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ORIGINAL

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE

THE SUPREME COURT  
OF THE  
UNITED STATES

**CAPTION:** HEATH A. WILKINS, Petitioner V. MISSOURI

**CASE NO:** 87-6026

**PLACE:** WASHINGTON, D.C.

**DATE:** March 27, 1989

**PAGES:** 1 thru 54

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x  
3 HEATH A. WILKINS, :

4 Petitioner :

5 v. :

No. 87-6026

6 MISSOURI :

7 -----x  
8 Washington, D.C.

9 Monday, March 27, 1989

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States  
12 at 11:44 o'clock a.m.

13 APPEARANCES:

14 NANCY A. MCKERROW, ESQ., Columbia, Missouri; on behalf  
15 of the Petitioner.

16 JOHN M. MORRIS, III, ESQ. Assistant Attorney General  
17 of Missouri, Jefferson City, Missouri; on behalf  
18 of the Respondent.

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P R O C E E D I N G S

(11:44 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-6026, Heath A. Wilkins v. Missouri.

Ms. McKerrow, you may proceed whenever you're ready.

ORAL ARGUMENT OF NANCY A. MCKERROW, ESQ.

ON BEHALF OF THE PETITIONER

MS. MCKERROW: Thank you, Mr. Chief Justice, and may it please the Court:

Heath Wilkins, acting pro se, pleaded guilty to having murdered Nancy Allen during a robbery of a liquor store deli in Clay County, Missouri, on July 27, 1985. At that time Heath Wilkins was 16 years old. Approximately one year later, after a sentencing hearing at which both Heath Wilkins and the prosecuting attorney recommended the sentence of death, Heath was in fact sentenced to death. His sentence and conviction were affirmed by the Missouri Supreme Court on September 15, 1987.

The question raised in this Court is whether or not the imposition of the death penalty on one who committed his or her crime at the age of 16 violates the cruel and unusual clause of the Eighth and Fourteenth Amendments to the United States Constitution. The

1 answer is yes.

2           Given the well-recognized and fundamental  
3 differences between children and adults, the imposition  
4 of a death sentence on someone who committed a crime at  
5 the age of 16 would always offend our current and  
6 evolving standards of decency and would constitute  
7 excessive punishment since it would provide no  
8 measurable benefit to society.

9           Under any accepted set of rules or standards,  
10 children are not small adults. While the varying  
11 maturity levels of the class of 16-year-olds is  
12 presented to the Court in the briefs and the Court may  
13 certainly consider that in rendering a decision, for  
14 purposes of this argument Petitioner is willing to  
15 assume that we are discussing only the most mature  
16 16-year-olds, because even the most mature 16-year-old  
17 is still a child in every state in the United States and  
18 we as a society treat children differently than we do  
19 adults in virtually every area of life.

20           The people of Missouri have certainly  
21 recognized that children are different, and speaking  
22 through their elected representatives they have passed  
23 more than 80 statutes restricting the rights and  
24 responsibilities of children based solely on the dates  
25 of their birth. Thus, in Missouri a 16-year-old child,

1 no matter how mature he or she may be, is ineligible to  
2 vote, to serve on a jury, or to control his own business  
3 affairs or money.

4 The people of Missouri have also recognized  
5 that children are --

6 QUESTION: Can they drive in Missouri at 16?

7 MS. McKERROW: Yes, Your Honor, they may.

8 QUESTION: There's no distinction there?

9 MS. McKERROW: No, Your Honor.

10 The people of Missouri have also recognized  
11 that children are in need of the kind of care,  
12 protection and control that could never be extended to  
13 adults. Thus, in Missouri a 16-year-old, no matter how  
14 mature he may be, can be forced to attend school. If he  
15 works, he can be forced to turn his earnings over to a  
16 parent or guardian, he can be denied entry into pool  
17 halls or other places of public entertainment.

18 A 16-year-old can be taken into custody for  
19 being promiscuous or incorrigible or if he runs away  
20 from intolerable living conditions, and, if an adult  
21 decides it's in his own best interest, he can be forced  
22 to return to those intolerable living conditions.

23 The people of Missouri have also spoken at  
24 least tangentially on the issue of children and the  
25 death penalty. A 16-year-old child in Missouri, no

1 matter how mature he may be, is considered too young and  
2 impressionable to witness an execution.

3 As a plurality of this Court noted in Thompson  
4 versus Oklahoma last year, it would be truly ironic if  
5 the assumptions we so readily make about children as a  
6 class, the assumptions which provide the justification  
7 for each of Missouri's 80 age-based statutes, were  
8 suddenly unavailable in determining whether it  
9 constitutes cruel and unusual punishment to treat  
10 children as if they were adults for purposes of  
11 inflicting society's ultimate punishment.

12 QUESTION: Well, what about subjecting them to  
13 not the ultimate but to prison as an adult?

14 MS. MCKERROW: Your Honor, I think the  
15 determination that a particular child needs or deserves  
16 confinement for lengthy periods of time is something  
17 that could be left to the states, but doesn't really  
18 address the issue of how young is too young to be  
19 executed.

20 QUESTION: Well, I suppose every state will  
21 permit children to be treated as an adult for some  
22 crimes.

23 MS. MCKERROW: Yes, Your Honor. I believe  
24 every state has --

25 QUESTION: And subjected to exactly the same

1 punishment as an adult?

2 MS. MCKERROW: When the punishment is terms of  
3 imprisonment, yes, Your Honor.

4 QUESTION: Well, do you acknowledge that life  
5 sentence without possibility of parole is constitutional  
6 for a 16-year-old?

7 MS. MCKERROW: Yes, Your Honor. If the court  
8 determines that he is guilty of first-degree murder in  
9 Missouri, then he can be sentenced to life without  
10 possibility of probation or parole.

11 The distinction is the distinction between the  
12 death penalty and every other punishment available to  
13 the state, Your Honor, and I think this Court has  
14 recognized that the death penalty is a unique  
15 punishment, and it's the one that as a society we  
16 reserve for the most extreme cases.

17 QUESTION: I take it your acknowledgement that  
18 a life sentence is constitutional is based on the  
19 premise that it is possible in some cases to determine  
20 that a sociopathic personality cannot be corrected even  
21 at the age of 16?

22 MS. MCKERROW: I don't know that I would  
23 concede that, Your Honor. I don't know if that's the  
24 determination that's made.

25 QUESTION: Well, then is your concession based



1 on the premise that a life sentence is a necessary  
2 deterrent to a 16-year-old?

3 MS. MCKERROW: In Missouri there are only two  
4 alternatives once an offender has been found guilty of  
5 first-degree murder, and that is life without probation  
6 or parole or the death penalty.

7 QUESTION: But you conceded that it is  
8 constitutional to imprison a 16-year-old for life.

9 MS. MCKERROW: Yes, Your Honor.

10 QUESTION: And I'm asking you if it's not  
11 because personality adjustment is unlikely. You seem to  
12 reject that.

13 Is it because it's a deterrent and a  
14 16-year-old can be deterred by a life sentence?

15 MS. MCKERROW: Yes, Your Honor. I think that  
16 this case illustrates that. Heath Wilkins pleaded  
17 guilty and asked to be sentenced to death. He saw life  
18 imprisonment as much more of a deterrent for his conduct  
19 than he does or did the death penalty.

20 QUESTION: So the deterrent value of either a  
21 life sentence or a death sentence is something that a  
22 16-year-old can understand?

