

No. 01-10009

IN THE  
SUPREME COURT OF THE UNITED STATES

---

KEVIN NIGEL STANFORD

*Petitioner,*

v.

PHIL PARKER, WARDEN,  
KENTUCKY STATE PENITENTIARY,

*Respondent.*

---

ON ORIGINAL PETITION FOR  
WRIT OF HABEAS CORPUS

---

BRIEF OF AMICUS CURIAE  
AMERICAN SOCIETY FOR  
ADOLESCENT PSYCHIATRY  
IN SUPPORT OF PETITIONER

---

Victor L. Streib  
*Counsel of Record*  
College of Law  
Ohio Northern University  
525 South Main street  
Ada, OH 45810  
*Attorney for Amicus Curiae*

## TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF <i>AMICUS CURIAE</i> .....	1
SUMMARY OF THE ARGUMENT .....	2
ARGUMENT .....	3
1. The Constitutionality of the Death Penalty for 17-Year-Old Offenders Should Be Reconsidered and Clarified by This Court....	3
A This Court’s Opinions on the Juvenile Death Penalty Are Deeply Divided and Provide Insufficiently Clear Guidance to the Death Penalty Jurisdictions. ....	3
2. Since 1989, Death Penalty Jurisdictions are Rejecting the Opportunity to Move to Age 16 as the Minimum Age for the Death Penalty. ....	8
1. Since 1989, Only Texas and Perhaps Virginia Have Significantly Embraced the Execution of Juvenile Offenders. ....	9
2. Conclusion .....	11

## TABLE OF CONTENTS - Continued

Page

II.	Well-Established Research on Adolescent Brain Development Reinforces the Eighth Amendment’s Evolving Standards of Decency Which Now Forbid the Death Penalty for 17-Year-Olds. ....	12
5.	The Human Brain, Particularly for Males, Continues to Evolve into the Late Teens and Early Twenties, With the Mental Ability to Control Impulses Developing Last. ....	12
2.	Legitimate Objectives of Punishment Are Not Served by Imposing Adult Capital Punishment Upon Offenders Who Do Not Have Adult Mental Abilities. ....	15
1.	Informed by the Recent Research on Adolescent Brain Development, the Death Penalty for 17-Year-Old Offenders is Contrary to Contemporary Standards of Decency..	17
2.	Conclusion .....	19
	CONCLUSION .....	20

**TABLE OF AUTHORITIES**

	<u>Page</u>
<b>Cases</b>	

<i>Atkins v. Virginia</i> , No. 00-8452 .....	18
<i>Brennan v. State</i> , 754 So.2d 1 (Fla. 1999) .....	9
<i>Coker v. Georgia</i> , 433 U.S. 584 (1977) .....	11
<i>Burger v. Kemp</i> , 483 U.S. 776 (1987) .....	4, 5, 7
<i>Eddings v. Oklahoma</i> , 455 U.S.104 (1982) .....	4, 6, 7
<i>Enmund v. Florida</i> , 458 U.S. 782 (1982) .....	17
<i>Ford v. Wainwright</i> , 477 U.S. 399 (1986) .....	11
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972) .....	8
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976) .....	8
<i>Stanford v. Kentucky</i> , 492 U.S. 361 (1989) .....	passim
<i>State v. Furman</i> , 858 P.2d 1092 (Wash. 1993) .....	9
<i>Thompson v. Oklahoma</i> , 487 U.S. 815 (1988) .....	passim

**Statutes**

Indiana SB 426 (signed by Governor) .....	9
Montana Code Annotated sec. 45-5-102 .....	9
New York Penal Code sec. 125.27 .....	9

**Other Authorities**

ABA Task Force on Youth in the Criminal Justice System, <i>Youth in the Criminal Justice System</i> (Chicago: American Bar Association) (2001).	16
Matt Crenson, <i>Brain Changes Shed Light on Teen Behavior</i> , Times Picayune, Dec. 31, 2000, p. A-18 .....	13
Elkhonon Goldberg, <i>The Executive Brain: Frontal Lobes and the Civilized Mind</i> (Oxford University Press, 2001) .....	15, 16

