No. 84454

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI ex rel.
CHRISTOPHER SIMMONS,

Petitioner,

v.

AL LUEBBERS,

Respondent.

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

JEREMIAH W. (JAY) NIXON
Attorney General

STEPHEN D. HAWKE
Assistant Attorney General
Missouri Bar No. 35242

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321
Attorneys for Respondent

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JURISDICTIONAL STATEMENT

Petitioner was convicted in the Circuit Court of Jefferson County, Missouri, of murder in the first degree and was sentenced to death. Section 565.020, RSMo. 1994. Petitioner is presently incarcerated at the Potosi Correctional Center located in Mineral Point, Missouri. Named respondent, Al Luebbers, is no longer the Superintendent of the Potosi Correctional Center. Rather, Don Roper is the Superintendent of the Potosi Correctional Center. Petitioner petitioned this court pursuant to Missouri Supreme Court Rule 91. This court has jurisdiction over this petition for writ of habeas corpus in the first instance since it involves a capital crime and a sentence of death. Missouri Supreme Court Rule 91.02(b).

STATEMENT OF FACTS

On October 7, 1993, an information charging petitioner, Christopher Simmons, with of one count each of murder in the first degree, burglary in the first degree, kidnapping, and stealing (counts I, II, III, and IV, respectively), was filed in the Circuit Court of Jefferson County (L.F. 29-31).[1] An amended information was filed on June 7, 1994 (L.F. 122-3). The trial court subsequently sustained the State's motion to sever counts II, III, and IV (see L.F. 17). On June 13, 1994, trial on count I, the murder charge, commenced before the Honorable Timothy J. Patterson (Tr. 1). Pursuant to this Court's order issued on June 7, 1994, jurors for petitioner's trial were summoned from Cape Girardeau County (L.F. 121).

Viewed in the light most favorable to the jury's verdict, the following evidence was adduced at trial: At approximately 9 p.m. on September 8, 1993, petitioner told his friend Christie Brooks (Tr. 824) that he was going to rob a neighbor's house, someone called "Voodoo" (Tr. 826). Petitioner told Brooks that he had a mask with eye holes, a dark button up shirt with leather gloves taped to the sleeves, a small shot gun, and a big knife (Tr. 826). Petitioner asked Brooks for a gun, saying there were going to be three people and they only had two weapons (Tr. 826-7).

On that same day, petitioner's neighbor Brian Moomey had a party attended by petitioner, co-defendant Charles Benjamin, and another friend, John Tessmer (Tr. 839). Moomey heard petitioner and

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[1] Respondent respectfully requests the court to take judicial notice on the contents of its file in State v. Christopher Simmons, No. SC77269. The record on appeal includes the direct appeal legal file (L.F.) and transcript (Tr.), supplemental trial transcript (Supp. Tr.), and the postconviction legal file (PCR L.F.) and transcript (PCR Tr.).

Benjamin discussing robbing a house and killing a family (Tr. 839). Petitioner appeared to be leading the conversation, and said that they could commit a robbery and murder and not get charged because they were juveniles and no one would think that juveniles would do it (Tr. 840).

Petitioner also discussed his plan to commit a murder with Tessmer during the early part of September, 1993 (Tr. 967, 969). Petitioner told Tessmer that he wanted a bunch of money, and that he planned to get it by throwing a neighbor, "Voodoo," off the bridge (Tr. 968). Petitioner talked to Tessmer about his plan between three and five times (Tr. 969). While at petitioner's house, Tessmer observed petitioner cutting masks (Tr. 969). Three days before Shirley Crook's murder Tessmer observed rope and gloves at petitioner's house (Tr. 970). At Moomey's trailer petitioner talked about his plan, saying that he wanted to kill someone for money, that he would tie them up and throw them off the bridge, and that he could tie them up to a tree and get their bank card (Tr. 971). Petitioner told Tessmer that no one would think kids did it (Tr. 971). Petitioner wanted to meet Tessmer and Benjamin at Moomey's at 2 a.m. on September 9 to commit the murder (Tr. 972).