23 MS. MCKERROW: I think when you're talking  
24 about deterrents for the class of 16-year-olds that life  
25 in prison probably provides a much better deterrence

1 than would a potential death sentence.

2 If the concern of the Court is to avoid the  
3 appearance of subjectivity or judicial law-making, then  
4 the action to be taken is clear. Simply bring death  
5 penalty law within the well-established American  
6 tradition of treating children differently. There is no  
7 basis in law or logic for abandoning the deferential  
8 treatment of children when it comes to the imposition of  
9 the death sentence.

10 All of the objective indicators --

11 QUESTION: Of course, you could say the same  
12 thing about life in prison. I mean, I don't see how  
13 logic imposes this upon us at all.

14 MS. MCKERROW: Well, Your Honor, I think it  
15 goes back again to the real distinction between the  
16 death penalty and every other punishment, including life  
17 without probation or parole, which doesn't irrevocably  
18 eliminate the possibility for change in a 16-year-old,  
19 even if that change takes place in a confined setting.

20 QUESTION: How would we know the top age from  
21 your argument, Ms. McKerrow? Is -- just 16 is all you  
22 are arguing for, but would it be whatever age minority  
23 generally ends at in the states?

24 MS. MCKERROW: Your Honor, we've argued for  
25 the age limit of 17 because Heath Wilkins was 16 at the

1 time of his offense, and therefore we're arguing this  
2 case. However, petitioner would agree with all of the  
3 amicus briefs that have been filed and with petitioner  
4 in Stanford that 18 is the more legitimate age at which  
5 to set this bright line.

6 QUESTION: And why should we set the bright  
7 line at 18?

8 MS. MCKERROW: Because when the Court looks at  
9 the objective indicia of society's attitudes, 18 is the  
10 one age that has the most to commend it in terms of  
11 that's the age that is most commonly chosen for  
12 demarking the difference between childhood and adulthood.

13 QUESTION: And suppose the states come along  
14 and raise the drinking age to 21 and raise a whole bunch  
15 of other ages. This line, this bright line, would then  
16 move to 21?

17 MS. MCKERROW: It could, Your Honor. That's  
18 always a potential. The Eighth Amendment speaks of the  
19 evolving standards, and so if those standards did in  
20 fact change I guess a case could come up before the  
21 Court again in the future where this question would have  
22 to be reexamined.

23 QUESTION: Certainly 50 years ago 21 was the  
24 dividing line on most everything, not 18.

25 MS. MCKERROW: Yes, sir, even up to 20 or 25

1 years ago. I would say it's only been within the last  
2 few years that 18 has been more recognized as the age  
3 that demarks children from adults.

4 QUESTION: Our voting age case gave that a lot  
5 of impetus.

6 MS. MCKERROW: Yes, Your Honor.

7 All of the objective indicators indicate that  
8 society recognizes and supports the notion that  
9 16-year-olds are children and that by virtue of that  
10 fact alone are entitled to differential treatment from  
11 the state. The people of Missouri have never  
12 specifically permitted the execution of 16-year-old  
13 children.

14 Instead, the Attorney General is asking this  
15 Court to presume that because Missouri has a transfer  
16 statute which permits children as young as 14 to be  
17 transferred into the adult court system that the  
18 Missouri legislature made a considered judgment on the  
19 issue of executing 16-year-olds. A majority of this  
20 Court has already rejected that reasoning and should do  
21 so again.

22 As Justice O'Connor noted in Thompson last  
23 year, there may be many reasons completely unrelated to  
24 the death penalty why a state legislature would provide  
25 as a general matter for the transfer of certain children

1 out of the juvenile and into the adult court systems.  
2 One reason, which is certainly apparent in Missouri, is  
3 that the present juvenile justice system lacks the  
4 resources and the facilities to effectively deal with  
5 violent children or to protect society against those  
6 children.

7 The juvenile court in this case noted that  
8 when it transferred Heath Wilkins into the adult court  
9 system. The juvenile court stated, "The present  
10 juvenile system of rehabilitation and confinement lacks  
11 sufficient security to deal with the perpetrator who  
12 constitutes a threat to society and there are no  
13 adequate rehabilitative facilities available to the  
14 juvenile court should jurisdiction of the above-named  
15 juvenile be retained by the court."

16 However, it must always be kept in mind that  
17 transferring a child, even a violent 16-year-old, from  
18 the juvenile court system into the adult court system  
19 does not transform that child into an adult. Thus, the  
20 16-year-old being treated as if he were an adult is  
21 still denied most of the rights enjoyed by adults.

22 He can never be judged by a jury of his peers  
23 since his peers are considered too young to serve on  
24 juries. If he becomes sick while he is in custody, the  
25 state must seek permission from his parent or his

1 guardian before medical treatment can be rendered.

2 QUESTION: In Missouri what is the age for  
3 service on a jury?

4 MS. MCKERROW: Twenty-one, Your Honor.

5 And if he is sued by his victim's family, he  
6 must be --

7 QUESTION: I don't understand. Age has to do  
8 with whether you have a jury of your peers or not?

9 MS. MCKERROW: Yes, Your Honor. Partly I  
10 would think that he would be completely denied the right  
11 to have anyone his own age on a jury, even the potential  
12 for that, since in Missouri you have to be 21 to serve  
13 on a jury.

14 QUESTION: If I have a jury composed entirely  
15 of 21-year-olds, I have not gotten a jury of my peers?

16 MS. MCKERROW: Not necessarily, Your Honor,  
17 but it's at least theoretically possible that people  
18 your age could serve on the jury.

19 QUESTION: I thought the Constitution doesn't  
20 require just the possibility of a jury of your peers,  
21 but the reality of a jury of your peers.

22 MS. MCKERROW: That's true.

23 QUESTION: Is that all the Constitution  
24 requires, that you have a good shot at getting a jury of  
25 your peers? I thought you had to have a jury of your

1 peers.

2 MS. MCKERROW: That's true, Your Honor.

3 QUESTION: I don't think age has anything to  
4 do with that.

5 MS. MCKERROW: I disagree on that, Your Honor.

6 The Attorney General also asks this Court to  
7 presume that because the Missouri death penalty statute  
8 lists age as a mitigating factor that the state has made  
9 a considered judgment concerning the constitutionality  
10 of executing children. Again, such a presumption cannot  
11 be made.

12 The Missouri death penalty statute also lists  
13 the extreme emotional disturbance of the defendant, or  
14 whether or not it asks the censor to determine whether  
15 or not the ability of the defendant to conform his  
16 conduct to the requirements of law was substantially  
17 impaired. However, the fact that the Missouri  
18 legislature recognizes that the mental state of a  
19 defendant is important in sentencing can in no way  
20 supplant the constitutional prohibition against  
21 executing the insane.

22 QUESTION: How old is Wilkins now?

23 MS. MCKERROW: He's 20 years old now, Your  
24 Honor.

25 QUESTION: Twenty?

1 MS. McKERROW: Twenty.

2 The Attorney General's argument concerning age  
3 as a mitigator must fail for the same reason. It rests  
4 on the presupposition that 16-year-olds are in fact  
5 death-eligible and in that way begs the question before  
6 the Court. Age as a mitigating factor is as available  
7 to the 60-year-old defendant as it is to the 16-year-old  
8 defendant, and thus tells us nothing about how young is  
9 too young to be put to death.

