

# YOUTH LAW NEWS



N ■ C ■ Y ■ L

*Journal of the National Center for Youth Law*

Vol. XXV No. 1

**REPRINT**

January- March 2004

# U. S. Supreme Court to Revisit the Juvenile Death Penalty

by Josh Friedman

The juvenile death penalty once again entered the public arena when, on Jan. 26, the United States Supreme Court chose to reconsider the question. Roughly fifteen years after *Stanford v. Kentucky*, when a 4-1-4 plurality vote upheld the constitutionality of executing juveniles between ages 16 and 18,<sup>1</sup> the Supreme Court now has agreed to review the case of *Simmons v. Roper*.<sup>2</sup>

Christopher Simmons of Missouri was 17 years old in 1993 when, during a botched house burglary, he murdered a woman who had recognized him and his 15-year-old companion. Christopher was found guilty of first-degree murder and condemned to death by the Circuit Court of Jefferson County. In 1997, the Missouri Supreme Court affirmed Christopher's conviction and sentence.<sup>3</sup>

The case began to garner national attention in August 2003, when the Missouri Supreme Court reversed its 1997 ruling in light of the United States Supreme Court's decision in *Atkins v. Virginia*, which prohibited execution of mentally retarded persons.<sup>4</sup> For the Missouri justices, *Atkins* signified that the United States Supreme Court "would today hold" executions of juvenile offenders unconstitutional.<sup>5</sup>

## Virginia Case Led to Juvenile Death Penalty Review

Significantly disabled by mental retardation, Daryl Renard Atkins was convicted of capi-

tal murder and sentenced to death by a Virginia court after shooting Eric Nesbitt with a semi-automatic handgun in 1996. On appeal to the United States Supreme Court in 2002, Daryl's conviction was overturned when the Court, in a six-to-three vote, held that the death penalty for mentally retarded persons is "excessive" and violates the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>6</sup>

The Court's analysis hinged on a particular examination of the Amendment's proscription against cruel and unusual punishment, which judges the fitness of the penalty in proportion to the crime. Proportionality, the Court decided, is measured by fluid, "evolving standards of decency," rather than antiquated, static norms from years ago.<sup>7</sup>

For the Court in *Atkins*, the most objective measure of contemporary standards was the consensus of the nation, which could be readily gauged by legislative decisions.<sup>8</sup> In deciding *Atkins*, the Court re-examined *Penry v. Lynaugh*, a 1989 case decided the same day as *Stanford*, in which the Court had held that a national consensus did not then exist to bar the execution of mentally retarded persons.<sup>9</sup> Thirteen years after *Penry*, the Court in *Atkins* found that during the intervening time, contemporary values had shifted enough to invalidate the practice.

Similarly, the Missouri Supreme Court concluded in *Simmons* that a nationwide consensus has emerged against the practice of executing juvenile offenders. Though review by the United States Supreme Court likely will not take place until October, a host of child welfare, psychiatric, medical, and religious organizations opposed to executing

<sup>1</sup>*Stanford v. Kentucky*, 492 U.S. 361 (1989).

<sup>2</sup>*State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003); Linda Greenhouse, *Court to Review Using Execution in Juvenile Cases*, N.Y. Times, Jan. 27, 2004, at A1.

<sup>3</sup>*State v. Simmons*, 944 S.W.2d 165 (Mo. 1997)

<sup>4</sup>*Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>5</sup>*Simmons*, 112 S.W.3d at 400.

<sup>6</sup>*Atkins*, 536 U.S. at 312.

<sup>7</sup>*Atkins*, 536 U.S. at 312 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 [1958]).

<sup>8</sup>*Atkins*, 536 U.S. at 312.

<sup>9</sup>*Penry v. Lynaugh*, 492 U.S. 302, 334 (1989).

