No. 03-633

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 RESPONDENT

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QUESTION PRESENTED

Whether the Cruel and Unusual Punishments Clause of the Eighth Amendment bars infliction of the death penalty on offenders who were under the age of eighteen at the time of the offense.

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STATEMENT OF THE CASE

The Crime and the Trial. On September 9, 1993, fishermen discovered the body of a woman, later identified as Shirley Crook, floating in the Meramec River, in St. Louis County, Missouri. TT 677-679.[1] Mrs. Crook's arms and legs had been bound and her face covered with a towel and duct tape. TT 687-688. The medical examiner determined that the cause of death was drowning. TT 752.

The following day, after learning that Christopher Simmons and his friend Charles Benjamin may have been involved in the crime, police arrested Simmons, a 17-year-old high-school junior with no previous criminal convictions, at

[1] The trial transcript is cited as "TT." The transcript of the hearing on Simmons' motion to suppress his confession is cited as "MST." The transcript of the hearing on Simmons' motion for post-conviction relief under Missouri Supreme Court Rule 29.15 is cited as "HT."

his school. TT 888-889, 922. Simmons was taken to the police station, where he waived his *Miranda* rights and was interrogated. TT 923, 927-928. Simmons initially denied involvement in the crime. TT 930. After nearly two hours of interrogation, during which police accused him of lying, falsely told him that Benjamin had confessed, and explained that he might face the death penalty and that it would be in his interest to cooperate, Simmons began to cry and asked to speak to one of the detectives alone. TT 930-948.

Simmons told the detective that, in the early morning of September 9, he and Benjamin met at the house of Brian Moomey, an adult friend of both Simmons and Benjamin. After trying and failing to wake Moomey, Simmons and Benjamin went to Mrs. Crook's house, planning to burglarize it. TT 899-900; MST 26-27. The two gained entry through an open window at the back of the house. Their entrance woke Mrs. Crook, who sat up in bed and asked, "Who is there?" TT 900-901; MST 27-28. Simmons recognized Mrs. Crook as someone with whom he had been involved in a minor car accident immediately after receiving his driver's license. TT 901-902; MST 28. Believing that Mrs. Crook had also recognized him, Simmons "panicked." MST 28. He and Benjamin took Mrs. Crook out of bed, bound her, put her in the back of her mini-van, and drove to Castlewood State Park in St. Louis County, where Simmons pushed her from a railroad trestle into the Meramec River. TT 902-906; MST 29-31. Asked if he would re-enact the crime on videotape, Simmons agreed; he accompanied the police to Castlewood State Park, where he demonstrated for the camera where he and Benjamin had parked the mini-van and where Mrs. Crook had been pushed from the trestle. TT 907-909.

Simmons was tried as an adult for first-degree murder.[2] At trial, in addition to the testimony of the detective to whom Simmons had confessed, the State presented the tes-

[2] Because Simmons was 17 at the time of the crime, under Missouri law he was outside the jurisdiction of the juvenile court and was automatically tried as an adult. *See* Mo. Rev. Stat. §§ 211.021, 211.031.

timony of several other witnesses, including Brian Moomey, John Tessmer (a friend of Simmons), and Christie Brooks (a neighbor).

Moomey—a 29-year-old who had served a prison sentence for burglary and assault—testified that he had a party at his house "every night" at which he drank until he passed out. TT 842-843, 845. A group of neighborhood teenagers, often including Simmons, Benjamin, and Tessmer, attended these "parties." TT 837-838. Moomey explained that the teenagers wanted to come to his house "because most of them get picked on [b]y their parents," and that they mowed his lawn, cleaned his house and car, and gave him rides in return for being allowed to "hang out" with him. TT 843-844. The teenagers called themselves the "Thunder Cats," and referred to Moomey as "Thunder Dad"; Tessmer, a 16-year-old whom Moomey considered his "best friend," was the "Number One Thunder Cat." TT 846-847.

Moomey claimed that, at one of the nightly parties at his house before the murder, he had heard Simmons, Benjamin, and Tessmer discussing a plan to burglarize a house and kill the occupants, and that Simmons had told the others that "they could do it and not get charged for it because they are juveniles." TT 839-840.[3] Moomey also alleged that, on the evening of September 9, Simmons had come to Moomey's house and told him that he had killed Mrs. Crook because she had seen his face. TT 841-842. Moomey admitted that, after this conversation, he failed to contact the police until he was told they had his name and wanted to talk to him (TT 855), and that he was concerned about testifying because he believed he was being investigated in connection with the murder (TT 872-873).

[3] Although the State contended, and Moomey testified, that Moomey related this alleged conversation planning the crime to the detectives who interviewed him (TT 874), the State stipulated that no reference to the conversation appeared in the videotaped portion of Moomey's initial interview with the police on September 10, or in the police report of that interview (TT 860-861).

John Tessmer, Moomey's 16-year-old "best friend," testified that, in the days leading up to the crime, Simmons had told him of a plan to rob and murder a male neighbor, and had asked him to meet Simmons and Benjamin at Moomey's house to carry out that plan. TT 968, 972. Tessmer testified that he in fact met Simmons and Benjamin at Moomey's house on the morning of September 9, before the crime was committed, but left and went home soon after Simmons and Benjamin arrived. TT 972-973. Based on his role in the offense, Tessmer—who at the time of trial had already been in juvenile custody for threatening to kill a woman and on juvenile probation for burglary (TT 980)—was charged as a juvenile with conspiracy to commit murder (TT 982-983). The charges against Tessmer were dismissed when he agreed to testify against Simmons. *Id.*

Christie Brooks, a neighbor of Simmons, corroborated Tessmer's account that Simmons had a plan to burglarize the male neighbor's house, but not the supposed plan to murder him. She testified that Simmons had also told her about the planned burglary, but that he did not mention any plan to commit murder. TT 825-826, 830.

The defense presented no witnesses. After a closing argument in which the prosecutor exhorted the jury not to let Simmons "use his age as a shield to protect him" (TT 1017), the jury found Simmons guilty of first-degree murder.

In the penalty phase, the State presented the testimony of Mrs. Crook's family about the effect of the crime. TT 1071-1095. The defense presented evidence that Simmons had no juvenile charges or adjudications and no prior adult criminal convictions (TT 1097-1098), along with brief testimony from Simmons' parents, his two young half-brothers, and two friends describing their loving relationships with him and various kind acts he had performed (TT 1098-1124). In closing argument, Simmons' counsel contended that Simmons' kind acts, his lack of any prior criminal history, and his age at the time of the crime were mitigating factors that counseled against the death penalty. TT 1147-1149. In response, the State argued that Simmons' age was "quite the

contrary" of mitigating (TT 1156-1157): "Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."

The jury found three statutory aggravating factors: that the murder "was committed for the purpose of receiving money"; that the murder "was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of the defendant"; and that the murder "involved depravity of mind" and was "outrageously and wantonly vile, horrible, and inhuman" because Mrs. Crook was bound before she was killed. TT 1163-1164.[4] It recommended a sentence of death (TT 1163), and the judge imposed that sentence (TT 1181).

Post-Conviction Proceedings. Now represented by new counsel, Simmons filed a motion in the trial court, pursuant to Missouri Supreme Court Rule 29.15, to set aside his conviction and sentence. Simmons alleged, among other things, ineffective assistance of trial counsel at the guilt and sentencing phases. An evidentiary hearing was held on the motion; the testimony at that hearing, from psychologists who had examined Simmons, his trial counsel, and his friends and neighbors, sheds light on Simmons' developmental history, his maturity at the time of the crime, and his ability to assist in his own defense.

Dr. Robert Smith, an expert clinical psychologist retained by Simmons' post-conviction counsel (HT 25), testified regarding his psychological evaluation of Simmons. Based on his evaluation, Dr. Smith characterized Simmons as an adolescent who was "very immature" (HT 132, 157), "very impulsive" (HT 137), and "very susceptible to being manipulated or influenced" (HT 211). Dr. Daniel Cuneo, who

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[4] *See* Mo. Rev. Stat. § 565.032. The jury had been instructed to consider those three aggravating factors, in addition to the aggravating factor that the murder was committed during a burglary. TT 1124-1125. The jury was also instructed to consider two statutory mitigating factors—Simmons' lack of significant history of prior criminal activity, and Simmons' age at the time of the offense—along with Simmons' "kind acts . . . for his family and friends," and any other mitigating circumstances. TT 1127.

had previously evaluated Simmons at the request of his trial lawyers,[5] also viewed him as immature. As Dr. Cuneo explained, the tests he conducted showed a person who "is often naive or childlike," and who, when "placed under stress, . . . gets easily frustrated." HT 734. "When he turns that frustration inward, he becomes depressed and there may be periodic suicide attempts. . . . When he turns it outward, he may strike out at others." HT 735.

Dr. Smith believed that Simmons' "extremely dysfunctional home environment" (HT 110) contributed to and exacerbated these characteristics, making the normal adolescent developmental stages particularly difficult for him (HT 144-147). Simmons' parents had separated before his birth, and both had remarried; he lived primarily with his natural mother, Cheryl Hayes, and stepfather, Bob Hayes. Bob Hayes, an alcoholic (HT 74, 112-113), was a neglectful and abusive parent. "[T]here were frequent arguments and fights, particularly when Mr. Hayes was drinking heavily. . . . [H]is verbal behavior was extremely abusive." HT 118. Hayes acknowledged to Dr. Smith that he also abused Simmons physically, hitting him, chasing him out the door, throwing things at him, or pinning him against the wall (HT 76-77, 126, 589-590), as the testimony of several of Simmons' friends and neighbors in the post-conviction hearing confirmed (HT 226, 249-250, 270-273, 311-312). Cheryl Hayes stood by and did not attempt to intervene during these incidents. HT 590.

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[5] Dr. Cuneo testified at the post-conviction hearing that he had conducted only limited interviews with Simmons' family. He was unaware of much of the developmental history that Dr. Smith elicited, including Simmons' dysfunctional home environment and his drug and alcohol abuse, and he believed that, had he known that history, it would have been significant to his evaluation. HT 693-713. Based on the more limited and incomplete evaluation of Simmons he was able to conduct, Dr. Cuneo concluded that Simmons was sane at the time of the offense and competent to stand trial (HT 729), but that his psychological condition was potentially mitigating (HT 738). After discussing Dr. Cuneo's initial findings with him, Simmons' trial counsel chose not to have Dr. Cuneo complete his evaluation and not to have him testify. HT 741-742.

Dr. Smith testified that he had reviewed Simmons' school records, which showed that Simmons was an average student until adolescence (HT 42), when his grades "plummeted" (HT 147) and there was a "dramatic change in his behavior" (HT 208). During this period, his behavior in school was immature and "very impulsive"; "he would act without considering the consequences." HT 137-138.

Simmons' adolescent school difficulties were compounded by a growing substance abuse problem. As a young teenager, he began "resort[ing] to alcohol and drugs," primarily marijuana, in an attempt to "cope with [his] dysfunctional environment." HT 208. By age 17, he was routinely skipping school to use drugs and alcohol, drinking to intoxication several times a week, and consuming four to five marijuana "joints" a day. HT 194. As an adolescent, Simmons began to escape his home, and the stepfather he feared, by running away to friends' houses—sometimes for weeks at a time, as one of those friends testified. HT 312-315.

