

# CRS Report for Congress

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## Capital Punishment and Juveniles

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### Summary

In *Roper v. Simmons*, 543 U.S. \_\_\_\_ (2005), the United States Supreme Court held that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 at the time of the offense. In deciding *Roper*, the Court was not writing on a clean slate. In 1988, in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), the Court struck down the death penalty for juvenile offenders under the age of 16. The Court last reviewed the issue in 1989, when its decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989) set the minimum eligibility age for the death penalty at 16, finding that there was not a national consensus against the execution of those aged 16 or 17 at the time of the offense. Since 1989, eight states have established a minimum age of 18, raising the total number of states that ban juvenile executions to 30. The *Roper* Court found that the “evolving standards of decency,” which led the Court in *Atkins v. Virginia*, 536 U.S. 304 (2002), to ban the execution of mentally retarded people are similar with respect to juveniles. The *Roper* decision overrules the Court’s prior decision in *Stanford*. The immediate effect of this decision is to end the execution of juveniles throughout the U.S., regardless of state law.

**Legal Background.** In 1988, the U.S. Supreme Court in *Thompson v. Oklahoma*<sup>1</sup> held that it constituted “cruel and unusual punishment” to execute persons who were under 16 years of age at the time of the offense and thus was prohibited by the Eighth Amendment of the U.S. Constitution. One year later, in *Stanford v. Kentucky*,<sup>2</sup> a 4-1-4 plurality concluded that there was not a national consensus against the execution of those aged 16 or 17 at the time of the offense and that such executions were thus constitutional.

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<sup>1</sup> 487 U.S. 815 (1988).

<sup>2</sup> 492 U.S. 361 (1989).

In 2002, the Court revisited the constitutionality of capital punishment as applied to offenders with mental retardation in *Atkins v. Virginia*.<sup>3</sup> In *Atkins*, the U.S. Supreme Court overruled its 1989 holding in *Penry v. Lynaugh*<sup>4</sup> and found that the execution of such individuals to be unconstitutional. The Court recognized a recently established and evolving national consensus that quantifiable behavioral and cognitive limitations diminish the moral culpability of offenders with mental retardation and, consequently, impact their appropriate punishment. Concerning these offenders with mental retardation, the Court specially stated:

Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.<sup>5</sup>

Some contend that the Court's reasoning in *Atkins* should apply with equal force to juvenile offenders. Juvenile offenders and mentally retarded offenders, have been deemed by one legal scholar as the "Siamese twins" of the death penalty, their status inextricably linked in constitutional principle and substance.<sup>6</sup> However, in footnote eighteen of the *Atkins* majority opinion, the Court explicitly distinguished those with mental retardation from juveniles with respect to a national consensus on application of the death penalty. Justice Stevens noted that the list of states barring execution of those with mental retardation had grown by 16 states since the original 1989 *Penry* holding. However with specific reference to juvenile offenders, he said:

A comparison to *Stanford v. Kentucky*, in which he held there was no national consensus prohibiting the execution of juvenile offenders over age 15, is telling. Although we decided *Stanford* on the same day as *Penry*, apparently only two state legislatures have raised the threshold age for imposition of the death penalty.<sup>7</sup>

**State Supreme Court Decision.** In 2003, the Missouri Supreme Court held that the execution of juvenile offenders in Missouri violates the evolving standards of decency and is prohibited by the Eighth Amendment ban on "cruel and unusual punishment" of the U.S. Constitution.<sup>8</sup> *Roper* is an unusual case in the boldness of the ruling that preceded its presentation before the highest court in the land. The Supreme Court of Missouri granted the petition of Christopher Simmons for relief from his upcoming execution, in spite of the fact that the U.S. Supreme Court has specifically rejected the very grounds on which the Missouri court based its decision: the fact that the petitioner was under 18 at the time of his offense.

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<sup>3</sup> 536 U.S. 304 (2002). For a legal analysis of this decision, refer to CRS Report RL31494, *Capital Punishment: Summary of Supreme Court Decisions of the 2001-02 Term* by Paul Starett Wallace, Jr.

<sup>4</sup> 492 U.S. 302 (1989)(holding that the executions of those with mental retardation was not constitutionally proscribed).