**TABLE OF AUTHORITIES - Continued**

Page

Ruben C. Gur, E-mail message to Victor L. Streib,	
---	--

April 13, 2002 .....	13, 14
D. Keating, <i>Adolescent Thinking</i> , in <i>At the Threshold</i> 54 (S. Feldman et. al, eds) (1990) ..	14
NAACP Legal Defense and Educational Fund, Inc., <i>Death Row U.S.A.</i> , Winter 2002 .....	10
National Institute of Mental Health, <i>Teenage Brain: A Work in Progress</i> , Feb. 6, 2001, <a href="http://www.nimh.nih.gov/publicat/teenbrain.cfm">http://www.nimh.nih.gov/publicat/teenbrain.cfm</a> .....	15
<i>Physical Changes in Adolescent Brains May Account for Turbulent Teen Years, McLean Hospital Study Reveals</i> , <a href="http://www.mclean.harvard.edu/PublicAffairs/TurbulentTeens.html">www.mclean.harvard.edu/PublicAffairs/TurbulentTeens.html</a> .....	14, 15
W. Overton, <i>Competence and Procedures</i> , in <i>Reasoning, Necessity and Logic 1</i> (W. Overton, ed.) (1990) .....	14
E.R. Sowell, P.M. Thompson, C.J. Holmes, T.L. Jernigen, and A.W. Toga, <i>In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions</i> , 2 <i>Nature Neuroscience</i> 859 (1999) .....	13
Victor L. Streib, <i>Death Penalty for Juveniles</i> (Bloomington, IN: Indiana University Press) (1987) .....	4, 10

**TABLE OF AUTHORITIES - Continued**

Page

Victor L. Streib, <i>The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile</i>	
--	--

<i>Crimes, January 1, 1973 - December 31, 2001</i> (March 2002) ( <a href="http://www.law.onu.edu/faculty/streib">http://www.law.onu.edu/faculty/streib</a> ) .....	10, 11, 16
Shankar Vedantam, <i>Are Teens Just Wired That Way?</i> , Washington Post, June 3, 2001, sec. A .....	13
Daniel R. Weinberger, <i>Teen Brain Lacks Impulse Control</i> , Seattle Post-Intelligencer, March 13, 2001 (editorial) .....	13
<b>Rules</b>	
Supreme Court Rule 36.2 .....	1
<b>Constitutional Provisions</b>	
United States Constitution, Amendment VIII ....	passim
United States Constitution, Amendment XIV ....	passim

## **INTEREST OF *AMICUS CURIAE***

The American Society for Adolescent Psychiatry (ASAP) files this brief as *amicus curiae* in support of Petitioner by written consent of all parties, pursuant to Rule 36.2 of the Rules of this Court. The parties' letters of consent are on file with the Clerk.

The ASAP was founded in 1967 and today has over 400 members. ASAP provides a national forum for adolescent psychiatry and promotes the exchange of psychiatric knowledge about adolescents. Since its founding, ASAP has supported research on the normal development, as well as the psychopathology and treatment, of adolescents, helped to broaden knowledge and understanding of the various factors that may influence adolescent development and substantially improved the psychiatric community's ability to recognize and diagnose psychiatric problems common in adolescents.

One half of ASAP's members are child psychiatrists, while the remaining number are general psychiatrists and psychoanalysts who maintain an active professional interest in adolescents. Its members work with adolescents in hospitals, schools and psychiatric clinics around the country as well as within the nation's juvenile court system. *Amicus* sponsors a wide array of educational programs for its members and other mental health professionals, as well as publishing a scientific journal.

## **SUMMARY OF THE ARGUMENT**

This Court has not addressed the constitutionality of the death penalty for 17-year-old offenders since the 1980s, a time when the Court's holdings were deeply divided and generated three rulings in seven years on the narrowest of margins. No five-Justice majority for all of the primary factors within this issue ever emerged in any case during that 1980s recent era or has ever occurred during the history of our nation. Nonetheless, despite the apparent "green light" given by the Court in 1989, death penalty states generally have rejected the opportunity to use age 16 as their minimum age for imposing this punishment. In fact, since 1989, only Texas and perhaps Virginia have embraced the death penalty for juvenile offenders at any meaningful level. Excluding these rogue states, the clear national consensus in the United States as of 2002 is to reject the death penalty for offenders who were 17-years-old at the time of their crimes.