Dr. Smith explained that as Simmons spent less time at home and school, he spent more and more time with a group of his peers who also abused drugs and alcohol. HT 145-147. Along with other teenagers in that group, Simmons also began to spend time with Brian Moomey. One member of the group testified that Moomey provided them with alcohol and smoked marijuana with them. HT 320-322.[6] Dr. Smith believed that Simmons' immaturity and his dependence on drugs and alcohol rendered him "very susceptible to being manipulated or influenced" in a relationship with a powerful figure who supplied him with those substances (HT 211), and

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[6] Notwithstanding the trial testimony that the youths in the group referred to Moomey as "Thunder Dad" (TT 847), Simmons' trial lawyer, David Crosby, explained that Moomey was hardly an "ideal father figure" (HT 384). Specifically, Crosby testified that it was the "talk in the neighborhood" that Moomey had young men "commit crimes for him" in return for allowing them to "drink in his house and . . . [do] drugs there." HT 383. Crosby also testified that Simmons had told him that Moomey "had helped plan" Simmons' crime. HT 433.

that Moomey was such a figure for Simmons (HT 491, 555). Dr. Cuneo also believed that Moomey—whom he characterized as the neighborhood "Fagin"—had significant influence over Simmons and the other teenagers who congregated at his house. HT 714-715, 724.[7]

Dr. Smith concluded that Simmons' "immaturity" and adolescent behaviors, along with his history of abuse and substance dependence, and evidence of a personality disorder,[8] "would influence his expression of aggression, his judgment, and . . . would play a very significant role in his commission of the offense." HT 212. He believed that, due to these factors, Simmons' "ability to completely appreciate and understand what he was doing and the consequences would have been diminished." HT 546.

Dr. Smith noted that Simmons' behavior continued to be "very immature" and impulsive when he was in jail awaiting trial; Simmons "acted out in a lot of very immature and inappropriate ways, very adolescent kinds of behavior," and at one point attempted suicide. HT 133, 157. Dr. Smith believed that Simmons' immaturity and psychological problems impaired his ability to assist his lawyers in preparing for trial. HT 445. David Crosby, Simmons' trial lawyer, confirmed that Simmons "didn't assist me greatly in the preparation of the case." HT 398. For instance, Simmons initially denied the abuse by his stepfather and minimized his own use of drugs and alcohol. HT 371-373, 398. Crosby also ob-

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[7] Marie Clark, a psychologist and mitigation specialist who prepared a social history for Simmons, also noted his general susceptibility to influence. She commented that he has a "tendency to follow other people and go along with whatever program he feels is appropriate or he feels the other person has." HT 627. "He tended to be a kid who tried to fit in and in doing so, made poor choices in terms of his friendships at times, in order to try to fit in." HT 655.

[8] Based on his evaluation of psychological tests administered to Simmons, which included tests not available to Dr. Cuneo, and the symptoms Simmons displayed, Dr. Smith diagnosed Simmons with schizotypal personality disorder. HT 172. Based on the more limited information available to him, Dr. Cuneo had tentatively diagnosed Simmons with borderline personality traits. HT 719.

served that Simmons neither understood the legal process nor appeared fully to comprehend that he was facing the death penalty: "I don't think [the possibility of the death penalty] really ever sunk in with Chris." HT 399-401.[9]

The trial court found that the evidence Simmons presented did not rise to the level of a violation of the Sixth Amendment right to counsel, and denied Simmons' Rule 29.15 motion. Simmons appealed his conviction and sentence and the denial of post-conviction relief to the Missouri Supreme Court, which affirmed. *See State* v. *Simmons*, 944 S.W.2d 165 (Mo. 1997). Simmons' federal habeas petition under 28 U.S.C. § 2254 was likewise unsuccessful. *See Simmons* v. *Bowersox*, 235 F.3d 1124 (8th Cir. 2001).

State Habeas Proceedings. In 2002, Simmons sought a writ of habeas corpus from the Missouri Supreme Court, contending that the juvenile death penalty violated the Federal and Missouri Constitutions' prohibition on cruel and unusual punishment. Relying on *Atkins* v. *Virginia*, 536 U.S. 304 (2002), the Missouri Supreme Court held that the evolving standards of decency embodied in the Eighth Amendment to the Federal Constitution barred execution of juvenile offenders, and granted the writ. JA 134.

SUMMARY OF ARGUMENT

Punishment is "cruel and unusual" within the meaning of the Eighth Amendment either if there is a general societal consensus against its imposition, or if it affronts "the basic concept of human dignity at the core of the Amendment" because it is disproportionate to the moral culpability of the offender. *Gregg* v. *Georgia*, 428 U.S. 153, 182 (1976) (opinion of Stewart, J.); *see also, e.g.*, *Atkins* v. *Virginia*, 536 U.S.

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[9] Dr. Cuneo also believed that Simmons' immaturity prevented him from making thoughtful decisions about his situation as a defendant. He noted that Simmons had been offered the chance to plead guilty in return for a life sentence and had rejected that option despite Dr. Cuneo's advice to accept. HT 729. Dr. Cuneo commented: "Mr. Simmons was seventeen years old. When I asked Mr. Simmons—at one point and this is typical for seventeen, he was rather unrealistic. 'If I get more than ten years, I don't know if I could put up with it. Suicide would be an option.'" HT 730.

304, 312 (2002). Each of these basic Eighth Amendment principles "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality).

This Court first considered the constitutionality of the death penalty for 16- and 17-year-old offenders in 1989. *See Stanford* v. *Kentucky*, 492 U.S. 361 (1989). In the 15 years since that decision, advances in the scientific understanding of adolescent development, and the consistent movement by legislatures and juries away from imposition of death on juvenile offenders,[10] have demonstrated that capital punishment of those under 18 is inconsistent with our society's evolving standards of decency. The execution of juvenile offenders—like that of mentally retarded offenders, *see Atkins*, 536 U.S. at 321—is both disproportionate to their personal moral culpability and contrary to national and worldwide consensus.

First, research in developmental psychology and neurology over the last 15 years has confirmed that 16- and 17-year-olds differ from adults in ways that both diminish their culpability and impair the reliability of the sentencing process. Adolescents of that age are less able than adults to weigh risks and benefits, less able to envision the future and apprehend the consequences of their actions, and less able to control their impulses. Indeed, the parts of the brain that enable impulse control and reasoned judgment are not yet fully developed in 16- and 17-year-olds. For those reasons, they are not the "fully rational, choosing agent[s]" presupposed by the death penalty. *Thompson* v. *Oklahoma*, 487 U.S. 815, 825 n.23 (1988) (plurality).

More broadly, the very nature of adolescence means that adolescents are less blameworthy than adults. By virtue of their developmental deficits and their legal minority, adolescents are inherently less able to resist the influence of peers and environment; they lack the control over them-

[10] For purposes of this brief, "juvenile offenders" refers to 16- and 17-year-old offenders.

selves and over their lives that adults possess, and are therefore not as fully responsible for their own actions as adults. Moreover, the defining feature of adolescence is that the self is still unformed; in a very real sense, 16- and 17-year-olds are not yet the people they will ultimately become. Adolescents' vulnerability and unformed nature preclude a reliable determination that death is a fit response to their personal culpability and character.

The maturity of individual 16- and 17-year-olds, of course, varies. But because of their developmental deficits and their inherent changeability, the case-by-case consideration that suffices for adults cannot provide the reliable assessment of character and culpability that the Eighth Amendment demands. The rapid pace of change during adolescence means that a jury evaluating an adolescent defendant at sentencing cannot assess with any certainty that defendant's maturity and moral responsibility at the time of the crime. Nor can the death penalty reliably be a "reasoned moral response" to the still-unsettled character of an adolescent. *California* v. *Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). For these and other reasons, permitting adolescents to be exposed to the death penalty creates a constitutionally intolerable "risk of wrongful execution." *Atkins*, 536 U.S. at 320.

Second, over the last 15 years, our nation has witnessed a "general legislative rejection" of the death penalty for juvenile offenders. *Stanford*, 492 U.S. at 381 (O'Connor, J., concurring in part and in the judgment). "A clear national consensus" now repudiates that punishment. *Id.* at 381-382. Since *Stanford*, seven additional states and the federal government have expressly set the minimum age for the death penalty at 18, and not one state has lowered the minimum age for the death penalty. Just as in *Atkins*, 31 jurisdictions and the federal government now expressly prohibit the death penalty for juvenile offenders. Even among states that theoretically permit the execution of juvenile offenders, just three have actually conducted such executions in the last 10 years. And in the last several years, death sentences

for juveniles—always unusual—have shown a dramatic, and statistically significant, decline. Both executions and death sentences imposed on juvenile offenders are now exceedingly rare—sufficiently rare that they are "cruel and unusual in the same way being struck by lightning is cruel and unusual." *Furman* v. *Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring). And the handful of United States jurisdictions that continue to impose the death penalty on juvenile offenders now stand alone in a world that has almost universally set its face against that punishment.

ARGUMENT

Fifteen years ago, when this Court first addressed the constitutionality of the death penalty for 16- and 17-year-old offenders, it concluded that there was not yet sufficient evidence that the practice contravened Eighth Amendment standards of decency. *See Stanford* v. *Kentucky*, 492 U.S. 361, 380 (1989) (plurality); *id.* at 381-382 (O'Connor, J., concurring in part and in the judgment). On the same day in 1989, the Court determined that then-current standards of decency did not prohibit execution of the mentally retarded. *See Penry* v. *Lynaugh*, 492 U.S. 302 (1989). But the Eighth Amendment's prohibition on cruel and unusual punishments "is not static"; rather, it "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality).

Accordingly, in 2002, when the Court revisited *Penry*'s holding, it held that the evolution in our society's standards of decency since 1989 required a different result. *See Atkins* v. *Virginia*, 536 U.S. 304, 321 (2002). The Court found that "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses," the mentally retarded do not "act with the level of moral culpability that characterizes the most serious adult criminal conduct," and that those same disabilities "can jeopardize the reliability and fairness of capital proceedings" against them. *Id.* at 306-307. Moreover, "[p]resumably for these reasons," the "deliberations" of "the American public, legislators, scholars, and judges"

since *Penry* reflected an emerging consensus against the execution of the mentally retarded. *Id.* at 307.

As the Missouri Supreme Court recognized, equally powerful evidence of evolution in our society's standards of decency is present here. In the 15 years since *Stanford*, scientific research has confirmed that 16- and 17-year-olds, as a class, have not yet fully developed the capacities for reasoning, judgment, and control that are necessary to act with the level of culpability justifying the ultimate punishment. And these developmental deficits, along with the changeability that is intrinsic to adolescence, seriously impair the reliability and fairness of capital proceedings against juvenile offenders. Concomitantly, since *Stanford*, a national—and, indeed, worldwide—consensus has developed against the execution of offenders under the age of 18. For both these reasons, the execution of juvenile offenders violates the standards of decency that obtain today.

As *Atkins* demonstrates, *stare decisis* is no bar to reconsideration of the holding in *Stanford*. Petitioner's argument to the contrary (Br. 14-15) simply fails to acknowledge that the standards of decency embodied in the Eighth Amendment evolve "as public opinion becomes enlightened by a humane justice." *Weems* v. *United States*, 217 U.S. 349, 378 (1910). The very nature of the Eighth Amendment accordingly requires that the principle of *stare decisis* yield—as it did in *Atkins*—to compelling evidence that society's values have changed. Because such compelling evidence is present in this case, the judgment of the Missouri Supreme Court should be affirmed.[11]

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[11] Because the Court has granted certiorari on the underlying question whether the execution of juvenile offenders violates the Eighth Amendment, and because it may affirm the Missouri Supreme Court's judgment on any ground, *see, e.g.*, *Thigpen* v. *Roberts*, 468 U.S. 27, 30 (1984), it need not address the first question raised by petitioner (Br. i, 11-14)—whether the Missouri Supreme Court erred in concluding that subsequent developments had undermined *Stanford* before this Court itself addressed the question. Even if lower courts are not free to assess evolving standards of decency for themselves where there is a prior—but outdated—Supreme Court decision on the question presented, this Court is

I. THE EXECUTION OF JUVENILE OFFENDERS VIOLATES THE EIGHTH AMENDMENT'S REQUIREMENT THAT DEATH MUST BE PROPORTIONATE TO THE OFFENDER'S PERSONAL CULPABILITY.

