

ORIGINAL

# TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of: )  
 )  
WILLIAM WAYNE THOMPSON, )  
 ) No. 86-6169  
 )  
 ) Petitioners )  
 )  
v. )  
 )  
OKLAHOMA )

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SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

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DATE: November 9, 1987

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1                                    IN THE SUPREME COURT OF THE UNITED STATES

2 -----x  
3 WILLIAM WAYNE THOMPSON,                                    x  
4                                    Petitioner,                                    x  
5                    v.                                    x                    No.86-6169  
6 OKLAHOMA                                    x  
7 -----x

8                                    Washington, D.C.

9                                    Monday, November 9, 1987

10                    The above-entitled matter came up for oral argument  
11 before the Supreme Court of the United States at 12:59 p.m.

12 APPEARANCES:

13 HARRY F. TEPKER, JR., ESQ., Norman, Oklahoma (appointed  
14                    by this Court); on behalf of Petitioner.

15 DAVID W. LEE, ESQ., Assistant Attorney General of Oklahoma,  
16                    Norman, Oklahoma: on behalf of Respondent.

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C O N T E N T S

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ORAL ARGUMENT

PAGE

HARRY F. TEPKER, JR., Esq.	
on behalf of Petitioner	3
DAVID W. LEE, Esq.	
on behalf of Respondent	21
HARRY F. TEPKER, JR. Esq.	
on behalf of Petitioner -- Rebuttal	44

1 PROCEEDINGS

2 CHIEF JUSTICE REHNQUIST: We will hear arguments now  
3 in No.86-6169, William Wayne Thompson v. Oklahoma. Mr. Tepker,  
4 you may proceed whenever you are ready.

5 ORAL ARGUMENT BY HARRY F. TEPKER, JR., ESQ.

6 ON BEHALF OF PETITIONER

7 MR. TEPKER: Mr. Chief Justice, may it please the  
8 Court:

9 In this case Oklahoma has decided that a fifteen year  
10 old boy lost his moral entitlement to live because he committed  
11 a brutal murder, the killing of the ex-husband of his sister.

12 According to the prosecution evidence the motive for  
13 this murder was revenge, revenge for the ex-husband's abuse of  
14 the boy's sister. This case comes before this Court on  
15 Certiorari to the Oklahoma Court of Criminal Appeals.  
16 Petitioner asked this Court to vacate the sentence of Death,  
17 but not the judgment that Wayne Thompson was guilty; and not  
18 the judgment that he deserves punishment.

19 Two basic issues in this case relate to one  
20 fundamental principle: the principle that Youth bears on the  
21 fundamental justice of the Death Penalty and emotion and  
22 prejudice do not.

23 First, does this principle require a minimum  
24 chronological age, or at least standards and instructions that  
25 tell the sentencing authority that their examination of non



1 adulthood should not be truncated. Second, did introduction of  
2 inflammatory photographs of the murder victim's decomposing  
3 remains undermine the reliability of this Death sentencing  
4 process?

5 Wayne Thompson was still a child under state law when  
6 he shot and killed the ex-husband of his sister. According to  
7 the prosecution's most incriminating evidence, the boy on the  
8 night of the murder shortly after the crime, confessed to his  
9 mother and explained to her that his -- sister "would not have  
10 to worry about her ex-husband any more."

11 Wayne was certified to stand trial as if he were an  
12 adult. The jury was told that he was an adult. The jury was  
13 instructed that Youth is a relevant mitigating circumstance  
14 they could consider, but they were not told that Youth is a  
15 relevant mitigating circumstance of great weight. They were  
16 told that they could decide for themselves what were and were  
17 not mitigating circumstances. These were the instructions  
18 before the jury that sentenced Wayne to death.

19 Under these circumstances and in a very real sense,  
20 this case comes before the Court presenting this Court with the  
21 first opportunity to decide whether or not Wayne Thompson was  
22 too young to be condemned to death. We submit under the  
23 circumstances of this case, as well as under circumstances  
24 generally applicable to a class of children and adolescents, it  
25 is most inappropriate under the Eighth Amendment, under the

1 prohibition against cruel and unusual punishment, to inflict  
2 the Death Sentence.

3 QUESTION: How old is he now?

4 MR. TEPKER: He is 20 now, Your Honor.

5 The reasons for treating Youth in a special manner  
6 have been recognized by this Court on a number of occasions.  
7 We submit that these factors, these reasons for treating Youth  
8 in a special way are compelling in this particular  
9 circumstance: first children and adolescents are simply too  
10 inexperienced to be judged by the same standards applicable to  
11 adults. They have not been around long enough to formulate  
12 the understanding, the capacity for self-control, to be judged  
13 by standards according to adults. The question is not merely  
14 whether they know the difference between right or wrong, but  
15 whether they have the experience to apply those standards, to  
16 resist the stress, the trauma, the difficulties -- of  
17 particularly difficult occasions.

18 We submit that, in addition to that, it is quite  
19 plain that children, adolescents, are far more vulnerable to  
20 volatile, impulsive, self-destructive behavior, and this,  
21 recognized by this Court in the past, is grounds for treating  
22 Youth, youths, in a different manner, particularly when the  
23 punishment is Death.

24 QUESTION: Mr. Tepker, do you think that it would be  
25 a violation of the Eighth Amendment to execute a minor who has,

1 for example, reached the age of 17 years and nine months, at  
2 the time the offense is committed, and who is found on an  
3 individual determination to have the moral culpability of an  
4 adult?

5 MR. TEPKER: Your Honor, we argue for a minimum  
6 chronological age.

7 QUESTION: Yes, I know you do, but my question is, do  
8 you think that it is a per se violation of the Eighth Amendment  
9 under the circumstances I describe?

10 MR. TEPKER: Yes, we do, Your Honor. We contend that  
11 18 is the most dominant traditional definition of non-  
12 adulthood, and in this situation, when you are short of  
13 eighteen, the chances -- excuse me?

14 QUESTION: In the abortion context, this Court has  
15 held that a minor can and must be treated as an adult upon  
16 proving her individual maturity to be so-treated. And yet you  
17 say in this context, we may not do that and the Constitution  
18 says we may not. That is a little bit inconsistent, perhaps.

19 MR. TEPKER: I think not, Your Honor. I think there  
20 is a difference between defining the reality and significance  
21 of adulthood for a non-adulthood for purposes of inflicting the  
22 Death Sentence, and making that same calculation when what is  
23 at stake is the fundamental right of privacy. Those -- that  
24 balancing, that inquiry, is not the same, and I do not suggest  
25 that Bellotti v. Baird or other cases which recognize the

1 difficulties here, block this particular -- case.

2 I must insist that the question you pose is not the  
3 question before this Court in one sense. Wayne Thompson was  
4 not certified to stand trial as an adult because he had a  
5 maturity beyond his years.

6 QUESTION: Well, did the Petitioner challenge the  
7 certification process in this case either at the trial or at  
8 appellate court level?