The law recognizes that 17-year-olds differ intellectually and emotionally from adults and must be judged and treated differently. This is confirmed by recent research on adolescent brain development, demonstrating that 17-year-olds tend to be less mature, more impulsive, and less capable of controlling their conduct and thinking in terms of long-range consequences. Therefore, capital punishment for 17-year-olds is disproportionate and makes no measurable contribution to acceptable goals of punishment. Finally, in light of this research, the death penalty for 17-year-old offenders is contrary to contemporary standards of decency.

#### **ARGUMENT**

1. The Constitutionality of the Death Penalty for 17-Year-Old Offenders Should Be Reconsidered and Clarified by This Court.

This Court has not addressed the constitutionality of the death penalty for offenders under the age of 18 since 1989, almost 13 years ago. At that time, the Court was deeply divided with no five-Justice majority for all of the primary issues ever emerging in any case. Despite the apparent “green light” given to the death penalty for juvenile offenders by the Court in 1989, death penalty states are rejecting this opportunity to use age 16 as their minimum age for imposing this punishment. In fact, since 1989, only Texas and perhaps Virginia have embraced the death penalty for juvenile offenders at any meaningful level. The other 38 of our 40 death penalty jurisdictions are joining together to manifest a national consensus against this practice.

**A This Court’s Opinions on the Juvenile Death Penalty Are Deeply Divided and Provide Insufficiently Clear Guidance to the Death Penalty Jurisdictions.**

Prior to 20 years ago, the death penalty for crimes committed by juvenile offenders existed only beneath the radar of American law. *See generally* Victor L. Streib, *Death Penalty for Juveniles* (Bloomington, IN: Indiana University Press) (1987). This Court did not directly consider the constitutionality of this practice for juvenile offenders until the 1980s, and **never more than four Justices of this Court**

**have agreed completely with any opinion on this issue.** See *Stanford v. Kentucky*, 492 U.S. 361 (1989) (4-1-4 decision); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (4-1-3 decision); and *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (5-4 decision).

The first case arose in 1981 when this Court considered a certiorari petition putting forward the specific issue of the constitutionality of capital punishment for an offense committed when the defendant was only 16 years old. *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *cert. granted*, 450 U.S. 1040 (1981). This Court decided *Eddings* in 1982 on a different issue, but a four-Justice dissent would have reached the ultimate issue and would have rejected any constitutional bar to the execution of 16-year-olds. *Eddings*, 455 U.S. at 120, 128 (Burger, C.J., dissenting, with Justices White, Blackmun, and Rehnquist). However, the *Eddings* dissent devoted only a few lines to this central issue, cited to no legal or psychiatric authorities for its decision, and certainly cannot be said to have fully and thoroughly considered the issue. See *id.* at 128.

*Burger v. Kemp*, 483 U.S. 776 (1987) was a case in which the offender was only 17 years old at the time of his crime, but *Burger* did not directly raise the minimum age issue. In his dissent, Justice Powell nonetheless questioned the constitutionality of the death penalty for the 17-year-old offender and lamented the majority's unwillingness to wait for a decision squarely on this issue. *Id.* at 819, 822 n.4 (Powell, J., dissenting).

Even as *Burger* was being decided, the Court granted certiorari in the case of a 15-year-old offender and was to

decide that case in 1988. *Thompson v. Oklahoma*, 479 U.S. 1084 (1987), *granting cert. to Thompson v. State*, 724 P.2d 780 (Okla. 1986), *vacated and remanded, Thompson v. Oklahoma*, 487 U.S. 815 (1988). In *Thompson* the issue was couched as "whether the execution of [a death] sentence would violate the constitutional prohibition against the infliction of 'cruel and unusual punishments' because petitioner was only 15 years old at the time of his offense." *Thompson v. Oklahoma*, 487 U.S. at 818-819 (Stevens, J., plurality opinion) (footnote omitted).