The Eighth Amendment requires that the "punishment for crime . . . be graduated and proportioned to the offense." *Atkins*, 536 U.S. at 311 (quoting *Weems*, 217 U.S. at 367). When the punishment is death, that extreme sanction must fit not only the crime, but also the offender: a death sentence must be "directly related to the personal culpability of the criminal defendant." *Franklin* v. *Lynaugh*, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring in the judgment); *see also Tison* v. *Arizona*, 481 U.S. 137, 149 (1987); *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976). The death penalty thus may not be imposed on those whose "crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder," *Godfrey* v. *Georgia*, 446 U.S. 420, 433 (1980), but must be reserved for "a narrow category" of the most culpable offenders, *Atkins*, 536 U.S. at 319. This Court has accordingly held that, because certain classes of defendants cannot reliably be said to fall within that narrow category, they warrant a categorical exemption from the death penalty. *See, e.g., id.* at 321; *Thompson* v. *Oklahoma*, 487 U.S. 815, 838 (1988) (plurality) (those under the age of 16); *Ford* v. *Wainwright*, 477 U.S. 399, 409-410 (1986) (the insane).

Most recently, this Court held in *Atkins* that, in light of the constitutional command that only "the most deserving" may be executed, the mentally retarded could not constitu-

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certainly free to reassess the constitutionality of the juvenile death penalty in light of the standards of decency that exist today, and to affirm the Missouri Supreme Court's judgment based on this Court's own assessment of that question. *See Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989). In that case, the court of appeals had reached a judgment contrary to this Court's decision in *Wilko* v. *Swan*, 346 U.S. 427 (1953). Although the Court noted that the court of appeals should not have renounced *Wilko* "on its own authority," the Court itself chose to overrule *Wilko*, and therefore affirmed the court of appeals' judgment. *Rodriguez de Quijas*, 490 U.S. at 484-486.

tionally be sentenced to death. 536 U.S. at 319. Although the mentally retarded "frequently know the difference between right and wrong and are competent to stand trial," they are less blameworthy because they have "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others"; they "act on impulse"; and they are likely to be influenced by others. *Id.* at 318. Moreover, due to those same deficiencies, "mentally retarded defendants in the aggregate face a special risk of wrongful execution," and case-by-case consideration of mental retardation as a mitigating factor cannot ensure that death sentences will be proportionate to their personal culpability. *Id.* at 321. As discussed below, the same factors that *Atkins* held require the mentally retarded to be exempt from the death penalty also apply to 16- and 17-year-olds.

A. Juvenile Offenders Lack The Capacity For Rational, Mature Judgment And For Controlling Their Conduct That Is A Predicate To Infliction Of The Death Penalty.

This Court has already recognized what ordinary experience and common sense tell us: compared to adults, 16- and 17-year-olds have a significantly diminished capacity for reasoned judgment, for understanding and appreciating the consequences of their choices, and for managing their emotions and controlling their behavior. "Our history is replete with laws and judicial recognition that minors . . . generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults. Even the normal 16-year-old customarily lacks the maturity of an adult." *Eddings* v. *Oklahoma*, 455 U.S. 104, 115-116 (1982) (quoting *Bellotti* v. *Baird*, 443 U.S. 622, 635 (1979)).[12] And, although juveniles' immaturity

[12] *See also, e.g., Johnson* v. *Texas*, 509 U.S. 350, 367 (1993) ("A lack of maturity and an underdeveloped sense of responsibility are found in youth

does not excuse their crimes, it mitigates their criminal culpability. As the *Thompson* plurality explained, "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult," because "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than an adult." 487 U.S. at 835; *see also Eddings*, 455 U.S. at 115 n.11. Research in developmental psychology and neurology over the last 15 years confirms that common-sense judgment—as to adolescents in general and 16- and 17-year-olds in particular.

Psychosocial Research. Perhaps the most striking evidence of adolescents' immature judgment and inadequate ability to control their impulses is their behavior. As any observer of teenagers would attest, adolescents "exhibit a disproportionate amount of reckless behavior, sensation seeking and risk taking" compared to adults.[13] Indeed, "reckless behavior [is] virtually a normative characteristic of adolescent development."[14] Adolescents' risky behavior frequently includes criminal activity—so much so that "it is statistically aberrant to refrain from crime during adoles-

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more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."); *Hodgson* v. *Minnesota*, 497 U.S. 417, 458-459 (1990) (O'Connor, J., concurring in part and concurring in the judgment in part) ("[M]inors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences."); *id.* at 480, 482-483 (Kennedy, J., concurring in the judgment and dissenting in part) (noting "the qualitative differences in maturity between children and adults"); *Parham* v. *J.R.*, 442 U.S. 584, 603 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions.").

[13] L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 Neurosci. & Biobehav. Rev. 417, 421 (2000).

[14] Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Dev. Rev. 339, 344 (1992).

cence."[15] Both violent crimes and less serious offenses "peak sharply" in late adolescence and "drop precipitously in young adulthood."[16]

Adolescents are reckless at least in part because they do not perceive and evaluate the costs and benefits of their actions in the same way that adults do.[17] First, adolescents may simply fail to take adequate account of the potential consequences of their actions. One recent study comparing adolescent and adult decision-making found that when asked to evaluate hypothetical decisions, adolescents as old as 17 were less likely than adults to mention possible long-term consequences, to evaluate both risks and benefits, and to examine possible alternative options.[18] In addition, adolescents may weigh risks and benefits differently than adults would and are likelier to discount risks. Compared to adults, adolescents focus more on opportunity for gains, and less on protection against losses, in making decisions.[19]

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[15] Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 Psych. Rev. 674, 685-686 (1993). That is not to say, of course, that serious violent crime is typical adolescent behavior. Rather, the increased incidence in adolescence of all kinds of reckless and criminal behavior—trivial and serious—is testimony to adolescents' diminished capacity for mature decision-making.

[16] *See id.* at 675 (noting that the "relationship between age and crime" obtains for "most types of crimes"); Arnett, *supra* note 14, at 343 (same); *see also* Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, OJJDP Statistical Briefing Book, *available at* www.ojjdp.ncjrs.org/ojstatbb/crime/qa05301.asp?qaDate=20030531 (last visited July 19, 2004) (statistics showing that arrests for serious violent crimes peak in late adolescence).

[17] *See, e.g.*, Arnett, *supra* note 14, at 350-353 (summarizing evidence that adolescents' poor capacity for assessing probabilities plays a role in their reckless behavior).

[18] *See* Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-making Competence in Adolescents and Adults*, 22 Applied Dev. Psych. 257, 264-270 (2001) (comparing twelfth-graders with mean age of 17.5 to adults with mean age of 23).

[19] *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty By Reason of Adolescence: Developmental Immaturity, Diminished Responsibil-*

Adolescents' more limited time horizons also impair their decision-making ability. By definition, adolescents have less life experience on which to draw.[20] Moreover, adolescents are less able than adults to project themselves into the future; the ability to envision and plan for the future is still developing during late adolescence.[21] Adolescents' greater uncertainty about their futures may lead them to "discount the future more than adults do and to weigh more heavily short-term consequences of decisions," impairing their ability to assess risks and to make mature judgments about their behavior.[22] Simply put, adolescents live for the present—and are less likely to appreciate the future consequences of their actions—because they are less able than adults to see beyond the present.

In addition, while the ability to regulate emotion is critical to achieving "adult levels of social maturity and the ability to show 'responsible' behavior,"[23] that ability has yet to mature fully during adolescence.[24] Adolescents are more

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ity, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1012 (2003).

[20] *See, e.g.*, Arnett, *supra* note 14, at 351-352 (noting that adolescents' more limited life experience makes it less likely that they will fully apprehend possible negative consequences of their actions).

[21] *See, e.g.*, Jari-Erik Nurmi, *How Do Adolescents See Their Future?: A Review of the Development of Future Orientation and Planning*, 11 Dev. Rev. 1, 28-29 (1991) (the ability to plan for the future continues to develop until the early twenties); *see also* Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 Behav. Sci. & L. 741, 748, 754 & tbl. 4 (2000) (in a study comparing maturity of judgment in adolescents and adults, finding that twelfth-graders with mean age of 17.5 scored lower than young adults on measures of "perspective," which encompassed "the ability to see short and long term consequences" as well as the extent to which one "take[s] other people's perspectives into account").

[22] Steinberg & Scott, *supra* note 19, at 1012.

[23] Ronald E. Dahl, *Affect Regulation, Brain Development, and Behavioral/Emotional Health in Adolescence*, 6 CNS Spectrums 60, 60 (2001).

[24] *See id.* at 61-62, 69; Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 Tex. L. Rev. 799, 815 (2003) (the capacity for self-

likely than adults to suffer from moodiness,[25] which may contribute to impulsive actions. And even late adolescents are less able than adults to control their impulses and exercise self-restraint in refraining from aggressive behavior.[26] "[T]he developing adolescent can only learn his or her way to fully developed control by experience. This process will probably not be completed until very late in the teen years. . . . [E]xpecting the experience-based ability to resist impulses and peers to be fully formed prior to age eighteen or nineteen would seem on present evidence to be wishful thinking."[27]

The ability to gauge risks and benefits accurately, the ability to envision the future, and the ability to resist impulses and control emotions—even in the face of environmental or peer pressures—are critical components of psychosocial maturity, necessary in order to make mature, fully reasoned decisions. Late adolescents have not fully developed these abilities and hence lack an adult's capacity for reasoned judgment.[28] "[I]t is clear that important progress

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direction and self-management is still developing during late adolescence); *see also Eddings*, 455 U.S. at 115 n.11 (adolescents are "more impulsive and less self-disciplined" than adults and have "less capacity to control their conduct") (internal quotation marks and citation omitted); *Thompson*, 487 U.S. at 835 (plurality) (an adolescent is "much more apt to be motivated by mere emotion . . . than an adult").

[25] *See* Reed Larson et al., *Mood Variability and the Psychosocial Adjustment of Adolescents*, 9 J. Youth & Adolescence 469, 488 (1980).

[26] *See* Cauffman & Steinberg, *supra* note 21, at 748-749, 754 & tbl. 4 (as compared to young adults, twelfth-graders scored significantly lower on measures of "temperance," which included "impulse control" and "suppression of aggression"); *see also* Steinberg & Scott, *supra* note 19, at 1013 (impulsivity increases in middle and late adolescence and declines in adulthood).

[27] Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, in *Youth on Trial: A Developmental Perspective on Juvenile Justice* 271, 280, 282 (Thomas Grisso & Robert G. Schwartz eds., 2000).

[28] *See, e.g.*, Cauffman & Steinberg, *supra* note 21, at 749, 754 tbl. 4 (compared to young adults, twelfth-graders score significantly lower on overall measures of psychosocial maturity); *see id.* at 756 (psychosocial

in the development of [psychosocial maturity] occurs some time during late adolescence, and that these changes have a profound effect on the ability to make consistently mature decisions."[29]

Neurological Research. Scientific advances in recent years, establishing that late adolescents' brains are still physically immature, provide new insight into their well-documented psychosocial immaturity.

Research using magnetic resonance imaging (MRI) technology to examine the development of the brain over time—something that was not possible until the 1990s—has shown that the frontal lobes of the brain, which govern the higher-order cognitive functions, are not yet fully developed in 16- and 17-year-olds. "As the seat of intentionality, foresight, and planning, the frontal lobes are the most uniquely 'human' of all the components of the human brain."[30] The frontal lobes, and particularly the area of the frontal lobes known as the prefrontal cortex, are often referred to as the "CEO" of the brain, in charge of the brain's "executive functions."[31] These regions of the brain are involved in nearly all "high-level cognitive tasks," especially those involving working memory.[32] They are central to the process of planning and decision-making,[33] including the evaluation of future

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maturity increases most dramatically between late adolescence and young adulthood, "sometime between 16 and 19 years").

[29] *Id.* at 758; *see also* Halpern-Felsher & Cauffman, *supra* note 18, at 271 ("[I]mportant progress in the development of decision-making competence occurs sometime during late adolescence.").

[30] Elkhonon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind* 23 (2001).

[31] *Id.* at 23-26.

[32] *E.g.*, Roberto Cabeza & Lars Nyberg, *Imaging Cognition II: An Empirical Review of 275 PET and fMRI Studies*, 12 J. Cognitive Neurosci. 1, 31 (2000).

[33] *See, e.g.*, Goldberg, *supra* note 30, at 24; Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neurosci. 859, 860 (1999).

consequences and the weighing of risk and reward.[34] They are essential to the ability to control emotions and inhibit impulses.[35] And they have been tied to the ability to exercise moral judgment.[36] In short, fully developed and properly functioning frontal lobes play a critical role in a person's capacity to be a rational moral actor, capable of mature decision-making.