Petitioner arrived at Moomey's trailer at approximately 1:30 a.m. on September 9 (Tr. 899). Tessmer, who had been sleeping, went home (Tr. 972-3). Petitioner and Benjamin went to the Crook's house to commit a burglary (Tr. 900), gaining access through a partially opened window which they used to unlock the back door (Tr. 901). As they moved through the house, petitioner turned on a hallway light (Tr. 901). The victim then sat up in bed and said "Who is there?" (Tr. 901). Petitioner knew Shirley Crook, having previously been involved in an automobile accident with her (Tr. 901-2). Petitioner entered the victim's bedroom and told her to get out of the bed (Tr. 902). When she did not comply, petitioner and Benjamin forced her to the floor (Tr. 902). While Benjamin stayed with the victim, petitioner found a roll

of duct tape (Tr. 903). Petitioner and Benjamin duct taped Shirley Crook's hands behind her back and her eyes and mouth shut (Tr. 903). Initially petitioner and Benjamin tried to get the victim out the front door, but had to take her out the back door (Tr. 903). They put Shirley Crook in the back of her minivan and petitioner drove to Castlewood State Park while Benjamin watched her from the front passenger seat (Tr. 904). The drive to Castlewood State Park from the Crook's residence takes twenty to twenty-five minutes (Tr. 905).

At the park petitioner drove the van on the railroad tracks to the railroad trestle (Tr. 905). Shirley Crook had freed her hands from behind her and removed some of the tape from her face (Tr. 905). After parking, petitioner then bound the victim with an electrical wire, purse strap, belt, bathrobe belt, and towel so that her hands and feet were restrained, her head was covered with the towel and connected to the strap binding her hands (Tr. 905-6). Upon walking the victim down the railroad trestle and tying her up more, petitioner pushed Shirley Crook over the railroad trestle (Tr. 906). Benjamin watched (Tr. 906-7). At the time petitioner pushed her into the river, Shirley Crook was alive (Tr. 907).

Steven Crook, the victim's husband, had spoken with his wife for the last time on September 8, between 9:30 and 9:45 p.m. -- the day before she was murdered and her body was found (Tr. 781). Crook, a truck driver, had been out of town since the day before (Tr. 780). On the morning of September 9, Steven Crook called his house shortly after 7 a.m., expecting to find his wife at home and awake (Tr. 782-3). No one answered the phone (Tr. 782-3). While still out of town, Crook learned that his wife did not make her delivery as scheduled (Tr. 784). Upon calling his house and getting no answer (Tr. 785), Steven Crook drove home and discovered that his wife's personal vehicle, the minivan, was gone (Tr. 786). Later that day, after not hearing anything from his wife, Crook called the police to make a missing persons

report (Tr. 790).

Petitioner went to Moomey's trailer the day he murdered Shirley Crook, bragging that he killed a woman "because the bitch seen my face." (Tr. 842). On that day, September 9, two fishermen on the Meramec River in St. Louis County found Shirley Crook's body floating down the river, approximately three-fourths of a mile downstream from a railroad trestle crossing over the river (Tr. 678-9, 693). After securing the body, one of the men remained behind while the other went to call the authorities (Tr. 678-80). Det. Timothy Haggarty of the Major Case Squad responded to the scene, where other officers had begun investigating the victim's death (Tr. 682-3). The victim was later fingerprinted for identification purposes (691-2, 707), while her purse, wallet, flashlight keychain, and assorted papers in the purse were subsequently recovered near the railroad viaduct (Tr. 817-9).

Prior to being pushed into the river, Shirley Crook had been "hogtied." (Tr. 688, 721, 745): her legs were tied together with a black electrical cable, which was tied to a towel over her head secured with a blue and white cloth bathrobe belt (L.F. 687-8); leather straps were tied around her wrists (L.F. 688); gray duct tape completely encased her face except for the openings to the nostrils (Tr. 725, 745). Police later recovered the matching blue and white bathrobe about forty feet from the viaduct (Tr. 693-4, 722). Shirley Crook had sustained numerous bruises and four fractured ribs (Tr. 748-51). The medical examiner opined that the fall from the bridge could not have caused the victim's bruising (Tr. 751), and that Shirley Crook was conscious at the time she drowned (Tr. 752-3).

Det. Tim Betz of the Jefferson County Sheriff's Office had responded to the Crook's residence in Jefferson County on September 9 to take the missing persons report (Tr. 699). While there, Det. Betz contacted the St. Louis County Police Department, which then contacted Det. Haggarty at the Meramec

River crime scene and dispatched him to Shirley Crook's house (Tr. 699). There, Det. Haggarty observed duct tape similar to that used to bind the wrists of the woman recovered from the Meramec River (Tr. 700). The roll of duct tape found on a shelf near the front door was out of place (Tr. 790-1), as Steven Crook regularly kept the duct tape in his utility room (Tr. 780-1). At the Crook's residence, damage to the walls along the hallway and near the victim's bedroom was observed (Tr. 885-6).