*The United States Supreme Court will revisit the issue of juvenile executions in a Missouri case*

juveniles are anxiously awaiting the Court's reexamination of *Simmons*.<sup>10</sup>

### United States Supreme Court Closely Divided on Juvenile Executions

Juvenile death-penalty opponents like the Washington, D.C.-based National Coalition to Abolish the Death Penalty count four Justices as clear allies in their efforts to end juvenile executions. When the United States Supreme Court refused, in a five-to-four vote, a 2002 *habeas* petition requesting reexamination of *Stanford*, Justices David Souter, Ruth Bader Ginsburg, and Stephen Breyer all joined Justice John Paul Stevens in dissent. Writing for the minority in the case, Justice Stevens declared, "The practice of executing such offenders is a relic of the past and is inconsistent with evolving standards of decency in a civilized society."<sup>11</sup>

<sup>10</sup>Mental health, psychiatric, child welfare, and educational groups that have released statements in opposition to the juvenile death penalty include The American Academy of Child & Adolescent Psychiatry, American Academy of Pediatrics, American Medical Association, American Psychiatric Association, American Psychological Association, American Humane Association, Human Rights Watch, National Center for Youth Law, National Education Association, National Mental Health Association, Physicians for Human Rights, and Youth Advocate Program International. Religious organizations in opposition include The American Baptist Churches USA, American Jewish Committee, Catholic Bishops of the United States, Unitarian Universalist Association, United Church of Christ, and United Methodist Church. See American Bar Association, *Juvenile Death Penalty Resources and General Information*, at <http://www.abanet.org/crimjust/juvjus/resources.html#Pols> (last visited Feb. 25, 2004).

<sup>11</sup>Tony Mauro, *Supreme Court Splits on Reviewing Teen Executions*, Am. Law. Media, Oct. 22, 2002, available at [www.law.com/jsp/article.jsp?id=1032128794722](http://www.law.com/jsp/article.jsp?id=1032128794722)

Following the decision, *Stanford*'s lawyer, Margaret O'Donnell of McNally & O'Donnell, remarked prophetically, "This [juvenile death penalty] is the next death penalty issue for the Court to consider," she said.<sup>12</sup>

Certainly, as juvenile death penalty opponents point out, the United States' practice of executing minors is, internationally, an isolated one. Critics argue that throughout the

<sup>12</sup>*Id.*

world, a consensus appears to be developing that the death penalty is inapplicable to juveniles.

"The overwhelming international consensus that the death penalty should not apply to juvenile offenders stems from the recognition that young persons, because of their immaturity, may not fully comprehend the consequences of their actions and should therefore benefit from less severe sanctions than adults," said Mary

Robinson, the former United Nations High Commissioner for Human Rights, in a statement urging clemency for two U.S. juvenile offenders. "More importantly, it reflects the firm belief that young persons are more susceptible to change, and thus have a greater potential for rehabilitation than adults."<sup>13</sup>

### United States One of Few Nations to Execute Juveniles

Amnesty International, in launching a two-year, worldwide campaign to end the "shameful practice" of executing child offenders, documented only eight countries where such executions have been carried out since 1990: China, the Democratic Republic of the Congo, Iran, Nigeria, Pakistan, Saudi Arabia, the United States, and Yemen.<sup>14</sup> Since that time, six of these countries have abolished the juvenile death penalty, making the United States' continued execution of juveniles a global anomaly.<sup>15</sup> Also, of the last seven executions of juvenile offenders worldwide since 2000, only two have occurred outside the United

(continued on p. 14)

<sup>13</sup>Press Release, Office of the United Nations High Commissioner for Human Rights, Statement by Mary Robinson (Aug. 1, 2002) (on file with Amnesty Int'l)

<sup>14</sup>Amnesty International, *Facts and Figures on the Death Penalty*, at <http://web.amnesty.org/pages/deathpenalty-facts-eng> (last modified Feb. 12, 2004).

<sup>15</sup>Press Release, Amnesty International, Execution of Child Offenders: Time to End a Shameful Practice (Jan. 21, 2004) (on file with author); American Bar Association, *Cruel and Unusual Punishment: The Juvenile Death Penalty, Evolving Standards of Decency* (Spring 2003), available at [www.abanet.org/crimjust/juvjus/factsheets\\_evolving\\_standards.pdf](http://www.abanet.org/crimjust/juvjus/factsheets_evolving_standards.pdf) [hereinafter ABA, *Evolving Standards*].