9 MR. TEPKER: He did challenge it at the appellate  
10 court level, Your Honor, and his appeal --

11 QUESTION: On the grounds that it was  
12 constitutionally insufficient or inadequate?

13 MR. TEPKER: On Kent v. U.S., yes, but we are not  
14 relying upon those at this point. That time has passed. The  
15 question really here is whether the certification process  
16 negates the need for some focused attention on non-adulthood in  
17 relation to the Death Penalty?

18 Certification proceeding is not geared toward --

19 QUESTION: Did the Petitioner asks the trial court to  
20 instruct the jury to consider age as a mitigating factor?

21 MR. TEPKER: He did not, Your Honor. Well, excuse  
22 me: he did ask for an instruction that Youth was cited by the  
23 Defense as a mitigating factor. But the more particular  
24 instruction that we suggested in our brief were not requested  
25 by trial counsel.



1           We submit, however, that trial counsel did present  
2 the issue of Youth. Appellate counsel did argue the per se  
3 issue. And we submit that it would be most unusual if this  
4 Court took away from itself the opportunity to decide the issue  
5 on narrower grounds. And that is why in my response to your  
6 initial question, trying to suggest that 18 years of age is the  
7 appropriate generalization line for defining the significance  
8 of non-adulthood versus adulthood --

9           QUESTION: Is that your definite submission here? A  
10 bright line at Age 18?

11           MR. TEPKER: That is the one that seems most logical  
12 to us based upon tradition. But we do --

13           QUESTION: Of course, 16 would not save Mr. Thompson  
14 anyway, would it not?

15           MR. TEPKER: It would indeed, Your Honor. And if  
16 this Court took the position that it wanted a greater consensus  
17 and it wanted to establish a floor that was truly a minimal  
18 floor, the fact that no state, having decided to select and  
19 express limitation on the Death Penalty, has selected an age  
20 below 16, might make 16 indeed the most logical line for  
21 purposes of federal constitutional law. We have attempted to  
22 provide the range of alternatives that would be necessary to  
23 resolve this case.

24           QUESTION: Mr. Tepker, are there some states other  
25 than Oklahoma in which a minor below the age of 16 could be

1 sentenced to Death?

2 MR. TEPKER: There are indeed, Your Honor. But 60  
3 percent of the jurisdictions in this country, encompassing 70  
4 percent of the population, would not tolerate this execution.

5 QUESTION: That is, 60 percent of the jurisdictions  
6 which provide for capital punishment?

7 MR. TEPKER: No. That is 60 percent of the states  
8 total. It is approximately half of the states that retain the  
9 Death Penalty, establish minimum lines that would not allow  
10 this execution.

11 QUESTION: And half of them do not?

12 MR. TEPKER: Yes, that is right.

13 QUESTION: And half of them would allow it?

14 MR. TEPKER: Half of them allow the potential for it,  
15 although I might add, if one takes into account the more  
16 general question of whether Youth bears upon the fundamental  
17 justice of the Death Penalty, Oklahoma is one of only three  
18 states that has neither a minimum line nor any special  
19 legislative declaration that Youth is a mitigating  
20 circumstance. And it is -- the only one of those three states  
21 to have someone on Death Row who is a juvenile.

22 QUESTION: Did the trial judge not say that the jury  
23 could take Youth into consideration as a mitigating  
24 circumstance here?

25 MR. TEPKER: He did, Your Honor. But then he said,

1 "what is a mitigating circumstance is up to you to decide." We  
2 submit that that violates the spirit of Eddings v. Oklahoma, in  
3 which this Court said, "Youth is a relevant mitigating  
4 circumstance of great weight, and it violates the principle was  
5 stated in a concurring Opinion in Skipper, which you joined,  
6 which says Youth bears directly on the fundamental justice of  
7 the Death Penalty.

8           The instructions left the jury with the impression  
9 that they had complete discretion over the matter. Moreover,  
10 the jury was told, contrary to the legal facts, that he was an  
11 "adult," when they asked that question of the trial judge. The  
12 trial judge responded, "yes, he is an adult." He was a "child"  
13 under the laws of Oklahoma.

14           QUESTION: You say that the jury should have been  
15 instructed that Youth is a mitigating factor and you should  
16 take it into consideration in your deliberations?

17           MR. TEPKER: Absolutely, Your Honor. And it should  
18 have been correctly informed as to his status under Oklahoma  
19 law that he was a "child" under the laws of Oklahoma.

20           For all these reasons, we submit there is great risk  
21 in this case apparent from the Record that the jury's inquiry  
22 into Youth, into non-adulthood, was truncated. It was  
23 truncated by the failure to answer the jury more specifically  
24 when they asked about the meaning of the word, "mitigating."  
25 It was truncated when the jury was told he was an adult. It

1 was truncated when they were not told in specific,  
2 particularized ways, that Youth is at the heart of this case,  
3 and that they must make a judgment on that question.

4 QUESTION: Did the Petitioner object when the trial  
5 court told the jury that he had been certified as an adult?

6 MR. TEPKER: No, he did not, Your Honor.

7 QUESTION: And did he raise the point in the Oklahoma  
8 Court of Criminal Appeals?

9 MR. TEPKER: On the issue of adulthood, no, but the  
10 Oklahoma Appellate Public Defender did raise the issue that  
11 more particularized guidelines focusing the jury on the  
12 mitigating circumstances was necessary. And, I might add, that  
13 would have required the overruling of an explicit Oklahoma  
14 Court of Criminal Appeals decision, Chainey v. State, in which  
15 particularized guidelines are not allowed under Oklahoma law.

16 We submit that this process made it very clear that  
17 there is a constitutionally unacceptable risk that non-  
18 adulthood was not weighed in a sensitive, careful, reasoned way  
19 in this particular case.

20 We also submit that this case also has additional  
21 facts that make this inappropriate occasion for infliction of  
22 the Death Sentence. According to the Oklahoma Court of  
23 Criminal Appeals, inflammatory photographs of decomposing  
24 remains of the murder victim were introduced and used by the  
25 prosecutor in the closing argument during the Death sentencing



1 process.

2 QUESTION: Was the effect of those photographs raised  
3 below?

4 MR. TEPKER: Yes, it was, Your Honor. The --

5 QUESTION: On the sentencing phase?

6 MR. TEPKER: On the -- well, there is an ambiguity in  
7 the Record on that point, Your Honor. The Appellate Public  
8 Defender argues strenuously that it was erroneous to admit the  
9 photographs. The argument of the Appellate Public Defender did  
10 not distinguish between the sentencing phase and the guilt  
11 phase, but it was not focused solely on the guilt phase.

12 The Appellate Public Defender also criticized the  
13 trial prosecutor for his use of the photographs in closing  
14 argument, also in connection with mischaracterizing the  
15 defendant's age.

16 QUESTION: Do you think there is any constitutional  
17 difficulty, Mr. Tepker, in introducing a photograph that shows  
18 the brutality of a killing if in fact the killing was brutal?  
19 I mean, if there was six or eight wounds on the body, do you  
20 think there is some reason why that photograph simply showing  
21 those wounds could not be introduced?