Police directed their attention to petitioner upon receiving information of his involvement in Shirley Crook's murder (Tr. 919). On September 10, Detectives Shane Knoll, Charles Milano, Sam Elia, and two other officers went to Fox High School in Arnold, Missouri to arrest petitioner (Tr. 888). Petitioner was taken into custody without incident and taken to the Fenton Police Department (Tr. 889). No interrogation took place prior to arriving at the police department (Tr. 889). The interview began shortly thereafter, with Knoll, Milano, and Elia present (Tr. 890). Prior to asking any questions, Det. Knoll advised petitioner of his rights (Tr. 890-1). Petitioner indicated that he understood his rights and that he was waiving them (Tr. 891-3). Though petitioner initially denied involvement in the murder (Tr. 895), after approximately one hour and forty-five minutes, petitioner asked to speak to Det. Knoll alone and then confessed to murdering Shirley Crook (Tr. 895-8). After confessing, petitioner agreed to do a video re-enactment (Tr. 907).

Petitioner did not testify or present any evidence at the guilt-phase of his trial. At the close of the evidence, instructions, and argument by counsel, the jury found petitioner guilty of murder in the first degree (Tr. 1050).

During the penalty-phase of his trial, petitioner's mother, Cheryl Hayes, testified that petitioner lived with her, his stepfather, and two younger half-brothers (Tr. 1100), that she separated from petitioner's father when petitioner was nine months old (Tr. 1099), and that petitioner stayed with his father every other

weekend, holidays, and birthdays (Tr. 1100). Hayes said petitioner had a good relationship with her and his half-brothers and his grandmother (Tr. 1001-2), and that the entire family visited with petitioner when they could (Tr. 1103). Petitioner's father, Dennis Simmons, testified that he would visit petitioner regularly (Tr. 1112) and that he visited with petitioner as often as permitted (Tr. 1114). Simmons also testified that petitioner's half-brothers looked up to him (Tr. 1113) and that petitioner looked after them (Tr. 1114). Christina Brown, the mother of one of petitioner's friends (Tr. 1105), testified that petitioner had a special relationship with her family (Tr. 1106), that he was helpful around the house (Tr. 1107), and that she trusted petitioner with her younger children (Tr. 1107). Christie Brooks testified that she turned to petitioner with her personal problems (Tr. 1110). Petitioner did not testify on his own behalf. The State presented evidence from Shirley Crook's husband, daughter, and two sisters as to the impact that the murder had upon their lives (Tr. 1073-91).

After the close of the evidence, instructions, and arguments by counsel, the jury recommended the death penalty (Tr. 1163), having found the following statutory aggravating circumstances:

> One, the murder of Shirley Crook was committed for the purpose of receiving money, or any other thing of value;
>
> Three, the murder of Shirley Crook was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of Defendant.
>
> Four, the murder of Shirley Crook involved depravity of mind, and as a result thereof the murder was outrageously and wantonly vile, horrible and inhuman. The murder involved the depravity of mind because the Defendant killed Shirley Crook after she was bound by Defendant, and the Defendant thereby exhibited a callous disregard for human

life. . . .

(Tr. 1163-4).[2] The trial court sentenced petitioner to death on August 19, 1994 (Tr. 1181; see L.F. 22). Petitioner filed his notice of appeal on August 29, 1994.

On January 17, 1995, petitioner filed a motion to vacate, set aside, or correct the judgment and sentence of the trial court, pursuant to Rule 29.15 (PCR L.F. 8). Following appointment of the public defender, an amended motion for postconviction relief was filed on March 24, 1995 (PCR L.F. 33). The Circuit Court of Jefferson County, Missouri held an evidentiary hearing on petitioner's motion on October 6, 23, and 24, and November 1, 1995, before the judge who had presided over petitioner's trial (See PCR L.F. 5-6). The motion court denied petitioner's motion on January 3, 1996 (PCR L.F. 681; see PCR L.F. 6).

Petitioner pursued a consolidated appeal with this court. This court affirmed petitioner's conviction and sentence and affirmed the denial of Rule 29.15 relief. State v. Simmons, 944 S.W.2d 165 (Mo. banc 1997). The United States Supreme Court denied discretionary review. Simmons v. Missouri, 522 U.S. 953 (1997).

Petitioner pursued federal habeas corpus relief under 28 U.S.C. §2254. The United States District Court for the Eastern District of Missouri denied the petition for writ of habeas corpus. Simmons v. Bowersox, No. 4:97-CV-2415 JCH (E.D. Mo. Aug. 5, 1999). The United States Court of Appeals for

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[2]The jury did not find beyond a reasonable doubt a fourth aggravating circumstance that had been submitted - i.e., "whether the murder was committed while the defendant was engaged in the perpetration of the felony of burglary." (L.F. 272).

the Eighth Circuit affirmed the denial of habeas relief. Simmons v. Bowersox, 235 F.3d 1124 (8th Cir. 2001). Again, the United States Supreme Court denied discretionary review. Simmons v. Bowersox, 534 U.S. 924 (2001).

