

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DONALD P. ROPER, :
4 SUPERINTENDENT, POTOSI :
5 CORRECTIONAL CENTER, :
6 Petitioner :

7 v. : No. 03-633

8 CHRISTOPHER SIMMONS. :

9 - - - - -X

10 Washington, D. C.
11 Wednesday, October 13, 2004

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 10:02 a.m.

15 APPEARANCES:

16 JAMES R. LAYTON, ESQ., State Solicitor, Jefferson City,
17 Missouri; on behalf of the Petitioner.

18 SETH P. WAXMAN, ESQ., Washington, D. C.; on behalf of the
19 Respondent.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 03-633, Donald Roper v. Christopher Simmons.

5 Mr. Layton.

6 ORAL ARGUMENT OF JAMES R. LAYTON

7 ON BEHALF OF THE PETITIONER

8 MR. LAYTON: Mr. Chief Justice, and may it
9 please the Court:

10 Though bound by Stanford v. Kentucky, the
11 Missouri Supreme Court rejected both its holding and its
12 rationale. This Court should stay the course it set in
13 Stanford, leaving in the hands of legislators a
14 determination as to the precise minimum age for capital
15 punishment within the realm of Thompson v. Oklahoma, and
16 leaving to jurors responsibility for determining the
17 culpability of individual defendants above that minimum
18 age.

19 The Missouri court justified its departure from
20 Stanford on Atkins v. Virginia, but the result it reached
21 is quite different from the result in Stanford. In that
22 -- excuse me -- in Atkins. In that case, the Court was
23 addressing mental ability, itself a component of
24 culpability. The Court announced a principle based on
25 that characteristic, that is, that the mentally retarded

1 are not to be eligible for capital punishment, but then it
2 left to the States the determination of the standard and
3 the means of implementing that principle.

4 The Missouri Supreme Court, by contrast, jumped
5 beyond the question of maturity, which is an element of
6 culpability analysis, to the arbitrary distinction of age.
7 It drew a line based purely on age, which is necessarily
8 over-inclusive, and then it gave that line constitutional
9 status, thus depriving legislators and juries of the
10 ability to evaluate the maturity of 17-year-old defenders.

11 JUSTICE SCALIA: Well, we didn't leave it up to
12 the States entirely. I mean, you -- you mean the States
13 could adopt any definition of mental retardation they
14 want?

15 MR. LAYTON: No. The States certainly --

16 JUSTICE SCALIA: So there's -- there's some
17 minimal level of mental retardation. Right?

18 MR. LAYTON: There is some minimal level.

19 JUSTICE SCALIA: And isn't that necessarily
20 over-inclusive, just as picking any single age is
21 necessarily over-inclusive?

22 MR. LAYTON: No.

23 JUSTICE SCALIA: Surely there will be some
24 people who -- who, although they have that level of mental
25 retardation, with regard to the particular crime in

1 question, are deserving of the death penalty.

2 MR. LAYTON: I -- I don't agree that it would be
3 over-inclusive, given the Court's analysis in Atkins. The
4 Court said that someone who has that level of mental
5 retardation is simply not sufficiently culpable by
6 definition. That certainly would not be true here. There
7 are 17-year-olds who are equally culpable with those who
8 are 18, 20, 25, or some other age.

9 JUSTICE GINSBURG: But the age 18 is set even
10 for such things as buying tobacco. The -- the dividing
11 line between people who are members of the community, the
12 adult community, is pervasively 18, to vote, to sit on
13 juries, to serve in the military. Why should it be that
14 someone is death-eligible under the age of 18 but not
15 eligible to be an adult member of the community?

16 MR. LAYTON: I think that legislators would be
17 surprised, when they adopted those statutes, that they
18 were affecting their criminal law. In fact, many of those
19 statutes have individualized determinations, the military
20 being one of them. 17-year-olds can enlist. There is an
21 individualized determination, albeit by parents, not the
22 Government. 17-year-olds may be serving in Iraq today.
23 That -- the other kinds of examples that you cite, for
24 example, tobacco --

25 JUSTICE GINSBURG: But with parental -- they are

1 wards of their parents.

2 MR. LAYTON: Yes.

3 JUSTICE GINSBURG: So their parents -- the same
4 thing with marriage. A 17-year-old can marry but not
5 without parental consent.

6 MR. LAYTON: Although in most instances can
7 marry if they go to a court and demonstrate they are
8 sufficiently mature, again contemplating individualized
9 determination, which the Missouri Supreme Court says does
10 not exist as to 17-year-olds with regard to capital
11 punishment.

12 JUSTICE SCALIA: Why pick -- why pick on the
13 death penalty? I mean, if you're going to say that
14 somehow people under 18 are juveniles for all purposes,
15 why -- why just pick on the death penalty? Why -- why not
16 say they're immune from any criminal penalty?

17 MR. LAYTON: Well, I -- I must assume that if we
18 -- if the Court says they are immune from the -- from
19 capital punishment that someone will come and say they
20 also must be immune from, for example, life without
21 parole.

22 JUSTICE SCALIA: I'm sure that -- I'm sure that
23 would follow. I -- I don't see where there's a logical
24 line.

25 MR. LAYTON: No. The -- the problem with

1 adopting the -- the 18-year-old line is that it is
2 essentially arbitrary. It's the kind of line that
3 legislators and not courts adopt.

4 CHIEF JUSTICE REHNQUIST: But didn't -- didn't
5 we adopt a 16-year-old line in our earlier case?

6 MR. LAYTON: In -- in Thompson, the Court in a
7 4-1-4 decision struck a 15-year-old -- a 15-year-old
8 execution, and the States have taken, including Missouri
9 through its General Assembly, have taken that to mean that
10 there is a 16-year-old line. And today, in fact, I think
11 it's true that there is a consensus nationally with regard
12 to the 16-year-old line, not because it has some
13 biological or psychological magic, but because perhaps --

14 JUSTICE O'CONNOR: Well, but -- but there was --
15 it's about the same consensus that existed in the
16 retardation case.

17 MR. LAYTON: Absolutely, that's true. If you
18 look at the -- the --

19 JUSTICE O'CONNOR: And -- and so are we somehow
20 required to at least look at that? I mean, the statistics
21 of how many States have approved 18 years as the line is
22 about the same as those in the retardation case.

23 MR. LAYTON: The -- the Court has kind of three
24 groups of cases with regard to the number of States. On
25 one extreme, are Enmund and Coker where you have three and

1 eight States. On the other extreme, are Penry and
2 Stanford where you have 24 and 34 States. And then
3 there's this middle group, which isn't just Atkins and
4 this case. It's also Tison, which is also almost exactly
5 the same number.

6 The Court in Atkins had to find a way of
7 distinguishing Tison, to the extent the Court relied on
8 that -- that counting process, and the -- the Court
9 concluded that there was kind of an inexorable trend with
10 regard to the mentally retarded. We don't have that kind
11 of trend here. In --

12 JUSTICE SOUTER: Well, we -- we have a different
13 kind of trend. What do you make -- you spoke of a
14 consensus, but what do you make of the fact that over the
15 last, I guess, 10- or 12-year period, the actual
16 imposition of the death penalty for -- for those whose
17 crimes were -- were under 18 has -- has steadily been
18 dropping. I think 10 years ago, there were 13. Last
19 year, I -- I think the figures were that there were two.
20 The -- the consensus seems to be eroding, and yet as -- as
21 the counsel on the other side pointed out, this has been
22 occurring at a time when -- when treating juvenile crime
23 seriously has not, in fact, been eroding at all. What --
24 what are we supposed to make of that?