22 MR. TEPKER: Perhaps, Your Honor, although, I --

23 QUESTION: What is the source of your reservation?

24 MR. TEPKER: Well, I recognize it is an extremely  
25 difficult task to ask this Court to get into the business

1 difficult and unpleasant of what photographs are too gruesome  
2 and what photographs are not. Here the Oklahoma Court of  
3 Criminal Appeals found the photographs to be "ghastly,  
4 gruesome, calculated only to enflame the jury, and proving  
5 virtually nothing."

6 QUESTION: Is this because of their submersion for  
7 almost a month?

8 MR. TEPKER: That is right. I mean, the photographs  
9 depicted the biology of decomposition, not the brutality of the  
10 crime.

11 QUESTION: But how -- if the prosecutor had some  
12 other photographs that did not show the decomposition, but  
13 showed the brutality, that would be one thing. But my  
14 impression is here there were not. There was no choice.

15 MR. TEPKER: If the photographs were probative of the  
16 way in which the crime was committed, probative and relevant  
17 for those grounds, then I would think that would be an entirely  
18 different case, Your Honor, one that would bear upon the  
19 fundamental justice of the Death Penalty because of the  
20 aggravating circumstance of what is "cruel, atrocious and  
21 heinous."

22 But that is not the situation here: the Oklahoma  
23 Court of Criminal Appeals said these photographs "proved  
24 virtually nothing."

25 QUESTION: But Mr. Tepker, no, but they said that in

1 saying they were not relevant to the determination of guilt.

2 MR. TEPKER: Yes, that is true.

3 QUESTION: So we do not really know whether they  
4 thought they were really relevant to the determination of the  
5 appropriate Death sentence -- the appropriate penalty. They  
6 just -- there is nothing in their Opinion that tells us whether  
7 they thought they could appropriately be considered in  
8 connection with sentencing.

9 MR. TEPKER: Well, Your Honor, I would suggest this:  
10 The Oklahoma Court of Criminal Appeals denounced the  
11 introduction of these photographs in very strong terms. And  
12 then said they were harmless as to guilt or innocence. It gave  
13 no indication whatsoever that these photographs could be  
14 admissible during the sentencing phase.

15 QUESTION: It gave no indication one way or the other  
16 on admissibility in the sentencing hearing, that is all I am  
17 saying.

18 MR. TEPKER: That is a fair characterization, Your  
19 Honor. We submit, however, that because of the way in which  
20 the Oklahoma -- excuse me, the Oklahoma Court of Criminal  
21 Appeals, described these photographs, facts that they found in  
22 relation to the inflammatory nature of these photographs, the  
23 constitutionally unacceptable risk that the jury was distracted  
24 from its duty, distracted from the true assessment of what is  
25 an appropriate -- sentence, is plain and apparent on the

1 Record.

2 If I may return to the basic, what we have tried to  
3 describe in our arguments as the "narrow Eighth Amendment"  
4 arguments, it is very clear that almost all jurisdictions --  
5 some 94 percent of the jurisdictions either have a minimum line  
6 or have something in their legislation which clearly indicates  
7 that cases involving youthful offenders are special. They  
8 deserve to be treated differently. That degree of consensus,  
9 along with the other factors surrounding the judgment of the  
10 Young in a capital sentencing case, make it particularly  
11 appropriate for this Court to declare now, to reaffirm, that  
12 Youth bears on the fundamental justice of the Death Penalty.

13 QUESTION: That is not what we are asked to do. That  
14 does not win you your case. It seems to me the relevant  
15 statistic would be what percentage of the states have aligned  
16 that would have rendered this sentence inappropriate.

17 MR. TEPKER: Your Honor, what percentage is that?  
18 Sixty percent of the jurisdictions encompassing 70 percent of  
19 the population with an absolute line --

20 QUESTION: What jurisdictions that have criminal --  
21 that have capital punishment -- it is, of course, irrelevant  
22 with respect to those jurisdictions that have chosen not to  
23 impose capital punishment at all.

24 But as to those that have, you say about half of them  
25 would not have allowed this sentence?



1 MR. TEPKER: That is true. The percentage is half.  
2 Although I must suggest that when we are considering the nature  
3 of the Death Penalty in considering the judgment of the Young,  
4 to throw out those states that have decided the Death Penalty  
5 process is uncertain enough, or illogical enough, or perhaps  
6 too cruel, out of the calculation of what are evolving  
7 standards of decency, is to not inquire into what the consensus  
8 really is.

9 QUESTION: We really have no idea what they would  
10 think about Youth as a factor, had they chosen capital  
11 punishment: they simply have not chosen capital punishment.  
12 We have no idea if they have not chosen it for the -- for  
13 adults or for youthful offenders. So it really says nothing  
14 about whether if they did have it they would consider that  
15 Youth is a factor that would render it absolutely intolerable.

16 MR. TEPKER: Well, let me shift then to trying to  
17 suggest that this Court has used international opinion and  
18 international law in order to assess what are evolving  
19 society's standards of decency.

20 QUESTION: We would not have capital punishment at  
21 all if we were to be bound by that, would we not.

22 MR. TEPKER: I am not certain about that, Your Honor.  
23 And I am not attempting to challenge or restrict the Death  
24 Penalty here at all. What I am suggesting is that 80 nations  
25 reject this kind of executions, and 40 of those nations retain

1 the Death Penalty. If you add to that the practice of the  
2 nations in terms of the rarity of these kinds of executions,  
3 the clear statements that appear in the International Covenant  
4 of Human Rights, and the American Convention of Human Rights,  
5 it becomes very clear that there is an objective rejection of  
6 execution of children, and Wayne Thompson was a child under the  
7 laws of Oklahoma.

8 QUESTION: Does the federal government place any  
9 limitation upon age with regard to the statutes in which it  
10 allows capital punishment to be imposed? Not the federal  
11 jurisdiction.

12 MR. TEPKER: I am unaware of a federal death penalty  
13 that goes to the question.

14 QUESTION: That goes to the question?

15 MR. TEPKER: Yes, I guess I am unaware of the answer  
16 to your question. I did not think that there was authorization  
17 on the part of the federal government for a death sentence of  
18 juveniles.

19 QUESTION: Not of juveniles, but there are -- there  
20 is a Death Penalty in the Federal Code. Is there any  
21 limitation upon the imposition of that upon juveniles?

22 QUESTION: I do not know the answer to that, Your  
23 Honor.

24 QUESTION: You do not know that there is?

25 MR. TEPKER: I do not know that there is.

1           The reasons for this great consensus -- and I must  
2 suggest strenuously it is a very strong consensus, really  
3 reflect the fact that it is so terribly difficult to make  
4 judgments about anybody at this tender age. As I suggested  
5 before, there is an inexperience factor here.

6           There is also the sense in which these people at this  
7 age have not been in command of their own lives. They have not  
8 taken responsibility for establishing a place in the community  
9 separate from family, from friends, and from parents. For all  
10 of these reasons, generally it is extremely difficult to make a  
11 judgment about a child or adolescent.

12           QUESTION: Do you have any statistics which could  
13 tell us how many juveniles have been prosecuted for offenses  
14 carrying the Death Penalty?