The present litigation began on May 3, 2002, when petitioner filed a petition for writ of state habeas corpus. After suggestions by respondent and petitioner, the court issued a writ of habeas corpus on November 26, 2002. Respondent filed a return on December 12, 2002. Briefing ensues.

ARGUMENT

I.

PETITIONER DEFAULTED ON HIS EIGHTH AMENDMENT CLAIM BECAUSE HE DID NOT PRESENT IT PROPERLY TO THE STATE COURTS IN THAT PETITIONER DID NOT PRESENT THE CLAIM TO THE TRIAL COURT AND, IF NECESSARY, ON DIRECT APPEAL TO THIS COURT.

Petitioner contends that his Eighth Amendment rights are violated by his sentence of capital punishment because he was seventeen years old when he drowned Shirley Crook by pushing her off a railroad bridge into the Meramec River.[3] Petitioner acknowledges that he defaulted upon his claim by failing to raise it in his previous direct and post-conviction appeals (Petitioner's Brf., page 20). Petitioner contends, however, that the court should review the claim because he can show "cause and prejudice or manifest injustice" (Petitioner's Brf., page 20). Petitioner fails to meet the high standard of "cause and prejudice" set forth by this court in Brown v. State, 66 S.W.3d 721, 726 (Mo. banc 2002). Additionally, petitioner fails to show that he is actually innocent under Clay v. Dormire, 37 S.W.3d 214 (Mo. banc 2000). Petitioner fails to show entitlement to review. Petitioner contends that the legal basis for the claim was unavailable until Atkins was decided (App. Brf., page 26). This is incorrect. Heath Wilkins made his Eighth Amendment claim over fifteen years ago. State v. Wilkins, 736 S.W.2d 409, 414-15 (1989). Heath Wilkins made this claim to the United States Supreme Court over thirteen years ago. See Stanford

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[3]Petitioner's birthday was April 26, 1976 (L.F. 27). The murder occurred on September 9, 1993, when petitioner was seventeen years, four months and thirteen days old.

v. Kentucky, 492 U.S. 361, 366-68 (1989). Petitioner had the legal tool by which to construct his Eighth Amendment claim at the time of his direct appeal. See Leggins v. Lockhart, 822 F.2d 764 (8th Cir. 1987), cert. denied, 485 U.S. 907 (1988).

Petitioner suggests that his claim was meritless therefore, his failure to present the claim should be excused (App. Brf., page 26). The meritless nature of the claim does not prevent an individual from asserting the claim properly. See e.g., State v. Wilkins, 736 S.W.2d at 414 ("this Court has repeatedly rejected constitutional challenges to Missouri's death penalty provisions."). Second, under federal precedent, whether a claim has merit does not affect the statutory obligation to assert the claim to the state court. 28 U.S.C. §2254(b), (c); see Duckworth v. Serrano, 454 U.S. 1 (1981).

Petitioner's second allegation of cause is a contention that only recently has there been research showing that youthful offenders are less culpable. Again, that is factually not true. In the Wilkins litigation, youth and cognitive function are discussed extensively. State v. Wilkins, 736 S.W.2d at 415; id. at 415 n.2 citing Burger v. Kemp, 483 U.S. 776 (1987); see also Petitioner's Brf., page 50 n.22; Petitioner's App. A-30 - A-31 citing Lewis et al., Neuropsychiatric, Psycho Educational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States, 5 Am. J. of Psychiatry 145 (May, 1988); Robinson and Stephens, Patterns of Mitigating Factors in Juvenile Death Penalty Cases, 3 Crim. Law Bulletin 28 (1992)). Petitioner fails to demonstrate cause for his default.

Petitioner must also allege that he suffered actual prejudice. Brown v. State, 66 S.W.3d at 726. Petitioner must demonstrate the existence of an error that infected his entire trial with error of constitutional dimension. United States v. Frady, 456 U.S. 152 (1982). A review of petitioner's brief should amply demonstrate that petitioner makes no assertion that his trial was unfair and certainly does not make the

heightened showing that his entire trial was infected with error of a constitutional dimension. Petitioner only argues that capital punishment for a juvenile offender is an incorrect social policy, not that his trial was unfair.

