No. 03-633

In The
Supreme Court of the United States

DONALD P. ROPER, Superintendent,

Petitioner,

v.

CHRISTOPHER SIMMONS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Missouri

BRIEF OF THE CONSTITUTION PROJECT AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The Constitution Project, based at Georgetown University's Public Policy Institute, is a bipartisan organization that seeks solutions to contemporary constitutional issues. In May 2000, it convened thirty members of a blue ribbon committee to examine capital punishment in this country. This diverse committee includes supporters and opponents of the death penalty, Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and other concerned Americans. Although The Constitution Project does not oppose the death penalty, it recommends an exemption for defendants who were under the age of 18 at the time of the crime. In the opinion below, the Supreme Court of Missouri identified The Constitution Project as one of many groups whose views are "consistent with the legislative and other evidence that current standards of decency do not permit the imposition of the death penalty on juveniles." *Simmons v. Roper,* 112 S.W.3d 397, 411 (Mo. 2003) (en banc).[1]

SUMMARY OF ARGUMENT

The court below correctly held that the execution of a person who was less than 18 at the time of the crime is cruel and unusual punishment prohibited by the Eighth Amendment because it offends contemporary standards of

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus curiae and its counsel made any monetary contribution toward the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk pursuant to Rule 37.3.

decency and cannot be reconciled with fundamental tenets of our capital jurisprudence.

Much has changed since the Court last considered this issue fifteen years ago in *Stanford v. Kentucky,* 492 U.S. 361 (1989). For example, several weeks after the Court decided *Stanford,* the first exoneration based on DNA evidence occurred. Each year there has been a steady increase in the number of exonerations, and recent studies show that there is a significantly higher percentage of false confessions among young people. As a result of these and other developments, many more Americans such as this amicus curiae now oppose the execution of juveniles. The position of The Constitution Project is significant because this bipartisan organization presents a nationwide view shared by an extremely diverse cross-segment of the American population that includes those with experience as homicide prosecutors and victim advocates among others.

Not long ago, the Court concluded that mentally retarded persons should be exempt from the death penalty because of the prevailing view in our society that they, as a group, do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. *Atkins v. Virginia,* 536 U.S. 304 (2002). The reasoning embraced by the Court in *Atkins* also supports a categorical exemption for persons who were less than 18 at the time of the crime. As a class, adolescent offenders lack the responsibility and culpability of adult criminals. Further, their lack of maturity and experience hinders their ability to defend themselves on an individual basis. The Constitution Project submits that, in light of the elevated and wholly unacceptable risk of error facing juvenile defendants, the holding

below is necessary to preserve the integrity of our capital jurisprudence.

ARGUMENT

I. "THERE IS SOME AGE BELOW WHICH A JUVENILE'S CRIMES CAN NEVER BE CONSTITUTIONALLY PUNISHED BY DEATH"

Not long ago, the Court concluded that mentally retarded persons should be exempt from the death penalty because of the prevailing view in our society that they, as a group, do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. *Atkins v. Virginia*, 536 U.S. 304, 306-307 (2002). This holding is compelled not only by current standards of decency, but also by two independent tenets of Eighth Amendment law: (1) the narrowing doctrine, which seeks to ensure that only the most deserving of execution are put to death, and (2) the reliability requirement, which safeguards against executing people who have been wrongfully convicted or sentenced. *Id*. at 319-321. Mental retardation poses an enhanced risk of wrongful execution because this impairment, as a practical matter, often impedes or even counteracts attempts to present mitigating evidence on an individual basis. *Id*. at 320-321.

The Court has applied similar reasoning to exempt a 15 year old from the death penalty despite the heinous nature of his crime. *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (plurality opinion). "Given the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to children," the execution of the juvenile offender would not serve either of the

goals of the death penalty, retribution and deterrence. *Id.* at 836-837. Accordingly, the plurality opinion in *Thompson* found that the execution of the 15 year old would be "'nothing more than the purposeless and needless imposition of pain and suffering,' *Coker v. Georgia,* 433 U.S. at 592, and thus an unconstitutional punishment." *Thompson,* 487 U.S. at 838.