15           MR. TEPKER: Prosecuted for offenses carrying the  
16 Death Penalty? I believe not, Your Honor. We do have in our  
17 brief the fact that those who receive the Death Penalty in  
18 proportion to the number who are arrested for criminal homicide  
19 are much, much smaller -- something like 0.06 percent, as  
20 opposed to 1.8 percent.

21           QUESTION: But we do not know actually how many under  
22 age 18, for example, of those now on Death Row, were prosecuted  
23 for offenses carrying the Death Penalty when they were --  
24 committed under 18? You do not have that?

25           MR. TEPKER: Percentages? No. There were

1 approximately 32 individuals on Death Row. And if I understand  
2 Your Honor's question as to basically defining the charges, I  
3 do not have that information defining the charges.

4 QUESTION: What I am trying to get at is how many  
5 have been prosecuted for offenses carrying the Death Penalty  
6 and how many of those prosecuted in fact were given the Death  
7 Penalty?

8 MR. TEPKER: That is an extremely difficult statistic  
9 to come up with. The best we have in our brief is the  
10 difference in proportion, the differential proportion based  
11 upon arrests for criminal homicide, and of course, that  
12 presents a problem about which arrests for criminal homicide  
13 are in fact capital offenses.

14 With respect to the uncertainty of the judgment, I  
15 would like to draw attention to the brief, the amicus brief for  
16 the American Society for Adolescent Psychiatry, which  
17 eloquently summarizes the evidence that what is happening with  
18 respect to the juvenile Death Sentence is not a situation where  
19 these individuals are being sentenced based upon a judgment  
20 that they have a maturity beyond their years; they are being  
21 sentenced to death despite their evident immaturity and  
22 retarded development.

23 The fact is that the American Psychiatric  
24 Association, when it discusses the diagnosis of "antisocial  
25 personality," states very clearly that such a diagnosis should



1 not be made until someone has had the time, the experience, to  
2 show the full longitudinal pattern. It is only then when an  
3 individual is in a sense ready for the kind of judgment.

4 The fact is that these individuals, this class of  
5 juveniles and adolescents, share characteristics universally  
6 regarded as mitigating, as deserving less punishment, or at  
7 least a more generous judgment in the final analysis. They  
8 share characteristics which make that they should be held  
9 responsible to the superlative degree of "cruel and unusual."

10 We submit that in this case, tradition yields a  
11 principle of "decent restraint." Decent restraint, that the  
12 judgment and the punishment of them should be more careful and  
13 sensitive. The only way to ensure that this tradition is  
14 vindicated is through a rule that leaves no latitude for  
15 evasion, a minimum chronological age.

16 But short of that, short of that we suggest that when  
17 a state seeks to kill a human being for the crimes of childhood  
18 or adolescence, it must show at a minimum that it made a  
19 reasoned, careful judgment based upon the reality of non-  
20 adulthood, without the influence of emotion or prejudice. For  
21 these reasons we pray that this Court vacate the sentence of  
22 Death in this case and remand to Oklahoma. Thank you.

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Tepker. We  
24 will now hear from you, Mr. Lee.

25

1 ORAL ARGUMENT BY DAVID W. LEE, ESQ.

2 ON BEHALF OF RESPONDENT

3 MR. LEE: Thank you, Mr. Chief Justice, and may it  
4 please the Court:

5 In my view, this case involves two questions:  
6 whether it was cruel and unusual punishment to impose the Death  
7 sentence upon the Petitioner in this case; and whether this  
8 Court should set as an aspect of the United States Constitution  
9 a minimum chronological age under which no state could go in  
10 imposing the Death sentence regardless of the circumstances of  
11 the individual crime irrespective of the individual of the  
12 defendant's maturity and background in each individual case.

13 In the present case, the Petitioner murdered the  
14 victim one and one-half months prior to the Petitioner's 16th  
15 birthday. The Petitioner had nine contacts with law  
16 enforcement officers, seven of which occurred prior to the  
17 murder in this case; four of those incidents involved assaults  
18 on a person and two of those involved assault with a deadly  
19 weapon. Testimony at trial revealed that Petitioner announced  
20 to witnesses as he left his house on the night of the murder,  
21 "We are going to kill Charles."

22 The victim died after having been brutally beaten;  
23 having his throat cut; and having been shot in the back of the  
24 head. After the murder, the Petitioner told witnesses on two  
25 different occasions that he had cut the victim's throat and

1 shot him in the head. The Petitioner made other several other  
2 callous comments after the murder that revealed that he felt no  
3 remorse, a fact that was corroborated by the testimony by the  
4 psychologist who examined him and by his juvenile officer.

5           Concerning the question of the Petitioner's age, the  
6 State contends that the adoption of the Petitioner's argument  
7 that this Court should set a minimum chronological age would  
8 require this Court to engage i artificial and arbitrary line  
9 drawing with regard to the decision whether to impose the Death  
10 sentence upon a young murderer. In its Decisions over the past  
11 eleven years, this Court has stressed the need for  
12 individualized decisions, regarding the Death sentence. And we  
13 contend also that there is no reason why age should be given  
14 any greater consideration or any greater weight than any other  
15 mitigating circumstances such as those involving mental  
16 retardation or mental illness.

17           Furthermore, a significant class of violent criminals  
18 in this country should not automatically be immunized from the  
19 possibility of receiving the Death sentence. It is  
20 unquestioned that this Court has itself recognized in the  
21 Eddings case that young criminals increasingly engage in  
22 violent crime and to announce in advance that none of them,  
23 under any set of circumstances, could receive the Death  
24 sentence regardless of the maturity that they displayed or the  
25 viciousness of the crime that they commit would be in our view,

1 to send the wrong message.

2 QUESTION: I did not hear the last part, "It would be  
3 in your view," what?

4 MR. LEE: That to announce in advance that, under no  
5 circumstances, regardless of the maturity the individual  
6 defendant displayed or irrespective of the viciousness of the  
7 crime that that defendant committed, we feel that would send  
8 the wrong message to other potential young murderers in this  
9 country.

10 QUESTION: Then you would say the same thing to those  
11 states which do not have the Death penalty for adults?

12 MR. LEE: Well, we think that the individual states  
13 should be allowed the discretion whether to impose the Death  
14 penalty or not.

15 QUESTION: I am merely saying that your argument  
16 would apply to states without the Death penalty equally?

17 MR. LEE: Well, of course those states have the right  
18 to choose whether or not they want to impose the Death penalty  
19 on a person of any age, and we think that if a state chooses to  
20 announce to the potential killers in that state, that in  
21 appropriate circumstances, if they commit a particularly  
22 vicious act, they too are subject to the Death penalty.

23 QUESTION: What about -- suppose Thompson had been  
24 ten years old? What would be your position then?

25 MR. LEE: Justice Stevens asked that question of me



1 in the Eddings case in 1981 and I told him at that time in my  
2 view it would be a violation of the Eighth Amendment to impose  
3 the Death penalty on an individual that is ten years of age.