Petitioner alleges that he can demonstrate manifest injustice to overcome his procedural default (Petitioner's Brf., pages 27-28). "Manifest injustice" has been defined by this court to require a showing that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Clay v. Dormire, 37 S.W.3d 214 (Mo. banc 2000) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)). Petitioner admits that he does not claim that he is actually innocent of "the underlying crime," first degree murder (Petitioner's Brf., page 23). Instead, petitioner contends he is actually innocent of the death penalty (App. Brf., page 23). During petitioner's direct appeal, this court confirmed petitioner's eligibility to receive capital punishment because the court affirmed the jury's finding of three statutory aggravating circumstances: "depravity of mind,""pecuniary gain" and "avoid lawful arrest." State v. Simmons, 944 S.W.2d at 180-81, 190. Petitioner's current claim does not challenge the existence of statutory aggravating circumstances as contemplated by the Supreme Court in Sawyer v. Whitley, 505 U.S. 333 (1992). Under Sawyer, petitioner can show that he is "probably actually innocent" of the death penalty by showing the non-existence of all statutory aggravating circumstance. Id. at 347 & n.15.

Petitioner contends that he can meet the high standard in Sawyer by showing that some other condition of eligibility for a penalty has not been met (Petitioner's Brf., pages 23-24 quoting Sawyer v. Whitley, 505 U.S. at 345). The language petitioner quotes, however, refers to statutory aggravating circumstances. Indeed, after the quoted language, there is a footnote (which petitioner omits) concerning how statutory aggravating circumstances vary from state to state. Id. at 345. Nothing in Sawyer indicates

that an individual is "probably actually innocent" of capital punishment if one is not competent at the time of execution, Ford v. Wainwright, 477 U.S. 399 (1986), below the age of sixteen at the time of murder, Thompson v. Oklahoma, 487 U.S. 815 (1988), or only convicted of rape, Coker v. Georgia, 433 U.S. 584 (1977). Petitioner seeks to be removed from Missouri's death row based on a technicality, that he was seven and a half months short of his eighteenth birthday at the time he pushed Shirley Crook off of that railroad bridge in Jefferson County. Petitioner's claim is the antithesis of petitioner's showing that he is probably actually innocent. State habeas corpus review of this petition is barred by default. State ex rel. Simmons v. White, 866 S.W.2d 443 (Mo. banc 1993).

II.

THE PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE DENIED BECAUSE THE UNITED STATES SUPREME COURT HAS DETERMINED THAT THE FEDERAL CONSTITUTION ALLOWS STATES TO PROTECT THEIR CITIZENS THROUGH THE USE OF CAPITAL PUNISHMENT OF THOSE WHO WERE SEVENTEEN YEARS OLD AT THE TIME THEY COMMITTED FIRST DEGREE MURDER.

Petitioner's contends in the petition for writ of habeas corpus is that the Eighth Amendment does not allow a state's capital punishment of an individual who was under eighteen at the time he killed (Petitioner's Brf., pages 28-102). The Supreme Court has resolved this issue against petitioner; accordingly, the petition for writ of habeas corpus should be denied.

In 1989, the United States Supreme Court issued its decision in Stanford v. Kentucky, 492 U.S. 361 (1989). In Stanford, the defendant was seventeen years and four months at the time he committed his murder. In the companion case, Wilkins v. Missouri, 492 U.S. 361 (1989), the defendant was sixteen years and six months when he committed his murder. Id. at 365, 366. After an extensive analysis of the issue, the Supreme Court concluded:

> We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Accordingly, we conclude that such punishment does not offend the Eighth Amendments prohibition against cruel and unusual punishment.

492 U.S. at 380. This should conclude the court's analysis of petitioner's claim.

Petitioner uses about sixty pages of his brief to weave a theory that Atkins v. Virginia, 122 S.Ct.

2242 (2002) overrules Stanford v. Kentucky (Petitioner's Brf., page 42-102). The Supreme Court has not adopted the legal rule advocated by petitioner in Atkins or in its decisions since Atkins (Petitioner's Brf., pages 28-42). See Tyler v. Cain, 533 U.S. 656 (2001). In this situation, the Supreme Court has instructed lower courts as follows:

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriguez De Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989). It is the Supreme Court's prerogative alone to overrule one of its precedents. State Oil Company v. Kahn, 522 U.S. 3, 20 (1997) quoted in United States v. Hatter, 532 U.S. 557, 567 (2001). The Supreme Court stated without subtlety that its decision are binding upon lower courts.

> Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.

Hohn v. United States, 524 U.S. 236, 260 (1998). As petitioner points out, the Supreme Court has not revisited the Stanford/Wilkins decisions; accordingly, those decisions are binding on this court.