<sup>5</sup> *Atkins v. Virginia*, 122 S.Ct 2242, 2244 (2002).

<sup>6</sup> Streib, Victor L., *Adolescence, Mental Retardation, and the Death Penalty: The Siren Call of Atkins v. Virginia*, 33 N.M. L.Rev. 183 (2003).

<sup>7</sup> *Atkins v. Virginia*, 122 S.Ct. 2242, 2249. Referring to Montana and Indiana.

<sup>8</sup> *Roper v. Simmons*, 112 S.W.3d 397 (2003).

In reaching its 4-3 decision in *Roper*, the Missouri Supreme Court followed the approach taken by the U.S. Supreme Court in *Atkins* and examined objective factors including (1) legislative action; (2) frequency of imposition of capital punishment on juveniles and the frequency with which the sentence is actually carried out; (3) national and international opinion; and (4) an independent examination of whether the death penalty as applied to juveniles violates evolving standards of decency and thus is barred by the Eighth Amendment.<sup>9</sup>

The Court noted that at the time *Stanford* was decided 11 states banned the execution of juvenile offenders. Since *Stanford*, five more states have banned such executions.<sup>10</sup> The Court opined that states have moved consistently in the direction of opposition to the juvenile death penalty demonstrating that the standard of decency has evolved since *Stanford*. The Court also noted that not a single state had lowered the minimum age for execution from 18 during this time; and many states have considered legislation to raise the minimum to 18.<sup>11</sup>

The Court noted that despite 22 states allowing the imposition of the death penalty on juveniles only 6 (Missouri, Texas, Virginia, Georgia, Oklahoma and Louisiana), have actually executed offenders since 1973 and that only three states (Texas, Virginia and Oklahoma) since 1993.<sup>12</sup> The Court found of particular significance the fact that only 22 juvenile offenders have been executed since reinstatement of the death penalty in 1976.<sup>13</sup>

Significantly, the Court cited international law prohibiting the execution of juveniles. This included specifically Article 37(a) of the Convention on the Rights of the Child and

<sup>9</sup> *Id.* at 407.

<sup>10</sup> *Id.* at 408. The five states referenced in *Roper* are: Indiana, Montana, Kansas, New York, and Washington. Since this decision, South Dakota and Wyoming passed legislation raising the age of execution to 18.

Thirteen American jurisdictions do not have the death penalty: Alaska, District of Columbia, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. The following states preclude capital punishment of offenders under 18 either by statute or judicial interpretation: California (Cal.Penal Code Ann. § 190.5); Colorado (Colo.Rev.Stat. § 16-11-103(1)(a)); Connecticut (Conn.Gen.Stat. § 53a-46a(g)(1)); Illinois (Ill.Rev.Stat., ch.38, ¶ 9-1(b)); Indiana (IC Stat. 35-50-2-3); Kansas (Kan. Crime. Code Ann. Sec. 21-4622); Maryland (Md. Ann., Code, Art. 27, § 412(f)); Missouri (*Roper v. Simmons*, 112 S.W.3d 397 (2003)); Montana (Mont. Code Ann. § 45-5-102(2)); Nebraska (Neb. Rev. Stat. § 28-105.01); New Jersey (N.J.Stat. Ann. § 2A:4A-22(a) and 2c:11-3(g)); New Mexico (N.M.Stat. Ann. §§ 28-6-1(A), 31-18-14(A)); New York (N.Y. Crim. Proc. Law Sec. 400.27 and N.Y. Penal Law § 125.27); Ohio (Ohio Rev.Code Ann. § 2929.02(A)); Oregon (Ore.Rev.Stat. §§ 161.620 and 419.476(1)); South Dakota (S.D. Codified Laws § 23A-27A)); Tennessee (Tenn.Code Ann. §§ 37-1-102(3), 37-1-102(4), 37-1-103, 37-1-134(a)(1)); Washington (*State of Washington v. Furman*, 122 Wash. 2d. 440 (1993)(holding its death penalty statute cannot be construed to authorize imposition of the death penalty for crimes committed by juvenile offenders)); Wyoming (W.S. 6-2-101(b)).

<sup>11</sup> *Roper*, 112 S.W.3d 397, 409.