10 Finally, the Attorney General blurs the very  
11 real distinction between death and every other  
12 punishment available to the state. The fact that a  
13 particular 16-year-old needs or deserves confinement  
14 beyond his 18th birthday in no way provides a  
15 constitutional justification for executing that same  
16 16-year-old.

17 The people of Missouri have never ascribed to  
18 that argument. Since the death penalty was reinstated  
19 in Missouri in 1977, 16 offenders who were 16 years old  
20 or younger have been transferred to adult courts and  
21 charged with first-degree murder. Only one, Heath  
22 Wilkins, was sentenced to death. No jury in Missouri  
23 has ever sentenced a person to death for a crime  
24 committed at the age of 16, despite having found  
25 transferees guilty of first-degree murder.



1           In addition, prosecutors are much more likely  
2 to waive the death penalty in cases involving those who  
3 committed their crimes at the age of 16. In eight of  
4 those 16 cases, the defendant ultimately stood trial for  
5 first-degree murder. In five of those eight cases the  
6 prosecutor waived the death penalty. Thus, in 64.5  
7 percent of the cases involving those who committed their  
8 crimes at the age of 16 the death penalty was waived,  
9 and that compares to approximately 33 percent of the  
10 cases involving adults in which the death penalty was  
11 waived by the prosecutor.

12           QUESTION: Well, of course that shows perhaps  
13 that juries are sensitive to this and there's no  
14 indication that they weren't sensitive in the case  
15 before us.

16           MS. MCKERROW: Your Honor, Heath Wilkins  
17 wasn't sentenced by a jury.

18           QUESTION: But the trial court was perfectly  
19 well aware of this, as was the Supreme Court.

20           MS. MCKERROW: Of his age, Your Honor?

21           QUESTION: Of course.

22           MS. MCKERROW: Yes, Your Honor, they knew his  
23 age. Petitioner would argue and argues in the brief  
24 that it was never considered, never given the sort of  
25 close consideration that this Court would require before

1 a death sentence could be entered.

2 Thus, juries and prosecutors, those in the  
3 best position to express the conscience of the community  
4 on issues of life and death, have rejected the death  
5 penalty as a legitimate punishment for those who commit  
6 their crimes at the age of 16. Professional and  
7 religious leaders have also rejected the practice of  
8 executing our young, as is evidenced by the numerous  
9 groups that have filed amicus briefs on behalf of Heath  
10 Wilkins and Kevin Stanford.

11 In addition, two particularly relevant events  
12 have occurred since this Court's decision in Thompson.  
13 First, on --

14 QUESTION: Excuse me. If it is that uniform a  
15 social feeling, presumably -- I mean, the state does  
16 have a legislature, I assume, which is popularly elected  
17 which could eliminate this death penalty for  
18 16-year-olds with a stroke of the pen.

19 CHIEF JUSTICE REHNQUIST: We'll resume at  
20 1:00. Thank you, Ms. McKerrow.

21 (Whereupon the Court recessed, to reconvene at  
22 1:00 o'clock p.m. the same day.)  
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AFTERNOON SESSION

CHIEF JUSTICE REHNQUIST: We'll resume where we left off before lunch, Ms. McKerrow.

MS. MCKERROW: Since this Court's decision in Thompson v. Oklahoma, two particularly relevant events have occurred. The first was on July 14, 1988, when the National Council of Juvenile and Family Court Judges passed a resolution opposing the imposition of the death penalty on those who commit their crimes under the age of 18.

As the amicus brief filed on behalf of the Attorneys General of 17 states in this case noted, juvenile court judges face the problem of violent children on a daily basis; therefore, that group's call for an end to the practice of executing those who commit crimes under the age of 18 lends strong support to petitioner's contention that there is a consensus in this country against the practice.

QUESTION: Do you say a brief was filed in support of the juvenile judges view by 17 Attorneys General of states?

MS. MCKERROW: No, Your Honor. The Attorneys General of 17 states filed an amicus brief on behalf of the State of Missouri in this case.

QUESTION: I see.

1 MS. MCKERROW: And in that brief they note,  
2 they specifically discuss the National Council of  
3 Juvenile and Family Court Judges and note that the  
4 judges deal with this problem on a daily basis.

5 The second particularly relevant event  
6 occurred on October 21, 1988, when Congress passed the  
7 death penalty amendment to the Federal drug bill. That  
8 amendment excludes those who commit -- execution of  
9 those who commit their crimes under the age of 18, and  
10 petitioner would argue again that this lends strong  
11 support to our contention that there is a national  
12 consensus in this country against the practice of  
13 executing our young

14 Finally, the international community has  
15 voiced its disapproval of executing those who commit  
16 their crimes while under the age of 18.

17 Heath Wilkins stands alone on Missouri's death  
18 row as the only person who committed his crime at the  
19 age of 16. He is not there because a jury determined  
20 that he deserved the death penalty, nor is he there  
21 because the prosecuting attorney in Missouri determined  
22 that the death penalty should not be waived. Rather,  
23 Heath Wilkins, who because of his age could not have  
24 represented himself in a civil suit, was permitted to  
25 represent himself. He pleaded guilty and then did

1 everything within his power to ensure that he received a  
2 death sentence, a sentence which, again based solely on  
3 the date of his birth, he would be considered too young  
4 to witness.

5 In Thompson, Justice O'Connor called for  
6 strong counter-evidence that the national consensus  
7 against this practice does not exist. The Attorney  
8 General has been unable to provide such evidence for the  
9 simple reason that it doesn't exist. All of the  
10 objective indicia of our current and evolving standards  
11 of decency indicate that society rejects capital  
12 punishment as a legitimate punishment for those who  
13 commit their crimes while children.

14 There is a second related but independent  
15 basis upon which --

16 QUESTION: You say that society rejects it and  
17 yet obviously in Missouri society hasn't rejected it.

18 MS. MCKERROW: Well, Your Honor, in Missouri  
19 the state has never specifically permitted the execution  
20 of 16-year-olds.

21 QUESTION: Well, certainly the Supreme Court  
22 of Missouri appears to be ready to permit it.

23 MS. MCKERROW: Yes, Your Honor, they did  
24 affirm.

25 QUESTION: Doesn't it speak for the state?

1 MS. MCKERROW: Not on this, I don't believe  
2 so, Your Honor. I think that --

3 QUESTION: Who does speak for the state on a  
4 question like this?

5 MS. MCKERROW: The state legislature would be  
6 a more accurate gauge of public policy on this, Your  
7 Honor.

8 QUESTION: And you say it simply -- it passed  
9 a statute dealing with the death penalty, didn't it?

10 MS. MCKERROW: The only statute which  
11 specifically deals with juveniles and the death penalty  
12 is the one that won't permit persons under the age of 18  
13 to witness an execution.

14 QUESTION: But the Supreme Court of Missouri  
15 has obviously interpreted the legislative enactment to  
16 authorize execution of people under 18, has it not?

17 MS. MCKERROW: Well, Your Honor, in this case  
18 they didn't specifically address that contention.  
19 Petitioner asked that that be addressed, but based on  
20 the fact that they did affirm Heath Wilkins' sentence,  
21 yes, Your Honor, that's probably true.

22 QUESTION: Ms. McKerrow, you do not  
23 acknowledge -- how many states have a statutory  
24 structure would apparently allow a 16-year-old to be  
25 executed, although they don't say specifically a

1 16-year-old may be executed?