In a 4-1-3 ruling resulting from a four-Justice plurality plus Justice O'Connor's essential fifth vote on narrower grounds, *Thompson* held that such an execution would be unconstitutional. *Id.* at 838 (Stevens, J., plurality opinion) and 857-58 (O'Connor, J., concurring). *Thompson* had only three dissenters (Chief Justice Burger, Justice White, and Justice Scalia). Justice Powell had retired the year before *Thompson* was decided, leaving the Court with only eight members (Justice Powell's position had not yet been filled by Justice Kennedy).

In *Stanford v. Kentucky*, 492 U.S. 361 (1989), Justice Scalia's plurality agreed with Justice Stevens' *Thompson* plurality that "evolving standards of decency" must be manifested primarily in the actions of the various legislatures and juries facing the issue. *Id.* at 368-369. In his *Stanford* plurality, Justice Scalia noted that the practice of sentencing and executing offenders age 16 and 17 clearly had not been as rare as for 15-year-old offenders, and Justice Scalia interpreted such rarity as understandable and laudable prudence rather than a clear signal of an evolved standard of

decency rejecting the practice. *Id.* at 373-374. Justice O'Connor's pivotal *Stanford* concurrence concluded that the executions challenged in *Stanford* could proceed since "it is sufficiently clear that no national consensus forbids the imposition of capital punishment on 16- or 17-year-old capital murderers." *Id.* at 381.

Justice Brennan's dissent in *Stanford* tracked closely the analytical scheme of Justice Stevens' plurality opinion in *Thompson*. (*Id.* at 382 (Brennan, J., dissenting)) After finding the juvenile death penalty generally rejected by legislatures, juries, informed organizations, and other nations (*Id.* at 384-390), the *Stanford* dissent noted the lesser moral culpability of juveniles and the failure of the juvenile death penalty to make any measurable contribution to acceptable goals of punishment under the Eighth Amendment. *Id.* at 390-405. The four *Stanford* dissenters (Justices Brennan, Marshall, Blackmun, and Stevens) would have drawn the minimum constitutional age line at 18. *Id.* at 405.

For the past 13 years, American death penalty jurisdictions have tried to gain meaning and guidance from *Eddings*, *Thompson* and *Stanford*, a daunting task. For example, in *Eddings* in 1982, four Justices (Burger, White, Blackmun and Rehnquist) found in a perfunctory dissent no constitutional bar to the execution of 16-year-olds. *Eddings v. Oklahoma*, 455 U.S. at 120, 128 (Burger, C.J., dissenting) However, by 1988 in *Thompson*, Justice Blackmun had changed his position from *Eddings* to then find that the executions of 16-year-olds is barred by the Eighth and Fourteenth Amendments. *Thompson v. Oklahoma*, 487 U.S. at 838 (Stevens, J., plurality opinion).

Also occurring in this 1982-1988 interim, Justice Powell retired from the Court in 1987. In one of his very last opinions, Justice Powell seriously questioned the constitutionality of the death penalty for 17-year-old offenders. *Burger v. Kemp*, 483 U.S. at 819, 822 n.4 (Powell, J., dissenting) It seems reasonable to assume that Justice Powell, had he delayed his retirement just until 1989, would have joined Justice Brennan's opinion in *Stanford*, transforming that dissenting opinion into a five-Justice majority ruling by this Court that execution of 17-year-old offenders is prohibited by the Eighth and Fourteenth Amendments to the United States Constitution.

The result of these few opinions by Justices of this Court on this issue over a 7-year period has been to provide razor-thin majority decisions, going opposite directions in back-to-back years, and being changed completely by the fortuity of Justice Powell's exact year of retirement. Surely such an important life-and-death issue for our nation's youth deserves better from our nation's highest Court. Therefore, *amicus* urges this Court to revisit the constitutionality of the death penalty for 17-year-old offenders.