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

<sup>13</sup> *Id.*

other international treaties and agreements.<sup>14</sup> Alongside international law, the Court looked to the views of the international community and worldwide imposition of the juvenile death penalty.<sup>15</sup> In addition, the Court found the opposition of many domestic social, professional and religious groups to confirm the national consensus against the execution of juvenile offenders.<sup>16</sup>

Finally, the Court examined whether the death penalty was warranted for juvenile offenders in regard to fulfilling the primary social purposes of the punishment: retribution and deterrence.<sup>17</sup> Comparing juvenile offenders to those with mental retardation, the Court found neither purpose to be furthered.<sup>18</sup> The Court noted the lesser culpability and reasoning ability of juvenile offenders addressed by the U.S. Supreme Court in *Thompson*<sup>19</sup> and concluded that the Supreme Court's reasoning in *Atkins* regarding the social purposes served by the death penalty is inapplicable to juvenile offenders.

The dissenters, quoting from *Stanford*, concluded there was neither a "historical or modern societal consensus forbidding the imposition of capital punishment on" those under 18 years of age at the time of the offense.<sup>20</sup> Further, noting the U.S. Supreme Court decision in *Stanford* and its subsequent refusal to readdress the issue despite recent opportunities to do so,<sup>21</sup> the Justices contended that the Missouri Supreme Court lacked authority to overrule existing U.S. Supreme Court precedent.<sup>22</sup>

**United States Supreme Court Decision.** In *Roper v. Simmons (Roper)*,<sup>23</sup> a divided Court held 5-4 that capital punishment for juveniles who committed their crimes when they were under the age of 18 is unconstitutional. Writing for the majority,<sup>24</sup> Justice Kennedy conceded that the Court was reconsidering a decision it had made in *Stanford* 1989. In overturning the *Stanford* ruling, the Court set aside a statement made by four

<sup>14</sup> *Id.* at 411.

<sup>15</sup> *Id.* at 410.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 411. In *Gregg v. Georgia* the Court established that imposition of the death penalty should "serve two principal social purposes: retribution and deterrence." 428 U.S. 153 (1976).

<sup>18</sup> *Roper* at 411.

<sup>19</sup> *Thompson*, 487 U.S. at 835 (stating "there is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults," *id.* at 834, and therefore "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.").

<sup>20</sup> *Roper* at 419 (Price, J.,dissenting).

<sup>21</sup> On two previous occasions, the U.S. Supreme Court declined to revisit the issue of the execution of juvenile offenders. See *Patterson v. Texas*, pet. for cert. denied, 123 S.Ct. 24 (2002) and *In Re Kevin Nigel Stanford*, pet. for writ of habeas corpus denied, 123 S.Ct. 472 (2003).

<sup>22</sup> *Roper* at 419 (Price, J.,dissenting).

<sup>23</sup> 543 U.S. \_\_\_\_ (2005), 2005 WL 464890 (U.S.Mo.).

<sup>24</sup> The majority consisted of Justices Kennedy, Breyer, Ginsburg, Souter and Stevens. Justice Stevens wrote a brief concurring opinion, praising the Court for modernizing its view of the 8<sup>th</sup> Amendment.

Justices<sup>25</sup> in that 1989 decision that the Court should not use its own independent judgment to decide whether the death penalty was too great a punishment for particular groups of individuals or crimes. The rejection in *Stanford* of that role for the Court, the *Roper* majority stated, is “inconsistent with prior Eighth Amendment decisions.”<sup>26</sup>

Instead, following the standard the Court set forth in *Atkins*, the majority rested its decision on three rationales: (1) that “evolving standards of decency that mark the progress of a maturing society,”<sup>27</sup> which led the Court in 2002 to ban the execution of mentally retarded people are similar with respect to juveniles; (2) that the brutality of a juvenile’s crime makes it all too likely that mitigating factors based on youth, such as vulnerability and immaturity, would be overlooked,<sup>28</sup> and (3) that the overwhelming weight of international opinion against the juvenile death penalty provides confirmation that the penalty is disproportionate punishment for juveniles.