Petitioner also contends that capital punishment of him violates his rights under Article I, §21 of the Missouri Constitution (App. Brf., pages 19, 43). Petitioner offers no authority for that proposition (Petitioner's Brf., page 43). To the contrary, this court has declined to extend that section beyond the protection provided by the Eighth Amendment to the United States Constitution. See State v. Newlon, 627 S.W.2d 606, 612 (Mo. banc), cert. denied, 459 U.S. 884 (1982). The court declined to assume the power to make policy decisions concerning punishment.

> We declared §565.008, RSMo. 1978 valid against such attack under Art. I, §21, in State ex rel. Westfall v. Mason, 594 S.W.2d 908, 916-17 (Mo. banc 1980), vacated on other grounds, Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). In so deciding we refuse to extend the reach of Art. I, §21 as requested, and arrogate to ourselves a policy decision properly within the legislative province. Similarly, we now refuse to stretch the meaning of Art. I, §21 to invalidate the death penalty, beyond the limits of the due process requirements of the Fourteenth Amendment to the US Constitution.

Id. at 612. In State ex rel. Westfall v. Mason, 594 S.W.2d 908 (Mo. banc 1980), the court limited its review to the question of whether the punishment was disproportionate to the crime for which it was imposed. Id. at 916 citing State v. Agee, 474 S.W.2d 817, 822 (Mo. 1971); State v. Brownridge, 353 S.W.2d 715, 718 (Mo. 1962). A punishment is not cruel simply because it is severe. Id. citing State v. Stubblefield, 157 Mo. 360, 58 S.W. 337, 339 (Mo. 1900). This court has already determined that capital punishment is not disproportionate for the crime of murder. State ex rel. Westfall v. Mason, 594 S.W.2d at 916. The court has already determined that capital punishment is not a disproportionate punishment for this offender. State v. Simmons, 944 S.W.2d at 191. That concludes the court's review under Art. I, §21 of the Missouri Constitution. Petitioner's claim is meritless.

III.

EVEN UNDER ATKINS, CAPITAL PUNISHMENT OF A JUVENILE MURDERER IS CONSTITUTIONAL BECAUSE OBJECTIVE FACTORS SHOW THAT EXECUTION OF THE JUVENILE MURDERER IS CONSISTENT WITH CURRENT STANDARD OF DECENCY.

Like the defendants in Stanford v. Kentucky, 492 U.S. 361, 368 (1989), petitioner does not contend that capital punishment of the juvenile murderer was cruel and unusual punishment at the time of the Bill of Rights was adopted. Id. at 368. Accordingly, petitioner argues a secondary position, that his punishment is contrary to the "evolving standards of decency that mark the progress of a maturing society." Id. at 369 quoting Trop v. Dulles, 365 U.S. 86, 101 (1958) (plurality opinion). That determination should be made objectively. Id. at 369.

In Stanford, the first indicator that the Supreme Court viewed was the statutes past by the state legislatures. Id. at 370. In 1989, "of the thirty-seven States whose laws permit capital punishment, fifteen declined to impose it upon 16 year-old offenders and 12 declined to impose it on 17 year-old offenders." Id. at 370. These numbers were an insufficient basis upon which to label the punishment cruel and unusual. Id. at 371.

Petitioner contends that five states have enacted new statutes in order to forbid capital punishment for juvenile killers (Petitioner's Brf., page 76). The Supreme Court identified two states, Montana and Indiana, in footnote 18 in Atkins v. Virginia, 122 S.Ct. 2242, 2249 (2002). In connection with these states, the Supreme Court wrote that it was not so much the number of these states that is significant, but the consistency of the direction of change. Id. at 2249. While petitioner cites New York and Kansas with

his numbers (Petitioner's Brf., page 76), neither state have raised its age for capital punishment. Instead, these states have just recently created the option of capital punishment with their legislation. Again, neither state increased the minimum age for capital punishment; accordingly, neither state provides support for petitioner's position concerning "the direction of change." Id. at 2249. Lastly, petitioner states that Washington had abolished capital punishment for juveniles by court action (App. Brf., pages 76-77). Of course, such court action is not a statute "passed by society's elected representatives." Stanford v. Kentucky, 492 U.S. at 370.