3. Since 1989, Death Penalty Jurisdictions are Rejecting the Opportunity to Move to Age 16 as the Minimum Age for the Death Penalty.

This Court in *Gregg v. Georgia*, 428 U.S. 153, 180-181 (1976), was impressed that at least 35 states and the federal government had enacted new death penalty statutes

even though their previous statutes were knocked down in *Furman v. Georgia*, 408 U.S. 238 (1972). The reactions of our 40 current death penalty jurisdictions since *Stanford* are of similar significance. *Stanford* was universally understood to have given the green light to death penalty jurisdictions wanting to impose that sanction upon offenders as young as age 16 at the times of their crimes. A predictable nationwide reaction would have been for almost all death penalty jurisdictions with higher statutory minimum ages to lower those minimum ages to 16 as constitutionally permitted by *Stanford*. **However, not a single death penalty jurisdiction has lowered its statutory minimum age from 17 or 18 to 16 since *Stanford* was decided in 1989.** If the 1972-1976 phenomenon was seen as embracing a national standard approving of the death penalty in general despite significant constitutional impediments, then the 1989-2002 phenomenon should be seen as refusing to embrace a national standard approving of the death penalty for 17-year-olds despite the removal of constitutional impediments.

Instead of a clear national standard of age 16 emerging, American death penalty jurisdictions have moved in precisely the other direction. The most recent is Indiana, which just raised its statutory minimum age from 16 to 18. (SB 426 signed by the Governor on March 26, 2002, to be effective July 1, 2002). The Montana legislature did the same thing in 1999. (Mont. Code Ann. Sec. 45-5-102) When New York returned to the death penalty and enacted its new statute in 1991, it set a minimum age of 18 for the death penalty. (N.Y. Penal Code sec. 125.27). The State of Washington accomplished this by state supreme court ruling. *State v.*

*Furman*, 858 P.2d 1092 (Wash. 1993). Florida also used court action to raise its minimum age from 16 to 17. *Brennan v. State*, 754 So.2d 1 (Fla. 1999). Finally, as described in Petitioner's Original Petition (p. 17), at least nine other death penalty states (Arizona, Arkansas, Florida, Kentucky, Mississippi, Missouri, Pennsylvania, South Carolina, and Texas) are considering legislative amendments to raise their statutory minimum age for the death penalty from age 16 or 17 to age 18. Instead of rushing through the door opened by *Stanford*, American death penalty jurisdictions have said "no, thank you" and have moved toward age 18 as their minimum age.

1. Since 1989, Only Texas and Perhaps Virginia Have Significantly Embraced the Execution of Juvenile Offenders.

The ultimate measure of the evolving standard of decency regarding the death penalty for juvenile offenders is a jurisdiction's willingness to carry such cases through to actual execution. In the years immediately prior to the *Stanford* decision in 1989, actual execution of juvenile offenders had stopped, presumably awaiting the outcome of *Thompson* and *Stanford*. Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973 - December 31, 2001* (March 2002) (accessible at <http://www.law.onu.edu/faculty/streib>). However, one might expect such executions to have returned to a "normal" level during the 1990-2001 time period.

This 12-year period saw a total of 629 executions. NAACP Legal Defense and Educational Fund, Inc., *Death Row U.S.A., Winter 2002*. Of these total 629 executions, only 15 (2%) were of juvenile offenders. Streib, *The Juvenile Death Penalty Today*, at p. 4. Of critical importance is that 8 of these 15 juvenile executions occurred in Texas and 3 others occurred in Virginia. Looking at the entire United States except for Texas and Virginia, a total of 31 states executed a total of 339 offenders from 1990-2001. Only 4 (1%) were of juvenile offenders, executed in Louisiana (1990), Georgia (1993), Missouri (1993), and Oklahoma (1999). However, it cannot be said that these four states are firmly in the fold of executing juvenile offenders. Prior to these recent-era juvenile executions, Louisiana last executed a juvenile in 1948, Georgia in 1957, and Missouri in 1921. Oklahoma had never executed a juvenile offender prior to 1999. Victor L. Streib, *Death Penalty for Juveniles, supra*, at 195, 197, 199, 203.