4 QUESTION: It would be?

5 MR. LEE: Yes. We concede that it would. That would  
6 obviously be too young.

7 QUESTION: What about 12?

8 MR. LEE: We do not think that this --

9 QUESTION: Then you see, what I am going to do is I  
10 am going up the ladder -- where would you draw the line?

11 MR. LEE: We do not think that this Court should  
12 decide in advance what that minimum age should be. We think  
13 this Court should merely look at the facts in each individual  
14 case and review what Oklahoma has done in this individual case.

15 Right now there are no people on Death Row in America  
16 and there have not been who are under the age of 15 years old  
17 at the time of the commission of the crime.

18 QUESTION: But you would say that any ten-year-old,  
19 no matter where he is, may not be executed?

20 MR. LEE: I think that there would be common and  
21 unanimous agreement among all people that that would be too  
22 young for an individual to receive the Death penalty.

23 However, we think the country is divided with regard  
24 to the minimum age with imposing of the Death sentence.

25 QUESTION: Mr. Lee, when is the last time that a

1 state in this country has executed someone in this country that  
2 was under sixteen at the time of the commission of the murder?

3 MR. LEE: In 1948 there was an execution of an  
4 individual who was sixteen years of age.

5 QUESTION: Has Oklahoma ever executed anyone?

6 MR. LEE: No, Your Honor. We have never executed  
7 anybody under the age of 18 at the time of the commission of  
8 the crime. But we think that we should be able to in view of  
9 changing conditions make the decision in an appropriate case.

10 I am glad to say that we do not have a lot of young  
11 people on Death Row in our state. And nationwide I am glad  
12 that that is not the case. But we think that individual  
13 states, if they have made a careful, individualized  
14 consideration as to an individual's maturity and background,  
15 that they should be allowed to impose the Death penalty in this  
16 case.

17 This is an individual -- Mr. Tepker has talked about  
18 the fact that young people are impulsive or immature -- that is  
19 not the case in this particular -- in Mr. Thompson's case. He  
20 had a number of previous contacts with law enforcement  
21 officials. He knew what he was doing would get him into  
22 trouble.

23 The particular act in this particular case was not an  
24 impulsive act. We agree that young people may be generally  
25 impulsive, but the fact is that this individual defendant did

1 not commit an impulsive act. It was a considered act. The  
2 fact that he had a motive to kill his ex-brother-in-law shows  
3 even more that it was calculated and planned and it was  
4 certainly not an impulsive act.

5 QUESTION: Mr. Lee, may I ask you, when you conceded  
6 that the execution of a ten-year-old for murder would be  
7 unconstitutional, are you resting that on a violation of the  
8 "cruel and unusual punishment" clause of the Eighth Amendment?

9 QUESTION: Yes, Your Honor, I think that would  
10 violate anybody's sense of decency under the Eighth Amendment.

11 QUESTION: There is nothing in the Eighth Amendment  
12 that would suggest such an exception, is there?

13 MR. LEE: Well, obviously, this Court is going to be  
14 the arbitor as what do constitute -- what does constitute a  
15 situation that would violate the consensus of the public in  
16 this country that an execution of a person of a particularly  
17 young age would be unconstitutional. But we think that the  
18 fact that there are 19 states in this country that allow the  
19 execution of an individual under the age of 16, I think you ask  
20 people generally, and they are divided, particularly if you  
21 show them the individual facts of individual murder cases, for  
22 example the case that this Court heard last Term, the  
23 Christopher Burger case. If you ask general public opinion  
24 about what should be done with that individual, and I think  
25 that there would be a lot of people in this country that would

1 agree that he should be executed.

2           This particular case involves, I think, a very  
3 serious crime, although the victim in this case was not a  
4 particularly appealing person, he underwent a very horrible  
5 murder; he had his -- the pathologist testified that all of the  
6 wounds that he had inflicted upon him were inflicted on him  
7 while he was still alive until the time that he was shot in the  
8 back of the head, so I think that this particular case,  
9 particularly in view of the fact that this individual had had  
10 previous contact with law enforcement officials, I do not think  
11 that this particular case involves a violation of the Eighth  
12 Amendment.

13           We also contend that a rule of constitutional law  
14 that would set a minimum chronological age for imposition of  
15 the Death penalty would make no allowance for any increase in  
16 --

17           QUESTION: But you have accepted that, I thought?  
18 You have accepted that?

19           MR. LEE: Well, not at the age of 15.

20           QUESTION: Well, all right. That is all we are  
21 arguing about then. What age it should be set at?

22           MR. LEE: Well, he is asking for 18. And, but then  
23 --

24           QUESTION: I understand. But then do not argue to us  
25 why a rule of constitutional law establishing a chronological



1 age is bad, because you have accepted a rule of constitutional  
2 law that uses a chronological age, have you not?

3 MR. LEE: I am saying that this Court does not have  
4 to say what that minimum chronological age would be. I am  
5 saying that there is nobody on Death Row in America that is  
6 under the age of 15. There are four that are now. Since 1984  
7 there have been six that are.

8 But I am saying that this Court does not have to say  
9 in advance in absence -- excuse me?

10 QUESTION: We do not have to say it in this case?

11 MR. LEE: Yes, or at any time. I do not see -- like  
12 I said, there has been nobody that has been 14 or under who has  
13 received the Death Penalty in this country in recent years, and  
14 I am just asking the Court to make an individualized  
15 consideration in this case as it insisted the states do in  
16 other Death Penalty cases.

17 QUESTION: You say, Mr. Lee, that there had been four  
18 or six in recent years that received a death penalty under  
19 sixteen?

20 MR. LEE: Since 1984 in my -- according to my  
21 calculation there have been six individuals under the age of  
22 16.

23 QUESTION: Who were sentenced to Death?

24 MR. LEE: Yes, they were all fifteen years of age.

25 QUESTION: How many of those were carried out?

1 MR. LEE: There have been none carried out and at  
2 the present time, there are three that are presently -- of  
3 those fifteen, there are three that are presently on Death Row:  
4 Mr. Thompson, the individual in Indiana, and another individual  
5 in North Carolina.

6 QUESTION: But none has been carried out?

7 MR. LEE: No, Your Honor.

8 QUESTION: Any significance to that, do you think?

9 MR. LEE: There has been a problem nationally with  
10 imposing the Death Penalty on people of any age. There have  
11 been only -- approximately 95 executions in this country since  
12 1967, although there are 2,000 people on Death Row. And  
13 obviously, juries and sentencers and appellate judges in this  
14 country are going to be careful with regard to the Death  
15 Penalty being imposed on a young person, and we certainly  
16 welcome that. We think that the certification hearing  
17 conducted by Oklahoma in this case revealed that there was a  
18 careful consideration in individual judgment with regard to  
19 this individual defendant's maturity and responsibility.

20 We think that it is important that in 1971 Congress  
21 in hearings involving the 26th Amendment adopted the testimony  
22 of Dr. Margaret Meade and others who testified that the age of  
23 maturity had declined three years since the 18th century. And  
24 it is also significant, I think, as we pointed out in our  
25 brief, that in 1984, Congress lowered the age for possible

1 transfer in federal criminal prosecution from 16 to 15 years of  
2 age.