It is precisely this part of the brain that is not yet fully developed in late adolescence. During childhood and adolescence, the brain is maturing in two ways. First, the brain undergoes myelination: the neural pathways connecting different parts of the brain are insulated with white fatty tissue called "myelin."[37] That insulation "speeds the neural signal transmission," making "communication between different parts of the brain faster and more reliable."[38] Second, during that same period the brain is undergoing "pruning," the

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[34] *See* Antoine Bechara et al., *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 Brain 2189, 2198-2200 (2000) (showing that patients with lesions in the prefrontal cortex suffered from impairments in ability to make real-life decisions because of an insensitivity to future consequences, whether reward or punishment); Antoine Bechara et al., *Dissociation of Working Memory from Decision Making Within the Human Prefrontal Cortex*, 18 J. Neurosci. 428, 428, 434 (1998) (prefrontal cortex is necessary for decision-making in tasks involving evaluation of risk and reward).

[35] *See, e.g.*, Goldberg, *supra* note 30, at 141; Sowell et al., *In Vivo Evidence*, *supra* note 33, at 860; B.J. Casey et al., *Structural and Functional Brain Development and its Relation to Cognitive Development*, 54 Bio. Psych. 241, 244-246 (2000).

[36] *See* Jorge Moll et al., *The Neural Correlates of Moral Sensitivity: A Functional Magnetic Resonance Imaging Investigation of Basic and Moral Emotions*, 22 J. Neurosci. 2730, 2730, 2733-2736 (2002) (finding that prefrontal cortex "play[s] a central role in moral appraisals" and noting that patients with frontal-lobe dysfunction show "impaired socio-moral emotion and behavior" even when they know right from wrong); Jorge Moll et al., *Frontopolar and Anterior Temporal Cortex Activation in a Moral Judgment Task*, 59 Arq. Neuropsiquiatr 657, 661-663 (2001) (finding activation of prefrontal cortex during moral judgment tasks).

[37] *See, e.g.*, Goldberg, *supra* note 30, at 144.

[38] *Id.*

paring away of excess synapses, thought to lead to more efficient neural connections.[39] Overall, during adolescence, myelination and pruning contribute to an increase in the brain's "white matter"—the tissue that forms pathways among different parts of the brain—and a simultaneous decrease in "gray matter"—the neurons that are the building blocks of the brain.[40] This shift in the composition of the brain helps the brain work faster and more efficiently.[41]

Different parts of the brain mature at different rates; parts of the brain associated with more basic, instinctual functions mature sooner, while the frontal lobes, and particularly the prefrontal cortex, mature later.[42] The new MRI studies of the developing brain demonstrate that the shift from gray to white matter in these regions is still taking place in 16- and 17-year-olds. Recent studies have shown a "dramatic" rate of gray matter loss—associated with greater efficiency in cognitive tasks—in the frontal lobes "[b]etween adolescence and adulthood."[43] Studies also show that, during the same period, the volume of white matter continues to

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[39] *See, e.g.*, Robert F. McGivern et al., *Cognitive Efficiency on a Match to Sample Task Decreases at the Onset of Puberty in Children*, 50 Brain & Cognition 73, 74 (2002); Casey et al., *supra* note 35, at 242-243, 245-246.

[40] *See, e.g.*, Goldberg, *supra* note 30, at 27; Casey et al., *supra* note 35, at 243.

[41] *See, e.g.*, Casey et al., *supra* note 35, at 245-246 (noting that myelination and synaptic pruning "coincide with the continued development of cognitive capacities"); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. Neurosci. 8819, 8819, 8828 (2001).

[42] *See, e.g.*, Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 Proc. Nat'l Acad. Sci. 8174, 8177 (2004); Casey et al., *supra* note 35, at 243.

[43] Sowell et al., *Mapping Continued Brain Growth*, *supra* note 41, at 8821; Sowell et al., *In Vivo Evidence*, *supra* note 33, at 860; Gogtay et al., *supra* note 42, at 8175 (in longitudinal study of brain development, finding that the prefrontal cortex "loses [gray matter] only at the end of adolescence").

increase,[44] consistent with findings that myelination continues at least until the early twenties, and the frontal lobes are the last region to myelinate.[45] Overall, the more detailed and precise picture of brain development obtained through MRI studies provides compelling evidence that the maturation of the frontal lobes—the part of the brain that is critical for competent decision-making, control of emotions, and moral judgment—is not complete at least until age 18.[46]

That adolescents' minds and brains are not yet fully developed mitigates their culpability. *See Thompson*, 487 U.S. at 835 (plurality); *Eddings*, 455 U.S. at 115 n.11. Because they have less ability to appreciate the full range of consequences attendant on their actions, to value costs and benefits appropriately, and to consider alternatives, adolescents have a "reduced capacity for considered choice." *Skipper* v. *South Carolina*, 476 U.S. 1, 13 (1986). And because they have a limited ability to handle their emotions and restrain their impulses, their conduct "deserve[s] less punishment." *Eddings*, 455 U.S. at 115 n.11 (internal quotation marks and citation omitted).

For the same reasons, the execution of adolescent offenders does not measurably further the legitimate purposes of punishment—retribution and deterrence. *See, e.g.*, *Atkins*, 536 U.S. at 319. Adolescents are inherently less capable of being deterred by the prospect of an uncertain future punishment, because they are less able to project into the future, to envision the consequences of their actions, and to apprehend the relevance of an uncertain future cost. Moreover, deterrence is significant only when the offender in fact

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[44] *See, e.g.*, Adolf Pfefferbaum et al., *A Quantitative Magnetic Resonance Imaging Study of Changes in Brain Morphology from Infancy to Late Adulthood*, 51 Archives of Neurology 874, 881 (1994) (finding that cortical white matter increased steadily until age 20, after which it stabilized); Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 Nature Neurosci. 861, 861 (1999) (finding increase in white matter through age 22).

[45] *See, e.g.*, Sowell et al., *In Vivo Evidence*, *supra* note 33, at 859.

[46] *See* Goldberg, *supra* note 30, at 144.

conducts "the cold calculus that precedes the decision to act," *Gregg*, 428 U.S. at 186; adolescents' immature and impulsive decision-making process is not likely to be a "cold calculus" of risks and benefits. *See also Enmund* v. *Florida*, 458 U.S. 782, 799 (1982); *Thompson*, 487 U.S. at 837-838 (plurality). Just as with mentally retarded offenders, "the same cognitive and behavioral impairments that make these defendants less morally culpable . . . also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *Atkins*, 536 U.S. at 320. And, as discussed further below, because "the severity of the appropriate punishment necessarily depends on the culpability of the offender," *id.* at 319, retribution is also not well-served by imposing death on adolescents, whose reduced capacity to make considered judgments and control their actions mitigates their culpability.

B. The Death Penalty Is Not Commensurate With Juvenile Offenders' Personal Responsibility For Their Criminal Acts.

The very nature of adolescence makes the death penalty far less "directly related to the *personal* culpability" of the offender—and therefore to the death penalty's retributive purpose. *Tison*, 481 U.S. at 149 (emphasis added); *see Atkins*, 536 U.S. at 319. It is "constitutionally indispensable" that the death penalty fit the "character and record of the individual offender," *Woodson*, 428 U.S. at 304, and "reflect a reasoned moral response to the defendant's background, character, and crime," *Brown*, 479 U.S. at 545 (O'Connor, J., concurring); *see also Parker* v. *Dugger*, 498 U.S. 308, 321 (1991). Two qualities intrinsic to adolescence—its vulnerability, and its transience—are inconsistent with that constitutional standard.

First, as this Court has recognized, "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings*, 455 U.S. at 115. Because of their developmental immaturity, adolescents are less able than

adults to resist the negative influences of their environment—and, indeed, are still the product of family and environment in a way that adults are not. "Adolescents are dependent on living circumstances of their parents and families and hence are vulnerable to the impact of conditions well beyond their control."[47] Both the family and the neighborhood in which an adolescent finds himself play a major role in juvenile delinquency.[48] Moreover, precisely because adolescents are legal minors, they lack the freedom and autonomy adults possess to remove themselves from external forces that exert pressure toward crime.[49]

Adolescents are also particularly "susceptible to pressure from their peers." *Lee* v. *Weisman*, 505 U.S. 577, 593 (1992). Pressure to conform socially and desire for peer approval, interacting with adolescents' developmental immaturity, can lead them to make unwise choices they would not be likely to make as adults.[50] Peer influence is particularly salient in juvenile crime, which is significantly correlated with exposure to delinquent peers.[51] A high proportion of juvenile crime (as compared to adult crime) takes place in groups and is at least partially the product of group dynamics. "No matter the crime [including homicide], if a teenager is the offender, he is usually not committing the offense

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[47] Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, in *Youth On Trial*, *supra* note 27, at 33, 47. As this Court has noted, "juveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents." *Schall* v. *Martin*, 467 U.S. 253, 265-66 (1984).

[48] *See* Kazdin, *supra* note 47, at 47-48; *see also* Jeffrey Fagan, *Contexts of Choice by Adolescents in Criminal Events*, in *Youth On Trial*, *supra* note 27, at 371, 371-394 (discussing coercive effect of social context on adolescents).

[49] *See, e.g.*, Scott & Steinberg, *supra* note 24, at 818.

[50] *See, e.g.*, Arnett, *supra* note 14, at 354-355.

[51] *See, e.g.*, Moffitt, *supra* note 15, at 687-688; Zimring, *supra* note 27, at 282.

alone."[52] Indeed, "[m]ost adolescent decisions to break the law take place on a social stage where the immediate pressure of peers is the real motive. . . . A necessary condition for an adolescent to stay law-abiding is the ability to deflect or resist peer pressure. Many kids lack this crucial social skill for a long time."[53]

The heightened vulnerability to external circumstances that is intrinsic to childhood and adolescence means that 16- and 17-year-olds do not have the same full share of personal responsibility for their actions that adults do. "[Y]outh crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." *Eddings*, 455 U.S. at 115 n.11 (internal quotation marks and citation omitted).

Second, the death penalty cannot reliably be "a reasoned moral response" to an adolescent defendant's character, *Brown*, 479 U.S. at 545 (O'Connor, J., concurring), because the defining quality of adolescence is that character is not yet fully formed.[54] Adolescents are still in the process of forging an identity, a process that will not be complete at least until early adulthood.[55] And, because there is no way to know what that identity will ultimately be, it is impossible

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[52] Zimring, *supra* note 27, at 281; *see also* Howard N. Snyder & Melissa Sickmund, National Center for Juvenile Justice, *Juvenile Offenders and Victims: 1999 National Report* 63 (1999) (in 1997, juveniles were twice as likely as adults to commit serious violent crimes in groups); *id.* at 56 (between 1980 and 1997, half of all juvenile homicide offenders committed the crime in a group).

[53] Zimring, *supra* note 27, at 280-281.

[54] *See generally* Erik H. Erikson, *Identity: Youth and Crisis* (1968).

[55] *See, e.g.*, Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in *Youth On Trial*, *supra* note 27, at 9, 27 ("[M]ost identity development takes place during the late teens and early twenties."); Alan S. Waterman, *Identity Development from Adolescence to Adulthood: An Extension of Theory and a Review of Research*, 18 Dev. Psych. 341, 355 (1982) ("The most extensive advances in identity formation occur during the time spent in college.").

to pass final judgment on the character of an adolescent offender.

Adolescents' lack of a coherent identity exacerbates their vulnerabilities. Without a consistent sense of himself as a person, an adolescent is much more likely than an adult to experiment with risky and criminal behavior; and he is much less likely to have the strength to resist the negative influence of a high-crime neighborhood or a delinquent peer group. Adolescent crime differs from adult crime because it is at least in part attributable to the inchoate nature of adolescence itself—which is by definition transient.[56] Adolescents change; and that changeability makes it virtually impossible to reach a reliable judgment that the crimes of a 16- or 17-year-old are the expression of a fixed and intractably malign criminal character.