The parallels between the *Atkins* and *Thompson* cases are obvious. Like the mentally retarded defendant in *Atkins*, the 15 year old in *Thompson* lacked the level of moral responsibility expected of an adult. He was an adolescent – susceptible to impulse and influence, not fully developed emotionally or intellectually. The *Thompson* opinion recognized a "broad agreement" that adolescents "as a class" are less mature and responsible than adults. *Id*. at 834. "'Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.'" *Id*. (quoting 1978 Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders). The same traits that undermined the retribution justification for the death penalty in *Atkins* and *Thompson* undermined the deterrence goal as well.

The common experience of parents throughout America bears witness to the "broad agreement" acknowledged in the plurality opinion in *Thompson*. A teenager's lack of maturity usually is accompanied by a countervailing capacity for growth. To the relief of all, most eventually emerge from the trying years of adolescence with the ability to function in society as responsible adults – a characteristic they lacked only a few years earlier.

In *Thompson*, the plurality declined to consider whether the Eighth Amendment bars the execution of 16 and 17 year olds because the case raised the issue only with respect to a 15 year old. *Id*. at 838. The next year, a bare majority of the Court found that, at that time, there was insufficient objective evidence of a national consensus against executing 16 and 17 year olds and that, therefore, the Eighth Amendment did not prohibit their execution. *Stanford v. Kentucky,* 492 U.S. 361 (1989). This issue, however, must be revisited over time. *Id.* at 381-382 (O'Connor, J., concurring). Indeed, regarding the *Thompson* decision, Justice O'Connor observed: "[t]he plurality and dissent agree on two fundamental propositions: that there is some age below which a juvenile's crimes can never be constitutionally punished by death, and that our precedents require us to locate this age in light of the 'evolving standards of decency that mark the progress of a maturing society.'" *Thompson*, 487 U.S. at 848 (O'Connor, J., concurring).

These fundamental propositions support the Missouri Supreme Court's ruling in this case. Today, the age for a constitutional death penalty cannot be less than 18 because there is a consensus in America that juveniles under this age, as a class, lack the responsibility and moral culpability of adult criminals that are necessary to render them death eligible.

II. CONTEMPORARY STANDARDS OF DECENCY DECRY THE EXECUTION OF A PERSON WHO WAS YOUNGER THAN 18 AT THE TIME OF THE CRIME

Our American society is not the same as it was in 1988 and 1989 when the Court issued the *Thompson* and

Stanford decisions. There have been enormous developments in the area of capital punishment. When *Stanford* was decided, the alternatives to capital punishment were more limited. In the 1990's, many states added the option of life without parole. *See* Jeffrey L. Kirchum, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,* 73 U. Co. L. R. 1, 66-67 (2002). Studies show that support for the death penalty drops significantly when life without parole is available as an alternative sentence. *Id. See also Simmons v. South Carolina,* 512 U.S. 154, 177 (1994) (O'Connor, J., concurring) (noting recent rejection of parole).

Of equal significance is the introduction of DNA evidence into the administration of justice. Several weeks after the Court decided *Stanford*, the first prisoner in American history was exonerated by DNA evidence. *See* Samuel R. Gross, Kristen Jacoby, Daniel Matheson, Nicholas Montgomery, and Sujata Patel, *Exonerations in the United States, 1989 Through 2003* (April 19, 2004) *available at* http://www.law.umich.edu/newsandinfo/exonerations-in-us.pdf (last visited July 14, 2004). There has been a steady increase in exonerations in recent years, and more than 70 death row inmates have been exonerated since 1989. *Id.* at 4, 6, 8. *See generally* Bureau of Statistics, U.S. Dept. of Justice, Pub. No. 197020, Capital Punishment 2001 (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cp01.pdf.

Due in part to the upward trend in exonerations and the unavoidable fact that teenagers as a group lack the maturity and responsibility expected of an adult, more Americans now oppose the execution of defendants who were under the age of 18 at the time of the crime. *Simmons v. Roper,* 112 S.W.3d 397 (Mo. 2003). As the court

below observed, since *Stanford*, additional respected American organizations have called for an end to the juvenile death penalty. *Id.* at 410-411. Among those expressly identified by the Missouri Supreme Court is The Constitution Project. *Id.* at 410.