3 QUESTION: In 1985 Congress insisted that the states  
4 raise the drinking age, did they not?

5 MR. LEE: Yes, and that is 21. And I do not think  
6 that anybody should say that 21 should be the bright line. The  
7 fact that chronological age is an inherently poor criterion for  
8 making a decision whether or not somebody should have the Death  
9 Penalty imposed on them.

10 QUESTION: Mr. Lee, does it come down to the fact  
11 that you recognize that the Eighth Amendment would allow you to  
12 enforce the 15-year limit, but we cannot put it at the 18-year  
13 limit? Is that your point?

14 MR. LEE: I think it would be -- I am sorry, Justice  
15 Marshall, I did not hear the first part of your question?

16 QUESTION: That you can set the 15-year limit, but  
17 this Court cannot set the 18-year limit?

18 MR. LEE: I do not think that 15 should necessarily  
19 be the limit. I am saying that 15 years is the lowest person  
20 we have on Death Row in this country.

21 QUESTION: Well, I thought you said you agreed that  
22 it could be done at 15?

23 MR. LEE: No, I am saying --

24 QUESTION: Did you not say that?

25 MR. LEE: No, Your Honor. If I said it --

1 QUESTION: Did you not say that you could understand  
2 that 15 years was good enough?

3 MR. LEE: No, I did not say that 15 should be the  
4 minimum age.

5 QUESTION: What did you say was 15 was for?

6 MR. LEE: Justice Blackmun asked me if 12 should be  
7 the minimum age, I think was the last age that he asked me, and  
8 I said at that point that I do not think that this Court needs  
9 to decide in advance what the minimum age would be.

10 QUESTION: What minimum age would you give?

11 MR. LEE: If I had to pick?

12 QUESTION: Yes.

13 MR. LEE: If there was any bright line, and I have  
14 thought about this for six years since Eddings, and of course I  
15 thought about it before Eddings, if I had to pick a particular  
16 bright line, if there was a case directly before this Court, if  
17 there is any bright line, Age 14 is the age of common law age  
18 incapacity, and this Court in two previous cases, the Gault  
19 case and the Ford case, which you yourself wrote, Justice  
20 Marshall, you used the common law as the guideline for, in that  
21 particular case, for the imposition of the Death Penalty on  
22 somebody who was insane.

23 Also, Blackstone, in his Commentaries on page 23,  
24 which we have cited in our brief, pointed out that from seven  
25 to 14 is the common law age of presumed incapacity.



1           QUESTION: I would say that our educational system  
2 and our government and everything else has sure progressed from  
3 Blackstone. Has it not?

4           MR. LEE: Well, yes, Your Honor. But you are asking  
5 for -- me to tell the Court what that bright line is, and the  
6 Court used Blackstone when it pointed out --

7           QUESTION: Pointed out why we cannot do it. Why we  
8 cannot set a huge bright line at 18.

9           MR. LEE: I think it is unnecessary for the Court to  
10 do so, particularly in this case. I think that the Court has  
11 said from Griggs on that a defendant should receive  
12 individualized consideration; that there should be allowances  
13 made for the imposition -- for the jury to impose mercy in a  
14 particular case; what is important that an individual's  
15 character and background should be viewed by the jury.

16           That was done in this case. It was done by the  
17 certification judge before the individual was certified to  
18 stand trial as an adult; it was viewed at the time that the  
19 jury made the decision; they found the existence of an  
20 aggravating circumstance; he was free to introduce evidence of  
21 any mitigating circumstance; he received an instruction that  
22 the youthfulness of the offender had been offered as evidence  
23 of mitigating circumstances. And we think that this individual  
24 defendant, his attorney argued in his closing argument in the  
25 second stage that age was a consideration; in their own brief

1 they pointed out -- I took one statement by the prosecutor out  
2 of context, but the Record shows that, particularly on page  
3 160, the prosecutor specifically told the jury that in the  
4 second stage of the trial, that age is a relevant mitigating  
5 circumstance -- a comment he made at least two times during the  
6 voir dire examination.

7           So we think that as long as the jury, and the jury  
8 has traditionally been held to be that link to evolving  
9 standards of decency in the community, and Justice Stevens in  
10 his Dissent in Spaziano said as much.

11           In this particular case, 12 people heard all this  
12 evidence and made the decision that the Death Penalty should be  
13 imposed. And we think that it was appropriate.

14           It has been observed that chronological age is an  
15 inherently poor criterion standard by which to draw the line  
16 with regard to criminal responsibility. We have noted in our  
17 brief that all federal and state courts that have considered  
18 the issue have rejected the proposition that there is one  
19 uniform age that the Constitution sets as that below which a  
20 state can never go in imposing the Death sentence.

21           In fact, the existence of certification, transfer,  
22 and waiver statutes in this country --

23           QUESTION: But you do not agree with that?

24           MR. LEE: I think that it --

25           QUESTION: You are really -- it seems to me that you

1 are arguing two different lines: your argument you are now  
2 supporting says that there cannot be any minimum age.

3 MR. LEE: I am saying that there is a bottom  
4 somewhere.

5 QUESTION: All right.

6 MR. LEE: That there would -- I am saying that, by  
7 age -- by age, there would be. But I am saying that,  
8 particularly that, with what they want, they want the age that  
9 would save the client in this particular case, and an age they  
10 say is 18 and there are any number of ages that could be  
11 selected and there are any number of ages that have been  
12 selected by the different states. And we think that the states  
13 should -- are the proper entity to decide, what the minimum age  
14 should be, is all I am saying.

15 QUESTION: Above ten, anyway?

16 MR. LEE: Yes. Yes, sir.

17 QUESTION: You are arguing that we should not set it  
18 lower than nay legislature has set it, I suppose is one thing  
19 that you have said?

20 MR. LEE: I am saying that, if there was a case that  
21 came up where the legislature had set the age at ten and a ten-  
22 year-old person was on Death Row, I think it would be  
23 appropriate under the "cruel and unusual punishment" clause.

24 QUESTION: You can argue statistics a million  
25 different ways, but -- is it correct, I think you said that

1 there had been no actual execution carried out of a defendant  
2 who was 15 or younger at the time of the crime since 1948?  
3 Something like that?

4 MR. LEE: In 1948 there was a sixteen-year-old that  
5 was executed in this country. As far as the actual fifteen-  
6 year-old further back than that, I am not sure.

7 I think it is important to point out that this  
8 individual is one and a half month prior to his sixteenth  
9 birthday.

10 QUESTION: I understand, but it would not be a  
11 different case if it was fifteen and a half, instead of fifteen  
12 years?

13 MR. LEE: No, we do not think so. We think that is  
14 what --

15 QUESTION: But I am just wondering to what extent --  
16 there are statistics in these Exhibits and all about juveniles  
17 and so forth, but do we know how many, say since the turn of  
18 the Century, how many defendants who were under sixteen at the  
19 time of the offense had actually been executed in the whole,  
20 say, last 100 years?