Put another way, "the malleability of adolescence"[57] offers the prospect that an adolescent offender can alter his life course and develop a moral character as an adult. Executing a juvenile before he is a fully formed person and before we can reliably predict what sort of adult he will become forecloses the chance for this development and thus cannot be a reasoned moral response to the defendant's character.

C. Individualized Sentencing Of Juvenile Offenders Cannot Provide The Reliable Assessment Of Character And Culpability Required By The Constitution.

This Court has made clear that "there is some age below which a juvenile's crimes can never be constitutionally punished by death," and that the Constitution requires this

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[56] *See, e.g.*, Scott & Steinberg, *supra* note 24, at 819-821 ("It is fair to assume that most adults who engage in criminal conduct act upon subjectively defined preferences and values, and that their choices can fairly be charged to deficient moral character. This cannot fairly be said of the crimes of typical juvenile actors, whose choices . . . are shaped by developmental factors that are constitutive of adolescence.").

[57] Steinberg & Schwartz, *supra* note 55, at 23.

Court to "locate this age" in light of Eighth Amendment principles. *Thompson*, 487 U.S. at 848 (O'Connor, J., concurring in the judgment); *see id.* at 828-829 (plurality). Indeed, petitioner concedes (Br. 33-34) that "[t]here is certainly a point at which age is an appropriate proxy for determining whether imposing capital punishment on an individual makes sense, even without legislation," and that juveniles under 16 are properly excluded from death eligibility. Petitioner contends, however (Br. 33), that because some 16- and 17-year-olds are more mature than others, a bright-line rule excluding them from death-eligibility is improper, and the Eighth Amendment is satisfied if juries are permitted to consider youth as a mitigating factor in each individual case.

Petitioner is wrong. To be sure, adolescents mature at different rates, and the abilities of 16- and 17-year-olds will vary from individual to individual, just as the abilities of the mentally retarded and juveniles under 16 vary.[58] But the alternative to a bright-line rule—permitting juries to decide,

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[58] Although the abilities of 16- and 17-year-olds differ, those who commit capital crimes are likely to be among the least mature. Empirical studies of juveniles on death row have shown that this group generally suffers from an array of developmental deficits, as well as a history of abuse and deprivation. *See, e.g.*, Dorothy Otnow Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 Am. J. Psych. 584 (1988). And, although petitioner contends that Simmons was sufficiently mature to deserve death, nothing in the record indicates that his abilities exceeded those of the typical immature adolescent. To the contrary, the uncontradicted testimony of the psychologists who examined him was that Simmons was particularly immature, impulsive, and susceptible to influence. *See supra* pp. 5-8. Petitioner argues (Br. 35) that Simmons acted "deliberately" and that he recognized the possibility that he would be punished (although he misunderstood the potential punishment he could face). But adolescents may be immature, and less culpable, even if they display basic cognitive abilities like the ability to plan and to understand the concept of punishment. That Simmons displayed that minimum competence does not show that he was able to envision and weigh the consequences of his actions in the way an adult would. Moreover, as this Court has recognized, developmental deficits mitigate culpability even where they do not prevent a person from acting "deliberately." *Tennard* v. *Dretke*, 124 S. Ct. 2562, 2572 (2004).

case by case, whether individual juvenile offenders are sufficiently mature to deserve death—is unworkable. Individualized sentencing cannot be expected to sort mature from immature juvenile offenders, because the very qualities that make 16- and 17-year-olds, as a class, less culpable also make individualized sentencing of juvenile offenders inherently unreliable. A bright line must exclude them—both for the reasons that have led states to set the age of majority at 18 in so many other contexts (*see infra* pp. 35-36), and for reasons quite specific to the imposition of capital punishment.

Because the death penalty is qualitatively different from any other sentence, it requires a "process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake. Surely, no less can be required when the defendant is a minor." *Eddings*, 455 U.S. at 117-118 (O'Connor, J., concurring); *see also Burger* v. *Kemp*, 483 U.S. 776, 823 (1987) (Powell, J., dissenting) ("Imposing the death penalty on an individual who is not yet legally an adult is unusual and raises special concern."). For several reasons, exposing juvenile offenders to the death penalty necessarily creates a constitutionally "unacceptable" "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978); *see Atkins*, 536 U.S. at 320-321.

First, the individualized sentencing schemes that the states currently employ simply are not designed to remove immature adolescents from consideration for the death penalty. Although juries may not be precluded from considering youth as a mitigating factor, *see Lockett*, 438 U.S. at 604, a jury would be free to conclude that even the most immature juvenile's developmental deficits were outweighed by the ugliness of his crime or other aggravating circumstances. Consequently, under the current regime there can be no guarantee that even the least mature 16- and 17-year-olds will escape death.

Second, as this Court recognized in *Atkins* with respect to mental retardation, reliance on age as a mitigating factor

"can be a two-edged sword." 536 U.S. at 321. The very fact that mitigates an adolescent defendant's culpability—his youth—can be used to inflame the jury's fears about the defendant's dangerousness and thus increase the likelihood of the death penalty. Indeed, the prosecutor did exactly that in closing argument in this case: "Let's look at the mitigating circumstances. . . . Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary." TT 1156-1157.[59]

Third, even if sentencing proceedings were structured so that immature juveniles were theoretically excluded from death-eligibility, and juries were instructed that death could be imposed only on exceptionally mature juveniles—which they are not—it would not be possible to achieve the degree of reliability that the Constitution demands. There is simply no way for a jury accurately to identify the particularly precocious adolescents who might possess sufficient culpability to warrant the death penalty. Indeed, this task would prove impossible even for a trained psychologist; no reliable diagnostic measure of this kind exists.[60]

The task of assessing a particular juvenile defendant's maturity is likely to be even more problematic for a jury. A jury evaluating an adolescent defendant may see someone who *looks* like an adult, and thus be more likely to credit the teenager with adult levels of maturity even where there is no reliable basis to do so. "A tall, physically mature juvenile with an adult appearance may very well have the decision-

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[59] Simmons' is not the only case in which prosecutors have portrayed youth as aggravating. *See* Ashley Dobbs, *The Use of Youth as an Aggravating Factor in Death Penalty Cases Involving Minors*, 10 Juvenile Justice Update 1, 14-15 (June/July 2004) (collecting examples). Nevertheless, petitioner's contention (Br. 36-37 n.6) that this danger can justify only "a rule regarding how mitigation evidence is presented and argued" is incorrect. Even if prosecutors were forbidden to mention the defendant's youth, there is an inherent risk that the jury will conclude that a younger defendant is more dangerous, for the same reasons that lead prosecutors to invoke the defendant's youth to argue for death.

[60] *See, e.g.*, Steinberg & Scott, *supra* note 19, at 1016.

making abilities of a child. . . . [I]t is inappropriate to draw inferences about a juvenile's psychological or social maturity from his or her physical appearance."[61] Nevertheless, "adults tend to do just this," rendering their assessments of maturity unreliable.[62] In other ways as well, assessments of maturity are likely to be skewed and to be contaminated with various improper considerations. For instance, a recent study found that police and probation officers who were subliminally exposed to words associated with African-Americans and then asked to evaluate a hypothetical juvenile offender "were less likely to judge the offender as immature . . . and more likely to perceive him as culpable and deserving of punishment."[63]

What is more, attempts to gauge a juvenile offender's immaturity at the time of the offense are likely to be confounded by the simple lapse of time between the offense and sentencing. The juvenile offenders who are now under sentence of death were sentenced, on average, over two years after they committed their crimes.[64] That lapse is significant. The very qualities that mitigate adolescents' blameworthiness—their immaturity and unformed nature—are

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[61] Steinberg & Schwartz, *supra* note 55, at 24-25.

[62] *Id.* at 25.

[63] Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & Hum. Behav. (forthcoming 2004); *see also* George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 Am. Sociological Rev. 554, 561 (1998) (finding that, when variables other than race were controlled, probation officers were more likely to attribute the delinquency of African-American juveniles to bad character, as opposed to external forces, and more likely to judge them as posing a risk of future dangerousness).

[64] Based on data collected by Victor Streib, for the juvenile offenders now under a valid sentence of death, the mean number of days between the offense and sentencing was 752, and the median number of days was 549. *See* Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973 - June 30, 2004*, at 24-31 (2004), *available at* www.law.onu.edu/faculty/streib/JuvDeathJune302004NewTables.pdf. These figures exclude three juvenile offenders for whom exact dates were unavailable.

inherently perishable. Because of the rapid pace of change and growth in adolescence, at sentencing a jury is likely to see a defendant who appears physically and emotionally more mature than he was at the time of the crime. In a very real sense, the defendant who stands before the jury at sentencing will be a different and more fully developed person than the younger adolescent who committed the crime. Moreover, an adolescent who has been in custody for a significant period between arrest and trial is likely to have undergone profound changes precisely because of his incarceration. For these reasons, it is all but inevitable that the impression made on the jury by the defendant's appearance and demeanor at the time of sentencing will thwart attempts to discern the adolescent offender's immaturity—and level of culpability—at the time of the crime. *Cf. Drope* v. *Missouri*, 420 U.S. 162, 183 (1975) (noting the "inherent difficulties of such a *nunc pro tunc* determination" in the context of a competency hearing).

Fourth, the very factors that make adolescents less culpable also put them at a disadvantage in coping with the adjudicative process, and thus increase the risk of both wrongful convictions and unconstitutionally disproportionate sentences. As with the mentally retarded, adolescents are at greater risk for confessing falsely, will be less able than adults to provide meaningful assistance to counsel, and may be less able to make an effective case for mitigation. *See Atkins*, 536 U.S. at 320-321.

As this Court has recognized, juveniles are more vulnerable than adults to coerced or false confessions. *See, e.g.*, *In re Gault*, 387 U.S. 1, 55 (1967); *Haley* v. *Ohio*, 332 U.S. 596, 599-600 (1948). A recent study analyzing a large group of proven false confessions has concluded that juveniles, including 16- and 17-year-olds, are over-represented among those who confess falsely.[65] Laboratory studies have also

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[65] *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 941-943 (2004). Drizin and Leo selected a group of 125 "confessions that are indisputably false because . . . dispositive evidence objectively establishes, beyond any

found that adolescents are more likely than adults to confess falsely to an act they did not commit.[66]

Adolescents' immaturity also means that, even where they meet minimum standards of competence to stand trial, they are less likely to render meaningful assistance to counsel at either the guilt or the penalty phase. Adolescents' well-documented deficits in decision-making, *see supra* Part I.A, will certainly carry over into the adjudicative decision-making process, impairing adolescents' ability to make mature choices about how to interact with their lawyers and how to conduct themselves at trial.

In addition, just as with the mentally retarded, adolescents' "demeanor may create an unwarranted impression of lack of remorse for their crimes." *Atkins*, 536 U.S. at 321. Adolescents' limited temporal perspective may deprive them of an ability to understand the finality of their actions; in other cases, they may adopt a mask of "apparent indifference" as "self-protection against the slings and arrows of their own turbulent feelings."[67] An adult observer may misinterpret these signs and rely on an adolescent defendant's "remorselessness" to justify a death sentence.[68]

Finally, as discussed above, *see supra* Part I.B, assessment of the offender's character in a broad sense is particu-

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doubt, that the confessor could not possibly have been the perpetrator." *Id.* at 923. The vast majority of the false confessions (81%) were to murder. *Id.* at 945 tbl. 5. The authors found that 33% of the false confessions came from juveniles, and approximately half (16%) of those were from 16- and 17-year-olds. *See id.* at 943 tbl. 3.

[66] *See* Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & Hum. Behav. 141, 148 (2003) (finding that 15- and 16-year-olds were significantly more likely than young adults, when accused, to confess falsely to an act they did not commit).

[67] Martha Grace Duncan, "*So Young and So Untender": Remorseless Children and the Expectations of the Law*, 102 Colum. L. Rev. 1469, 1490, 1500 (2002) (internal quotation marks and citation omitted).