2 MS. MCKERROW: Eighteen, Your Honor.

3 QUESTION: Eighteen states. And if you walk  
4 through their statutes there's nothing in it that would  
5 prevent a 16-year-old from being executed?

6 MS. MCKERROW: That's true, Your Honor.

7 QUESTION: But what you insist upon is that  
8 the state adopt a statute that specifically says  
9 16-year-olds may be executed, right? That's all you  
10 will accept?

11 QUESTION: That's a pretty hard thing to  
12 expect a state to adopt. I'm not sure I could get a  
13 state to adopt a statute that says, you know, blind  
14 people can be executed, although I can fully see how in  
15 a particular circumstance a jury might impose a sentence  
16 of death upon a blind person.

17 Why do you pick out the particular sympathetic  
18 factor of youth as the one that the state must set forth  
19 in its statute? You wouldn't say that if it were a  
20 blind person convicted to death. You wouldn't say well,  
21 you can't do it unless the state says in so many words.

22 MS. MCKERROW: Yes, Your Honor. I think that  
23 age is more than a sympathetic factor of the defendant.  
24 I think that when you look at this nation's attitudes  
25 towards children, which is defined by age, we have

1 carved out a special place for those children in society  
2 as well as under the law, a place that is not shared by  
3 other what you would call sympathetic groups such as  
4 blind people.

5 QUESTION: What about elderly people? When --  
6 I don't recall seeing many states that have recently  
7 executed someone over 70, let's say. Is there a  
8 national consensus that the elderly should not be  
9 executed, too, and are the laws that would permit the  
10 elderly to be executed invalid unless the state  
11 expressly says we are willing to execute people over 70?

12 MS. MCKERROW: No, Your Honor, I don't believe  
13 so. I think what would distinguish an elderly person  
14 from a child is that the society doesn't normally  
15 consider an elderly person to be less competent than an  
16 adult, but we do make that assumption about children in  
17 this country in virtually every area of life.

18 And what petitioner is arguing is that  
19 assumption should be carried forward in this particular  
20 context.

21 QUESTION: But we don't generally make it in  
22 the criminal area. We don't. I mean, the fact is, we  
23 don't. We're willing to send children to prison for  
24 life even though they are 16, aren't we?

25 MS. MCKERROW: Yes, Your Honor, that's true.



1 QUESTION: And that's okay.

2 MS. McKERROW: But we have also an entirely  
3 separate juvenile justice system which recognizes the  
4 differences between children and adults. And when you  
5 begin to talk about the transfer statutes you have to  
6 take into consideration the facilities and the resources  
7 available to the states, and petitioner's contention is  
8 the transfer statute more properly indicates a lack of  
9 resources and facilities than it does any sort of a  
10 judgment that children are in fact, when they commit  
11 criminal acts, adults, which I think has been not the  
12 case of how we deal with children.

13 QUESTION: Is the transfer statute in Missouri  
14 automatic at age 16 or just discretionary with the judge?

15 MS. McKERROW: No, Your Honor. It's a  
16 judicial determination made by the juvenile court judge  
17 and the age if 14.

18 QUESTION: Fourteen?

19 MS. McKERROW: Yes, Your Honor.

20 QUESTION: And what factors does he have to  
21 take into consideration? Is it whether the other  
22 facilities are over-crowded?

23 MS. McKERROW: An examination of Missouri case  
24 law on this would indicate that what the courts  
25 primarily look at in Missouri is the age of the child at

1 the time of the commission of the offense, the  
2 seriousness of the offense, and the availability of  
3 resources and facilities within the state to deal with  
4 that child.

5 So that a child who is nearing the age of the  
6 end of juvenile court jurisdiction who commits a very  
7 serious offense and is deemed to need incarceration or  
8 deserve incarceration beyond, let's say, the 18th  
9 birthday then is transferred into adult courts because  
10 the juvenile courts simply don't have the facilities to  
11 deal with them.

12 Your Honor, at this point I'd like to reserve  
13 the rest of my time for rebuttal.

14 QUESTION: Very well, Ms. McKerrow.

15 Mr. Morris, we'll hear now from you.

16 ORAL ARGUMENT OF JOHN W. MORRIS, III, ESQ.

17 ON BEHALF OF THE RESPONDENT

18 MR. MORRIS: Thank you, Mr. Chief Justice, and  
19 may it please the Court:

20 The arguments presented in petitioner's brief  
21 and also by counsel for petitioner today resemble in  
22 some respects some of the arguments that might be  
23 offered to a legislature in deciding whether or not a  
24 categorical age limitation might be imposed. But I  
25 would suggest to this Court that this Court is presented

1 with two definite, specific, distinct issues in deciding  
2 whether or not this punishment violates categorically,  
3 for all persons at the age of 16 when they commit their  
4 murder, whether it violates the Eighth and Fourteenth  
5 Amendments to the Constitution.

6 The first of those questions is whether this  
7 Court can find an objective basis that there is a  
8 national consensus in opposition to the execution of  
9 those who commit murders at petitioner's age -- in other  
10 words, whether this practice violates the evolving  
11 standards of decency, as it's been described.

12 The second question is whether -- it's been  
13 variously formulated, but I understand it to be whether  
14 this punishment is categorically, for persons of this  
15 class, excessive or disproportionate to the crime  
16 committed or other factors, in particular factors  
17 regarding penological justification, whether there was  
18 any measurable penological justification for the  
19 carrying out of such sentences.

20 On the first of these questions, I submit that  
21 this Court's search for objective indicators is never  
22 going to be a scientific or quantitative sort of  
23 analysis, if for no other reason than because there is  
24 no absolutely and invariably reliable, objective  
25 indicator. Even legislation, which this Court has most

1 frequently cited, is not always going to reflect the  
2 views of the public for the simple reason that  
3 legislators don't always necessarily vote according to  
4 the views of their constituents.

5 They may and in many cases do vote the views  
6 of their own convictions or many other factors, and I  
7 submit that is particularly true in cases, such as those  
8 involving capital punishment, which involve questions of  
9 deep personal conviction.

10 But I think what can be done for this  
11 examination, although it can't be made scientific, is to  
12 apply the greatest rigor possible to examining these  
13 so-called objective indicators and seeing if they really  
14 are objective and, if so, why, and second I think to  
15 arrive at a measure of consistency in what one deems to  
16 be objective, an objective indicator of public views and  
17 what is not.

18 Members of this Court have pointed out on  
19 repeated occasions that this Court, just from the nature  
20 of the institution, is not inherently well suited to  
21 judge the public mind, and for that reason I think the  
22 greatest possible care should be taken in this  
23 examination.

24 Beginning with the subject of legislation, I  
25 would respectfully disagree with my opposing counsel.

1 The number of states which would permit the execution of  
2 those of petitioner's age is not 18 but 22. They are  
3 set out in Appendix B of my brief.

4 Four of those 22 states make an express  
5 reference in their capital punishment statutes to the  
6 question of age. Three of those set a categorical floor  
7 of age 16. The fourth sets a general age of 17, but  
8 allows for specific exception to that.

9 Now judging from this Court's opinions in  
10 Thompson v. Oklahoma it would seem that there would seem  
11 to be basic consensus that these statutes in which the  
12 age is referred to in the capital punishment statutes  
13 are objective indicators of public view. It would seem  
14 that the dispute comes in those remaining 18  
15 jurisdictions, including Missouri, which have a juvenile  
16 transfer statute, a juvenile statute which sets a  
17 minimum age for prosecution, and that minimum age also  
18 serves as the age for execution.