25 MR. LAYTON: Well, two things.

1 Number one is that capital sentences have been
2 dropping for all ages, not just for those under 18. So it
3 -- you have to take that into account.

4 The second is that although the last --

5 JUSTICE SOUTER: Has -- has the -- has the rate
6 of attrition been the same?

7 MR. LAYTON: It is --

8 JUSTICE SOUTER: 13 to 2 is pretty spectacular.

9 MR. LAYTON: It is not --

10 JUSTICE SOUTER: I don't think we've seen that,
11 or maybe we have seen that, for -- for death imposition
12 generally. Is that so?

13 MR. LAYTON: It is certainly greater, but part
14 of the problem is we're dealing with such small numbers
15 for the -- the juveniles, those under 18, that the
16 difference of one or two makes a huge difference in how
17 the numbers come out.

18 But if you look over the last 10 years, in fact,
19 it has gone up and down and currently is in a down trend,
20 but the down trend --

21 JUSTICE SOUTER: Well, it went up once I think,
22 didn't it?

23 MR. LAYTON: It -- it went up once within --
24 since -- since Stanford and then came back down. Now,
25 whether this -- this period in which it comes back down is

1 going to remain that way or whether we'll go back up to
2 where we were 10 years ago I don't know. That's entirely
3 hypothetical to suggest that -- that this very recent
4 trend is more dispositive than the trends over the last 10
5 years.

6 JUSTICE SOUTER: So -- so you're basically --
7

8 JUSTICE SOUTER: You're -- you're basically
9 saying that the -- the time is too short, the numbers are
10 too small --

11 MR. LAYTON: Right.

12 JUSTICE SOUTER: -- to infer anything.

13 MR. LAYTON: Right, and the time is too short on
14 the legislative side as well. We're only talking about
15 the States that have adopted new legislation having done
16 so, one of them in 1999 and the others simply in 2002 and
17 2004. If we were to look at the history of -- of capital
18 punishment in the United States, there are many times when
19 States have abolished capital punishment and then
20 returned. And Justice --

21 JUSTICE KENNEDY: You -- you were in the midst
22 of telling us why the -- there is a consensus now that
23 it's inappropriate to execute anyone under 16, and I -- I
24 -- you weren't --

25 MR. LAYTON: No. It --

1 JUSTICE KENNEDY: You couldn't finish that
2 answer. I want to know it.

3 MR. LAYTON: Since -- since Stanford, we have
4 had no executions under 16 even though it is possible to
5 read Justice O'Connor's opinion in that case as allowing a
6 State to adopt a statute that specifically says 15. No
7 one has tried that. Everyone seems to have taken Thompson
8 and Stanford together to mean there is a 16-year-old line.
9 Two States have adopted 16 by statute.

10 JUSTICE KENNEDY: And -- and so you say there's
11 -- there's not so much as a consensus as an understanding
12 of what that decision means.

13 MR. LAYTON: I -- I think that that's right.
14 There are States that have adopted it specifically and
15 others have simply implemented it. If I were a prosecutor
16 today, I -- it's hard to imagine that I would -- even in a
17 State where I could find a statute saying I could
18 prosecute someone under age 16, that I would try such a
19 thing.

20 JUSTICE KENNEDY: Let -- let me ask you this. I
21 -- I don't yet have the -- the record showing the full
22 closing argument of -- of both sides, but we do have the
23 portion where the prosecutor says, isn't this scary? Can
24 adolescence ever be anything but mitigating?

25 MR. LAYTON: I -- I don't know how it could be

1 anything but mitigating. But what we have in that --

2 JUSTICE KENNEDY: But that's not how the
3 prosecution presented it to the jury.

4 MR. LAYTON: In that statement, but --

5 JUSTICE KENNEDY: He said -- he -- he almost
6 made it aggravating. Isn't that scary? I don't have the
7 -- I don't have the full argument.

8 MR. LAYTON: No. What -- what he's facing is --
9 is 18 pages of transcript that occupied the -- the defense
10 counsel's argument. Of those 18 pages, 4 pages are
11 dedicated purely to Mr. Simmons' youth, and throughout the
12 rest of the argument, he uses terms to reinforce that. He
13 refers to him repeatedly as a 17-year-old. He calls him a
14 kid. He does things to reinforce with the jury that he's
15 very young.

16 So then we come back and in a few pages of
17 rebuttal, we have a couple of words -- I shouldn't say
18 that -- two sentences in which the prosecutor is trying to
19 respond to that particular lengthy theme and argument.

20 JUSTICE GINSBURG: It was pretty clear. The --
21 the words in question were: Think about age. 17 years
22 old. Isn't that scary? Doesn't that scare you?
23 Mitigating? Quite the contrary I submit. Quite the
24 contrary.

25 MR. LAYTON: And if we were here because Mr.

1 Simmons said that was improper and the Missouri Supreme
2 Court said that was improper, well, we wouldn't be here.
3 We wouldn't have asked for certiorari. The Court wouldn't
4 have granted it.

5 JUSTICE GINSBURG: But the question is, can --
6 is -- is age, youth inevitably mitigating, and here is a
7 prosecutor giving the answer no, it can be aggravating.

8 MR. LAYTON: The Missouri statute requires that
9 an instruction be given that says that age is a mitigator,
10 and the -- the instruction was given here. And the jury
11 heard argument concerning that particular claim

12 JUSTICE SCALIA: Well, what's -- what's the --

13 JUSTICE KENNEDY: Well, that's somewhat --

14 JUSTICE SCALIA: What is the contrary of -- of
15 mitigating? I -- I would assume --

16 MR. LAYTON: Aggravating, but aggravating --

17 JUSTICE SCALIA: Is it? I -- I would assume
18 it's not mitigating.

19 MR. LAYTON: Well, you're right, Your Honor,
20 because --

21 JUSTICE SCALIA: Maybe the opposite of
22 mitigating is aggravating, but it -- it's perfectly good
23 English to say, mitigating? Quite the contrary --

24 MR. LAYTON: It is --

25 JUSTICE SCALIA: It's not at all mitigating.

1 MR. LAYTON: Yes. And -- and --

2 JUSTICE SCALIA: So I don't know why you give
3 that one away.

4 MR. LAYTON: Certainly aggravating circumstances
5 are defined in the Missouri statute, and they were defined
6 in the instructions. So this was not to be considered by
7 the jury as an aggravator.

8 JUSTICE KENNEDY: Let -- let's focus on the word
9 unusual. Forget cruel for the moment, although they're
10 both obviously involved.

11 We've seen very substantial demonstration that
12 world opinion is -- is against this, at least as
13 interpreted by the leaders of the European Union. Does
14 that have a bearing on what's unusual? Suppose it were
15 shown that the United States were one of the very, very few
16 countries that executed juveniles, and that's true. Does
17 that have a bearing on whether or not it's unusual?

18 MR. LAYTON: No more than if we were one of the
19 very few countries that didn't do this. It would bear on
20 the question of unusual. The decision as to the Eighth
21 Amendment should not be based on what happens in the rest
22 of the world. It needs to be based on the mores of -- of
23 American society.

