



## Supreme Court Weighs Juvenile Executions

[by Mary Hutcheon]

As the U.S. Supreme Court weighs whether executing teenagers who commit crimes at age 16 or 17 should be banned as cruel and unusual punishment, international opposition to juvenile executions could play a key role in determining the outcome.

The case -- *Roper v. Simmons*--has attracted worldwide attention, with many foreign countries filing briefs that cite international human rights norms as justifications for banning the practice.

According to the human rights group Amnesty International, besides the United States, the only countries to execute juvenile offenders since 2000 were Iran, Pakistan, China, and the Democratic Republic of Congo. Pakistan and China have since abolished the juvenile death penalty. And the United States--along with Somalia, which lacks a central government--are the only countries that have not ratified the United Nation's Convention on the Rights of the Child, which bars capital punishment for juveniles.

By continuing to execute minors, "we are literally alone in the world," said Seth Waxman, arguing before the Supreme Court on behalf of Christopher Simmons. Mr. Simmons was sentenced to death for murdering Shirley Crook in September 1993 when he was 17 years old. By a 4-3 vote in August 2003, the Missouri Supreme Court overturned his death sentence and sentenced him to life imprisonment, ruling that the execution of those who committed crimes while under 18 violates "evolving standards of decency" and is prohibited by the 8th Amendment of the U.S. Constitution. The U.S. Supreme Court heard oral arguments in the case October 13 and is not expected to rule until 2005.

Early in the arguments came the question of whether overwhelming world opinion against juvenile executions should influence the

Court's interpretation of the Constitution's prohibition against cruel and unusual punishment.

"Suppose it were shown that the United States was one of the very, very few countries that executed juveniles, and that's true. Does that have a bearing on whether or not it's unusual?" Justice Anthony Kennedy asked.

James Layton, representing the state of Missouri, replied that the Court's judgment "should not be based on what happens in the rest of the world." Rather, he added, it should be based on the "mores of American society."

Observers are divided on how much influence the international community should have on the Court's decisions. "Virtually none," according to Kent Scheidegger, legal director of the Criminal Justice Legal Foundation. "Contemporary international opinion should have no bearing on shaping domestic law," he said. Instead, people through the states retain the right to determine the legality of juvenile capital punishment.

"The courts always have looked to international law in interpreting national standards," countered Constance de la Vega of the University of San Francisco School of Law, who wrote an amicus brief for the Bar of England and Wales, Human Rights Advocates, Human Rights Watch, and the World Organization for Human Rights USA.

The juvenile death penalty challenge is just one of a series of recent cases that highlights

the increasing willingness of a majority of justices to acknowledge the relevance of international law in deciding U.S. constitutional law issues. Six of the justices--including Justices Kennedy and Sandra Day O'Connor--support using references to international law in decisions. Three justices are against the trend.

In 2002, in *Atkins v. Virginia*, the Court struck down the death penalty for executing mentally retarded people, finding that the rest of the world's overwhelming disapproval is a relevant factor in determining that the practice is "truly unusual" in violation of the Eighth Amendment. The three justices in the minority--William Rehnquist, Antonin Scalia, and Clarence Thomas--took issue with the majority's consideration of international practice.

The following year, in *Lawrence v. Texas*, Justice Kennedy cited a decision by the European Court of Human Rights for support in his landmark decision upholding gay rights: "The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries." Justice Scalia in his dissent wrote that the court should not "impose foreign moods, fads or fashions on Americans."

Victor Streib, a professor at Claude W. Pettit College of Law at Ohio Northern University, points to international law and comparative law as among the factors to be considered in evaluating whether or not the "evolving standards of decency that mark the progress of a maturing society" now prohibit juvenile



executions in the United States. "The international law issue is that customary international law--*jus cogens*--now prohibits the death penalty for juveniles, putting the United States in violation of international law," he said.

The comparative law issue is that the United States, compared to other countries, "is completely out of step with the rest of the world on this issue, causing many to ponder whether the United States is wrong on this issue."

Many in the international community agree that the overwhelming opposition against the juvenile death penalty has reached the status of a *jus cogens* norm. Under article 53 of the Vienna Convention, a *jus cogens* norm is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

Ignoring the international consensus is particularly difficult, said Professor de la Vega, for those justices who have spent time abroad with their foreign counterparts. Justices Ruth Bader Ginsberg, Stephen Breyer, O'Connor, and Kennedy have met extensively with judges in Europe, and Justice Kennedy has met with Chinese judges in China and the United States. Justice O'Connor also has been active in the American Bar Association's reform initiative in Eastern Europe.

Justice Ginsberg, who said during the oral arguments in *Roper* that for the United States to lead, it must "show a decent respect for the opinions of mankind," told the American Constitution Society in 2003 that the Court is beginning to broaden its perspective beyond the nation's borders. "Our island or loner mentality is beginning to change," she said. The justices "are becoming more open to comparative and international law perspectives."

Whether Justice Ginsberg is correct remains to be seen. Until the Supreme Court hands down its decision, the world can only watch and wait.