In Atkins, the Supreme Court looked to a dramatic shift in state legislation concerning capital punishment for those labeled mentally retarded. Atkins v. Virginia, 122 S.Ct. at 2246. Indeed, there was a dramatic shift. No state imposing the death penalty prohibited the execution of the mentally retarded before 1986. There were only two states specifically excluding the mentally retarded from being executed when Penry v. Lynaugh, 492 U.S. 302 (1989) was decided. Since 1989, however, sixteen more states followed suit in excluding the mentally retarded from execution. Atkins v. Virginia, 122 S.Ct. at 2248. This shift was especially dramatic because, despite the imprimatur given to execution of the mentally retarded in Penry, not one state that had prohibited the execution of the mentally retarded changed its law to remove the prohibition in reliance on Penry. Id. at 2249. Only after seeing this "dramatic shift" in the legislative landscape did the Supreme Court agree to revisit the issue first addressed in Penry. Atkins v. Virginia, 122 S.Ct. at 2246.

In contrast, when it comes to execution of sixteen and seventeen year old murderers, there is not the same "dramatic shift" in the legislative landscape. By petitioner's count, since Stanford was decided, only five more states have adopted the age of eighteen as the minimum age for commission of capital

offenses (Petitioner's Brf., pages 76-77). By respondent's count, only two states have increased the age limit to eighteen. Whether one looks at the legislative change for juvenile offenders as a change of five states (an increase of 45%) or two states (an increase of 18%), it is a far cry from the legislative change for mentally retarded offenders (an increase from two states to eighteen states, which represents an increase of 800%).

The lack of change in the states may reflect societal concern about the exploding homicide rate of juvenile offenders. See From Homicide Trends in the U.S., offending rate trends by age, Bureau of Justice Statistics, online at http://www.ojp.usdoj.gov/bjs/homicide/tables/ortsanmtab.htm. The crime rates for juvenile and mature offenders headed in opposite directions; while murders by adults over twenty-five years of age were dropping by 18% from 1990 to 1994, and by adults under age 24 rose only by 2%, murder by juveniles aged fourteen to seventeen jumped 22%. Trends in Juvenile Violence, available online at http://www.ojp.usdoj.gov/bjs/pub/pdf/tjufox.pdf.

Since those statistics, homicide by juveniles continues to confront the American public, from the school shooting in Columbine to the Washington Beltway snipers. The very public decision to try John Malvo in Virginia has not elicited a reaction that reflects a consensus against capital punishment for those under eighteen.

Moreover, unlike Atkins, not all the movement in legislation is one direction. There has also been positive action to retain a minimum age below eighteen years of age by the United States Senate. Apparently in reliance on Stanford, the Senate ratified the International Covenant on Civil and Political Rights in 1992 with five reservations, five understandings, four declarations and one proviso. Domingues v. State, 961 P.2d 1279, 1280 (Nev. 1998), cert. denied, 528 U.S. 936 (1999). Among these limitations

are:

> That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.
>
> . . . . .
>
> That the United States declares that the provisions of Article 1 through 27 of the [ICCPR] are not self-executing.

1138 Cong. Rec. S4781-02, *S4783-84 (Daily Ed. April. 2, 1992) (Statement of presiding officer of resolution of ratification). Thus, rather than accept a minimum age of eighteen for commission of offenses subject to capital punishment, the Senate has affirmatively acted to preserve the sixteen year old minimum age allowed in Stanford.

Another example of movement by a state to lower the age of commission of offenses for which the death penalty is now available is the recent general election in Florida. In Brennan v. State, 754 So.2d 1 (Fla. 1999), the Florida Supreme Court construed its constitutional prohibition of cruel or unusual punishment as providing greater protection than the Eighth Amendment prohibition of cruel and unusual punishment. As a result, the court held that the Florida Constitution prohibited the execution of capital offenders who committed their offense while under the age of seventeen years. In the general election on November 5, 2002, the voters approved an amendment to the Florida Constitution to change the wording of Article I, §17, from "cruel or unusual" to "cruel and unusual" and provided that the provision should be construed as the Supreme Court interprets the Eighth Amendment. Adoption of this provision repudiated

Brennan and reflected a decision that the minimum age of commission of a capital offense for which one may be executed in Florida should be lowered from seventeen to sixteen years of age. The provisions was overwhelmingly adopted by 69.7% of the voters, 3,169,542 in favor versus 1,377,678 opposed. Official Results of the Florida Department of State, Division of Elections, available on-line at: http://election.dos.state.fl.us/elections/resultsarchive/ index.asp?ElectionDate=11/5/02&DATAMOD=

The question of the minimum age for commission of capital offenses is still in flux among the state legislatures. It cannot be said that a consensus exists which "unquestionably reflects a wide-spread judgment," Atkins, 122 S.Ct. at 2250, about the relative culpability of sixteen and seventeen year olds who murder or for penological purposes served by the death penalty.