Texas and perhaps Virginia are the only two jurisdictions within the entire United States that have significantly embraced the execution of juvenile offenders since *Stanford*. During 1990-2001, Texas executed 220 persons, 8 (4%) of whom were juvenile offenders. As of the end of 2001, Texas had 30 juvenile offenders on its death row and has indicated its intent to continue to execute such offenders. Victor L. Streib, *The Juvenile Death Penalty Today, supra*. Virginia executed 70 persons during 1990-2001, only 3 (4%) of whom were juvenile offenders. However, Virginia has not sentenced any juvenile offenders to death for several years and has no juvenile offenders now

on its death row, making Virginia's position somewhat unclear. While even 4% is still a very small portion of all executed offenders and thus may not be truly significant, it might be argued that Texas and perhaps Virginia continue to embrace the death penalty for juvenile offenders. However, the operative "standards of decency" under the Eighth Amendment must flow from national practices and procedures and are not dictated by a few rogue states. *See, e.g., Ford v. Wainwright*, 477 U.S. 399, 408 (1986); *Coker v. Georgia*, 433 U.S. 584, 595-596 (1977). One clear indicator of a national consensus against this practice is that only one or two states can be described as continuing to embrace the actual execution of juvenile offenders.

#### 4. Conclusion

A Constitutional issue of the significance of the death penalty for juvenile offenders should be illuminated by holdings of this Court that are clear, consistent, and convincing. Since this Court's last consideration and exposition of this issue, only Texas and perhaps Virginia have continued to include juvenile offenders among those persons they execute in any significant numbers. The actual practices of the other 38 of our 40 death penalty jurisdictions reveal a national consensus that rejects the behavior of those two isolated states.

## **II. Well-Established Research on Adolescent Brain Development Reinforces the Eighth Amendment's**

**Evolving Standards of Decency Which Now Forbid  
the Death Penalty for 17-Year-Olds.**

6. The Human Brain, Particularly for Males, Continues to Evolve into the Late Teens and Early Twenties, With the Mental Ability to Control Impulses Developing Last.

*Amicus* completely endorses the arguments presented in Petitioner's Brief (pp. 23-25) as to the scientific research on adolescent brain development. Earlier stages of this research were relied upon by this Court in *Thompson v. Oklahoma*, 487 U.S. 815, 833-838 (1988) (Stevens, J., plurality opinion). During the ensuing years since *Thompson* and *Stanford*, this research has continued and has reenforced the earlier findings.

The new research findings come chiefly from magnetic resonance imaging (MRI) of both the structural and functional varieties. Numerous news articles describe recent MRI studies comparing adolescent brains to adult brains and which suggest a connection between teen behavior and brain development. *See e.g.*, Matt Crenson, *Brain Changes Shed Light on Teen Behavior*, *The Times-Picayune*, December 31, 2000, p. A-18; Daniel R. Weinberger, *Teen Brain Lacks Impulse Control*, *Seattle Post-Intelligencer*, March 13, 2001, ed.; Shankar Vedantam, *Are Teens Just Wired That Way?*, *The Washington Post*, June 3, 2001, sec. A.

Structural MRI has revealed that the brain changes as one matures, that different parts change at different times, and that the frontal lobes (and more particularly the pre-frontal

lobes) along with a subcortical area, the striatum, change most dramatically between a sample of youths ages 12 to 16 and a sample of adult ages 22 to 30. *See, e.g.*, E.R. Sowell, P.M. Thompson, C.J. Holmes, T.L. Jernigen, & A.W. Toga, *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neuroscience 859 (1999). Functional MRI uses similar techniques to observe changes in brain activity and has found that changes in those areas indicative of maturation continue to take place during late adolescence and into early adulthood.

Counsel for *amicus* also has received a communication on this precise issue from Dr. Ruben C. Gur, Professor and Director of Neuropsychology in the Department of Psychiatry of the University of Pennsylvania Health System. Dr. Gur's summary of the evidence from the recent MRI research is as follows:

Increase in white matter continues well into late adolescence, and the frontal lobes are the last to myelinate. The behavioral significance of this neuroanatomical finding is that the very brain system necessary for inhibition and goal-directed behavior comes "on board" last and is not fully operational until early adulthood (about 18-22 years).