21 MR. LEE: I am unable at this time to recall what  
22 that figure would be, Your Honor.

23 QUESTION: Is it more than a handful, do you know?

24 MR. LEE: In all honesty, I cannot remember.

25 QUESTION: I could not figure it out either.



1 QUESTION: Are there any?

2 MR. LEE: I am unable at this time to recall what  
3 that figure was, Your Honor. I am sorry. Obviously it is  
4 something that --

5 QUESTION: It might be zero?

6 MR. LEE: I cannot remember. Obviously we want to be  
7 very careful with this and I am glad that -- I am not coming  
8 here saying that there have been hundreds and hundreds of young  
9 persons who have been executed and therefore it is  
10 constitutional. I think it is good that in this country that  
11 the individual sentencers and the individual legislatures have  
12 been careful with regard to this decision.

13 All I am saying is in particular cases involving  
14 individuals like the Petitioner in this case, like Christopher  
15 Burger, like Kevin Stanford, like individuals like that, for  
16 committing their particular vicious crime, that if the  
17 particular act has been reviewed as it was in this particular  
18 case by a certification judge and then by a jury, that the  
19 state should be free to impose the Death Penalty.

20 QUESTION: One of the reasons I am trying to explore  
21 this is you express I think very appropriately the concern  
22 about sending the wrong message to potential offenders who are  
23 under 16. Of course, if you assume that they are very  
24 brilliant and knowledgeable about what is happening in the  
25 criminal justice system in the last century, I do not suppose

1 that it is much more of a deterrent to have one out of -- you  
2 know, one every fifty years, than to have none at all.

3 MR. LEE: Well, as I have stated, we have only had 95  
4 executions in this country since 1967, which means it is very  
5 rare and infrequent. But I do not think that should be the  
6 basis for abolishing the Death Penalty in this country. I  
7 mean, the states have tried to impose the Death Penalty --

8 QUESTION: There is a lot of difference between 95 in  
9 three or four years and none in 100 years.

10 MR. LEE: I am sorry, Your Honor?

11 QUESTION: I said there is a lot of difference  
12 between 95 in five or six years, whatever it is, and only one  
13 or two in a century.

14 MR. LEE: Well, there has got to be a bottom  
15 somewhere. At some point there is going to be a --

16 QUESTION: But I am just focusing on the deterrence  
17 argument at this point.

18 MR. LEE: I think in this day -- particularly the  
19 Petitioner in this case, that this was a "street-wise"  
20 individual. He has had nine -- or before the murder he had  
21 seven contacts with law enforcement officials; this is an  
22 individual who is aware of what might happen to him with regard  
23 to the fact that he was going to be picked up by law  
24 enforcement officials --

25 QUESTION: I suppose if you talk about the

1 particulars, there were several people involved in the killing  
2 here, were there not?

3 MR. LEE: Yes, and I know that particularly Justice  
4 Blackmun has been concerned, like in his Dissent in the Burger  
5 case, he was concerned about the possibility that there might  
6 be domination by other individuals.

7 In this particular case, this individual was tried  
8 separately; there was nothing like there was in the Burger case  
9 that would prevent his attorney from presenting mitigating  
10 circumstances with regard to this case; there is not one word  
11 in the Record to suggest that this individual acted under the  
12 domination of anybody else. He certainly had enough family  
13 members that testified that could have testified if Mr.  
14 Thompson at one point had said that his family --

15 QUESTION: Some of his family was involved in the  
16 crime, were they not?

17 MR. LEE: Well, there was one half-brother that was,  
18 but he made statements to a number of family, or at least close  
19 friends, to family members -- there were certainly plenty of  
20 family members around that could have testified that he made  
21 the comment that he did this because he was afraid of Tony Mann  
22 or because they made him do it.

23 The Record is clear in this case that this individual  
24 acted of his own free will and volition in this particular  
25 case, and there is no inference whatsoever that he was

1 dominated by any of these other individuals.

2 As I have noted, we think that the -- it is important  
3 that the states -- even states that have set a minimum age for  
4 the imposition of the Death sentence, cannot agree on what that  
5 minimum age should be. And it was unclear until the oral  
6 argument what the Petitioner himself thinks the minimum age  
7 should be.

8 We believe that common sense tells us that, if asked  
9 what the minimum age for the imposition of the Death Penalty  
10 should be, most people would say that it depends on the  
11 individual facts of the case, including the seriousness of the  
12 crime and what that individual defendant is really like.

13 We contend that the objective factors of this case do  
14 not support the Petitioner's position. As we have noted, all  
15 state supreme courts that have ruled on this issue, have  
16 rejected the contention that age alone should bar imposition of  
17 the Death sentence.

18 Nineteen states, as I have noted, permit the  
19 execution of a person who was under the age of 16 at the time  
20 of the murder. By my count, there are presently 38 persons on  
21 Death Row in this country who are under the age of 18 at the  
22 time of the commission of the crime. These were people who  
23 were sentenced by judges and juries in 14 different states. In  
24 a one-year period of time from 1985 until 1986, three persons  
25 who were 17 at the time of the commission of the murder, were



1 executed.

2 We contend that there is no unambiguous trend in this  
3 country with regard to the raising or lowering of the age for  
4 the Death sentence. As I previously mentioned, Congress in  
5 1984 lowered the age for transfer for violent crimes from 16 to  
6 15, which in my view -- also in response to Justice Scalia's  
7 question that, under the Federal Air Piracy Act, which was  
8 mentioned by this Court in the McCleskey case, a fifteen-year-  
9 old person, if he is properly transferred pursuant to the  
10 certification transfer statutes, could receive the Death  
11 Penalty if the procedure is adequate.

12 Therefore, the general public sentiment and the  
13 objective factors that would justify the abolition of the Death  
14 Penalty for young murderers is not present. We think that the  
15 crime itself is relevant in proportionality principles. One  
16 who reads the facts in many of these cases cannot help but  
17 think that individual states and individual juries are  
18 justified in imposing the Death sentence in those cases.

19 In the present case the Petitioner was convicted and  
20 sentenced because of his direct role in a calculated, savage  
21 murder. He was certified to stand trial as an adult after two  
22 hearings, one where the certifying judge determined prosecutive  
23 merit; another when the judge weighed six factors under our  
24 certification statute. I might note that our certification  
25 statute is very similar to the federal transfer statute, Title

1 18, Section 5032.

2           These factors included first the willful nature of  
3 the act; whether the crime involved an act against the person;  
4 another consideration made by the certifying judge was the  
5 sophistication maturity of the Petitioner in his distinguishing  
6 right from wrong as determined by his psychological evaluation;  
7 his home; his environmental situation; his emotional attitude  
8 and pattern of living; and finally the record and past history  
9 and prospects for rehabilitation.

10           QUESTION: Mr. Lee, how many federal offenses carry  
11 the Death Penalty?

12           MR. LEE: I think that is the only one, Your Honor,  
13 the Federal Air Piracy Act; that is the only one that I know  
14 of.

15           We note that the Petitioner in this case --

16           QUESTION: Would that involve murder and rape?

17           MR. LEE: Excuse me?

18           QUESTION: Murder and rape are federal charges.

19           MR. LEE: Well, I do not know if at the present time  
20 that is a possible punishment for -- if it is possible under  
21 federal law for receipt of the Death sentence.