## Death Penalty Timeline

### CASE

*Penry v. Lynaugh*,  
492 U.S. 302 (1989)

*Stanford v. Kentucky*,  
492 U.S. 361 (1989)

*Atkins v. Virginia*,  
536 U.S. 304 (2002)

*State ex rel. Simmons v. Roper*,  
112 S.W.3d 397  
(Mo., 2003)

### HOLDING

**U.S. Supreme Court** held that the Eighth Amendment to the U.S. Constitution does not prohibit the death penalty for mentally retarded offenders.

**U.S. Supreme Court** held that the Federal Constitution does not prohibit executions for juveniles who committed crimes between the ages 16 and 18 regardless of state laws.

The **U.S. Supreme Court** examined current national data to hold that the death penalty for mentally retarded offenders violates the U. S. Constitution's prohibition against cruel and unusual punishment.

The **Missouri Supreme Court** overturned Christopher Simmons' sentence, holding that the death penalty for juveniles who committed crimes at ages 16 or 17 violates the Eighth Amendment's prohibition against cruel and unusual punishment, based upon reasoning closely analogous to mentally retarded offenders. However, the Missouri court's ruling on federal constitutionality currently applies only in Missouri. This case has been accepted for review by the U.S. Supreme Court.

(continued from p. 13)

## Juvenile Death Penalty

States.<sup>16</sup> Moreover, the United States is the only nation with a formal policy of executing juveniles.<sup>17</sup>

Amnesty International and others contend that recent global trends are legally binding, since these standards are so broadly accepted by individual nations in law and practice as to constitute a principle of international law.<sup>18</sup> They also cite international human rights treaties and agreements adopted by intergovernmental bodies expressly prohibiting the execution of juvenile offenders, by which the United States is bound.

These prohibitions have gained statutory support through the United Nations Convention on the Rights of the Child (CRC), which the United States has

signed, and the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party. Ratified in November 2003 by 151 nations, ICCPR asserts that the “[s]entence of death shall not be imposed for crimes committed by persons below eighteen years of age...”<sup>19</sup> Likewise, the CRC states, “Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offenses committed by persons below eighteen years of age.”<sup>20</sup> The United States, though it has signed the CRC, is one of only two countries, out of the global total of 194, which has failed to ratify the human rights treaty.

But whether developments in international law will be a deciding factor for the Court in *Simmons* is unclear. When reviewing *Stanford*, the Justices rejected evidence on evolving international practices as unpersuasive and irrelevant in determining whether a national consensus existed.<sup>21</sup>

“The Court has an ambivalent relationship with international norms,” Professor Austin Sarat, author of *When the State Kills: Capital Punishment and the*

*American Condition*, said in a recent interview. “And this ambivalence is reflective of a greater ambivalence throughout the political system.”<sup>22</sup>

On the other hand, note Court observers, national trends may play a more central role here.<sup>23</sup> Taking their cue from the *Atkins* precedent, opponents have mounted strong arguments demonstrating that a comparable national consensus against the death penalty for minors is emerging, as it had around the issue of executing the mentally retarded.

For the Court, the “consistency of the direction of change” in recent legislatures’ actions is clearly a central issue,<sup>24</sup> though in *Stanford* it had concluded that such action leading up to the case did not reveal a nation-

wide consensus in objection to the juvenile death penalty.

## States Move to Bar Juvenile Executions

But the direction of the issue’s momentum is becoming clear. Even after the *Stanford* ruling gave states the go-ahead to continue executing juveniles, virtually no legislatures have lowered the statutory minimum age.<sup>25</sup>

Instead, legislation abolishing the juvenile death penalty and fixing the minimum age for capital punishment at age 18 has since been approved in Montana, Indiana, New York, and Kansas.<sup>26</sup> On March 4, South Dakota and Wyoming were added to the list. Similar bills have been introduced in Arizona, Arkansas, Delaware, Florida, Kentucky, Mississippi, Missouri, Nevada, Pennsylvania,

<sup>16</sup>Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes*, Jan. 1, 1973–Dec. 31, 2003, at 8 (2004), at <http://www.law.onu.edu/faculty/streib/JuvDeathDec2003.pdf> (last modified Dec. 31, 2003).