24 JUSTICE SCALIA: Have the countries of the
25 European Union abolished the death penalty by popular

1 vote?

2 MR. LAYTON: I don't know how they've done that,
3 Your Honor.

4 JUSTICE SCALIA: I thought they did it by reason
5 of a judgment of a court --

6 MR. LAYTON: Well, in fact --

7 JUSTICE SCALIA: -- which required all of them
8 to abolish it.

9 MR. LAYTON: I -- I believe that --

10 JUSTICE SCALIA: And I thought that some of the
11 public opinion polls in -- in a number of the countries
12 support the death penalty.

13 MR. LAYTON: I believe that there are countries
14 in Europe who abolish it because of their membership in
15 the European Union --

16 JUSTICE KENNEDY: I -- I acknowledged that in --
17 in my question. I recognize it is the leadership in many
18 of these countries that objects to it.

19 But let us -- let us assume that it's an
20 accepted practice in most countries of the world not to
21 execute a juvenile for moral reasons. That has no bearing
22 on whether or not what we're doing is unusual?

23 MR. LAYTON: I -- I can't concede that it does
24 because it's unimaginable to me that we would be willing
25 to accept the alternative, the flip side of that argument.

1 It does seem to me, however, that that goes to a
2 particular -- back to the aspect where I began --

3 JUSTICE BREYER: Is there -- is there any on --
4 on that? Is there any indication? I mean, I've never
5 seen any either way, to tell you the truth, but -- that
6 Madison or Jefferson or whoever, when they were writing
7 the Constitution, would have thought what happened
8 elsewhere, let's say, in Britain or in the British -- they
9 were a British colony. They did think Blackstone was
10 relevant. Did any -- that they would have thought it was
11 totally irrelevant what happened elsewhere in the world to
12 the word unusual. Is there any indication in any debate
13 or any of the ratification conventions?

14 MR. LAYTON: Nothing that I have seen has
15 suggested that --

16 JUSTICE BREYER: So if Lincoln --

17 MR. LAYTON: -- one way or the other.

18 JUSTICE BREYER: -- Abraham Lincoln used to
19 study Blackstone and I think he thought that the Founding
20 Fathers studied Blackstone, and all that happened in
21 England was relevant, is there some special reason why
22 what happens abroad would not be relevant here? Relevant.

23 MR. LAYTON: There's a --

24 JUSTICE BREYER: I'm not saying controlling.

25 MR. LAYTON: There's a special reason why

1 Blackstone would be relevant because that was the law from
2 which they were operating when they put this language into
3 the Constitution.

4 JUSTICE BREYER: Absolutely, and they, I guess,
5 were looking at English practices, and would they have
6 thought it was wrong to look abroad as a relevant feature?

7 MR. LAYTON: And -- and I don't know the answer
8 to that, Your Honor.

9 JUSTICE KENNEDY: Do we -- do we ever take the
10 position that what we do here should influence what people
11 think elsewhere?

12 MR. LAYTON: I -- I have not seen that overtly
13 in any of the Court's opinions, Your Honor.

14 JUSTICE SCALIA: You -- you think --

15 JUSTICE KENNEDY: You -- you thought that Mr.
16 Jefferson thought that what we did here had no bearing on
17 the rest of the world?

18 MR. LAYTON: Oh, I -- I think Mr. Jefferson
19 thought that. I think many of the Founders thought that
20 they were leading the world, and I have no objection to us
21 leading the world, but Mr. Jefferson's lead of the world
22 was through the legislature not through the courts.

23 JUSTICE GINSBURG: But did he not also say that
24 to -- to lead the world, we would have to show a decent
25 respect for the opinions of mankind?

1 MR. LAYTON: That -- that may well be.

2 JUSTICE SCALIA: What did John Adams think of
3 the French?

4 (Laughter.)

5 MR. LAYTON: I read a biography of John Adams
6 recently. I recall that he didn't think highly of them

7 (Laughter.)

8 MR. LAYTON: The -- Missouri, in order to
9 implement the principle that those who are immature should
10 not be subject to capital punishment, has adopted an
11 approach that, first off, excludes anyone age 16 and under
12 from capital punishment; second, requires certification by
13 the juvenile court for anyone who is 16, but otherwise
14 turns the matter over to the jury and defines it as a
15 statutory mitigator.

16 The kind of evidence that is discussed in Mr.
17 Simmons' brief at some length could have been applied --
18 could have been presented during the penalty phase of Mr.
19 Simmons' trial. It has been reflected in decisions of
20 this Court as far back as Eddings where there was evidence
21 of mental and emotional development. In Penry, there was
22 evidence of mental age and social maturity. And here, in
23 the post-conviction proceeding, Mr. Simmons presented such
24 evidence regarding his impulsivity, his susceptibility to
25 peer pressure, and his immaturity. But he didn't present

1 that at trial. There is a mechanism in Missouri for him
2 to do that and he chose not to.

3 JUSTICE BREYER: Before you go off on this, the
4 one statistic that interested me -- and I'd like you to
5 discuss its relevance really -- is if we look back 10
6 years, I have only three States executing a juvenile:
7 Texas, 11; Virginia, 3; and Oklahoma, 2.

8 MR. LAYTON: Correct.

9 JUSTICE BREYER: And those three States account
10 for about 11 percent of the population of the country,
11 11.3 percent.

12 Now, if we go back a few more years to Stanford,
13 we get three others in there: Louisiana, 1; Georgia, 1;
14 and Missouri, 1.

15 MR. LAYTON: And if you go to the convictions
16 rather than the executions, then Alabama goes into that
17 mix.

18 JUSTICE BREYER: We have a very different
19 number.

20 MR. LAYTON: Right.

21 JUSTICE BREYER: So the reason that I thought
22 arguably it's more relevant to look at the convictions is
23 there are a lot of States. Say, New Hampshire, I think,
24 for example -- when I was in the First Circuit, there were
25 several States that on the books permitted the death

1 penalty, but nobody ever had ever been executed. And --
2 and that's true across the country. There are a number of
3 States like that. So if we look at the States that
4 actually execute people, it's 10 years, say, 11 percent of
5 the population are in such States. You go back 15 years,
6 and you get these three other States, which raises the
7 percentage.

8 How -- how should I understand that? I'm
9 interested in both sides --

10 MR. LAYTON: Frankly, we don't know what those
11 numbers mean because we don't know to what extent
12 juveniles are committing capital level murders. We -- and
13 there is no way in current social science to make that
14 determination.

15 It's interesting that among the three States --
16 two of the three States that are on that list that Justice
17 Breyer mentioned are States in which there is a specific
18 instruction to the jury, or indeed, in Texas, a
19 requirement, that the jury evaluate future dangerousness.
20 That is, the argument that was referred to by opposing --
21 or that counsel made, the State's counsel made, the
22 prosecutor made, in the -- in the trial here, there's
23 actually an instruction in some of those States. And that
24 may play into the manner in which this -- those States --
25 the reason those States have additional convictions and

1 additional executions.

2 But Missouri doesn't have that. We don't
3 require that the jury find future dangerousness, and
4 although that may come up in the course of a mitigation
5 and aggravation argument in the penalty phase, it isn't
6 highlighted like it is in those States. And that may be
7 more problematic than the system that Missouri has
8 created.