The Constitution Project is not a radical group. It is a mainstream organization that approaches constitutional issues, such as the one in this case, with input from both Democrats and Republicans, conservatives and liberals, prosecutors and defense lawyers, as well as other interested Americans such as victim advocates, journalists, scholars, former judges, and others. It adheres to the view that individuals who commit violent crimes deserve swift and certain punishment, and does not categorically oppose the death penalty.

In May 2000, the Constitution Project convened a committee to examine capital punishment in this country. The co-chairs are Charles F. Baird, former Judge, Court of Criminal Appeals of the State of Texas; Gerald Kogan, former Chief Justice, Supreme Court of the State of Florida and former Chief Prosecutor, Homicide and Capital Crimes Division, Dade County, Florida; and Beth A. Wilkinson, Prosecutor, Oklahoma City bombing case. The members of the committee also are distinguished, and brought to the table varied backgrounds and perspectives.[2]

[2] The director of The Constitution Project's death penalty initiative is Virginia E. Sloan. Its members are: The Reverend James E. Andrews, Stated Clerk (retired), Presbyterian Church (U.S.A.); The Honorable Harry Barnes, Jr., former U.S. ambassador to Romania, India, and Chile; The Honorable Charles B. Blackmar, former Chief Justice, Supreme Court of Missouri; William G. Broaddus, former Attorney General, Commonwealth of Virginia; David I. Bruck, Capital Defense

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Counsel; The Honorable Robert J. Burns, retired Judge, Jefferson Parish, Louisiana; Rosalynn Carter, Vice Chair of The Carter Center; W. J. Michael Cody, former Attorney General, State of Tennessee; The Honorable Mario M. Cuomo, former Governor, State of New York; The Honorable John J. Gibbons, former Chief Judge, U.S. Court of Appeals for the Third Circuit; Thomas A. Gottschalk, General Counsel, General Motors Corporation; Charles A. Gruber, former President, International Association of Chiefs of Police; Cardinal William H. Keeler, Archbishop of Baltimore; Paula M. Kurland, Victim Advocate and Office Manager, Crime Prevention Institute; David Lawrence, Jr., President, Early Childhood Initiative Foundation and former Publisher, Miami Herald and Detroit Free Press; The Honorable Abner J. Mikva, former Member of Congress (D-IL), former Chief Judge, U.S. Court of Appeals for the D.C. Circuit, and former White House Counsel, Clinton administration; Sam D. Millsap, Jr., former District Attorney, Bexar County, San Antonio, Texas; The Honorable Sheila M. Murphy, former Judge, Sixth District, State of Illinois and Executive Director, Illinois Death Penalty Education Project; Dr. LeRoy Riddick, Forensic Pathologist; Chase Riveland, former Secretary, Department of Corrections, State of Washington; Laurie O. Robinson, President, CSR, Inc., Senior Fellow, Crime Policy Program, University of Pennsylvania, Jerry Lee Center of Criminology, and former Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice, Clinton administration; The Honorable Kurt L. Schmoke, former Mayor, City of Baltimore, Maryland, former State's Attorney, State of Maryland, and Dean, Howard University Law School; The Honorable William S. Sessions, Director, Federal Bureau of Investigation, Reagan and Bush administrations and former Chief Judge, U.S. District Court for the Western District of Texas; G. Elaine Smith, Past President, American Baptist Churches, USA; B. Frank Stokes, Jr., Special Agent, FBI, Retired and Private Investigator; Jennifer Thompson, Spokesperson, Center on Wrongful Convictions; Scott Turow, Partner, Sonnenschein Nath & Rosenthal; The Honorable Vin Weber, former Member of Congress (R-MN); John W. Whitehead, President, The Rutherford Institute; Rabbi Eric H. Yoffie, President, Union of American Hebrew Congregations. Individual member biographies can be found at http://www.constitutionproject.org/dpi/members.html. The Committee's Reporters are Professor Susan Bandes, DePaul University College of Law, Chicago, IL; Professor Robert P. Mosteller, Duke University School of Law, Durham, NC; Professor Stephen Saltzburg, The George Washington University Law School, Washington, DC.

