IN THE SUPREME COURT OF THE UNITED STATES

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DONALD P. ROPER, :

SUPERINTENDENT, POTOSI :

CORRECTIONAL CENTER, :

Petitioner :

v. : No. 03-633

CHRISTOPHER SIMMONS. :

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Washington, D.C.

Wednesday, October 13, 2004

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

APPEARANCES:

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

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

C O N T E N T S

P R O C E E D I N G S

(10:02 a.m.)

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

Mr. Layton.

ORAL ARGUMENT OF JAMES R. LAYTON

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

MR. LAYTON: No. The States certainly --

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

MR. LAYTON: There is some minimal level.

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

MR. LAYTON: No.

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

question, are deserving of the death penalty.

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

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

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

JUSTICE GINSBURG: But with parental -- they are

wards of their parents.

MR. LAYTON: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. LAYTON: Well, two things.

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

The second is that although the last --

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

MR. LAYTON: It is --

JUSTICE SOUTER: 13 to 2 is pretty spectacular.

MR. LAYTON: It is not --

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

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

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

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

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

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

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

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

MR. LAYTON: Right.

JUSTICE SOUTER: -- to infer anything.

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

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

MR. LAYTON: No. It --

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

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

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

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

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

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

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

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

MR. LAYTON: In that statement, but --

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

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

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

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

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

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

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

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

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

JUSTICE KENNEDY: Well, that's somewhat --

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

MR. LAYTON: Aggravating, but aggravating --

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

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

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

MR. LAYTON: It is --

JUSTICE SCALIA: It's not at all mitigating.

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

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

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

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

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

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

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

vote?

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

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

MR. LAYTON: Well, in fact --

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: So if Lincoln --

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

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

MR. LAYTON: There's a --

JUSTICE BREYER: I'm not saying controlling.

MR. LAYTON: There's a special reason why

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

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

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

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

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

JUSTICE SCALIA: You -- you think --

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

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

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

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

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

(Laughter.)

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

(Laughter.)

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

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

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

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

MR. LAYTON: Correct.

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

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

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

JUSTICE BREYER: We have a very different number.

MR. LAYTON: Right.

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

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

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

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

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

additional executions.

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

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

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

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

CHIEF JUSTICE REHNQUIST: It was never -- never

tested in the trial court.

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

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

MR. LAYTON: Absolutely.

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

MR. LAYTON: Absolutely.

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

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

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

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

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

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

CHIEF JUSTICE REHNQUIST: Very well, Mr. Layton.

Mr. Waxman, we'll hear from you.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE RESPONDENT

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

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

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

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

MR. WAXMAN: Well, there is a --

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

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

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

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

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

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

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

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

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

MR. WAXMAN: There are nine States that allow

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

JUSTICE SCALIA: With their parents' consent --

CHIEF JUSTICE REHNQUIST: Right.

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

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

JUSTICE SCALIA: But they can drive.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. WAXMAN: Well --

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

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

we -- our brief concedes, is generally no.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE REHNQUIST: Yes.

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

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

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

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

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

where a constitutional line should be drawn.

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

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

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

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

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

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

CHIEF JUSTICE REHNQUIST: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

formed.

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

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

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

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

MR. WAXMAN: We --

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

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

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

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

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

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

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

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

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

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

MR. WAXMAN: Well --

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

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

But even -- but with respect to --

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

deterrent remains.

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

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

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

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

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

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

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

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

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

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

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

MR. WAXMAN: Well --

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

MR. WAXMAN: May I answer? Briefly.

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

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Waxman.

MR. WAXMAN: Thank you.

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

REBUTTAL ARGUMENT OF JAMES R. LAYTON

ON BEHALF OF THE PETITIONER

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

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

MR. LAYTON: Yes.

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

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

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

JUSTICE STEVENS: May I just ask one further?

MR. LAYTON: Yes.

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

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

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

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

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

and yet there still is a role by this Court.

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

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

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

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

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

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

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

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

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

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

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

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

MR. LAYTON: Yes.

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

MR. LAYTON: No.

(Laughter.)

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

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

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

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

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

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

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Layton.

The case is submitted.

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