[68] *See Thomas* v. *Commonwealth*, 419 S.E.2d 606, 620 (Va. 1992) (sustaining death sentence for 17-year-old based in part on apparent lack of remorse); Duncan, *supra* note 67, at 1486-1491 (discussing *Thomas*).

larly problematic in juveniles. The constitutional requirement of individualized sentencing is designed to enable the jury to reach "a reasoned moral response to the defendant's background, character, and crime." *Brown*, 479 U.S. at 545 (O'Connor, J., concurring). But the changeability that is intrinsic to adolescence precludes a reliable assessment of an individual adolescent's character. Because the adolescent self is not yet fully formed, there is no way an observer can reliably conclude that even a very serious crime committed by an adolescent is the expression of a fixed and irredeemably bad character; there is no way to distinguish the hypothetical juvenile offender who is a hardened criminal from the offender whose crime is a product of the transient influences of adolescence itself.[69] Accordingly, no outside observer can ever reliably determine that any particular juvenile offender falls within the "narrow category" of offenders whose character and consciousness are significantly more "depraved" than the typical adult murderer. *Atkins*, 536 U.S. at 319.

In short, the individualized sentencing scheme designed for adults cannot adequately fulfill its constitutional purpose when the defendant is an adolescent. Like the mentally retarded, adolescents as a class "face a special risk of wrongful execution," *Atkins*, 536 U.S. at 321, and individualized consideration cannot remedy that gross risk of constitutional error. Permitting juries to decide on a case-by-case basis whether juvenile offenders should be put to death thus merely ensures that death will be meted out "wantonly and freakishly," *Furman*, 408 U.S. at 310 (Stewart, J., concur-

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[69] *See, e.g.*, Steinberg & Scott, *supra* note 19, at 1016. That same difficulty confounds attempts to assess an individual adolescent's future dangerousness, a factor that is often highly important to a jury's determination whether to impose the death penalty. For instance, in Texas—where, since 1973, more executions of juvenile offenders have taken place than in all other states combined, *see* Streib, *supra* note 64, at 4 tbl. 1—the jury is required to find future dangerousness before imposing a death sentence, *see* Tex. Penal Code Ann. § 37.071(2)(b)(1), (c). The key determination whether a defendant is likely to continue a career of criminal violence cannot be reliably made for adolescents.

ring), contrary to the principle that eligibility for the death penalty be rationally narrowed precisely in order to avoid such a risk. *See, e.g.*, *Arave* v. *Creech*, 507 U.S. 463, 474 (1993).

For all the above reasons, the Eighth Amendment requires that the line "below which a juvenile's crimes can never be constitutionally punished by death," *Thompson*, 487 U.S. at 848 (O'Connor, J., concurring in the judgment), be drawn at 18. That is anything but an arbitrary line: rather, it is the only rational line that can be drawn in this case. As discussed above, given the compelling evidence that 16- and 17-year-old adolescents are still developing, physically, socially, and emotionally, only drawing the line at 18 can protect against the grave risk that immature juvenile offenders, whose character is still unformed and whose culpability cannot rise to the level necessary for imposition of the death penalty, will be executed.

Moreover, a bright line excluding 16- and 17-year-olds from eligibility from the death penalty is consistent with our society's uniform and enduring judgment—expressed in the actions of its legislatures—that adolescents of that age do not possess the same level of personal responsibility as do adults. Eighteen is almost universally the legal boundary between childhood and adulthood,[70] and there is a broad array of legislative prohibitions and protections aimed at those under 18. Our society regards 16- and 17-year-olds as too immature and inexperienced to have a full understanding of the consequences of their decisions, and it does not allow them to vote.[71] It recognizes that they lack a fully developed capacity for moral judgment, and it bars them from sitting in judgment of others.[72] It understands that they are less able

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[70] *See* Appendix A (46 jurisdictions set the age of majority at 18; none sets it below 18).

[71] *See* Appendix B (no jurisdiction has lowered the age for voting below 18).

[72] *See* Appendix C (all jurisdictions require a person to be at least 18 to serve on a jury).

than adults to weigh risk and reward, and it forbids them to gamble.[73] It acknowledges that their selves are still changeable, and it presumes that they lack the capacity to make a lifetime commitment to another person.[74] And, knowing that they are still vulnerable and in need of protection, it requires their parents to protect them.[75] These and other special protections and disabilities embody our society's determination that, before the age of 18, adolescents are not fully formed people, and cannot be held fully responsible for choices made by their incomplete selves.

This Court has consistently recognized the relevance of that determination to the Eighth Amendment question presented here. *See, e.g.*, *Thompson*, 487 U.S. at 825 n.23 (plurality); *id.* at 855 (O'Connor, J., concurring in the judgment); *Stanford*, 492 U.S. at 382 (O'Connor, J., concurring in part and in the judgment); *id.* at 394-395 (Brennan, J., dissenting). And that determination remains relevant even if, as the *Stanford* plurality put it, it is not a judgment that no 16- or 17-year-old can ever be sufficiently responsible to make these choices, "but at most a judgment that the vast majority are not." 492 U.S. at 374. The societal recognition that "the vast majority" of 16- and 17-year-olds are insufficiently mature, and their selves insufficiently developed, to make potentially life-altering choices makes clear the magnitude and gravity of the constitutional risk created by exposing those under 18 to the death penalty—a risk that, as demon-

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[73] *See* Appendix D (all jurisdictions that permit gambling restrict participation by those under 18).

[74] *See* Appendix E (all but four jurisdictions require a person to be 18 to marry without parental or judicial consent).

[75] *See, e.g.*, Ga. Code Ann. § 19-7-2; Md. Code Ann., Fam. Law § 5-203; Miss. Code Ann. § 97-5-3; S.D. Codified Laws § 25-5-18.1; Tenn. Code Ann. § 34-1-102. Although states have not codified the parental caretaking obligation in a uniform way, no state denies parents' basic duty to care for their minor children.

strated above, individualized sentencing cannot sufficiently lessen.[76]

II. THE EXECUTION OF JUVENILE OFFENDERS VIOLATES STANDARDS OF DECENCY, AS REFLECTED IN A NATIONAL, AND INDEED WORLDWIDE, CONSENSUS AGAINST SUCH EXECUTIONS.

In determining whether a punishment is unconstitutionally cruel and unusual, this Court has also asked whether objective indicia demonstrate a societal consensus against its imposition. *See, e.g.*, *Atkins*, 536 U.S. at 313-316. Fifteen years ago, in *Stanford*, the Court concluded that there was not yet sufficient evidence of such a societal consensus against the execution of juvenile offenders. *See* 492 U.S. at 373. Justice O'Connor, however, recognized that "[t]he day may come when there is such general legislative rejection" of the death penalty for juvenile offenders "that a clear national consensus can be said to have developed." *Id.* at 381-382 (O'Connor, J., concurring in part and in the judgment). That day has come.

Since *Stanford*, no state has lowered the minimum age for the death penalty, and a substantial number have amended their laws to include express prohibitions on the execution of juvenile offenders. A significant majority of jurisdictions—31, as in *Atkins*—now expressly bar that punishment. Moreover, even in those states that theoretically permit the execution of juvenile offenders, the punishment is rarely imposed. Only three states have conducted such executions in the last 10 years. Over the last several years, death sentences for juveniles—always very rare—have seen a rapid and statistically significant decline. Excluding resentencings, only one juvenile offender was sentenced to death in 2003. And this national consensus is consistent with a

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[76] Petitioner suggests (Br. 34) that if this Court sets the line at 18, it will next be asked to extend the line to 21 or 35. That concern is unwarranted. No state has set the minimum age for executions above 18, precisely because 18 is generally regarded as the age at which a person is sufficiently mature to achieve the status and privileges of adulthood.

worldwide revulsion against the execution of juvenile offenders—a practice that has been almost universally abandoned.

A. Since *Stanford*, A Clear National Consensus Has Emerged Against The Execution Of Juvenile Offenders.

1. A significant majority of jurisdictions expressly prohibit execution of juvenile offenders.

The emergent national consensus against the execution of juvenile offenders is reflected most obviously in state and federal law, the "clearest and most reliable objective evidence of contemporary values." *Atkins*, 536 U.S. at 312 (quoting *Penry*, 492 U.S. at 331). Under the circumstances presented in *Atkins*, this Court concluded that the laws of 31 jurisdictions barring the death penalty for the mentally retarded reflected a national consensus against punishing those persons with death. Since *Stanford*, our nation has moved to repudiate the execution of juvenile offenders just as broadly: 31 jurisdictions and the federal government now expressly prohibit the death penalty for those under 18.

When *Stanford* was decided, 11 states set the minimum age for the death penalty at 18.[77] Since *Stanford*, seven additional states and the federal government have done so. Specifically, in 1993, the Supreme Court of Washington construed its death-penalty statute not to permit the execution

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[77] Those states are California, Colorado, Connecticut, Illinois, Maryland, Nebraska, New Jersey, New Mexico, Ohio, Oregon, and Tennessee. *See* Cal. Penal Code § 190.5; Colo. Rev. Stat. § 18-1.4-102(1)(a); Conn. Gen. Stat. § 53a-46a(h); 720 Ill. Comp. Stat. 5/9-1(b); Md. Code Ann., Crim. Law § 2-202(b)(2)(i); Neb. Rev. Stat. § 28-105.01(1); N.J. Stat. Ann. § 2C:11-3(g); N.M. Stat. Ann. § 31-18-14(A); Ohio Rev. Code Ann. § 2929.02(A); Or. Rev. Stat. §§ 161.620, 137.707(2); Tenn. Code Ann. § 37-1-134(a)(1). All of these states have retained their bar on the juvenile death penalty. Although *Stanford* also identified New Hampshire as a state that set the minimum age at 18, *see Stanford*, 492 U.S. at 370 n.2, New Hampshire in fact sets the minimum age for the death penalty at 17, *see* N.H. Rev. Stat. Ann. § 630:1(V).

of those under 18 at the time of the offense. *See State* v. *Furman*, 858 P.2d 1092, 1103 (Wash. 1993).[78] When Kansas reinstated the death penalty in 1994, it set the minimum age at 18. *See* Kan. Stat. Ann. § 21-4622.[79] New York likewise set the minimum age at 18 when it reinstated the death penalty in 1995. *See* N.Y. Penal Law § 125.27.[80] Montana estab-

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[78] Petitioner contends (Br. 23-24) that Washington cannot provide evidence of a legislative consensus because its position is the result of a judicial ruling. But the Washington Supreme Court held that Washington's statute—which set no express minimum age—"cannot be construed to authorize imposition of the death penalty for crimes committed by juveniles." *Furman*, 858 P.2d at 1103. The Washington Supreme Court is, of course, the authoritative interpreter of Washington's statutes, *see, e.g.*, *City of Chicago* v. *Morales*, 527 U.S. 41, 61 (1999); *Winters* v. *New York*, 333 U.S. 507, 514 (1948), and the Washington legislature has not disturbed its interpretation in the more than ten years since that ruling.

[79] Petitioner would dismiss the relevance of Kansas law on the ground that Kansas "merely carried over a distinction in its existing sentencing law" exempting those under 18 from the maximum prison term provided by statute, and "[t]here was not a legislative vote in favor of any particular age." Br. 22. Petitioner is simply incorrect. Kansas has expressly prohibited the execution of juvenile offenders since 1935. *See* Kan. Gen. Stat. § 21-403 (1935). When it reinstated the death penalty in 1994, Kansas reaffirmed that long-standing prohibition, expressly providing that if "the defendant was less than 18 years of age" when the crime was committed, "no sentence of death shall be imposed." Kan. Stat. Ann. § 21-4622 (1994).