<sup>17</sup>Some dispute surrounds China’s use of the juvenile death penalty, despite its stated policy outlawing the practice. This year, Amnesty International reported that “Zhao Lin, aged 18 years and three months, had been executed in January for a murder committed in May 2000, when he was 16 years old.” Amnesty International, *Stop Child Executions! Ending the Death Penalty for Child Offenders*, ACT 50/001/2004 (Jan. 21, 2004), at <http://web.amnesty.org/library/Index/ENGACT500012004>, though other current research suggests otherwise. See, e.g., Streib, *supra* note 16, at 8 (stating that “the last non-U.S. executions of juvenile offenders occurred in 2000 in the Democratic Republic of the Congo and in Iran in 2001, with none since this time”).

<sup>18</sup>See, e.g., Amnesty International, *supra* note 17.

<sup>19</sup>International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, art. VI, para. 1, (entered into force Mar. 23, 1976), available at [www.unhcr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhcr.ch/html/menu3/b/a_ccpr.htm).

<sup>20</sup>Convention on the Rights of the Child, G.A. Res. 44/25, Annex 44, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989), Art. 37(a) (entered into force Sept. 2, 1990), available at <http://www.unicef.org/crc/crc.htm>.

<sup>21</sup>*Stanford*, 492 U.S. at 370 n.1; But cf. *Atkins*, 536 U.S. at 316 n.21 (affirming that evidence of international trends is acceptable in determining whether a consensus exists).

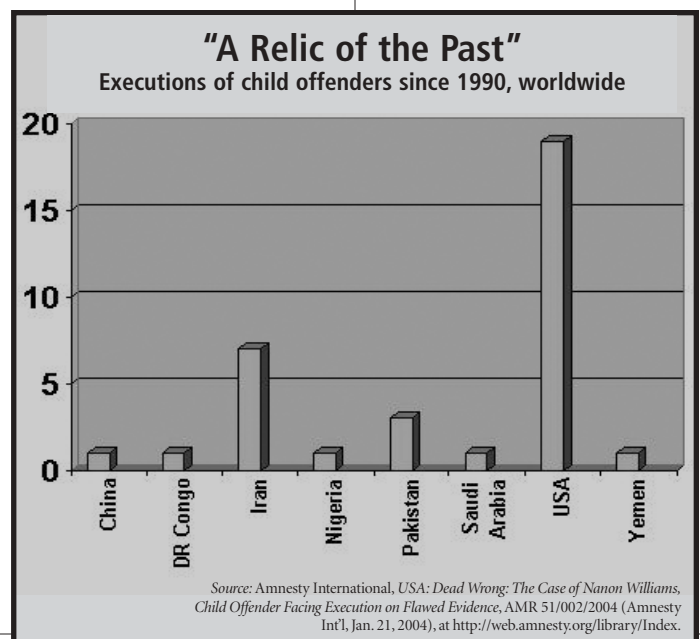
<sup>22</sup>Telephone Interview with Austin Sarat, William Nelson Cromwell Professor of Jurisprudence and Political Science, Amherst College, (Feb. 19, 2004) [hereinafter Sarat].

<sup>23</sup>See, e.g., Greenhouse, *supra* note 2, at A19; See also Mauro, *supra* note 11.

<sup>24</sup>*Atkins*, 536 U.S. at 315.

<sup>25</sup>Streib, *supra* note 16, at 8.

<sup>26</sup>ABA, *Evolving Standards*, *supra* note 15; See also 2002 Ind. Code § 35-50-2-3; 1999 Mont. Code Ann. § 45-5-102; N.Y. Crim. Proc. Law § 400.27 (2002); Kan. Stat. Ann. § 21-4622 (2002).



and Texas.<sup>27</sup> The state of Washington outlawed the practice in a 1993 state Supreme Court ruling, *State v. Furman*.<sup>28</sup> Altogether, 30 states prohibit capital punishment for juveniles.<sup>29</sup>

The declining frequency of juvenile executions nationwide seems to follow these same trends. The total of seven juvenile executions annually in 2000 and 2001 was half that of each of the preceding six years. By 2003, this number fell to the lowest point since 1989, with only two such executions nationwide.<sup>30</sup>