9 If the kind of evidence, psychosocial evidence,
10 that is cited in Mr. Simmons' brief had been presented at
11 the penalty phase, of course there would have been an
12 opportunity to rebut it, to question it. Instead, what we
13 have in this case is the marshaling of untested evidence
14 from various cause groups and some dispassionate
15 observers.

16 CHIEF JUSTICE REHNQUIST: At what point was this
17 inserted into the record, Mr. Layton?

18 MR. LAYTON: The -- the kind of -- well, as to
19 Mr. Simmons specifically, it came in in the post-
20 conviction proceeding, and then was also present in the
21 habeas record. In this case, the -- the lengthy litany of
22 scientific studies appeared for the first time in his
23 brief in this Court. There were references to a few of
24 them before, but nothing --

25 CHIEF JUSTICE REHNQUIST: It was never -- never

1 tested in the trial court.

2 MR. LAYTON: Oh, no. Oh, no, because he never
3 made the argument in the trial court during his trial that
4 -- that scientifically he was too immature to be culpable
5 to the degree that would merit capital punishment.

6 JUSTICE SOUTER: Well, at least to the extent
7 that he's simply quoting public sources, you had a chance
8 to quote public sources in -- in return.

9 MR. LAYTON: Absolutely.

10 JUSTICE SOUTER: So I think you're -- you're
11 even on that --

12 MR. LAYTON: Absolutely.

13 JUSTICE SOUTER: -- or at least your opportunity
14 is.

15 MR. LAYTON: I -- and I think the reason that we
16 did that and we cited the difficulties in our reply brief
17 with what he cited is to highlight that the precise age is
18 a legislative question based on legislative type facts.
19 Legislatures can evaluate this series of studies and then
20 pick what is essentially an arbitrary age. There is no
21 study in anything that Mr. Simmons cites that -- that
22 justifies that particular day, 18. They talk about
23 adolescence. They talk about young adolescence, old
24 adolescence. They talk about adolescence continuing until
25 the mid-20's. Nothing justifies the age of 18. That

1 makes it the kind of fact that a legislature ought to be
2 evaluating, not a court.

3 JUSTICE SCALIA: Does adolescence as a
4 scientific term -- does it always occur on the same day
5 for -- for all individuals?

6 MR. LAYTON: No. The -- the studies point out
7 that adolescence is -- well, they don't agree on what
8 adolescence means, and they don't -- and they point out
9 that it begins and ends on different times for different
10 people. So we don't know what adolescence means in the
11 studies, and we don't know what it would mean were the
12 Court to base a decision on the -- this concept of
13 adolescence.

14 I'd like to reserve the rest of my time, if
15 there are no other questions.

16 CHIEF JUSTICE REHNQUIST: Very well, Mr. Layton.

17 Mr. Waxman, we'll hear from you.

18 ORAL ARGUMENT OF SETH P. WAXMAN

19 ON BEHALF OF THE RESPONDENT

20 MR. WAXMAN: Mr. Chief Justice, and may it
21 please the Court:

22 Everyone agrees that there is some age below
23 which juveniles can't be subjected to the death penalty.
24 The question here is where our society's evolving
25 standards of decency now draw that line.

1 15 years ago, this Court found insufficient
2 evidence to justify a bright line at 18, but since
3 Stanford, a consensus has evolved and new scientific
4 evidence has emerged, and these developments change the
5 constitutional calculus for much the same reasons the
6 Court found compelling in Atkins. As was noted --

7 JUSTICE SCALIA: Can the constitutional calculus
8 ever move in the other direction? I mean, once we hold
9 that, you know, 16 is the age, if there's new scientific
10 evidence that shows that some people are quite mature at
11 18 or at -- at 17-and-a-half or if -- if there is a -- a
12 new feeling among the people that youthful murderers are,
13 indeed, a serious problem and -- and deterrence is
14 necessary, can we ever go back?

15 MR. WAXMAN: Well, there is a -- .

16 JUSTICE SCALIA: It's sort of a one-way ratchet.
17 Isn't it?

18 MR. WAXMAN: There is a one-way ratchet here as
19 there is whenever this Court draws a constitutional line;
20 that is, whenever this Court determines that the
21 Constitution preempts the ability of legislatures to
22 make --

23 CHIEF JUSTICE REHNQUIST: Well, but what -- what
24 if a State legislature decides that, sure, the Supreme
25 Court said in the Simmons case that you can't execute

1 anybody under 18, but we think there's kind of a tendency
2 the other way, we're going to pass a statute and see what
3 happens in court?

4 MR. WAXMAN: Well, you could -- you could have,
5 I guess, what I refer to as the Dickerson v. United States
6 phenomenon. It could come up. But what's -- what's
7 really interesting -- I think what's --

8 CHIEF JUSTICE REHNQUIST: Is it -- is that a
9 closed book? I mean, granted, you may lose the argument,
10 but is it a permissible argument that the standards have
11 evolved the other way?

12 MR. WAXMAN: It -- it certainly would be a
13 permissible -- permissible argument.

14 What's -- what's notable here, Justice Scalia
15 and Mr. Chief Justice, is how robust this consensus is.
16 We're talking not only about the whole variety of ways in
17 which our society has concluded that 18 is the bright line
18 between childhood and adulthood and that 18 is the line
19 below which we preserve -- presume immaturity. But the
20 line with respect to executions, the trend is very robust
21 and it is very deep.

22 JUSTICE SCALIA: We don't -- we don't use 18 for
23 everything. Aren't there States that -- that allow
24 adolescents to drive at the age of 16?

25 MR. WAXMAN: There are nine States that allow

1 adolescents to drive at the age of 16 without their
2 parents' consent. That -- driving, of course, is the
3 classic example, but --

4 JUSTICE SCALIA: With their parents' consent --

5 CHIEF JUSTICE REHNQUIST: Right.

6 JUSTICE SCALIA: With their parents' consent,
7 how many?

8 MR. WAXMAN: To -- to -- there are 41 States
9 that require parental consent below 18.

10 JUSTICE SCALIA: But they can drive.

11 MR. WAXMAN: But they can drive if their parents
12 agree. My -- my --

13 JUSTICE SCALIA: If it's okay with the parents,
14 it's okay with the State.

15 MR. WAXMAN: My point here is that with respect
16 to the death penalty, we have a substantial consensus
17 within the United States, as it happens, exactly the same
18 lineup as existed in -- as existed in -- was true in
19 Atkins. We have not just a worldwide consensus that
20 represents the better view in Europe. There are 194
21 countries --

22 CHIEF JUSTICE REHNQUIST: Well, how does one --
23 how does one determine what is the better view?

24 MR. WAXMAN: I was -- I was referring to the
25 implication that it has often been said that because the

1 European Union thinks something, we should, therefore,
2 presume that the world views it that way. We're now
3 talking about --

4 CHIEF JUSTICE REHNQUIST: Are you suggesting
5 that we adopt that principle?

6 MR. WAXMAN: To the contrary. My point is we
7 are not talking about just what a particular European
8 treaty requires. We -- the -- the eight States that --
9 that theoretically -- that have statutes that
10 theoretically permit execution of offenders under 18 are
11 not only alone in this country, they are alone in the
12 world. Every country in the world, including China and
13 Nigeria and Saudi Arabia and the -- and the Democratic
14 Republic of the Congo, every one has agreed formally and
15 legislatively to renounce this punishment, and the only
16 country besides the United States that has not is Somalia,
17 which as this Court was reminded yesterday, has no
18 organized government. It is incapable --

19 JUSTICE SCALIA: They have a lot of customs that
20 we don't have. They don't allow most -- almost all of
21 them do not allow -- have trial by jury. Should we -- and
22 they think it's not only more efficient, it is fairer
23 because juries are, you know, unpredictable and whatnot.
24 Should we yield to the views of the rest of the world?