19 The question as I would see it presented in  
20 Thompson is, can this Court disregard those 18  
21 jurisdictions in judging evolving standards of decency  
22 on the theory that the legislatures in those states just  
23 simply didn't think about the subject of capital  
24 punishment when they passed those laws.

25 Now I submit the question -- the answer to

1 that question is no for three reasons. First of all, we  
2 have specific evidence on the face of some of these  
3 statutes -- five of the 18, to be exact -- in which  
4 references are made in the juvenile statutes which we're  
5 examining either to capital punishment or to that  
6 state's version of capital murder. I cited a particular  
7 pronounced example in my brief at pages 23 and 24, the  
8 Georgia -- pardon me, the Florida juvenile statute,  
9 which is rife with references to the fact that a  
10 juvenile can receive the death penalty.

11 I think it's awfully difficult to justify in  
12 the face of that evidence alone a proposition that one  
13 could ignore these juvenile statutes as a whole because  
14 the legislature just didn't think about this question.

15 In addition to that and apart from that I  
16 would offer additional evidence, which is admittedly  
17 less direct, which is the fact that the vast majority of  
18 these legislatures, the 18 juvenile states we're dealing  
19 with, 14 of the 18, have passed statutes in their  
20 capital punishment provisions which expressly recognize  
21 the importance of a connection between the defendant's  
22 age as a mitigating factor in capital punishment.

23 Now I concede that none of these statutes make  
24 a reference to juvenile laws. I've never contended  
25 otherwise. But what I am saying is what we are

1 encountering here is petitioner's desire to assume that  
2 the same connection between age and capital punishment  
3 was not made when the legislature passed their juvenile  
4 laws. And I submit that that is at least a  
5 circumstantial indication that they made the same  
6 connection there.

7 A second major reason why these 18  
8 jurisdictions should not be overlooked in considering  
9 evolving standards of decency is that we have not just  
10 evidence of legislative contemplation of this subject,  
11 which I have mentioned already, but also actual exposure  
12 of the public to this issue.

13 The sentencing of persons to death at  
14 petitioner's age is not an academic consideration in  
15 this country. Since 1982 there have been 15 persons of  
16 that age sentenced to death in this country, of which  
17 eight were in jurisdictions with these juvenile statutes.

18 I think this Court has acknowledged and should  
19 acknowledge that the acts of legislators reflect their  
20 public as a general proposition, and I would submit that  
21 that phenomenon cannot be deemed to have ceased once a  
22 law is passed. If there is a law on the books which, in  
23 the words of the plurality in Thompson, "is abhorrent to  
24 the conscience of the community", I would suggest that a  
25 reasonable conclusion exists that that law is not going

1 to be on the books very long.

2 Yet -- and I've cited in my brief, as a matter  
3 of fact, examples in which when a person of young age,  
4 and specifically age 15, has been sentenced to death in  
5 states and there have been repeated occasions when, very  
6 quickly in some cases, there has been adjustment upward  
7 of the minimum age in that state. Indiana, for example,  
8 sentenced a 15-year-old woman to death, and less than a  
9 year after that sentence that legislature passed a law  
10 setting the minimum age at 16.

11 But when you look at these eight states, not  
12 only of these states with actual experience in  
13 sentencing individuals of this age to death has made any  
14 change to its minimum age during the period I've been  
15 talking about, since 1982. Again, it is not direct  
16 evidence, but I submit that it is one more basis for  
17 saying that we can't -- we cannot presume, as petitioner  
18 desires that we presume, that these statutes are simply  
19 irrelevant to the question of public views.

20 Finally, I would suggest that it is simply  
21 counter-intuitive to presume that a legislature which  
22 passed a law which subjected juveniles to all adult  
23 criminal penalties somehow didn't contemplate that the  
24 death penalty was one of those penalties.

25 Now it's true, as was stated by Justice



1 O'Connor in the concurrence of Thompson, that there  
2 could be many reasons apart from the death penalty why a  
3 particular minimum prosecution age might be set. But if  
4 that is the case, and unless the legislature is  
5 oblivious to the question of capital punishment, there  
6 are many ways the legislature can take that fact into  
7 account, either by adjusting the prosecution age or by  
8 setting a separate capital punishment age, as some  
9 states have done.

10 But I submit that in order to assume that  
11 legislatures just didn't think about this thing you  
12 must, as a necessary inference, assume that the  
13 legislature didn't even know they had a capital  
14 punishment statute. And I submit that that is not a  
15 tenable or reasonable assumption.

16 For all of these reasons, the respondent  
17 submits that the dominant fact when we are reviewing the  
18 question of public views in this country on this subject  
19 is that 22 of the 36 states in this country which have a  
20 death penalty statute have authorized the sentence of  
21 death in the situation in which petitioner finds  
22 himself, for capital murders committed at age 16.

23 I submit that even apart from the other  
24 factors which I will proceed to discuss that on its face  
25 demonstrates an absence of a national consensus in

1 opposition to that punishment.

2 I think it's a measure of the inconsistency of  
3 petitioner's position that petitioner attempts, while  
4 ignoring these 18 states which address this particular  
5 subject, attempts to rely upon statutes which have  
6 nothing to do with the subject of capital punishment or  
7 even criminal prosecution, for that matter, and I'm  
8 referring specifically to the voting and drinking and  
9 driving and so forth ages.

10 What I would say about those statutes are two  
11 things. First of all, they pertain to what they  
12 pertain. There are ages ranges in every state. In  
13 Missouri there are age ranges all the way from 10 to 21  
14 for different activities. How does one possibly select  
15 one of those ages or one of those statutes and say that  
16 that statute has some pertinence to what the public  
17 feels about capital punishment? I submit that that  
18 connection is simply not makable.

19 Even if -- even aside from that, there is the  
20 fact that these statutes that petitioner is talking  
21 about are basically different in character from the kind  
22 of statutes we're dealing with in these cases. In  
23 capital punishment statutes and as a general principle  
24 in juvenile statutes, we are dealing with an  
25 individualized consideration of the particular person at

1 issue.

2 We are dealing with a weighing of aggregating  
3 versus mitigating factors or the factors that the  
4 juvenile statutes prescribe which require consideration  
5 of various aspects of the youth in deciding whether he  
6 should be treated -- whether or not he should be treated  
7 as an adult.

8 That is not true of any of the statutes  
9 petitioner cites. They are class statutes. And  
10 inasmuch as we are already conducting in (inaudible)  
11 into these individuals, I don't see the relevance of  
12 class statutes in determining objective public standards  
13 of decency.

14 I don't propose to go through and discuss each  
15 and every one of the purportedly objective factors cited  
16 by petitioner, but I would like to say a few words about  
17 jury verdicts. In this Court's decisions of Furman, and  
18 Gregg, and Coker, this Court had before it some evidence  
19 not just of the pure number of those sentenced to the  
20 punishment which was being challenged but also the  
21 proportion of that number to the occasions on which this  
22 sentence was being sought.

23 For example, in Gregg v. Georgia, Justice  
24 Stewart mentioned in his plurality opinion that this  
25 Court had before it indications that of those cases in

1 which a person was convicted of murder less than 20  
2 percent were sentenced to death, and this figure was  
3 discussed as to whether it was relevant in indicating  
4 public views in support or opposition to capital  
5 punishment.