[80] As with Kansas, petitioner argues (Br. 23) that New York merely "carried . . . over" its prohibition against imposing the previous maximum sentence of life imprisonment without parole on those under 18, and never reached a considered judgment against capital punishment for juveniles. Again, petitioner is mistaken. That New York's exclusion of those under 18 from death-eligibility is found in the definition of first-degree murder, rather than in the death-penalty statute itself, is of no moment, and is merely an artifact of the history of the death penalty in New York. New York has barred the juvenile death penalty since 1963, when it amended its death-penalty statute to include an express exemption for those under 18. *See* Act of May 3, 1963, ch. 994, sec. 1, § 1045(3). After *Furman* invalidated its death-penalty statute, New York created a new crime of first-degree murder, with a mandatory punishment of death. *See* Act of May 17, 1974, ch. 367, sec. 2, § 60.06. The minimum death-eligible age remained 18, but this requirement was incorporated into the elements of the crime of first-degree murder, *see id.* sec. 5, § 125.27(1)(b), and remained an element of first-degree murder even after the new mandatory death pen-

lished a statutory minimum age of 18 in 1999, *see* Mont. Code Ann. § 45-5-102, as did Indiana in 2002, *see* Ind. Code Ann. § 35-50-2-3. Most recently, in March of this year both Wyoming and South Dakota raised the minimum age for the death penalty to 18. *See* Wyo. Stat. Ann. § 6-2-101(b); S.D. Codified Laws § 23A-27A-42.[81] These 18 states, together with the 13 jurisdictions that do not permit the death penalty at all,[82] bring the total number of jurisdictions forbid-

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alty statute was held unconstitutional. When the death penalty was reinstated in 1995, it was therefore unnecessary to specify in the death-penalty statute itself that juveniles were exempt. The legislature was fully aware, however, that juveniles would not be death-eligible. *See* Record of Proceedings, N.Y. State Assembly, Bill No. 4843, at 126, 210, 529 (Mar. 6, 1995) (statements by assemblymen recognizing that the new death-penalty statute barred execution of those under 18 at the time of the crime).

[81] Other state legislatures took significant steps toward enacting bars on the juvenile death penalty in 2004. *See Atkins*, 536 U.S. at 315 (noting bills that passed one or more houses of state legislature as evidence of consensus against execution of mentally retarded). A bill to raise the minimum age for the death penalty to 18 passed both houses of the state legislature in New Hampshire, only to be vetoed by the governor. *See* S. 513 (N.H. 2004). Such a bill was also introduced in Florida and was approved by the Senate. *See* S. 224 (Fla. 2004). The House version of the Florida bill, H.R. 63, was reported out of committee favorably, but the legislative session expired before the bill could be voted on by the House.

[82] The jurisdictions without valid statutes authorizing the death penalty are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin, and the District of Columbia. Although *Stanford* did not consider the states that barred the death penalty altogether as bearing on the question of a national consensus against the juvenile death penalty, *see Stanford*, 492 U.S. at 370 n.2, we believe it is appropriate to do so. *Stanford*'s analogy to "discerning a national consensus that wagering on cockfights is inhumane by counting within that consensus states that bar all wagering," *id.*, is, we respectfully submit, inapt. A state may decide to ban gambling for any number of reasons that have nothing to do with the morality or propriety of the activity being gambled on. By contrast, a state legislature's decision to bar the death penalty altogether necessarily entails a determination that the death penalty is an inappropriate punishment for all offenders, including juveniles.

ding capital punishment of juvenile offenders up to 31.[83] Finally, when Congress enacted the Federal Death Penalty Act in 1994, it expressly barred the imposition of the death penalty on juvenile offenders. *See* 18 U.S.C. § 3591.[84]

In *Atkins*, the Court found notable not only the number of states that had enacted prohibitions on execution of the mentally retarded, but also "the consistency of the direction of change." 536 U.S. at 315. As in *Atkins*, the legislative movement on the issue of the juvenile death penalty has been consistently in one direction—toward higher minimum ages for the death penalty. Although *Stanford* made clear that the jurisdictions that prohibited the juvenile death penalty in 1989 were free to reinstate it, none has done so in the 15 years since that decision.[85]

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[83] Of the remaining states, four set the statutory minimum age for the death penalty at 17. *See* Ga. Code Ann. § 17-9-3; N.H. Rev. Stat. Ann. § 630:1(V); N.C. Gen. Stat. § 14-17 (minimum age is generally 17, but those under 17 who commit murder while serving a prison sentence for a previous murder may receive the death penalty); Tex. Penal Code Ann. § 8.07(c). Four set the minimum age at 16. *See* Ky. Rev. Stat. Ann. § 640.040(1); Mo. Rev. Stat. § 565.020; Nev. Rev. Stat. 176.025; Va. Code Ann. § 18.2-10(a). The remaining twelve states set no express statutory minimum age for the death penalty. *See* Ala. Code § 13A-6-2(c); Ariz. Rev. Stat. § 13-703(A); Ark. Code Ann. § 5-4-615; Del. Code Ann. tit. 11, § 4209(a); Fla. Stat. ch. 985.225(1); Idaho Code § 18-4004; La. Rev. Stat. Ann. § 14:30(c); Miss. Code Ann. § 97-3-21; Okla. Stat. tit. 21, § 701.10; 18 Pa. Cons. Stat. Ann. § 1102; S.C. Code Ann. § 16-3-20; Utah Code Ann. § 76-3-206(1).

[84] Contrary to petitioner, therefore, Congress has clearly spoken against the juvenile death penalty. While petitioner contends (Br. 27-28) that the Senate's decision not to ratify treaties barring the juvenile death penalty, or to ratify them with a reservation of the right to impose death on juveniles, demonstrates that Congress has endorsed the juvenile death penalty, those decisions merely left states free to set their own criminal punishments, as is appropriate—subject to constitutional constraints—in our federal system. When Congress itself addressed the question, it chose to forbid imposition of the death penalty on juveniles.

[85] Petitioner's suggestion that some states have "moved the other way" (Br. 24) is incorrect. Although petitioner contends (Br. 25-26) that Arizona and Florida effectively lowered the age for the death penalty, in neither case did the legislature make any determination regarding the appropriate minimum age for capital punishment. In Arizona, the law was

The consistent legislative movement away from the death penalty for 16- and 17-year-old offenders is especially striking in a time when "anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime." *Atkins*, 536 U.S. at 315. Indeed, the legislative consensus against the death penalty for juvenile offenders is still more compelling than the consensus found in *Atkins*, because it has endured and grown in a time when legislation imposing more stringent penalties for *juvenile*

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amended to provide that juveniles 15 and older accused of certain serious violent crimes were subject to mandatory prosecution as adults. *See* Ariz. Rev. Stat. § 13-501(A). The amendment did not mention the death penalty. As this Court has recognized, such statutes, which merely provide for trial of juveniles in adult court, in no way constitute a legislative judgment that the death penalty is appropriate for juveniles. *See Thompson*, 487 U.S. at 826 n.24 (plurality); *id.* at 850 (O'Connor, J., concurring in the judgment). Indeed, the Arizona Supreme Court held that the death penalty could not constitutionally be imposed on a juvenile tried in adult court pursuant to that provision. *See State* v. *Davolt*, 84 P.3d 456, 481 (Ariz. 2004).

In Florida, the state constitution's prohibition on "cruel *or* unusual punishment" was amended to conform to the federal Constitution's prohibition of "cruel *and* unusual" punishment. Fla. Const. art. I, § 17 (2002) (emphasis added). Again, the amendment did not speak at all to the appropriate age for the death penalty. Petitioner appears to contend that the amendment was intended to overturn the Florida Supreme Court's decision barring execution of 16-year-old offenders. *See Brennan* v. *State*, 754 So. 2d 1 (Fla. 1999). (Although petitioner refers (Br. 26) to *Allen* v. *State*, 636 So. 2d 494 (Fla. 1994), which barred execution of 15-year-old offenders, that appears to be an error.) But *Brennan* did not turn solely on the "cruel or unusual" language of the Florida Constitution; rather, it made clear that the imposition of death on a 16-year-old "would be unconstitutional under both the Florida and United States Constitutions," because the Florida statute did not provide individualized consideration of the juvenile defendant's maturity and moral responsibility. 754 So. 2d at 8. The legislative history of the Florida amendment confirms that it was not intended to overturn *Brennan*. *See* H.R. Comm. on Crime Prevention, Corrections & Safety, Final Analysis, House Bill 951, at 9 (June 26, 2001) (concluding that the amendment would not affect *Brennan*).

Finally, although both Missouri and Virginia amended their death-penalty statutes after *Stanford* to set a minimum age of 16 (*see* Pet. Br. 24-25), those amendments merely confirmed prior practice, and represented no shift in policy in those states.

crime has been particularly popular. The rising rate of juvenile crime during the 1980s and early 1990s profoundly changed public perception of the juvenile justice system and of juvenile offenders, who were widely believed to be "qualitatively different" and more vicious than such offenders had been in the past.[86] The menacing figure of the juvenile "superpredator" was often invoked in support of calls to treat juvenile offenders like adults.[87] Although the "superpredator" was eventually exposed as a myth, during the 1990s that "myth caused a panic that changed the juvenile justice system and its response to the Nation's youth."[88] Since *Stanford*, virtually every state has taken action to ensure more stringent treatment of juveniles; between 1992 and 1997, 45 states modified their laws governing transfer of juveniles to provide that more offenders under the age of 18 would be tried as adults.[89] In the midst of this "sea of change sweeping across the Nation,"[90] and reflecting a significantly more punitive stance toward juvenile offenders, the steady legislative movement away from the death penalty for such offenders demonstrates a national consensus that transcends passing fashions in juvenile justice.

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[86] Franklin E. Zimring, *American Youth Violence* 6 (1998).

[87] *See, e.g., id.* at 6-7; David S. Tanenhaus & Steven A. Drizin, *"Owing to the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide*, 92 J. Crim. L. & Criminology 641, 642-643, 664-665 (2002). As one account put it: "America is now home to thickening ranks of juvenile 'super-predators'—radically impulsive, brutally remorseless youngsters . . . who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs, and create serious communal disorders." William J. Bennett et al., *Body Count: Moral Poverty . . . And How to Win America's War Against Crime and Drugs* 27 (1996).

[88] *See, e.g.*, Snyder & Sickmund, *supra* note 52, at 133; *see also Youth Violence: A Report of the Surgeon General* 5 (2001) (concluding that the "superpredator" was a "myth," and that there was no evidence that juvenile offenders of the 1990s were more vicious than in the past).

[89] *See* Snyder & Sickmund, *supra* note 52, at 89.

[90] Patricia Torbet et al., National Center for Juvenile Justice, *State Responses to Serious and Violent Juvenile Crime: Research Report* xi (1996).

2. The death penalty is rarely inflicted on juvenile offenders.

This broad national consensus is reflected not only in the judgments of our legislatures, but also in the infrequency with which the punishment of death is actually inflicted on a juvenile offender. *See, e.g.*, *Atkins*, 536 U.S. at 316; *Thompson*, 487 U.S. at 852 (O'Connor, J., concurring in the judgment); *Coker* v. *Georgia*, 433 U.S. 584, 596-597 (1977). By any measure, both executions and death sentences imposed on juvenile offenders are exceedingly rare.

In the last 10 years, only three of the 20 states that theoretically permit the execution of juvenile offenders have actually carried out such executions: Texas, Oklahoma, and Virginia.[91] *Cf. Atkins*, 536 U.S. at 316 (noting that, in the past 13 years, only five states had executed offenders known to be mentally retarded). Indeed, since 1973, the beginning of the death penalty's modern era, only 22 persons have been executed for crimes committed as juveniles, in only seven states.[92] Texas alone accounts for nearly two-thirds of all such executions.[93]

Death sentences for juveniles are also concentrated in a small handful of states. In the last 10 years, only three states—Texas, Florida, and Alabama—account for nearly 60% of all juvenile death sentences.[94] Only 13 states (including Missouri) currently have any juvenile offenders under sentence of death.[95] Four states that theoretically permit the juvenile death penalty—Delaware, Idaho, New Hampshire, and Utah—have neither executed a juvenile offender

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[91] *See* Streib, *supra* note 64, at 4 tbl. 1.

[92] *See id.* By comparison, data collected by the American Bar Association, and cited by the Missouri Supreme Court, show that 24 mentally retarded offenders were executed between 1976 and 2002, when *Atkins* was decided. JA 135.

[93] *See* Streib, *supra* note 64, at 3.

[94] *See id.* at 20-32 (listing juvenile death sentences from 1994 to present).