E-mail message from Dr. Ruben C. Gur to Victor L. Streib, dated April 13, 2002 (on file with *amicus* counsel).

We know that the prefrontal cortex is most important for "executive functioning" including planning, and using judgment, controlling impulsiveness, etc. Now we see that

there is an objective basis for the common knowledge that teenagers tend to have a lot less of these qualities than adults, both in terms of the structure of the brain (which is manifestly more immature in the prefrontal area in adolescents than adults) and function of the brain.

Confirming what every parent of a teenager knows, the scientific research has concluded that adolescents actually think differently from adults. D. Keating, *Adolescent Thinking*, in "At the Threshold," 54-89 (S. Feldman et al. Eds., 1990); W. Overton, *Competence and Procedures*, in "Reasoning, Necessity and Logic," 1-32 (W. Overton ed. 1990). These recent neurological studies conclude that the adolescent brain is not fully developed and, among other things, undergoes major reorganization in the area associated with social behavior and impulse control. See *Physical Changes in Adolescent Brains May Account for Turbulent Teen Years, McClean Hospital Study Reveals*, <http://www.mclean.harvard.edu/PublicAffairs/TurbulentTeens.htm>; National Institute of Mental Health, *Teenage Brain: A Work in Progress*, 2/6/01, <http://www.nimh.nih.gov/publicat/teenbrain.cfm>.

To a certain degree, this latest research simply confirms what we have always known or suspected about the brain development of 17-year-olds. While they often appear to be "fully-grown" physically and may seem to be functioning as adults, their judgment and impulse-control are simply not that of adults. Yes, they may know "right from wrong" under an infancy defense or an insanity test, but they nonetheless are lacking in fully adult-level functioning of their brains. They may make horrible decisions, and they act

on impulse, without thinking clearly about the consequences.

3. Legitimate Objectives of Punishment Are Not Served by Imposing Adult Capital Punishment Upon Offenders Who Do Not Have Adult Mental Abilities.

Amicus fully endorses Petitioner's arguments concerning deterrence and retribution, the objectives of capital punishment which have been accepted by this Court. Petitioner's Brief, pp. 20-27. The targets of these punishment objectives are 17-year-olds whose brains are not fully developed, particularly as to judgment and impulse control. Elkhonon Goldberg's *The Executive Brain: Frontal Lobes and the Civilized Mind* (Oxford University Press 2001) describes the frontal lobes as "the CEO of the brain" and concludes that those lobes "cannot fully assume their leadership role" until they are mature. *Id.* at 144-145.

It further appears that adolescents such as Petitioner typically do not come up even to the standards of their 17-year-old peers. Other factors in their lives often hold back their mental development even further, making them even less culpable mentally than others their age. *See, e.g.,* ABA Task Force on Youth in the Criminal Justice System, *Youth in the Criminal Justice System* 39-46 (Chicago: American Bar Association) (2001).

If the objective is general deterrence of similarly homicidal behavior by other 17-year-olds in the future, executing the Petitioner simply will not have that effect. The delayed brain development described above negatively

impacts impulse control. The theory of deterrence, in direct contrast, assumes a person's ability to conduct an on-the-spot cost/benefit analysis and to control or redirect impulses. Not surprisingly, *Thompson* rejected the deterrence rationale as simply unacceptable for young offenders. *Thompson v. Oklahoma*, 487 U.S. 815, 837-838 (Stevens, J., plurality opinion).

The other prong of the general deterrence theory is that the execution of any one offender deters the behavior of all other potential offenders, including those older than age 17. However, if this Court completely abolishes the execution of all juvenile offenders, this would reduce executions nationally by about 2%. See Point I.C. above, and Streib, *The Juvenile Death Penalty Today*, at p. 4. That is, 98% of executions would continue to occur and would have whatever highly questionable impact they might have on these older potential offenders. *Amicus* believes that this 2% reduction would have no significant impact on deterrence.