6 After Coker, beginning in Enmund, we begin to  
7 see for the first time a reference to the raw number of  
8 those cases in which persons are sentenced to death for  
9 the class challenged as if that number on its face has  
10 some significance, and I submit that that is not the  
11 case. I think a good illustration comes from the facts  
12 of this case.

13 Again, since 1982 there have been 15 persons  
14 in this country of petitioner's age, including  
15 petitioner, who have been sentenced to death. Now if  
16 that number comes from, let's say, 200 trials in which  
17 people of this age were convicted of a capital crime in  
18 which the death penalty was sought, then perhaps it  
19 certainly could be argued that there is a  
20 disproportionate reluctance on the part of sentencers to  
21 return a death sentence for people of petitioner's age.

22 If, on the other hand, that number is 15 out  
23 of 30 trials, then I don't think that argument can be  
24 tenably made at all. Petitioner has offered no evidence  
25 of the opportunity of sentencers to consider this

1 question. I have no figures. The only figures I have  
2 been able to offer concern Missouri, and in the last 12  
3 years that Missouri has had an operating death penalty  
4 we've had 138 cases in which the death penalty has been  
5 sought after a conviction of capital murder, and only  
6 three of those involved persons of petitioner's age or  
7 younger.

8 Now I don't know if that can be extrapolated  
9 to other states or not, but if it can it might go a long  
10 way to explain why the number of those under sentence at  
11 petitioner's age is not very high and would have nothing  
12 to do with the proposition that those sentencers who  
13 consider the crimes committed by those of petitioner's  
14 age are reluctant to impose that penalty.

15 QUESTION: How many executions have there been  
16 in Missouri since the reinstatement of the death  
17 penalty?

18 MR. MORRIS: One, Your Honor. It was this  
19 January.

20 QUESTION: How many are on death row?

21 MR. MORRIS: Approximately 70, Your Honor.

22 QUESTION: It's been slow.

23 MR. MORRIS: Yes, it has, Your Honor. Yes, it  
24 has been very slow.

25 Aside from this problem in proof, I would also

1 submit and I think members of this Court have pointed  
2 out that it does not follow, even if we could show a  
3 disproportionate reluctance of sentencers to consider or  
4 to impose sentences of death upon those petitioner's  
5 age, it has been pointed out that that is not  
6 necessarily an indication that there is an abhorrence or  
7 a consensus in opposition to this penalty.

8 As I pointed out, virtually every state in  
9 this country with a death penalty has recognized in its  
10 statute the importance of the defendant's age as a  
11 possible mitigating factor, and if, as seems eminently  
12 reasonable, the younger the defendant, the more  
13 important that factor, that also would explain such a  
14 disproportion and would have, again, nothing to do with  
15 the proposition that there is a national consensus  
16 against this penalty.

17 QUESTION: General Morris, your opponent  
18 mentioned the federal statute as a new development. Do  
19 you want to comment on that?

20 MR. MORRIS: Yes, Your Honor. There is --  
21 indeed, last November was passed the Anti-Drug Abuse Act  
22 of 1988, and it does include a minimum age of 18. As  
23 has been pointed out in Thompson, there are a number of  
24 other death penalty statutes in the federal  
25 jurisdiction, and it's awfully hard to know how or where

1 the federal jurisdiction stands in that situation.

2 At least in the states we have one death  
3 penalty statute or we don't have one. It was discussed  
4 and argued in Thompson, of course, in the various  
5 opinions that this either has a general implication or  
6 it just has a narrow implication to the sort of crime  
7 that was being passed, and I can't disprove or prove  
8 either of those propositions.

9 That is the reason I've sort of set aside the  
10 federal jurisdiction as just being one of the  
11 legislature.

12 QUESTION: Well, in the area that's covered,  
13 it's a narcotics statute, isn't it?

14 MR. MORRIS: Yes, Your Honor.

15 QUESTION: I suppose that's an area in which  
16 deterrence might be particular effective, because there  
17 are a lot of young offenders in that type of criminal  
18 activity, aren't there?

19 MR. MORRIS: Well, yes, Your Honor. I'm not  
20 sure that the particular acts which are covered focus on  
21 young offenders or there are a lot of young offenders in  
22 that category, because the crime, as it's set out,  
23 involves conspiracies and plots to kill law enforcement  
24 officers and I believe there's also sort of a general in  
25 the commission of drug offenses.

1 I don't think it follows or I wouldn't have  
2 any indication as to whether there are a large  
3 percentage of young offenders doing that sort of thing.  
4 There certainly are a lot of young offenders in drug  
5 offenses; I agree with you.

6 I submit that if there is no basis for  
7 excluding the possibilities that I've mentioned -- and  
8 particularly the possibility that of the relatively  
9 small number of those sentenced to death at petitioner's  
10 age is simply an expression of the reluctance to  
11 sentence people this age to death -- we shouldn't be  
12 relying upon this as an objective indicator of public  
13 views.

14 If there is not even intuitive basis for  
15 excluding that possibility, then I submit it should not  
16 be relied upon.

17 Contrary to petitioner's reply brief, I don't  
18 suggest the only factor for this Court to consider is  
19 legislation. I think other factors such as polls might  
20 be useful, although it is awfully hard to tell -- I'm  
21 not sure I can say -- how one can characterize a  
22 national consensus in terms of percentages. I'm not  
23 sure it can be done. But I do think polls might be  
24 useful as a secondary indicator if one has evidence  
25 separately of a consensus either to support or --



1 QUESTION: Apropos of the question put from  
2 the bench to Ms. McKerrow, one would expect if these  
3 polls were terribly accurate that eventually they would  
4 be reflected in legislation, would one not?

5 MR. MORRIS: Yes, Your Honor, they would. And  
6 it's also true that if there is a public abhorrence of  
7 this there is no point in my being here or making this  
8 argument, because eventually that will be the law anyway.

9 And I might mention in that connection that  
10 since this case has been granted there was legislation  
11 offered in Missouri to make it a minimum age of 18 and  
12 it was not passed. So perhaps that's one example of  
13 that.

14 QUESTION: Did it pass either house?

15 MR. MORRIS: Your Honor, I don't know. They  
16 tried to make it part of a bill and it was defeated, as  
17 it was removed from that bill. But it was a categorical  
18 limitation at age 18 and it is not going to become law.

19 But, Your Honor, yes, if there is a national  
20 abhorrence as reflected in polls, yes, it certainly  
21 should be indicated by other indications, and also  
22 mainly in the legislature.

23 I also think such things as treaties can be  
24 relevance if they are ratified, for the same reason as  
25 legislation is relevant. But what I think we cannot do

1 and what petitioner, I believe, has done is to author a  
2 raft of so-called objective indicators without any  
3 stringent effort to consider whether they really are  
4 objective.

5 Justice Powell, in his opinion in Furman, I  
6 believe, quoted Justice Holmes in a previous case as  
7 saying the most delicate and grave task this court has  
8 to undertake is to review legislative choices of a  
9 legislature. And I submit it is doubly grave and  
10 delicate, whereas there this Court is required under its  
11 cases to arrive at a view of the national mind in  
12 deriving constitutional policy.

13 And I submit that that sort of activity  
14 requires the most stringent care in determining that  
15 there really -- the test, the objective factors that  
16 this Court is relying on really are objective.

17 If there isn't a national consensus against  
18 the execution of those of petitioner's age, that of  
19 course does not end the matter. This Court has said in  
20 its cases that even publicly approved punishments may be  
21 deemed to violate the Eighth and Fourteenth Amendments  
22 if they are essentially excessive and disproportionate.

