



# Research SPOTLIGHT

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## The Eighth and Eighteen:

### Eighth Amendment Bars the Execution of Offenders Under 18 Years of Age



*“When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.”*

*—Justice Kennedy,  
Roper v. Simmons*



#### Introduction

On March 1, 2005, the United States Supreme Court, in a 5-to-4 decision, ruled in Roper v. Simmons that the Eighth Amendment to the United States Constitution, which bars cruel and unusual punishment, prohibits imposing the death penalty on persons who were under 18 years of age at the time they committed their crimes. The decision impacts Texas because Section 8.07, Texas Penal Code, prohibits punishing a person by death for an offense committed while he or she was younger than 17 years of age. This paper discusses the decision, examines a prior decision used by the majority in its analysis, and summarizes the majority and dissenting opinions. It also examines the impact of this decision on Texas and across the nation.

#### Summary

The majority applied the analysis used in the court's 2002 decision Atkins v. Virginia which ruled that the execution of mentally retarded persons is cruel and unusual punishment prohibited by the Eighth Amendment. In Atkins, the majority had declared that the Eighth Amendment protects individuals against excessive sanctions, meaning that the punishment for a crime should be proportional to the offense. Whether a punishment is so disproportionate as to be cruel and unusual, the majority stated, is determined by the currently prevailing standards of decency, such as trends in legislation. The court must also consider whether there is any reason to disagree with the consensus reached by the states.

The majority reviewed legislative and legal trends and found a national consensus against the death penalty for juveniles. A majority of the states had rejected the juvenile death penalty, and it was rarely used even in states with no express prohibition against imposing the death penalty on juveniles. The consistency in the trend toward abolition of the practice, the majority declared, provided sufficient evidence that society views juveniles as categorically less culpable than adults. The majority also found that juveniles under 18 years of age were less culpable than adults because juveniles lack maturity and a sense of responsibility, they are more susceptible to negative influences and outside pressures, and their character and personality are less formed and fixed.

Because of this diminished culpability, the majority said, the execution of juveniles does not serve the dual purposes of the death penalty: retribution and deterrence. Retribution requires that the punishment be proportional to the offender's culpability, and that purpose is not served if the punishment is imposed on one whose culpability is substantially diminished by youth and immaturity. As for deterrence, the majority stated that the same characteristics that render juveniles less culpable than adults also suggest that juveniles are less susceptible to deterrence.



The majority admitted that the qualities that distinguish juveniles from adults do not disappear when an individual turns 18 years of age and that some persons under 18 years of age may be more mature than some adults. However, the majority stated, a line must be drawn, and the age of 18 years is the point where society draws the line for many purposes between childhood and adulthood.

## Atkins v. Virginia

On June 20, 2002, in a six-to-three decision, the United States Supreme Court ruled that the execution of mentally retarded persons is cruel and unusual punishment prohibited by the Eighth Amendment. The majority held that the Eighth Amendment requires that the punishment for any crime be proportional to the offense. A claim that punishment is excessive is judged by currently prevailing standards. The majority stated that this proportionality review should be based on objective factors, such as trends in legislation. However, the Supreme Court must also consider whether there is any reason to disagree with the consensus reached by the states.

In 1989, the court, in Penry v. Lynaugh, 492 U.S. 302 (1989), ruled that the Eighth Amendment does not prohibit the execution of mentally retarded defendants. The majority in Atkins examined the trends in legislation regarding the imposition of the death penalty on mentally retarded offenders, since Penry. At the time of the Penry decision, only two states and the federal government expressly barred the execution of mentally retarded persons. However, after Penry, at least 15 states enacted legislation expressly barring the execution of mentally retarded offenders, and no state passed legislation reinstating the power to conduct such executions. By the time Atkins was decided, only a minority of states permitted the practice, and even in those states it was rare. This trend, the majority concluded, provided powerful evidence of a national consensus against executing mentally retarded offenders.

In addition to examining society's evolving standards of decency, the Atkins majority also relied on the court's independent judgment on the acceptability of a particular punishment under the Eighth Amendment. The majority found no reason to disagree with the judgment of a majority of the states, concluding that because mentally retarded persons have diminished cognitive and behavioral capacities, they should be categorically excluded from execution. Mental retardation, the majority stated,

diminishes the personal culpability of the offender. Because of this diminished culpability, the majority ruled that the execution of mentally retarded persons does not serve the dual purposes of capital punishment: retribution and deterrence. Retribution requires that the severity of the punishment depend on the culpability of the offender and the diminished capacities of the mentally retarded make them less culpable. Further, capital punishment serves as a deterrent only if the offender is capable of premeditation and deliberation. It is unlikely, based on their cognitive and behavioral impairments, that mentally retarded defendants can fully understand the possibility of capital punishment and can consequently control their conduct. The majority also concluded that the reduced capacity of mentally retarded offenders puts them at a special risk of wrongful execution. Mentally retarded defendants may give false confessions, are less able to assist their counsel, and are typically poor witnesses; additionally, their demeanor may create an unwarranted impression of lack of remorse.