22           QUESTION: Treason?

23           MR. LEE: I think right now that air piracy is the  
24 only one, Your Honor. It was mentioned specifically by this  
25 Court in a footnote in the McCleskey case, and I do not know of

1 any others.

2 I might note that the Petitioner in his brief made  
3 note of the fact that there should be an attempt for  
4 rehabilitation. We contend that the Petitioner in this case  
5 was the beneficiary of a number of rehabilitative efforts in  
6 this case over the years. He received counselling; he received  
7 -- he had a tour at a home outside of -- in Oklahoma City; he  
8 received probationary services; he had a test -- had testing  
9 done on him done six months before the murder, and none of  
10 these seemed to make any difference, a fact revealed to him --  
11 a fact testified to by the probation officer at the time he was  
12 certified.

13 I want to note before I close that in their brief,  
14 the Petitioner mentioned the fact that the Tenth Circuit has  
15 said that our "aggravating circumstance, especially as  
16 heinous, atrocious or cruel," has been found by the Tenth  
17 Circuit to be overbroad. I want to point out that the  
18 "aggravating circumstance" that was mentioned was mentioned in  
19 the Reply Brief. It was not mentioned until that time.

20 The instruction in the particular case is not the  
21 same instruction that was used which is the subject of the  
22 Cartright v. Maunard case. In this particular case, the jury  
23 was instructed that "the aggravating circumstances, the  
24 heinous, atrocious or cruel, the murder must be preceded by  
25 torture or serious physical injury." So we think that the

1 structure of this case is different than the one out of the  
2 Tenth Circuit, which to mention out of the Reply Brief, that it  
3 sufficiently narrows the class of people that are subject to  
4 the Death sentence. Does the Court have further questions?

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lee.

6 Mr. Tepker, you have five minutes remaining.

7 ORAL ARGUMENT BY HARRY F. TEPKER, JR., ESQ.

8 ON BEHALF OF PETITIONER -- REBUTTAL

9 MR. TEPKER: Thank you.

10 First, if I may focus on the deterrent question: we  
11 are talking about a risk of a Death sentence that is already  
12 extremely low. We are also talking about a situation in which  
13 we have got individuals who are impulsive, who are not  
14 necessarily calculating, sophisticated individuals. To believe  
15 in the deterrent effect when the risk is so small even with the  
16 sophisticated and the calculating is difficult enough, but the  
17 individuals of the nature who are being sentenced to death --

18 QUESTION: Every person under 18 is not sophisticated  
19 and calculating?

20 MR. TEPKER: No, Your Honor, that is not what I meant  
21 to say. What I meant to say is they are part of a class who  
22 share characteristics of immaturity and they are particularly  
23 vulnerable to those personality characteristics. What I am  
24 trying to say is that even for the sophisticated individual,  
25 the risk is not great. The deterrent effect even for them may



1 be extremely minimal.

2 For these individuals who are the ones receiving the  
3 Death sentence, it is extremely difficult to believe that  
4 deterrence plays any meaningful role in the kinds of thought  
5 processes that led to these crimes.

6 Certification has been discussed and perhaps my  
7 answers were garbled before, so I wanted to focus on that: we  
8 do not challenge the certification of Wayne Thompson before  
9 this Court. The certification process is designed to assess  
10 the capacity for rehabilitation within the Oklahoma system, and  
11 it refers as much to the Oklahoma system as it does to the  
12 individual.

13 But more to the point, it does not focus on the  
14 question of moral culpability for purposes of the Death  
15 Penalty. It is designed to avoid a prospect that I think  
16 everyone in this room would find very difficult to accept, the  
17 prospect of a manifestly unfair short incarceration period for  
18 a serious offense. If Wayne Thompson had not been certified to  
19 stand trial as if he were an adult, he would have been under  
20 the rehabilitation system for something less than three years,  
21 a plainly short time.

22 The question of certification, as decided by the  
23 Oklahoma trial courts, does not go to the question of the  
24 justice of the Death Penalty. And it does not negate the need  
25 for some clear focus by the sentencing authority on the

1 propriety of the Death sentencing process. It does not even  
2 depend on the question of maturity.

3 QUESTION: Do you -- count the number of states who  
4 authorize the Death Penalty for people under 15? Do you count  
5 them the same as your opponent?

6 MR. TEPKER: To my understanding it is 18, Your  
7 Honor. Eighteen of 36 retain the possibility of executing  
8 someone below the age of 16. Seventeen of those are by express  
9 statute. One of those --

10 QUESTION: Anyway, so your only apart by no more than  
11 one?

12 MR. TEPKER: That is right. That is right, Your  
13 Honor.

14 The question of rehabilitation has been raised. We  
15 do suggest that it is appropriate for the jury to make a  
16 judgment about rehabilitation. With respect to Wayne Thompson,  
17 I would point out that the jury was asked by the prosecutor to  
18 find if this individual would commit acts of violence in the  
19 future. And they refused to so-find. That is a clear  
20 indication that this question of rehabilitation was not brought  
21 home to them as being of a primary importance or focus or  
22 purposes of assessing the Death sentence.

23 Moreover, the State's description of the  
24 rehabilitation efforts of Wayne Thompson, while accurate to a  
25 degree, are somewhat exaggerated: despite the seriousness of

1 previous incidents involving law enforcement, Wayne Thompson  
2 was never institutionalized. He was referred to a private  
3 church home for something like a month. He did receive some  
4 counselling both at school and elsewhere. But there was never  
5 any effort, despite the seriousness of these offenses, to  
6 institutionalize him in the juvenile justice system.f

7           Given that fact, I think it is fair to say that the  
8 rehabilitative potential of Wayne Thompson is up in the air.  
9 It is uncertain, and not at all clear that the jury did not  
10 make the right decision when it refused to find a propensity  
11 for future violence -- in the future.

12           One last point: counsel for the State has conceded  
13 that there is a bottom somewhere. I suggest that if one is  
14 going to make a careful assessment of where that bottom is, the  
15 only concept that is meaningful in the law is the concept of  
16 non-adulthood, to draw a line right in the middle of the class  
17 of non-adults; right in the middle of the class who share these  
18 characteristics of inexperience and immaturity; right in the  
19 middle of this class of individuals who are so difficult to  
20 judge at Age 15 or 13 or 14 -- makes no sense whatever. Non-  
21 adulthood, then, should be the concept. The tradition of  
22 criminal jurisprudence and American jurisprudence is that these  
23 non-adults ought to be treated differently and judged more  
24 fairly. Thank you very much.

25           CHIEF JUSTICE REHNQUIST: Thank you, Mr. Tepker. The

1 case is submitted.

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REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-6169

CASE TITLE: WILLIAM WAYNE THOMPSON v. OKLAHOMA

HEARING DATE: November 9, 1987

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States, and that this is a true and accurate transcript of the case.

Date: November 9, 1987

*Margaret Daly*  
\_\_\_\_\_  
Official Reporter

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