23 In cases involving the facts of the crime,  
24 this Court has used that to derive qualitative  
25 distinctions between those sorts of activities which are

1 proportionate for the death penalty and those which  
2 aren't. But this case, like Thompson, is not one of  
3 those cases. It is a case in which we are dealing  
4 exclusively with characteristics of a defendant. And I  
5 submit to this Court that in that context and that  
6 context alone this proportionality analysis is virtually  
7 unworkable.

8 Defendants are sentenced to death because of  
9 what they did, not because of what they are. Now what  
10 they are, the kind of person they are, the kind of  
11 history they've had, is relevant to show why they did  
12 what they did and their culpability in doing what  
13 they've done. But the core decision in sentencing is to  
14 consider what a person has done and his culpability in  
15 doing it.

16 The decision as to what kind of person he is  
17 is one removed from that. To give an illustration from  
18 this case, under Missouri law in order to be found  
19 guilty of first-degree murder one must act with  
20 deliberation. There, incidentally, is no felony murder  
21 which is a capital offense in Missouri. Felony murder  
22 is not a capital offense. You must act with  
23 deliberation, which is defined in Missouri law as coolly  
24 reflecting for some time in advance upon the murder.

25 But when petitioner focuses upon not the facts

1 of the crime or the elements of the crime but upon the  
2 character of the defendant these facts sort of get moved  
3 away and not considered. Part of petitioner's argument,  
4 it seems to me, is in essence that Heath Wilkins didn't  
5 deliberate. Heath Wilkins is a youth and is impulsive.

6 QUESTION: In Missouri do you execute insane  
7 people?

8 MR. MORRIS: No, Your Honor, we don't.

9 QUESTION: Well, I don't understand your  
10 argument.

11 MR. MORRIS: No, Your Honor.

12 QUESTION: The defendant himself means  
13 nothing. That's what you said.

14 MR. MORRIS: No, Your Honor. Pardon me. If I  
15 said that, I don't mean to be interpreted as saying  
16 that, no.

17 QUESTION: I misunderstood you.

18 MR. MORRIS: I'm sorry. Let me clarify that  
19 since it's come up. I am saying that the character of  
20 the defendant is relevant, but it is collaterally  
21 relevant and it mainly pertains to the kind of crime it  
22 is, to explain whether he is culpable, how culpable he  
23 is. You don't sentence someone to death because he is a  
24 nice person or a bad person. You sentence him because  
25 he has committed a murder and, incidentally, he did so

1 out of full awareness of what's going on and knowledge  
2 of the consequences, or didn't, for that matter.

3 QUESTION: I don't understand. Are you saying  
4 -- perhaps it's the same thing Justice Marshall asked --  
5 that the particular character of the offender has  
6 nothing to do with the degree of culpability?

7 MR. MORRIS: No, Your Honor. In fact, I'm  
8 saying the contrary. I'm saying --

9 QUESTION: You keep referring back to elements  
10 of the offense.

11 MR. MORRIS: Not in a mechanical sense, but  
12 I'm saying that the ultimate question is, is what did he  
13 do and how culpable was he in doing it. And certainly  
14 it is relevant --

15 QUESTION: Well, but on that very question  
16 wouldn't you say that youth is at least a mitigating  
17 factor?

18 MR. MORRIS: Unquestionably, Your Honor.  
19 Absolutely.

20 QUESTION: So then youth does have something  
21 to do with the culpability.

22 MR. MORRIS: I'm not disputing that, Your  
23 Honor. What I'm saying is that the center of the  
24 sentencing decision is what he did and why he did it,  
25 which includes his youth or any other mitigating factors

1 one may consider. But the center of the decision is  
2 that and not just what sort of person he happens to be.

3 When this Court --

4 QUESTION: But you would agree -- I assume  
5 everybody had agreed -- that there is an age below which  
6 you would say there can't be sufficient culpability?

7 MR. MORRIS: Yes, Your Honor. And, as a  
8 matter of fact, I think that can be derived and must be  
9 derived from this Court's public views determination.  
10 In lieu of a question or perhaps not even a question, I  
11 think if one examines such factors again as legislation,  
12 I think that figure can be identified as somewhere  
13 between 13 and 14 because at age 13 we have only three  
14 states in this country which expressly authorize  
15 sentencing to death of a person that age, which puts us,  
16 it seems to me, in the ballpark of Coker.

17 QUESTION: You mean through the juvenile  
18 system?

19 MR. MORRIS: Yes, Your Honor. Some of these  
20 statutes -- at age 13 all of the statutes are juvenile  
21 statutes, that's correct, Your Honor.

22 But at age 14 the number goes up  
23 substantially, I think to nine or something like that.  
24 But I think, the only way that number can be determined  
25 is what I'm saying, is through the public views sort of

1 analysis.

2 QUESTION: You don't think we could reach that  
3 conclusion even if there weren't any such statutes out  
4 there?

5 MR. MORRIS: I'm sorry, Your Honor?

6 QUESTION: You don't think we could reach the  
7 conclusion, that conclusion that 12 or 13 is too young,  
8 even if there were no such statutes out there? You  
9 think that rests entirely on the existence of those  
10 statutes?

11 MR. MORRIS: No, Your Honor. That's really  
12 all I had to work with, because, you know, when we're  
13 dealing with persons 13 or 14 there hasn't been an  
14 execution in those cases in half a century. There are  
15 no one on death row that age. So the younger the age  
16 becomes in this analysis the most difficult it is to  
17 deal with because it is to thoroughly hypothetical.

18 The only persons on death row in this country  
19 now are, at the youngest, age 15 and that of course is  
20 in question now because of Thompson.

21 What I'm really saying, I'm not again  
22 intending to say that the characteristics of the  
23 defendant are not relevant, but I'm saying when this  
24 Court makes a distinction based upon the crime it is  
25 doing something, especially when it makes a distinction

1 based upon the elements of intent, such as it did in  
2 Enmund, it is again addressing the core of the  
3 sentencing decision.

4           Again, an example from this case. I mentioned  
5 that Heath Wilkins acted with, was found to have acted  
6 with deliberation. When you ignore the details of the  
7 crime and the elements that must be proven in a crime,  
8 you are left with the sort of generalizations the  
9 petitioner offers here.

10           How can it be said -- and I submit it can't be  
11 said -- that there is no 16-year-old who cannot be  
12 deterred by the death penalty? Heath Wilkins conducted  
13 a thoroughly rational and vicious risk-benefit analysis  
14 in this case. He decided in advance that he was going  
15 to kill someone, and he carried out that plan with  
16 considerable rationality. He decided in effect that  
17 killing Nancy Allen was a good bet for him because he  
18 would raise his chances of not being apprehended.

19           I submit it also cannot be said that there is  
20 no 16-year-old, perhaps many 16-year-olds, who would not  
21 act with such awareness as to -- for whom the principal  
22 retribution would not apply.

23           QUESTION: He originally asked for the death  
24 penalty. Does the record indicate at what point he  
25 changed his mind?



1 MR. MORRIS: Yes, Your Honor. He was caught,  
2 confessed, and he had not made this decision at that  
3 time. In fact, he said he was trying to play crazy at  
4 that time. But then probably a month or so later he was  
5 being given psychiatric evaluations and between one and  
6 the other he made this decision. So it wasn't right  
7 after his arrest but it was at a somewhat later time.