25 MR. WAXMAN: Of course not, but this is a --

1 this is a standard which -- a constitutional test that
2 looks to evolving standards of moral decency that go to
3 human dignity. And in that regard, it is -- it is notable
4 that we are literally alone in the world even though 110
5 countries in the world permit capital punishment for one
6 purpose -- for one crime or another, and yet every one --
7 every one formally renounces it for juvenile offenders.

8 And, Justice Kennedy, my submission isn't that
9 that that's set -- you know, game, set, and match. It's
10 just relevant, and I think it is relevant in terms of the
11 existence of a consensus.

12 There was reference made by my opponent to the
13 fact that there are four States that set the age at 17 and
14 four States that set the age at 16. No -- in terms of
15 movement, no one has suggested that any of those States or
16 any other State has ever lowered the age. In fact, if you
17 look at those particular -- those eight States, a number
18 of them legislated an age that represented raising the
19 number over what had previously been permitted. The
20 movement, as this Court addressed, talked about in Atkins,
21 has all been in one direction, and it's not as if that
22 movement, in and of itself, answers the question. But
23 where you have the type of consensus that exists here, as
24 it did in Atkins, and where you have a scientific
25 community that in Stanford was absent -- the American

1 Medical Association, the American Psychological
2 Association, the American Psychiatric Association, the
3 major medical and scientific associations, were not able
4 in 1989, based on the evidence, to come to this Court and
5 say there is scientific, empirical validation for
6 requiring that the line be set at 18.

7 JUSTICE KENNEDY: Well, in fact, the American
8 Psychological Association is not your brief. You're not
9 accountable for inconsistencies there.

10 But I -- I would like your comment. They came
11 to us in *Hodgson v. Minnesota*, as I think the State quite
12 correctly points out, and said that with reference to the
13 age for determining whether the child could have an
14 abortion without parental consent, that adults -- that
15 they -- that they were risk -- that they could assess
16 risk, that they had rational capacity, and they completely
17 flip-flop in this case.

18 MR. WAXMAN: Well --

19 JUSTICE KENNEDY: Is that just because of -- is
20 that just because of this modern evidence?

21 MR. WAXMAN: No, no, no. I don't -- I think
22 it's -- it may be in small part to that, Justice Kennedy,
23 but I think the main point is that what their brief looked
24 to -- what the argument was was our -- are adolescents
25 cognitively different than adults. And the answer is, as

1 we -- our brief concedes, is generally no.

2 And what was at issue in the abortion cases was
3 competency to decide. And just as we allow the mentally
4 retarded the ability to decide whether or not to obtain an
5 abortion but not to be subject to a penalty that is
6 reserved for the tiny fraction of murderers that are so
7 depraved that we call them the worst of the worst, here
8 competency to decide here, as with the mentally retarded,
9 isn't the issue.

10 Christopher Simmons was found, beyond a
11 reasonable doubt, to have committed this offense with the
12 specific intent necessary to do it, just as the mentally
13 retarded can be. The issue in Hodgson was cognitive
14 ability to be able to make a competent decision. And so I
15 don't -- I didn't represent the APA then and I don't now,
16 but I don't, with respect, think there's an inconsistency.

17 In fact, the difference here goes to the factors
18 that Atkins identified about why overwhelmingly the
19 mentally retarded -- and here adolescents -- are less
20 morally capable. They are much, much less likely to be
21 sufficiently mature to be among the worst of the worst.
22 And here, even more than with the mentally retarded, the
23 few 16- and 17-year-olds who might, if we could even
24 determine it, be -- we could determine were in fact so
25 depraved that they were among the worst of the worst,

1 there is no way reliably to identify them and there's no way
2 reliably to exclude them. And it is in this respect that
3 science I think changes.

4 At the time of Stanford, everybody on this
5 Court, of course, knew what all of us as adults
6 intuitively know, which is that adolescents -- and -- and
7 here we're talking about -- I agree that when adolescence
8 starts and when it ends is undefined. But every
9 scientific and medical journal and study acknowledges that
10 16- and 17-year-olds are the heartland. No one excludes
11 them. And what we know from the science essentially
12 explains and validates the consensus that society has
13 already developed.

14 JUSTICE SCALIA: If all of this is so clear, why
15 can't the State legislature take it into account?

16 MR. WAXMAN: Well, one could have said --

17 JUSTICE SCALIA: I mean, if it's such an
18 overwhelming case that -- that we can prescribe it for the
19 whole country, you would expect that the number of States
20 that -- that now permit it would not permit it. All you
21 have to do is bring these facts to the attention of the
22 legislature, and they can investigate the accuracy of the
23 studies that the American Psychological Association does
24 or other associations in a manner that we can't. We just
25 have to read whatever you put in front of us.

1 MR. WAXMAN: Justice Scalia, the number of
2 States that engage in these executions is very small, and
3 if it were all of the States, none of this Court's Eighth
4 Amendment jurisprudence would ever have to come -- would
5 ever have to be developed. But --

6 JUSTICE SCALIA: But that's precisely because
7 the jury considers youthfulness as one of the mitigating
8 factors. It doesn't surprise me that the death penalty
9 for 16- to 18-year-olds is rarely imposed. I would expect
10 it would be. But it -- it's a question of whether you
11 leave it to the jury to evaluate the person's youth and
12 take that into account or whether you adopt a hard rule
13 that nobody who is under 18 is -- is -- has committed such
14 a heinous crime with such intent that he -- that he
15 deserves the death penalty.

16 MR. WAXMAN: Justice -- Justice Scalia, there's
17 no doubt -- and the jury was instructed -- that age is a
18 mitigating factor although, Justice Kennedy, in response
19 to your question, our brief points out prosecutors, in the
20 context of future dangerousness, which is relevant, argue
21 it all the time and jurors intuitively think it all the
22 time.

23 But the fact that he could have made an
24 individualized mitigating case or argued that he was only
25 -- that he was young, as he did, doesn't address the

1 constitutional problem The constitutional problem is
2 that overwhelmingly 16- and 17-year-olds, for reasons of
3 the -- the developmental reasons relating to their
4 psychosocial character --

5 CHIEF JUSTICE REHNQUIST: Well, Mr. Waxman, was
6 that in evidence that you referred to from these various
7 associations? Was that introduced at trial?

8 MR. WAXMAN: The -- about the character --

9 CHIEF JUSTICE REHNQUIST: Yes.

10 MR. WAXMAN: No. The trial was -- I'm making an
11 observation just as in -- as in Atkins --

12 CHIEF JUSTICE REHNQUIST: Well, but I -- I would
13 think if you want to rely on evidence like that, it ought
14 to be introduced at trial and subject to cross examination
15 rather than just put in amicus briefs.

16 MR. WAXMAN: Oh, no, Mr. Chief Justice. I'm not
17 making an argument about the character or maturity of this
18 defendant, which would have been the only thing that would
19 be --

20 CHIEF JUSTICE REHNQUIST: No. But you're making
21 an argument that science says people this age are simply
22 different, and it seems to me you -- if that's to be an
23 argument, it ought to be introduced at trial.

