied to the United States.

The basis for determining if the execution of a seventeen year old is "cruel and unusual" must be made based on the contemporary values of the citizens of the United States of America only. International opinions hold absolutely no bearing on domestic cases. Foreign laws are not relevant to questions involving the Eighth Amendment. In a dissenting opinion from Justice Rehnquist from *Atkins v. Virginia*, 536 U.S. 304 (2002),

> "…the Court's decision to place weight on foreign laws, the views of professional and religion organizations, and opinion polls in reaching its conclusion. The Court's suggestion that these sources are relevant to the constitutional questions finds little support in our precedents."

The values and standards of Europeans, Asians, Africans, and any other foreign people are not connected in any way to the values and standards of Americans.

International precedents are irrelevant because views on issues such as "cruel and unusual punishment" are relative based on the values of the citizens. Capital punishment is legal in most states. Most European countries have outlawed the death penalty. Does this mean we should do the same? No, because European values go against capital punishment while American values do not. Iran, on the other hand, practices much harsher forms of punishment than our nation does. A nine year old girl caught stealing will lose four fingers for the first offense, lose a foot for the second offense, be sent to prison for the third offense, and will be sentenced to death for the fourth offense. Based on our standards, this is surely "cruel and unusual." However, the values of Iranians are different than those of Americans. This is not "cruel and unusual" in Iran.

Placing weight on international precedents can lead to a legal system that contradicts the contemporary values of American society. Such is the case in Israel. Execution is not practiced in the State of Israel. This goes against Israeli values. Israelis attain most of their standards from their religion. Capital punishment is commonplace in the Torah. Israelis still agree with execution of murderers, as shown by the execution of Adolf Eichmann. The

Nazi participant in the Holocaust was executed despite Israel's laws against capital punishment. Then why is capital punishment illegal in Israel. The answer lies in their incorporation of foreign values into their legal system. When the State of Israel was founded in 1948, the Europeans who helped set up the state implanted many of their beliefs into the Israeli system. The result is a conflict between Israel's values and its government. We cannot allow this to happen in the United States.

CONCLUSION

In the previous pages, it is stated that: the Missouri Supreme Court ruling is illegal and therefore, the original sentence should be affirmed, death. The respondent cannot seek shelter under precedents that overturned the death penalty for minors that were criminally insane or mentally retarded; brain scans and neuroscience tests are not adequate proof that adolescents are less culpable for serious crimes; the death penalty does not violate the Eighth or Fourteenth Amendments; Judicial Law allows for the death of someone in a capital felony; the U.S. Supreme Court cannot rule that the death penalty is illegal for minors or anyone in all cases; international precedents are irrelevant due to views that are based in value of the citizens, and to find a punishment "cruel and unusual" there must be a "unanimous condemnation" of the penalty and it must violate "the evolving standards of decency."

For the reasons stated above, the Court should reverse the decision of the Missouri Supreme Court and reaffirm the death penalty for the Respondent in *Roper v. Simmons.*

Respectfully Submitted,

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