Given the extensive research findings on capital punishment during the past several decades, the only legitimate objective that retains any credibility is retribution. However, this Court also has noted that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." *Thompson v. Oklahoma*, 487 U.S. at 835 (footnote omitted). Given what we have learned since 1989 about adolescent brain development, this conclusion from *Thompson* is even more persuasive. Retribution is to be commensurate with the offender's personal culpability. *Enmund v. Florida*, 458 U.S. 782, 798-800 (1982). Seventeen-year-olds simply do not and

can not have a sufficient level of personal culpability to fully deserve the maximum adult punishment known to our legal system.

1. Informed by the Recent Research on Adolescent Brain Development, the Death Penalty for 17-Year-Old Offenders is Contrary to Contemporary Standards of Decency.

*Amicus* fully endorses Petitioner's arguments that this Court should also take into consideration the parallel issue of mental retardation and the international law setting. Petitioner's Brief at 27 and 29. When added to the above-discussed concerns about adolescent brain development, these issues argue strongly that the juvenile death penalty is not in accord with contemporary standards of decency in this country or literally anywhere in the world.

This Court is properly concerned about the death penalty for mentally retarded offenders, as is indicated by the grant of certiorari in *Atkins v. Virginia*, No. 00-8452, and the interchanges during oral argument of *Atkins* on February 20, 2002. See Petitioner's Brief at 27-28. It seems nearly impossible to separate the legal analysis of the death penalty for the mentally retarded from the death penalty for juveniles. Both are physically able to commit terrible crimes, but neither has the level of mental development to be held fully responsible and to receive the maximum punishment for those crimes. Both juvenile and mentally retarded offenders have "the mind of a child," albeit often in the body of an adult. A

national consensus opposing the death penalty for each group has become manifest, recognizing that neither children nor those with the minds of children should receive the maximum adult punishment.

The Justices of this Court have been split in the past over the importance of comparative and international law in examining our national consensus concerning the death penalty. *Amicus* firmly believes that these are very relevant issues, but a larger context is also important. The United States, represented in this practice almost solely by Texas and perhaps Virginia, is essentially alone in the world in imposing the death penalty upon juvenile offenders. We feebly respond to the resulting international criticism by trying to explain that juvenile executions are only 2% of all American executions, that only one or two states actually engage in this practice, and that the vast majority of Americans do not allow their state or federal governments to engage in such un-American acts. It is now time for this Court to acknowledge that our national standards of decency no longer permit the execution of juvenile offenders anywhere in the United States. It is an odious practice that has essentially ended throughout American except for a couple of last holdout states, and they must now be brought into line with American values and standards

### 3. Conclusion

Brain development continues typically through the teenage years and into the early twenties, with impulse control commonly developing last. Seventeen-year-olds,

particularly those with the atypical problems of the Petitioner, simply cannot be held to an adult standard in this regard. General deterrence theories are simply inapplicable to 17-year-olds, since their stage of brain development does not lend itself to rational, cost/benefit analyses. American standards of decency now reject the imposition of the death penalty upon those with such immature brain development.

## CONCLUSION

*Amicus* ASAP urges this Court to reconsider and clarify the constitutionality of the death penalty for juvenile offenders and to find that a national consensus now exists which opposes this practice. *Amicus* particularly wishes to endorse and further develop the issues in this case regarding the mental development of adolescents, particularly those such as Petitioner who were under the age of 18 at the time of the acts in question. Adolescents are developmentally different from adults, regardless of the acts they may commit. Accordingly, *amicus* strongly urges this Court to spare these non-adults the imposition of that most adult of all sanctions, capital punishment and to find that the execution of juvenile offenders is Cruel and Unusual in violation of the Eighth and Fourteenth Amendments. Consequently, Petitioner's death sentence should be vacated.

Respectfully submitted,

---

Victor L. Streib

*Counsel of Record*

Ohio Northern University College of Law

525 South Main Street

Ada, OH 45810

(419) 772-2207

*Counsel for Amicus Curiae*

American Society for Adolescent Psychiatry