### Roper v. Simmons

#### Facts

Seventeen-year-old Christopher Simmons told two friends, then aged 15 and 16 years, that he wanted to murder someone and proposed breaking into a home, tying up a victim, and throwing the victim off a bridge. Simmons assured his friends they could “get away with it” because they were minors. Simmons and one of the other boys broke into the home of Shirley Crook, bound Crook, and drove her to a railroad trestle spanning the Meramec River, where they threw her from the bridge, causing her to drown. Afterwards, Simmons bragged about the killing. He was arrested the next day and confessed to the crime. Simmons was tried as an adult and found guilty of murder. During the penalty phase of the trial, Simmons’ attorneys provided evidence that Simmons had no prior convictions or charges and urged the jury to consider Simmons’ age as a mitigating factor. The defense counsel

reminded the jurors that juveniles of Simmons’ age cannot drink, serve on juries, or even see certain movies, because “the legislatures have wisely decided that individuals of a certain age aren’t responsible enough.” In rebuttal, the prosecutor gave the following response: “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.” The jury recommended the death penalty, which the trial judge imposed.



Following Atkins, Simmons filed for relief, arguing that the reasoning of Atkins established that the United States Constitution prohibits the execution of a juvenile who was under 18 years of age when the crime was committed. The Missouri Supreme Court agreed and changed Simmons’ sentence to life without parole. The case was appealed to the United States Supreme Court.

#### Majority Opinion

In Simmons, the majority opinion applied the reasoning in Atkins in analyzing the constitutionality of executing an offender who was under 18 years of age at the time of the offense. In Atkins, the majority had declared the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions, meaning that the punishment for a crime should be proportional to the offense. To determine which punishments are so disproportionate as to be cruel and unusual, the court must refer to the evolving standards of decency that mark the progress of a maturing society.

In a 1988, in Thompson v. Oklahoma, 487 U.S. 815 (1988), a plurality of the court had determined that the nation’s standards of decency did not permit the execution of any offender who was under the age of 16 at the time of the commission of the crime. The plurality opinion explained that no state with a death penalty that expressly considered a minimum age for the death penalty had set that age lower than 16 years. The plurality also observed that the conclusion that it would offend civilized standards

of decency to execute a person who was less than 16 years of age at the time of his or her offense was consistent with the views that have been expressed by respected professional organizations and Western European nations. The opinion further noted that juries imposed the death penalty on offenders under 16 years of age with exceeding rarity. The next year, the court, over a dissenting opinion joined by four justices, ruled that the contemporary standards of decency in this country did not proscribe the execution of juvenile offenders over 15 years of age but under the age of 18. The majority in that case noted that 22 of the 37 death penalty states permitted the death penalty for 16-year-old offenders and 25 permitted it for 17-year-old offenders. These numbers, in the majority's view, indicated there was no national consensus sufficient to label this particular punishment cruel and unusual. That same day, the court also declared that the Eighth Amendment did not mandate a categorical exemption from the death penalty for the mentally retarded.

Later, the court revisited the issue of the constitutionality of executing mentally retarded persons in Atkins, ruling that the standards of decency had since evolved and now demonstrated that the execution of the mentally retarded is cruel and unusual punishment. Applying the Atkins analysis in the Simmons case, the majority held that there is a similar national consensus against the death penalty for juveniles. The majority found that a total of 30 states prohibit the juvenile death penalty, including 12 states that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach. Even in the



20 states without a formal prohibition on executing juveniles, the majority found that the practice is infrequent. Although the majority admitted that the rate of change in reducing or abolishing the incidence of the juvenile death penalty among the states had been slower than the movement against the execution of the mentally retarded noted in Atkins, the majority found the change to be consistent and significant. The rejection of the juvenile death penalty in a majority of the states; the infrequency of its use even where it remained on the books; and the consistency in the trend toward abolition of the practice, the majority declared, provide sufficient evidence that society views juveniles as being categorically less culpable than adult criminals.

Capital punishment, stated the majority, must be limited to those offenders who commit the most serious crimes and whose extreme culpability makes them the most deserving of execution. The majority found three general differences between juveniles under 18 years of age and adults demonstrating that juvenile offenders cannot reliably be classified among the worst offenders:

- As confirmed by scientific and sociological studies, juveniles lack maturity and have an underdeveloped sense of responsibility. These qualities often result in impetuous and ill-considered actions and decisions. In recognition of the comparative immaturity and irresponsibility of juveniles, almost every state prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. This susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult;
- Juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. They have less control, or less experience with control, over their own environment. Juveniles' own vulnerability and comparative lack of control over



their immediate surroundings means that they have a greater claim than adults for forgiveness if they fail to escape negative influences; and

- The character of a juvenile is less formed than that of an adult and juvenile personality traits are more transitory and less fixed. This means that even a heinous crime committed by a juvenile is not evidence of irretrievably depraved character or that the juvenile is not capable of being reformed.