8 QUESTION: Well, I assume he's changed his  
9 mind again and now does not want to be executed.

10 MR. MORRIS: Well, Your Honor, all I have is  
11 his signature on the formal pauper's form. He does,  
12 incidentally, have a state post-conviction proceeding  
13 pending as well. So I guess there are some inferences  
14 in that, yes.

15 But petitioner really doesn't try to prove  
16 that there are no people of this age for which  
17 retribution or deterrence applies. Petitioner applies  
18 what I would suggest is the meat-ax approach. We might  
19 -- there might be a lot of people of this age who might  
20 not be sufficiently culpable and therefore we should, as  
21 a matter of proportionality analysis, say that no person  
22 of this age should be executed.

23 Well, Your Honors, I submit that that is not a  
24 proportionality analysis. That is, if anything, social  
25 engineering and I really submit that a reasoning of that

1 character really has no place in the Eighth and  
2 Fourteenth Amendments.

3 Thank you.

4 QUESTION: Thank you, Mr. Morris.

5 Ms. McKerrow, do you have rebuttal?

6 REBUTTAL ARGUMENT OF NANCY A. MCKERROW, ESQ.

7 ON BEHALF OF PETITIONER

8 MS. MCKERROW: Thank you, Your Honor.

9 First I would like to discuss something that  
10 Mr. Morris talked about, the lack of an objective basis  
11 for choosing an age, and then later on in his argument  
12 he spoke about and everyone on the Court seems to agree  
13 that there an age below which the states could not  
14 constitutionally execute a -- someone for a crime.

15 Petitioner would argue that all the objective  
16 indicators in the society point to that age as being  
17 18. When you look at the vast majority of states set 18  
18 as the age of emancipation, the international standard  
19 is clearly at 18, the American Bar Association has  
20 chosen 18, the American Law Institute has chosen 18, the  
21 National Council of Juvenile and Court Judges has chosen  
22 18, the majority of courts which have specifically set  
23 an age set it at 18 -- that is 12 states have chosen  
24 that age.

25 And when you just intuitively think about

1 where it is that we draw the line between childhood and  
2 adulthood, the most common figure is in fact 18.

3 As to the states which don't specifically set  
4 an age limit and what we can presume and not presume  
5 from those statutes, I would point to the same statute  
6 that the Attorney General has pointed to, which is the  
7 Florida statute, and that statute states that a person,  
8 a child of any age shall be transferred up if charged  
9 with a capital crime and a person of any age, if found  
10 guilty of that crime, shall be sentenced as if that  
11 person were an adult. So that statute doesn't tell us  
12 anything about how young is too young to be executed.

13 Concerning the Missouri legislation that has  
14 taken place since Thompson there was in the Juvenile  
15 Omnibus Act an insertion to set the minimum age at 18.  
16 The legislature voted to remove that without  
17 consideration. They have simply not considered the  
18 question this term, and there is a House bill currently  
19 pending in the Missouri legislature but no action has  
20 been taken on that bill.

21 As far as the relevance of the other sorts --

22 QUESTION: What do you mean when you say the  
23 legislature removed it without consideration?

24 MS. MCKERROW: When they were about to debate  
25 the Omnibus Juvenile bill there was a motion made to

1 just simply remove the part of that bill that would have  
2 set the minimum age at 18. That was voted on. That  
3 part, section of the bill was removed and it wasn't  
4 debated or considered.

5 QUESTION: Well, you're not saying that it  
6 wasn't considered, are you? Are you saying the  
7 legislators did not consider whether or not to vote yes  
8 or no?

9 MS. MCKERROW: Yes, Your Honor. They voted to  
10 remove that section from the bill without considering it  
11 or voting specifically on it, but only to vote yes or no  
12 to remove it.

13 QUESTION: Well, what do you seek to  
14 demonstrate by that point?

15 MS. MCKERROW: Well, Your Honor, I'm just  
16 pointing that out to show that the Attorney General has  
17 argued that the legislatures, that if they had, if there  
18 was some strong feeling on this issue that the  
19 legislatures would in fact deal with the issue.

20 QUESTION: And you don't feel the Missouri  
21 legislature dealt with it in the process you just  
22 described?

23 MS. MCKERROW: No, I don't, Your Honor. I  
24 think that they are waiting for some guidance from this  
25 Court.

1           As far as the other sorts of class-based  
2 statutes such as voting age and setting juries, the  
3 relevance of those statutes indicates our, as a  
4 society's, attitude towards children and our belief that  
5 children are, as a class, less capable of making the  
6 sorts of mature determinations that are necessary to  
7 allow them to have the kinds of rights and  
8 responsibilities which we permit adults in the society.

9           And I think the Court should consider those  
10 statutes for that purpose as how they indicate society's  
11 attitudes towards children.

12           QUESTION: Once again, as far as rights or  
13 responsibilities are concerned, you are not arguing that  
14 society wouldn't or that a state here could not send a  
15 child to jail for life, a 16-year-old to jail for life?

16           MS. MCKERROW: No, Your Honor, I'm not.

17           QUESTION: So the child is responsible for the  
18 criminal act?

19           MS. MCKERROW: Yes, Your Honor.

20           QUESTION: So all you are arguing here is you  
21 can do it for life but you can't execute, and that's  
22 seems to me to be, although you disclaim the argument  
23 that this is just a sympathy factor, it seems to me that  
24 that's exactly what the case is, because you hold the  
25 child responsible. You are willing to send the child to

1 jail for life, which you would not do an insane person.

2 For insane people we don't say -- you just  
3 can't execute them if the person is insane at the time  
4 of the crime. It's a defense in virtually every state,  
5 isn't it?

6 MS. MCKERROW: Yes, Your Honor.

7 QUESTION: That's responsibility. But you're  
8 not talking here about responsibility, it seems to me.

9 MS. MCKERROW: No, Your Honor. We're not  
10 talking about the fact that a 16-year-old child cannot  
11 act with criminal responsibility. Petitioner's argument  
12 is that no 16-year-old can act with the level of moral  
13 culpability which should be required by a society before  
14 that person is executed, and that we require the highest  
15 level of moral culpability and responsibility before we  
16 would execute a person for a crime committed.

17 QUESTION: I think Justice Kennedy had a  
18 question for you.

19 QUESTION: You indicated that the legislature  
20 was waiting for this Court's guidance.

21 MS. MCKERROW: Yes, Your Honor.

22 QUESTION: But your whole argument has been  
23 that we're supposed to take our guidance from the  
24 legislature.

25 MS. MCKERROW: Yes, Your Honor. It goes to

1 the ability to use the legislature as some sort of a  
2 factor. It goes back to Justice O'Connor's concurring  
3 opinion in Thompson that we can wait for the legislature  
4 to act on this, but it's petitioner's contention that  
5 what occurred in Missouri this year is that this is the  
6 sort of thing that legislators are waiting to see  
7 whether they can operate within.

8 They know that they are constrained by the  
9 Constitution and that it's this Court's responsibility  
10 to inform them of what the Constitution requires, and  
11 they are waiting for that.

12 QUESTION: I see some circularity there.

13 CHIEF JUSTICE REHNQUIST: Thank you, Ms.  
14 McKerrow. The case is submitted.

15 (Whereupon, at 1:40 o'clock p.m., the case was  
16 submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:  
No. 87-6026 - HEATH A. WILKINS, Petitioner V. MISSOURI

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BY Judy Freilicher  
(REPORTER)



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