24 MR. WAXMAN: I -- I -- it's an argument about
25 what the Constitution prohibits. It's an argument about

1 where a constitutional line should be drawn.

2 CHIEF JUSTICE REHNQUIST: Well, but you're --
3 you're talking facts basically and facts ordinarily are
4 adduced at trial for cross examination.

5 MR. WAXMAN: Well, I am not aware of any
6 instance in which legislative facts, as you will call
7 them, that is, facts that go to where a line should be
8 drawn, whether it's by this Court because the Constitution
9 ought to be so interpreted or a legislation should change,
10 would be properly introduced to a jury that is supposed to
11 accept the law, that has required to accept the law as is
12 given by a judge --

13 CHIEF JUSTICE REHNQUIST: Well, how about in the
14 -- how about in the habeas proceeding?

15 MR. WAXMAN: In the habeas proceeding, it's --
16 it's -- an argument could have been made and, indeed, was
17 made in this case that the line -- that under Atkins
18 juvenile offenders are the same and --

19 CHIEF JUSTICE REHNQUIST: Well, was this
20 evidence adduced at the habeas proceeding?

21 MR. WAXMAN: The habeas -- if you're talking
22 about the -- the scientific studies --

23 CHIEF JUSTICE REHNQUIST: Right.

24 MR. WAXMAN: -- in peer-reviewed journals, it
25 was not.

1 JUSTICE KENNEDY: Well -- well, surely at the
2 trial, you could have had a psychiatrist testify to all
3 the things that are in your -- in your brief, and in fact
4 the -- it would be another argument, but maybe the --
5 maybe the finding was deficient on that ground as well.

6 MR. WAXMAN: Well, we certainly could have had a
7 psychiatrist argue that in -- generally speaking,
8 adolescents are less mature and on a range of psychosocial
9 factors, they --

10 JUSTICE KENNEDY: Well, he could have cited all
11 the -- all the authorities you cite in your brief.

12 MR. WAXMAN: Right. But, Justice Kennedy, I --
13 I concede that.

14 The issue for this Court is whether the
15 Constitution requires that as a matter of law, not as a
16 matter of the application of law to a particular
17 defendant, the line has to be drawn this way, and --

18 JUSTICE KENNEDY: Suppose -- suppose that all of
19 the things set forth in your brief were eloquently set
20 forth by a psychiatrist to the jury. Could the jury then
21 weigh these things that you're telling us?

22 MR. WAXMAN: The jury could have weighed these
23 things, but there is no way, even for a psychiatrist or a
24 psychologist, much less a juror to -- to be confident
25 because of the inherent, documented transiency of the

1 adolescent personality. No psychiatrist and no juror can
2 say with confidence that the crime that was committed by a
3 16- or 17-year-old, on the average 2 years ago -- and this
4 is the key point -- proceeded from enduring qualities of
5 that person's character as opposed to the transient
6 aspects of youth, and therefore --

7 CHIEF JUSTICE REHNQUIST: But now, that -- that
8 itself is a purported scientific fact, what you just said,
9 and it seems to me if we're -- if we're to rely on that,
10 it ought to have been tested in the way most facts are.

11 MR. WAXMAN: What the jury -- perhaps I'm not
12 understanding your point.

13 CHIEF JUSTICE REHNQUIST: Well, you're -- you're
14 relying on factual -- the statement you just made was --
15 was a factual statement about the enduring character, et
16 cetera. Now, if -- if we are to take that as a fact, it
17 ought to have been tested somewhere rather than just given
18 to us in a brief.

19 MR. WAXMAN: Well, the -- the -- an argument to
20 the jury that regardless of what a psychiatrist or a
21 psychologist would have said about Christopher Simmons, as
22 a group, 16- and 17-year-olds have such labile
23 personalities that it is impossible to know whether
24 they're -- the crime that they committed reflected an
25 enduring character is an argument that could have been

1 made to spare this particular defendant, but it need not
2 have been credited or given dispositive weight,
3 particularly since at sentencing -- and this Court has
4 acknowledged this in cases like Pate v. Robinson and Drope
5 v. Illinois -- the jury is evaluating somebody,
6 determining their moral blameworthiness 2 years later.

7 JUSTICE KENNEDY: But -- but if you're reluctant
8 to give it dispositive weight in an individual case, then
9 you come in and ask us to give it dispositive weight as a
10 general rule, that seems to me inconsistent.

11 MR. WAXMAN: Well, no. What I'm -- what I'm
12 asking you to do -- what I'm suggesting is that the weight
13 of scientific and medical evidence of which the Court can
14 take judicial notice and should take judicial notice and
15 did take judicial notice in cases like Atkins and Thompson
16 and Stanford explains and validates the consensus that
17 society has drawn. We're not arguing that the science or
18 what a particular neurobiologist or developmental
19 psychologist says dictates the line of 18. The question
20 is we have a consensus. It's even more robust than it was
21 in Atkins. Looking at proportionality and reliability
22 with respect to that consensus, is there a good,
23 objective, scientific reason to credit the line that
24 society has drawn?

25 And I'm suggesting two things. Number one, that

1 although one could posit that there are 16- and 17-year-
2 olds whose antisocial traits are characterological rather
3 than transient, we know it is impossible -- we know this
4 from common sense and it's been validated by science, of
5 which the Court can take note, that it is impossible to
6 know whether the crime that was committed by a 16- or 17-
7 year-old is a reflection of his true, enduring character
8 or whether it's a manifestation of traits that are
9 exhibited during adolescence. And --

10 JUSTICE KENNEDY: Well, suppose -- suppose I --
11 I were not convinced about your scientific evidence was
12 conclusive and I don't identify a clear consensus. Do you
13 lose the case, or can you then make the same argument you
14 just made appealing to some other more fundamental
15 principle that Stanford was just wrong?

16 MR. WAXMAN: Here -- no. Well -- no. Here's
17 what I would appeal to. I -- there are three relevant
18 factors that this Court has to look at. There's the
19 determination of consensus. Is there enough of a one or
20 isn't there? There's the determination of
21 proportionality, and then there's the issue identified in
22 Lockett and in Atkins, which is how reliable is the
23 individualized sentencing process. How reliably -- when
24 we're talking about picking the tiny few who are the worst
25 of the worst, how reliably can we do that? We think that

1 with respect to each of those, we have demonstrated that
2 the Eighth Amendment requires recognizing 18.

3 But I will take as a posit your hypothetical
4 question that I haven't convinced you on number one,
5 number two, or perhaps individually on all three. This is
6 truly a case, Justice Kennedy, in which the whole is
7 greater than the sum of the parts. Taken together, the
8 fact that it's impossible for a jury to know whether the
9 crime of an adolescent was really the feature of an
10 enduring character, since we know, as in Atkins, that many
11 of the characteristics that manifest themselves in mental
12 retardation also affect the inability of adolescents to
13 communicate with their attorneys, to express remorse, that
14 2 years later when this person is on trial, physically,
15 emotionally it's not the same person that the jury is
16 looking at and being asked to evaluate --

17 JUSTICE BREYER: So that -- that's
18 -- that last point was what I thought the scientific
19 evidence was getting at, that it simply confirmed what
20 common sense suggests, that when you execute a person 15
21 or sometimes 20 years later, a problem always is that that
22 person isn't the same person who committed the trial in a
23 meaningful sense. And it's specially true of 16- and 17-
24 year-olds who, observation would suggest, have a lot of
25 changing to do because their personality is not fully

1 formed.