Once the diminished culpability of juveniles is recognized, the majority said, it is evident that the justifications for the death penalty—retribution and deterrence—apply to them with lesser force than to adults. Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity. As for deterrence, the majority stated that it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles. The same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence. The majority concluded that neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders.

The majority admitted that drawing the line at 18 years of age is subject to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18 years of age, and admittedly some under 18 years of age have already attained a level of maturity that some adults will never reach. However, the majority stated, a line must be drawn. Eighteen years of age is the point where society draws the line for many purposes between childhood and adulthood, and, the majority concluded, is the age at which the line for death eligibility ought to rest.

The majority also found support for its determina-

tion in international law, with the United States being the only country in the world that continues to give official sanction to the juvenile death penalty.

## Dissent

Justice O’Connor filed a dissenting opinion challenging the majority’s conclusion that there is an emerging national consensus against imposing the death penalty on juveniles and arguing there should be a clearer showing that society has rejected the death penalty for persons under 18 years of age before finding that the Eighth Amendment categorically bars such executions. She also asserted that although juveniles as a class are undoubtedly less mature and therefore less culpable than adults, there are at least some 17-year-old offenders who are sufficiently mature to deserve the death penalty in certain cases. There was no evidence presented showing that capital juries are incapable of accurately assessing a youthful offender’s maturity or giving due weight to mitigating factors, such as the offender’s youth.

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, rejected the majority’s use of an evolving standards test regarding cruel and unusual punishment under the Eighth Amendment. He challenged the majority’s finding that the majority of states now reject the death penalty for juveniles and asserted that the majority was imposing its own subjective views.



# Across the Nation

Texas is not the only state impacted by the Roper decision. At the end of 2004, throughout the country, 72 persons were awaiting execution for crimes committed when they were under 18 years of age. Thirty-seven states and the federal government provide for the death penalty as punishment for certain offenses. Of these, 19 jurisdictions have expressly selected 18 years of age as the minimum age at which the death penalty may be imposed. Four jurisdictions (Georgia, New Hampshire, North Carolina, and Texas) statutorily set a minimum age of 17 years, and four other states (Kentucky, Missouri, Nevada, and Virginia) provide by statute for a minimum age of 16 years. The remaining 11 jurisdictions (Alabama, Arizona, Arkansas, Delaware, Idaho, Louisiana, Mississippi, Oklahoma, Pennsylvania, South Carolina, and Utah) provide no express statutory minimum age for imposing the death penalty, but these states are bound by Thompson, which bars the execution of any offender under 16 years of age at the time of the commission of the crime. The minimum age for Florida is less clear; although the state's supreme court declared in 1999 that the Florida Constitution bars the execution of persons under 17 years of age, a subsequent amendment to the state's constitution appears to have overridden that decision.

The following states set a statutory minimum age:

- Section 17-9-3 of the Georgia Code prohibits the imposition of the death penalty on a person who is convicted of a capital offense without a recommendation for mercy and was under 17 years of age at the time of the commission of the offense. Instead, the punishment is imprisonment for life.
- Section 640.040 of the Kentucky Statutes bars sentencing to capital punishment any offender who has been convicted of a capital offense who was under the age of 16 years at the time of the commission of the offense.
- Section 565.020.1. of the Missouri Statutes provides that murder in the first degree is a class A felony punishable by either death or imprisonment for life without eligibility for probation or parole, except that, if a person has not reached his sixteenth birthday at the time of the commission of the crime, the punishment shall be imprisonment for life without eligibility for probation or parole.
- Under Section 176.025 of the Nevada Statutes, a death sentence may not be imposed or inflicted upon any person convicted of a crime now punishable by death who at the time of the commission of such crime was under the age of 16 years. Assembly Bill 6, effective May 3, 2005, increases the age to 18 years.
- Section 630.1 of the New Hampshire Statutes provides that no person under the age of 17 years can be considered culpable of a capital murder. H.B. 147, effective January 1, 2006, amends this section increase the age to 18 years.
- Under Section 14-17 of the North Carolina Statutes, murder in the first or second degree is punishable by death or imprisonment for life without parole except that any person who was under 17 years of age at the time of the murder must be punished by imprisonment for life without parole. However, a person under the age of 17 years who commits first degree murder while serving a prison sentence imposed for a prior murder or while on escape from a prison sentence imposed for a prior murder is subject to the death penalty.
- Section 18.2-10(a) of the Virginia Code provides for a death sentence for Class 1 felonies if the person convicted was 16 years of age or older at the time of the offense. If the person was under 16 years of age at the time of the offense, the punishment is imprisonment for life and a fine of not more than \$100,000.