[95] *See id.* at 11.

nor sentenced one to death in the 15 years since *Stanford*.[96] The extreme rarity with which the juvenile death penalty is imposed even in most states that theoretically allow it demonstrates that legislative authorization does not signify general acceptance in those states. As *Atkins* observed, 536 U.S. at 316, "there is little need to pursue legislation barring" a punishment that is never, or rarely, practiced.

The available evidence also indicates that juries are increasingly reluctant to put juvenile offenders to death. Since 1999, when there were 14 death sentences for juvenile offenders,[97] the number of death sentences for juveniles has declined each year. As a recent study analyzing sentencing patterns notes, after resentencings are excluded, in 2000, there were seven new juvenile death sentences; in 2001, five; in 2002, three; and in 2003, just one juvenile offender was sentenced to death.[98] That study found that, although death sentences in general have declined since 1999, the magnitude and precipitousness of the decline for juvenile offenders are significantly greater than for adults.[99] Moreover, the rate at which juvenile offenders are sentenced to death (expressed as the number of juvenile death sentences per 100 homicide arrests of offenders under 18) also declined sharply in that period, from 1.61% to 0.20%.[100] The study concluded that the decline in juvenile death sentences is statistically significant

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[96] *See id.* at 4 tbl. 1, 10 tbl. 4.

[97] *See id.* at 9 tbl. 3.

[98] *See* Jeffrey Fagan & Valerie West, *The Decline of the Juvenile Death Penalty: Scientific Evidence of Evolving Norms*, J. Crim. L. & Criminology (forthcoming Winter 2004) (analyzing sentencing patterns from 1990 to 2003). The study excluded resentencings of juvenile offenders who had previously been sentenced to death because such sentences are not independent of the initial sentence and would distort the statistical analysis. *See id.* Even if resentencings are included, however, the decline in juvenile death sentences has been stark—from 14 in 1999 to seven in 2000, seven in 2001, four in 2002, and two in 2003. *See* Streib, *supra* note 64, at 9 tbl. 3. Thus far in 2004, only one juvenile offender has been sentenced to death. *See id.*

[99] *See* Fagan & West, *supra* note 98.

[100] *See id.*

after controlling for alternative explanations such as declines in the murder rate, in the number of juveniles arrested for homicide, and in death sentences in general.[101] Thus, in the last several years, not only the actions of legislatures, but also the sentences imposed by juries show a demonstrable and significant trend toward rejection of the death penalty for juveniles.[102]

In short, the death penalty for juvenile offenders has become exceedingly rare—so rare as to be "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Furman*, 408 U.S. at 309 (Stewart, J., concur-

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[101] *See id.*

[102] Petitioner contends (Br. 29-32) that juveniles are more likely to receive the death penalty now than at the time of *Stanford*. But petitioner's data do not support that conclusion. First, petitioner examines juvenile death sentences as a percentage of total death sentences, and executions of juvenile offenders as a percentage of total executions. (It should be noted that petitioner misstates (Br. 30) the total number of death sentences from 1990 to 2003; that total is 3599, not 359. *See* Streib, *supra* note 64, at 9 tbl. 3.) Those percentages show that death sentences and executions of juvenile offenders are very rare in absolute numbers, and thus "support the inference of a national consensus opposing the death penalty" for juveniles. *Thompson*, 487 U.S. at 853 (O'Connor, J., concurring in the judgment). But they cannot show the rate at which juveniles are sentenced to death or changes in that rate over time, since they fail to control for the different rate at which adults and juveniles commit crimes and for variation in the age distribution of offenses over time. *See, e.g., id.* Accordingly, no conclusions at all can be drawn from petitioner's data.

Second, the time periods petitioner chooses to examine are too broad and arbitrary to shed any significant light on the question of trends in sentencing over time. Petitioner contends that executions of juvenile offenders made up a greater proportion of total executions during the period from 1973 to 2003 than during the period from 1642 to 1986, and that juvenile death sentences were a greater proportion of total death sentences during the period from 1990 to 2003 than during the period from 1982 to 1988. Comparing a span of nearly 350 years to a span of 30 years is far too crude to show trends relevant to today's standards of decency; similarly, looking at the period from 1990 to 2003 as an undifferentiated whole obscures the statistically significant downward trend in juvenile death sentences that has occurred within that period.

ring). That is a clear indication that contemporary morality rejects the punishment of death for juvenile offenders.[103]

B. The National Consensus Is Consistent With A Worldwide Revulsion Against The Execution Of Juvenile Offenders.

In the 15 years since *Stanford*, it has become clear that an overwhelming worldwide consensus rejects the execution of juvenile offenders. Almost without exception, the other nations of the world have rejected capital punishment of those under 18, confirming that the juvenile death penalty is

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[103] In an attempt to counter the evidence that the American polity—through the actions of its legislatures, prosecutors, and juries—has rejected capital punishment for juvenile offenders, petitioner offers the results of a miscellaneous assortment of surveys and opinion polls (Br. 38-40), contending that they "demonstrate[] societal acceptance of capital punishment for juveniles" (Br. 40). As petitioner concedes (Br. 38), polls—even when conducted by reputable polling organizations according to accepted methods—are "an uncertain foundation upon which to rest constitutional law." Certainly, they cannot outweigh the "reliable objective evidence of contemporary values" provided by the determinations of legislatures and juries. *Atkins*, 536 U.S. at 312.

In any event, even if scientifically sound opinion polls could carry some weight in the analysis, petitioner's data suffer from such obvious methodological defects and disabling biases that they cannot possibly be taken as reliable evidence that our society accepts the juvenile death penalty. Petitioner primarily relies on polls asking respondents, in the wake of particularly notorious, high-profile crimes, if they support imposition of the death penalty on the juveniles who committed those crimes. Br. 39-40. Such polls obviously tend to elicit exaggeratedly punitive, and unreliable, responses. Petitioner also relies on a survey of juvenile court judges and a mock jury study. Br. 40. The survey of judges, taken 10 years ago, actually shows that a distinct minority of that decidedly unrepresentative group—"89 percent white, 83 percent male, and 91 percent older than 40"—then supported the juvenile death penalty. Rorie Sherman, *Juvenile Judges Say: Time to Get Tough*, Nat'l L.J., Aug. 8, 1994, at A1. The mock jury study elicited such astonishingly punitive responses—60% of respondents voted to execute a 10-year-old defendant—that the authors of the study themselves called the results "startling." Catherine A. Crosby et al., *The Juvenile Death Penalty and the Eighth Amendment*, 19 L. & Hum. Behav. 245, 257 (1995). The authors also questioned whether their sample was "skewed," and "caution[ed] against the use of the present data as grounds for any legislative or constitutional changes." *Id.* at 256, 260.

contrary to Eighth Amendment standards of decency. *See, e.g.*, *Atkins*, 536 U.S. at 316 n.21 (recognizing relevance of international law and practice); *Thompson*, 487 U.S. at 830 n.31 (plurality); *Enmund*, 458 U.S. at 796 n.22; *cf. Lawrence* v. *Texas*, 539 U.S. 558, 123 S. Ct. 2472, 2483 (2003) (in interpreting the Due Process Clause, noting that "[t]he right the petitioners seek . . . has been accepted as an integral part of human freedom in many other countries").

Perhaps most significantly, in 1989 the United Nations adopted the Convention on the Rights of the Child ("CRC"), which bars capital punishment for those under 18. *See* United Nations Convention on the Rights of the Child, Nov. 20, 1989, art. 37, 1577 U.N.T.S. 3, 28 I.L.M. 1448, 1468-1470 (entered into force Sept. 2, 1990). Every country in the world, except the United States and Somalia—which has no organized government—has now ratified the CRC; none has entered a reservation to the article prohibiting the execution of juvenile offenders.[104]

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[104] *See* Office of the U.N. High Comm'r for Human Rights, Status of Ratifications of the Principal Human Rights Treaties (June 9, 2004), *available at* www.unhchr.ch/pdf/report.pdf ("Status of Ratifications"); Office of the U.N. High Comm'r for Human Rights, Declarations and Reservations to the Convention on the Rights of the Child, *available at* www.ohchr.org/english/law/crc-reserve.htm (last visited July 19, 2004). At least three other international human-rights treaties also bar the execution of juvenile offenders. *See* International Covenant on Civil and Political Rights ("CCPR"), Dec. 16, 1966, art. 6(5), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); American Convention on Human Rights ("ACHR"), Nov. 22, 1969, art. 4(5), 1144 U.N.T.S. 143, 146 (entered into force July 19, 1978); African Charter on the Rights and Welfare of the Child ("ACRWC"), art. 5(3), OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999). Since *Stanford*, 69 countries have become parties to the CCPR; as of June 9, 2004, 152 countries are parties to that treaty. *See* Status of Ratifications. Twenty-five countries are parties to the ACHR, *see* Organization of American States, American Convention on Human Rights, *available at* www.oas.org/juridico/english/Sigs/b-32.html (last visited July 19, 2004), and 33 countries are parties to the ACRWC, *see* African Union, List of Countries Which Have Signed, Ratified/Acceded to the African Charter on the Rights and Welfare of the Child, *available at* www.africa-union.org (last visited July 19, 2004).

Consistent with the international norm expressed in the CRC, since 1990 executions of juvenile offenders worldwide have virtually ceased. In that time, only seven countries other than the United States are believed to have executed juvenile offenders: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China.[105] Only Iran and Pakistan have executed more than one juvenile offender in that time.[106] These sporadic and isolated executions of juvenile offenders are not countenanced even by the countries where they took place; all of them have either enacted prohibitions on the execution of juvenile offenders or publicly disavowed the practice.[107]

The nearly universal consensus against the execution of juvenile offenders that has emerged since *Stanford* led the Inter-American Commission on Human Rights to declare that the prohibition on such executions is now a binding norm of international law. *See Domingues* v. *United States*, Case No. 12.285, Inter-Am. C.H.R. Rep. No. 62/02, ¶ 84 (2002). Fifteen years earlier, in 1987, the Commission had determined that sufficient evidence did not yet exist to warrant a conclusion that capital punishment of persons under

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[105] *See* Amnesty International, *Stop Child Executions! Ending the Death Penalty for Child Offenders* (2004) (AI Index: ACT 50/001/2004).

[106] *See id.*

[107] Iran has ratified both the CCPR and the CRC, and has consistently denied executing juvenile offenders. *See* Amnesty International, *The Exclusion of Child Offenders from the Death Penalty Under General International Law* 23-24 (2003) (AI Index: ACT 50/004/2003). Pakistan enacted a prohibition on the execution of juvenile offenders in 2000. *See id.* at 25-26. Saudi Arabia ratified the CRC in 1996, and has not executed a juvenile offender since that time. *See id.* Yemen raised the minimum age for the death penalty to 18 in 1994. *See id.* at 27. Nigeria has ratified the CCPR and the CRC, and has denied executing juvenile offenders. *See id.* at 24-25. The execution of a juvenile offender that reportedly took place in the Democratic Republic of Congo was carried out by a military court; the DRC has denied executing juvenile offenders and has commuted four other death sentences imposed by the military courts on juveniles. *See id.* at 22-23. China abolished the juvenile death penalty in 1997; the lone execution of a juvenile offender reportedly carried out in 2003 was illegal. *See Stop Child Executions*, *supra* note 105.

the age of 18 violated international customary norms. *See Roach and Pinkerton* v. *United States*, Case No. 9647, Inter-Am. C.H.R. Rep. No. 3/87, ¶ 60 (1987). In *Domingues*, the Commission considered the "nearly unanimous and unqualified international trend toward prohibiting" the execution of juvenile offenders over the last 15 years and concluded that a *jus cogens* norm, binding on all states, "has emerged prohibiting the execution of offenders under the age of 18 years at the time of their crime." *Domingues*, ¶¶ 76, 84-85. The small minority of United States jurisdictions that continue to execute those under 18 now stand virtually alone—not just in this country, but in a world that has concluded that the execution of juvenile offenders is contrary to contemporary standards of decency.

CONCLUSION

The judgment of the Missouri Supreme Court should be affirmed.

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JULY 2004