2 Now, I thought that the -- the scientific
3 evidence simply corroborated something that every parent
4 already knows, and if it's more than that, I would like to
5 know what more.

6 MR. WAXMAN: Well, it's -- I think it's -- it's
7 more than that in a couple of respects. It -- it
8 explains, corroborates, and validates what we sort of
9 intuitively know, not just as parents but in adults that
10 -- that -- who live in a world filled with adolescents.
11 And -- and the very fact that science -- and I'm not just
12 talking about social science here, but the important
13 neurobiological science that has now shown that these
14 adolescents are -- their character is not hard-wired.
15 It's why, for example -- here's a -- here's an interesting
16 and relevant scientific fact. Psychiatrists under the
17 DSM, the Diagnostic and Statistical Manual, which is their
18 Bible, are precluded from making a diagnosis of antisocial
19 personality before the age of 18 precisely because before
20 the age of 18, personality and character are not fixed
21 even with respect to --

22 JUSTICE SCALIA: Mr. Waxman, I -- I thought we
23 punish people, criminals, for what they were, not for what they
24 are. I mean, you know, if you have someone who commits a
25 heinous crime and by the time he's brought to trial and

1 convicted, he's come to Jesus, we don't let him off
2 because he's not now what he was then. It seems to me we
3 punish people for what they were.

4 MR. WAXMAN: We --

5 JUSTICE SCALIA: And to say that adolescents
6 change, everybody changes, but that doesn't justify
7 eliminating the -- the proper punishments that society has
8 determined.

9 MR. WAXMAN: I think, with respect, Justice
10 Scalia, I'm not -- I think that there is an interesting
11 question about -- with respect to death, whether what they
12 are and what they will become is totally irrelevant.

13 But accepting the premise of your question, my
14 point is that science has confirmed what we intuitively
15 know, which is that when the jury gets around to
16 evaluating what the character was that manifested that
17 horrible crime, they can't tell because of the passage of
18 age and because of a number of confounding factors and
19 because psychologists and psychiatrists can't tell
20 themselves whether the crime that occurred 2 years ago or
21 2 weeks ago was the manifestation of an enduring character
22 or transient psychosocial traits that rage in adolescence.

23 CHIEF JUSTICE REHNQUIST: Is part of your answer
24 based on the length of time between the killing and the
25 trial?

1 MR. WAXMAN: Only part, Mr. Chief Justice. Part
2 of it is that the jury, of course, is looking at the
3 defendant, and we have laid before the Court peer-reviewed
4 scientific studies that show that they -- that people are
5 -- frequently equate maturity and psychosocial development
6 with race and with physical appearance. In addition,
7 because the adolescent personality is transient and the
8 lapse of time for trial is 2 years, in a very real sense
9 psychosocially as opposed to -- in addition to physically,
10 the person that the jury is judging is not the -- is not a
11 manifestation of the person who committed the crime.

12 CHIEF JUSTICE REHNQUIST: Well, what if -- what
13 if a State said I see the problem, so we'll bring this
14 person to trial in 6 weeks?

15 MR. WAXMAN: Even if it were in 6 weeks, Mr.
16 Chief Justice, we believe that the process is -- is
17 sufficiently -- that would just make the youth the same as
18 the mentally retarded, because the mentally retarded have
19 stable personalities and stable characters, and yet, what
20 this Court said in Atkins was we have two things to say.
21 One is that overwhelmingly as a group the mentally
22 retarded are unlikely to be among the very worst of the
23 worst, and the very deficits that they have -- that you
24 called deficits in reasoning, judgment, and control of
25 their impulses, makes the jury -- the process of the jury

1 evaluating the moral culpability, the moral
2 blameworthiness unreliable. And it's on the basis of
3 those two things that we think that the consensus that's
4 otherwise reflected is validated. And here --

5 JUSTICE KENNEDY: I have -- I have one other
6 question I'd like to ask because it's been troubling me
7 and I want your comment.

8 A number of juveniles run in gangs and a number
9 of the gang members are over 18. If we ruled in your
10 favor and this decision was given wide publicity, wouldn't
11 that make 16-, 17-year-olds subject to being persuaded to
12 be the hit men for the gangs?

13 MR. WAXMAN: Well --

14 JUSTICE KENNEDY: I'm -- I'm very concerned
15 about that.

16 MR. WAXMAN: I -- I am also concerned about it,
17 and I -- I have thought about this. First of all, if they
18 are enlisted by people over the age of 18 to do that, the
19 -- the precise degree of culpability goes to the people
20 who are over 18, and juries ought to consider whether
21 people who are over the age of 18 have so enlisted them

22 But even -- but with respect to --

23 JUSTICE KENNEDY: I'm talking about the
24 deterrent value of the existing rule insofar as the 16-
25 and 17-year-old. If -- if we rule against you, then the

1 deterrent remains.

2 MR. WAXMAN: Well, I think -- I think, as with
3 the mentally retarded, or in fact, even more than with the
4 mentally retarded, adolescents -- the -- the role of
5 deterrence has even less to say, precisely because they
6 weigh risks differently and they don't see the future and
7 they are impulsive and they're subject to peer pressure.

8 And in fact, if you look at what happened in
9 this case, it's as good an example as any. The State
10 says, well, okay, you know, he -- you know, this guy,
11 according to the State's witness, the person, who was over
12 18 and described as the Fagin of this group of juveniles,
13 testified to the court, well, Christopher Simmons says,
14 let's do it because, quote, we can get away with it.

15 JUSTICE KENNEDY: Well, there were a number -- a
16 number of cases in the Alabama amicus brief, which is
17 chilling reading -- and I wish that all the people that
18 sign on to the amicus briefs had at least read that before
19 they sign on to them -- indicates that often the 17-year-
20 old is the ringleader.

21 MR. WAXMAN: Well, the 17-year-old may be the
22 ringleader, and even if you posit that Christopher Simmons
23 was the ringleader here, he -- he wasn't under any
24 illusions. He wasn't making a statement about being
25 executed. He said, we could get away with it, which

1 speaks volumes about the -- the extent to which -- this
2 guy was subject to life without parole, which is, Justice
3 Scalia, fundamentally different than death. This Court
4 has said that only when the penalty is death, do you look
5 at the character of the defendant as opposed to the nature
6 of the crime and the act.

7 But the data shows -- and I think this Court has
8 acknowledged -- it acknowledged in Thompson in any event
9 -- that the -- that adolescents like the -- the mentally
10 retarded are much less likely to be deterred by the
11 prospect of an uncertain, even if probable, very
12 substantial penalty. The -- no mature adult would have
13 thought, as Chris Simmons reportedly said, I can get away
14 with this because I'm 17 years old, when the mandatory
15 punishment for him would have been life in prison.

16 It's -- it is not -- eliminating the death
17 penalty as an option, which is -- which is imposed so
18 rarely as to be more freakish than the death penalty was
19 in Furman -- three States in the last 10 years, one --

20 JUSTICE STEVENS: But of course, the death
21 penalty was not a deterrent for any of the crimes
22 described in the Alabama brief because those are all --
23 crimes all occurred in States which execute people under
24 18.