The members of this death penalty initiative disagree on much, including whether capital punishment should be abolished. They are united, however, in their concern that procedural safeguards and other assurances of fundamental fairness in the administration of the death penalty are deeply flawed. They note the dramatic recent increase in the number of persons who have been released from death row because they were shown – often at nearly the last minute – to have been wrongfully convicted.

The work of the committee culminated in the publication of The Constitution Project, *Mandatory Justice, Eighteen Reforms to the Death Penalty* (2001) ("the Report"), *available* at http://www.constitutionproject.org/dpi/ (last visited July 14, 2004). The Report's recommendations are particularly significant because they represent a compilation of a nationwide view shared by an extremely diverse cross-segment of the American population. Among other things, the Report recommends an exemption from the death penalty for people who face an unacceptable risk of wrongful execution, including the mentally retarded and juveniles under the age of 18 at the time of the crime.

The Report presents compelling findings in support of its recommendations. First, it points out that there is "a strong and growing consensus" that executing juveniles serves no acceptable purpose. Report at 13. "A child or adolescent generally does not possess the level of moral responsibility and culpability that society expects of an adult. Juveniles are particularly unlikely to be deterred by the specter of punishment." *Id*. at 14. As for retribution, "'such irreversible giving up upon a person even before they emerge from childhood is squarely in opposition to the fundamental premises of juvenile justice in comparable socio-legal systems.'" *Id*. (quoting American Bar

Association, Report of the Section of Criminal Justice, reprinted in Reports of the American Bar Association 990 (1983)).

Of even more concern is the increased risk of error in juvenile cases. Noting recent examples of false confessions in cases involving juvenile defendants and the problems associated with allowing juries to weigh age as a mitigating factor, the Report concludes that an individual approach to the death penalty does not adequately address the risk of an erroneous sentence with this class of defendant. *Id.*

The Missouri Supreme Court noted that the *Thompson* and *Atkins* opinions looked to the views of organizations such as The Constitution Project to assess "evolving standards of decency." *Simmons*, 112 S.W.3d at 411. This Court should do the same, and conclude that contemporary standards of decency decry the execution of someone who was less than 18 at the time of the crime.

III. BEDROCK PRINCIPLES OF CAPITAL JURISPRUDENCE ALSO REQUIRE A CATEGORICAL EXEMPTION FOR JUVENILES UNDER 18

The existence of a national consensus, however, is not necessary for an affirmance because bedrock principles of capital jurisprudence require a categorical exemption for juveniles under the age of 18. In *Atkins*, the Court found two independent grounds for the exclusion of the mentally retarded: (1) the narrowing doctrine; and (2) the special risk of wrongful execution facing this class of defendant. The same grounds support the decision below.

The Report of The Constitution Project explains why constitutional law requires a categorical rule barring the execution of both mentally retarded and juvenile offenders under 18 regardless of a national consensus on the issue.

> [T]he argument for a categorical rule does not rest on the existence of a national consensus . . .
>
> The death penalty is meant to be reserved for the most morally culpable offenders . . .
>
> The risks of executing those undeserving of death, and of cutting short a life that could hold promise, are simply too great, and outweigh the possibility that some juveniles may be among the most heinous and depraved murderers. . . .
>
> As discussed above in regard to persons with mental retardation, allowing juries to weigh age as a mitigating factor against aggravating factors such as the seriousness of the crime does not adequately address the risk of an erroneous sentence.

Report at 12-14.

Like The Constitution Project, the *Atkins* Court could not ignore "the fact that in recent years a disturbing number of inmates on death row have been exonerated." 536 U.S. at 320 n.25. Studies published within the last few months have shown that there is a significantly higher percentage of false confessions among young people than the population at large. *See Exonerations in the United States, 1989 Through 2003* at 19-20; Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World,* 82 N.C. L. Rev. 891, 963 (2004). Further, there are a number of documented instances of false

murder confessions obtained from teenagers over the age of 15. *See, e.g., id.* at 966-68, 974-77.

In sum, because of the elevated and unacceptable risk of error facing juveniles, the death penalty age limit recommended by The Constitution Project is necessary to preserve the integrity of our capital jurisprudence. The Supreme Court of Missouri, therefore, correctly held that the Eighth Amendment prohibits the execution of people who were under the age of 18 at the time of the crime.

CONCLUSION

The Court should affirm.

Respectfully submitted,

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