In Brennan v. State, 754 So. 2d 1 (Fla. 1999), the Florida Supreme Court reduced the death sentence of Keith Brennan, who was 16 years old at the time of his offense, to life imprisonment. At the time, Article 1, Section 17, of the Florida Constitution barred cruel or unusual punishment, and the Florida court deemed the execution of 16-year-olds to be unusual and barred under the state constitution, effectively setting the minimum age in Florida at 17 years of age. In 2002, the voters of Florida approved an amendment to Section 17 expressly providing that the state's constitutional prohibition against cruel and unusual punishment must be "construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution." Some assert that this amendment effectively overruled Brennan, returning Florida's minimum age to 16 years, in conformity with Thompson.

In a number of states, there has been activity seeking to bar the execution of a defendant who was younger than 18 years of age at the time of an offense committed prior to the Supreme Court's decision in Roper. Montana raised its minimum age for the death penalty to 18 years of age in 1999. Effective July 2, 2002, Indiana law bars an individual less than 18 years of age from receiving a sentence of death. In March of 2004, the governors of South Dakota and Wyoming signed into law legislation raising the minimum age of eligibility for the death penalty in their states to 18 years of age. Also in 2004, the New Hampshire legislature enacted legislation that would have increased the state's minimum age from 17 to 18 years of age, but the governor vetoed the bill. On December 31, 2002, the Arizona Attorney General's Capital Case Commission, after studying the imposition of capital punishment in the state, made a number of recommendations, including that the death penalty in Arizona not apply to defendants who were under the age of 18 at the time of the offense. Legislation acting on this recommendation was introduced in 2003 and 2004 but was not enacted. In the past few years, legislation to raise the minimum age for the death penalty to 18 years of age was also introduced in Alabama, Arkansas, Delaware, Florida, Kentucky, Mississippi, Missouri, Nevada, Pennsylvania, Oklahoma, South Dakota, Texas, and Wyoming.

*"The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."*

—Justice Kennedy, Roper v. Simmons

# Texas



The Roper decision substantially impacts Texas, which allows for the execution of persons younger than 18 years of age. Article 8.07 (Age Affecting Criminal Responsibility), Texas Code of Criminal Procedure, generally provides that a person may not be prosecuted for or convicted of any offense that the person committed when younger than 15 years of age except for certain specified traffic or misdemeanor offenses. For certain more serious offenses, such as a capital felony, a person may be prosecuted for such offense committed when the offender was 14 years of age or older. However, Article 8.07(c) provides that no person may, in any case, be punished by death for an offense committed while he was younger than 17 years. In the majority opinion, Justice Kennedy noted that in the past decade, only three states have executed prisoners for crimes committed as juveniles: Oklahoma, Texas, and Virginia.

According to the Texas Department of Criminal Justice, there were 28 persons on the state's death row who were under 18 years of age when they committed their crimes. (A 29th person, Patrick Horn, was sentenced to death in Texas for the murder of an eight-year-old boy committed when Horn was 17 years old, but he is currently serving a life sentence in a Georgia federal prison for subsequent unrelated crimes.) After the United States Supreme Court accepted Roper for review, it subsequently stayed the scheduled executions of three Texas inmates who had been sentenced to death for crimes committed when they were 17 years old:

- Mauro Barraza was granted a stay by the United States Supreme Court on March 29, 2004, just four hours prior to his scheduled execution. Barraza had been sentenced for the 1989 sexual assault and murder of 73-year-old Vilorie Nelson in her home during the course of a burglary.
- Edward Capetillo was assigned an execution date of March 30, 2004, but received his stay on March 2, 2004. In 1995, Capetillo and four others entered the home of Matt and Allison Vickers to commit robbery. During the robbery, both Capetillo and one of his companions fired weapons, wounding one person and killing two others.
- Anzel Jones faced an execution date of April 29, 2004. In 1995, Anzel Jones broke into the home of Edith and Sherry Jones (no relation to Anzel Jones). Both women were stabbed and their throats cut, resulting in the death of Shirley Jones. Edith Jones was also sexually assaulted.

On March 7, 2005, the Supreme Court remanded the cases of Barraza, Capetillo, and Jones to lower court for reconsideration in light of Roper. During the 79th Legislature, Regular Session, S.B. 60, which provided for the penalty of life without parole in capital cases, was amended in the house to bar imposition of the death penalty on a person who was under 18 years of age at the time the crime was committed. S.B. 60 was signed by Texas Governor Rick Perry on June 17, 2005. On June 22, 2005, Governor Perry commuted the death sentences of all 28 juveniles on Texas' death row to life in prison.

—by Sharon Hope Weintraub