While the Supreme Court looked to other factors in determining that there was a consensus against execution of mentally retarded murderers -- organizations with germaine experience, representatives of religious communities, polling data, opinions of the world community -- it did so only to confirm their consistency with the legislative evidence. Id. at 2249 n.21. These factors may be, and no doubt have been, brought to bear on the state legislatures to persuade them to adopt a minimum age of eighteen. The fact that only two states have acted to increase the minimum age to eighteen shows that the evidence of brain development and religious opinion, etc., has not compelled a consensus from the states. In the absence of the dramatic change in the state legislatures concerning the minimum age for the commission of offenses for which the death penalty may be imposed, petitioner has not made a compelling case for habeas relief.

Petitioner suggests that juvenile murderers do not have the same degree of moral culpability as

adults. None of petitioner's rhetoric (Petitioner's Brf., pages 48-64) demonstrates that a line should be drawn at eighteen as compared to sixteen or for that matter, twenty-five. See generally, W. Logan, Proportionality and Punishment: Imposing Life Without Parole on Juveniles, 33 Wake Forest L. Rev. 681, 724 (1998) (concluding that sentence of life without parole violated juveniles Eighth Amendment rights). The law recognizes juveniles as individuals with differing degrees of culpability. See Chapter 211, RSMo. 2000 (establishing juvenile courts); §211.071, RSMo. 2000 (certification of juvenile for trial as adult). Individuals mature at different ages, one seventeen year old individual may be more mature than another and should not, by virtue of chronological age alone, be exempt from the moral responsibility of an eighteen year old. Age is a matter for the jury to consider in mitigation, see §565.032.3(7), RSMo. 2000, but that is a matter for individualized sentencing.

Petitioner urges that only a small percentage of American's death row prisoners were below the age of eighteen years when they committed their murders (Petitioner's Brf., pages 80-83). Petitioner's statistical argument says nothing about the percentage of nineteen year olds, thirty-four year olds, or seventy year olds comprising America's total death row population. Considered in isolation and removed from comparison with other specific ages, the sixteen and seventeen year old percentage offered by petitioner means absolutely nothing. Also, the petitioner does not offer any statistics reflecting the number of percentage of death penalty-punishable crimes committed by juveniles in comparison with those committed by adults. This might well explain why petitioner stops short of suggesting a significant statistical disparity between the relative number of juvenile death row inmates and the number of juveniles who actually faced the death penalty at trial.

Petitioner refers to the opposition voiced by various special interest policy organizations

(Petitioner's Brf., pages 83-87). In a democratic society such as the United States only the minority would be expected to speak out in opposition. If those groups represented the majority view, they would not find it necessary to advocate that the law be changed. Consequently, this too is an unreliable factor.

Petitioner offers as evidence the laws of other countries (Petitioner's Brf., pages 87-97). The evidence pertaining to the laws of other countries is confused by the facts that the vast majority of the 22 Western Europe and other Anglo-American nations have no death penalty at all for "ordinary crimes" (except wartime offenses or under circumstances not at issue here). See Thompson v. Oklahoma, 487 U.S. at 830-31 (plurality opinion).

Also,

> We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici (accepted by the dissent, see post, at 389-390, 106 L.Ed.2d, at 331-332) that the sentencing practices of other countries are relevant. While "[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but text permitting, in our Constitution as well," *Thompson v. Oklahoma*, 487 U.S. 815, 868-869, n.4., 101 L.Ed.2d 702, 108 S.Ct. 2687 (1988) (Scalia, J., dissenting), quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 82 L.Ed.288, 58 S.Ct. 149 (1937) (Cardozo, J.), they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.

Stanford v. Kentucky, 492 U.S. at 370, n.1 (emphasis in original). The decision in Stanford remains

controlling of petitioner's claim. It is meritless.

CONCLUSION

For the foregoing reasons, respondent prays the court deny the petition for writ of habeas corpus.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

STEPHEN D. HAWKE
Assistant Attorney General
Missouri Bar No. 35242

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains _____words, excluding the cover, this certification and the appendix, as determined by WordPerfect 6 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of February, 2003.

Patrick J. Berrigan
Attorney at Law
2500 Holmes
Kansas City, MO 64108

Jennifer Brewer
Attorney at Law
33 Flower Valley, #188
St. Louis, MO 63033

JEREMIAH W. (JAY) NIXON
Attorney General

STEPHEN D. HAWKE
Assistant Attorney General
Missouri Bar No. 35242

P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321

Attorneys for Respondent