Those states still actively sentencing juveniles to death, opponents argue, have isolated themselves from the growing national consensus. From 1973 to the present, three states – Texas, Virginia, and Oklahoma



### Wide Range of Groups Oppose Juvenile Executions

Also promising for opponents of juvenile executions are the opinions of professional and religious organizations. Although *Stanford* dismissed the opinions of social, professional, and religious organizations as an “uncertain

can Academy of Child and Adolescent Psychiatry, the National Mental Health Association, The Coalition for Juvenile Justice, The American Humane Association, and The Constitutional Project.<sup>35</sup>

The psychiatric and medical establishment has been especially vocal on the issue. Experts point to new scientific research on adolescent brain development confirming that adolescents are subject to greater “limitations in judgment and maturity” than adults.<sup>36</sup> Due to frontal lobe underdevelopment, research says, adolescents may react impulsively, and may not understand the consequences of their actions, suggesting a lesser degree of culpability for their actions.<sup>37</sup>

However, opponents are keenly aware that much uncertainty

<sup>35</sup>See *Simmons*, 112 S.W.3d at 11; See also *Atkins*, 536 U.S. at 312.

<sup>36</sup>American Bar Association, *Adolescent Brain Development and Legal Culpability, Cruel and Unusual Punishment: The Juvenile Death Penalty* (Spring 2003), available at [www.abanet.org/crimjust/juvjus/factsheets\\_brain\\_development.pdf](http://www.abanet.org/crimjust/juvjus/factsheets_brain_development.pdf).

<sup>37</sup>*Id.*

still surrounds the *Simmons* case.<sup>38</sup>

During the next several months, opponents and champions of the juvenile death penalty alike probably will rely on dueling interpretations of the same evidence to state their cases. Meanwhile, it also is unclear where the Justices will fall on the issue. “Just about everyone except [Justices] Scalia and Rehnquist are in play here,” said Professor Sarat.<sup>39</sup>

This situation could bode well for opponents. Though only four votes are required to grant review by the United States Supreme Court, five are needed to overturn a previous decision. Juvenile death-penalty opponents, playing off the differences in *Stanford*’s five-four vote and *Atkins*’ six-three vote, are likely to pitch their arguments to the two likely swing votes, Justices Sandra Day O’Connor and Anthony Kennedy. For that reason, those Justices opposed to executing minors would need to bring only one vote to their side to prevail.

*Josh Friedman is an intern at the National Center for Youth Law. In addition to writing for Youth Law News, he is providing research support to Deputy Director Patrick Gardner on mental health law and policy affecting mental health care for low-income and foster youth. He plans to attend law school in Fall 2005.*

<sup>38</sup>See, e.g., Tony Mauro, *Supreme Court to Revisit Juvenile Execution Issue*, Legal Times, Jan. 27, 2004, available at <http://www.law.com/jsp/article.jsp?id=1074819338880>.

<sup>39</sup>Sarat, *supra* note 22.

### Individual states have moved to bar juvenile executions amid growing opposition to the practice by religious and professional groups

– have accounted for 81 percent of the national total for juvenile executions.<sup>31</sup> In that same time, Texas alone has accounted for nearly two thirds of all such executions, outpacing every other U.S. jurisdiction and country in the world that still retains the juvenile death penalty.<sup>32</sup>

foundation” for deciding constitutional law,<sup>33</sup> *Atkins* relied substantially on such opposition as testament to a developing national consensus abhorring the death penalty for the mentally retarded.<sup>34</sup>

Since *Stanford*, additional professional organizations have come out in opposition to the juvenile death penalty, most notably The American Psychiatric Association, The Ameri-

<sup>33</sup>*Stanford*, 492 U.S. at 369 n.1.

<sup>34</sup>*Atkins*, 536 U.S. at 316 n.21.

<sup>27</sup>Streib, *supra* note 16, at 8.

<sup>28</sup>*State v. Furman*, 858 P.2d 1092 (Wash. 1993).

<sup>29</sup>ABA, *Evolving Standards*, *supra* note 15.

<sup>30</sup>Streib, *supra* note 16, at 10.

<sup>31</sup>Streib, *supra* note 16, at 6.

<sup>32</sup>Streib, *supra* note 16, at 3.