The majority runs through the statistical case for an emerging national consensus against the juvenile death penalty. But as the majority seems to realize, the statistical case is not as strong as in *Atkins*. The *Atkins* Court was able to rely on the fact that, after 1989, no state had gone on record affirming its desire to execute the mentally retarded. But the situation with juvenile offenders is arguably different. Two states recently affirmed their desire to execute particularly culpable juvenile offenders.<sup>29</sup> Twelve states still have juvenile offenders on death row. In finding now a national consensus against execution of juvenile offenders, the Court noted that 30 states now bar such sentences (12 that have abolished the death penalty for all persons, and 18 that retain the death penalty but do not allow it for juveniles). The Court noted the infrequency of the execution of juvenile offenders citing that in the last 16 years only six states have executed juvenile offenders, but in the past decade, only three have done so: Oklahoma, Texas and Virginia.<sup>30</sup>

The majority conceded that, in contrast to the pace of states’ abolition of the death penalty for the mentally retarded, the rate of change regarding juveniles has been slower.

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<sup>25</sup> It is worth noting that Justice Kennedy was one of the four Justices who endorsed that statement. He did not explicitly explain his change of mind, but noted that the Court had abandoned that statement when it ruled in *Atkins*.

<sup>26</sup> *Roper* at \*15.

<sup>27</sup> *Roper* at \*6 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1978)).

<sup>28</sup> *Roper* at \*14 (stating that “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.”)

<sup>29</sup> Missouri and Virginia Legislatures, which, at the time of *Stanford*, had no minimum age requirement, expressly established 16 as the minimum. See Mo.Rev.Stat. § 565.020.2 (2000); Va.Code Ann. § 18.2-10(a)(Lexis 2004).

<sup>30</sup> *Roper* at \*9 (citing V. Strieb, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes*, January 1, 1973-December 31, 2004, No. 76, p. 4 (2005), available at [<http://www.law.onu.edu/faculty/streib/documents/JuvDeathDec2004.pdf>] ).

Though less dramatic, the Court said, the change remains significant. In addition, the Court also said that the trend away from executing juveniles was a consistent one.<sup>31</sup>

Besides relying upon that trend, the Court also cited scientific and sociological studies showing significant differences between juveniles under 18 and adults, including less sense of responsibility, susceptibility to negative influences, and the lack of fully-formed character.<sup>32</sup> The Court also noted that the two social purposes that the death penalty serves, retribution and deterrence, have less force, or none at all, with regard to juvenile offenders. The same characteristics of youth that make them less culpable than adults also suggest they will be less susceptible to deterrence, the majority suggested.<sup>33</sup>

In finding a new consensus against executing juveniles, the Court also relied upon what it called “the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”<sup>34</sup> The Court noted that this reality is not “controlling,” since it is the Court’s responsibility to interpret the 8<sup>th</sup> Amendment. However, the Court added that since 1958 the Court “has referred to the laws of other countries and to international authorities as instructive” in defining the meaning of that 8<sup>th</sup> Amendment’s prohibition of “cruel and unusual punishments.”

Justice O’Connor wrote a dissent only for herself, in which she argued that the majority had not found a “genuine national consensus” against executing juveniles; rather it simply relied on its own independent moral judgment that death is a disproportionate penalty for any 17-year-old offender.<sup>35</sup>

Justice Scalia,<sup>36</sup> in a markedly bitter dissent, condemned every facet of the Court’s approach to the Eighth Amendment issue. He said the consensus discerned by the majority was on “the flimsiest of grounds.” He also argued that the Court illegitimately had cast aside the judgment of the people’s representatives, and substituted its own proclamation of itself as “the sole arbiter of our nation’s moral standards.”<sup>37</sup> In addition, he also lambasted the majority for its reliance upon what he called “like-minded foreigners.”<sup>38</sup>

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<sup>31</sup> *Roper* at \*10.

<sup>32</sup> *Id.* at \*11-12 (discussing the general differences between juveniles under 18 and adults).

<sup>33</sup> *Id.* at \*13 (concluding that neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders).

<sup>34</sup> *Id.* at \*16.

<sup>35</sup> *Roper* at \* 19 (O’Connor, J., dissenting).

<sup>36</sup> Joined by Chief Justice Rehnquist and Justice Thomas.

<sup>37</sup> *Roper* at \*31 (Scalia, J., dissenting).

<sup>38</sup> *Id.*

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