25 MR. WAXMAN: Yes, and I -- and I -- the -- the

1 examples in the Alabama brief are horrifying. But if you
2 look at those examples, the very first one, this is a kid
3 who went on a killing spree, including his father, because
4 he felt he was unjustly deprived use of the family truck.
5 And there -- I can go through the other examples, but
6 these are posited as people who a jury could, with a
7 degree of reliability that the Constitution requires, say
8 acted out of a stable, enduring character rather than
9 transient aspects of youth? I think that's a poster child
10 for us.

11 JUSTICE SCALIA: Whereas if it had been done by
12 an 18-year-old, a jury could have said that.

13 MR. WAXMAN: Well --

14 JUSTICE SCALIA: If an 18-year-old did the same
15 thing, you say, well, he's certainly stable.

16 MR. WAXMAN: May I answer? Briefly.

17 The line -- the science shows what common sense
18 understands which is that development is a continuum, but
19 the line, 18, is one that has been drawn by society.

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Waxman.

21 MR. WAXMAN: Thank you.

22 CHIEF JUSTICE REHNQUIST: Mr. Layton, you have 8
23 minutes remaining.

24 REBUTTAL ARGUMENT OF JAMES R. LAYTON

25 ON BEHALF OF THE PETITIONER

1 MR. LAYTON: Mr. Simmons, of course, was found
2 by the jury to be the ringleader. And in essence, that
3 creates a contrast with the Lee Malvo case where we had
4 something like what Justice Kennedy referred to, adults
5 influencing a juvenile, and the jury was able to make that
6 distinction in the Virginia Lee Malvo case.

7 JUSTICE STEVENS: May I ask this question, Mr.
8 Layton? This case kind of raises a question about the
9 basic State interests that are involved here, and the
10 State interests that justify the death penalty include
11 deterrence and also retribution.

12 MR. LAYTON: Yes.

13 JUSTICE STEVENS: Which, if either, of those do
14 you think is the primary State interest you seek to
15 vindicate today?

16 MR. LAYTON: I -- I think that they are of equal
17 weight in the minds of the legislators in the State of
18 Missouri.

19 The -- Mr. Simmons' counsel comes to the edge of
20 asking this Court to --

21 JUSTICE STEVENS: May I just ask one further?

22 MR. LAYTON: Yes.

23 JUSTICE STEVENS: Is there any evidence that the
24 death penalty for those under 18 or even above has, in
25 fact, had any deterrent value?

1 MR. LAYTON: From all that I have read, the
2 evidence both directions is inconclusive, Your Honor, and
3 thus, subject to legislators' determination.

4 Mr. Simmons' counsel comes to the edge of asking
5 the Court to elevate proportionality to be equivalent to
6 -- to a consensus. But let me just highlight two aspects
7 of the non-capital case proportionality jurisprudence of
8 this Court.

9 Justice Kennedy, in -- in Harmelin recently
10 cited by the plurality in Ewing, pointed out that two of
11 the considerations in proportionality review in those
12 instances are the primacy of the legislature and the
13 nature of the Federal system. What we should have here is
14 a principle that is a principle dealing with immaturity,
15 and the States, within the Federal system, should be able
16 to make the determination as to how to implement it.

17 As pointed out, this Court's jurisprudence in
18 Eighth Amendment areas has proven to be a one-way ratchet,
19 and because of that, the Court has to be very wary of
20 leading rather than reflecting societal norms. Now, there
21 are some States, of course, that have raised the age, the
22 minimum age, for capital punishment, but at least in some
23 instances, such as Missouri, that is a reaction to this
24 Court's jurisprudence, that is, a reaction to Thompson and
25 Stanford. Other States have left 18 for other purposes,

1 and yet there still is a role by this Court.

2 Pornography is an example. I am confident that
3 but for this Court's First Amendment jurisprudence, the
4 Missouri General Assembly would adopt a statute that said
5 that pornography should not be allowed at ages much higher
6 than 18 and not because of maturity, but because of their
7 opposition to pornography.

8 In many of the instances cited by Mr. Simmons,
9 the kind of statutes that he cites, gambling and others,
10 it is a compromise in the legislative arena, not
11 necessarily based on maturity or immaturity, that leads to
12 the selection of the age of 18. Many States have, of
13 course, individualized determinations with regard to those
14 statutes. There was a discussion of driver's licenses.
15 In Missouri, of course, we allow people to drive at age
16 15. They have to have parental consent, yes, but there
17 also is a test. That is, there is an individualized
18 determination before we do that, and that's what the State
19 requests here.

20 Mr. Simmons' counsel points out that in Atkins
21 the Court took judicial notice of psychosocial evidence,
22 and that's true. The Court did. But remember that what
23 the Court had before it in Atkins was not a proxy for a --
24 a factor that plays into culpability. It was, in fact,
25 the factor itself, that is mental capacity. And what they

1 want here is not a determination as to the maturity or the
2 capacity of individuals. They want a bright line test
3 that is based purely on age.

4 This Court should adopt, as it did in Atkins, a
5 principle and leave it to the States to act. That's what
6 the Court did in --

7 JUSTICE STEVENS: Of course, one -- one of the
8 objections in -- in Atkins was we needed a bright line
9 test. We'd have difficulty determining which ones are
10 mentally retarded. Here we don't have that problem at
11 all. I guess everybody knows whether or not the defendant
12 is over or under 18.

13 MR. LAYTON: Well, if that's the bright line.
14 We don't know whether they're mature or immature, and we
15 have to measure that somehow.

16 JUSTICE STEVENS: But the -- but the purpose of
17 a bright line test is to avoid litigation over the
18 borderline cases, and you just have completely avoided
19 that in this category.

20 MR. LAYTON: Because the -- having a bright line
21 test means that the individual who murders at age 17, 364
22 days is treated differently than a more -- a less mature
23 individual who is 2 days older.

24 JUSTICE STEVENS: But it's an equally arbitrary
25 line if it's 16, 17, or 15.

1 MR. LAYTON: Yes, it is, and it's an arbitrary
2 line that the legislatures have set because it's a
3 legislative type determination based on what even Mr.
4 Waxman called legislative facts.

5 JUSTICE STEVENS: May I ask one -- have you read
6 the brief of the former U. S. diplomats in the case?

7 MR. LAYTON: Yes.

8 JUSTICE STEVENS: Do you think we should give
9 any credence whatsoever to the arguments they make?

10 MR. LAYTON: No.

11 (Laughter.)

12 JUSTICE STEVENS: The respect of other countries
13 for our country is something we should totally ignore.

14 MR. LAYTON: That's not for this Court to
15 decide. Congress should consider that. The legislatures
16 should consider that. It's an important consideration,
17 but it is not a consideration under the Eighth Amendment.

18 JUSTICE STEVENS: We should leave it up to the
19 legislature of the State of Missouri to resolve those
20 questions.

21 MR. LAYTON: Within the parameters of -- of
22 Thompson and Stanford, yes. Yes.

23 The Missouri Supreme Court -- the Atkins v.
24 Virginia -- in Atkins v. Virginia, this Court did not
25 authorize the Missouri Supreme Court to reject Stanford.

1 The Court should refuse to -- to sanction such activity by
2 the lower courts and continue the course it set in that
3 decision.

4 Thank you.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Layton.

6 The case is submitted.

7 (Whereupon, at 10:59 a.m., the case in the
8 above-entitled matter was submitted.)

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