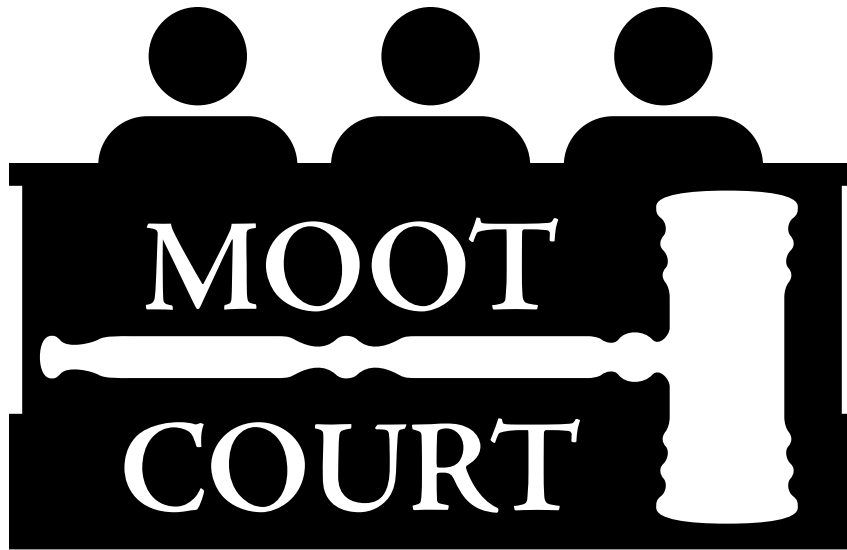


Artist Ron Leone

## Teacher Packet



Artist Ron Leone

## Exploring the Appellate Process

The Teacher's Guide and the hand-out materials for *Moot Court – Exploring the Appellate Process* have been excerpted and adapted from a simulation on the judicial branch called *Puttin' on the Robes – Exploring the Legal Process*. This simulation is available through our nonprofit corporation, Center for Economic and Civic Education (CE<sup>2</sup>). For more information see our Web site <http://cesqd.org/Cts.html>. Materials developed by Carla Young Garrett, except for the Moot Court competition format and rules which were developed by Carla Young Garrett and Ron Leone. The U.S. Supreme Court case of *Roper vs Simmons* is a public record.

**Project LEGAL (the classroom part of this program) made possible by a generous grant from the Foundation of the State Bar of California without whose support this project would not be possible.**

We'd also like to thank major contributor Rotary International, Walnut Creek and contributor The Mechanics Bank for their support for this project.

A special thanks goes to the faculty and students of John F. Kennedy University School of Law and the Contra Costa County Bar Association for volunteering their time to work with the high school students and teachers participating in this project. We gratefully acknowledge the help and encouragement of the Constitutional Rights Foundation (CRF).

We'd also like to thank Contra Costa County Office of Education (CCCOE) which sponsors and provides In-kind support for the annual Moot Court competition and John Muir Health for their continuing support of this competition.

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# Teacher Materials for Roper vs Simmons

## Table of Contents

### **I Teacher’s Guide**

|                                   |     |
|-----------------------------------|-----|
| Classroom Instructions .....      | 1—2 |
| Standards .....                   | 3   |
| Case Outcome .....                | 4   |
| Appellate Courtroom Diagram ..... | 4   |

### **II Case Materials<sup>1</sup>**

|   |        |
|---|--------|
| Overview of the Appellate Process ..... | iii–iv |
| Case.....                               | 1–11   |
| Table of Citations .....                | 12     |
| Glossary.....                           | 13     |
| Appendix .....                          | A1—C2  |
| Appellate Brief Format .....            | A1     |
| Reply Brief Format .....                | A2     |
| Brief Writing Organizer .....           | A3–A5  |
| Oral Argument Notemaker.....            | A6–A8  |
| Courtroom Dialog (Sample) .....         | B1–B2  |
| Courtroom Dialog (Fill-in) .....        | C1–C2  |

### **III Assessment and Evaluation**

|                                 |       |
|---------------------------------|-------|
| Grade Sheet .....               | D1    |
| Self Grade .....                | D2    |
| Activity Evaluation .....       | D3—D4 |
| Oral Argument Rubric .....      | D5    |
| Listening/Speaking Rubric ..... | D6    |

### **IV Competition: Rules, Forms and Evaluation<sup>2</sup>**

|                                |      |
|--------------------------------|------|
| Rules.....                     | 1—7  |
| Time sheet.....                | 8    |
| Sample Team Combinations ..... | 9–10 |
| Scoring Examples .....         | 11   |
| Forms .....                    | 1—5  |
| Competition Evaluation .....   | 1    |

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1 Also in the Student Packet.

2 Also in the Student Packet.

# Overview of Moot Court

## Getting There – The Appellate Courts

In the United States when one side loses or is unhappy with something about the outcome of their trial they have a right to appeal.<sup>1</sup> The lawyer representing the party or parties appealing (called the "appellant" or "petitioner") usually files a Notice of Intent to Appeal with the trial court. A transcript of the trial is prepared and sent to the appellate court.<sup>2</sup> The appellate lawyer files a brief (see sample and blank forms, Appendix A1–A2), laying out the legal<sup>3</sup> errors made at trial and what law applies in this case. The lawyers representing the other party (called the "respondent" or "appellee") files a reply brief. Then there's oral argument (see Courtroom Dialog B1–C2), where both lawyers appear before a three-judge court to present their sides of the case (see the diagram "Setting Up an Appellate Courtroom," page 4). The appellate judges ask questions and then "take the case under submission" (reserve making a decision until a later date).

The judges have a conference to see where they stand on the cases they've heard. When two or three judges agree on the outcome (who wins), one of them volunteers to write the "opinion," which lays out not only the "holdings" (legal rulings) in the case, but also the legal rationale for their decision. A judge who agrees with the outcome but has other or different reasons, can write a "concurring" opinion. A judge who disagrees with the outcome can write a "dissenting" opinion. Your students replicate this process.

## Materials Provided

Included in this packet:

- Teacher's Guide
- Case materials
- Sample appellate forms
- Sample and fill-in courtroom dialog
- Courtroom setup diagram
- Assessment and Evaluation materials

On our Web site (<http://cesqd.org/mootcourt2006.html>) there is also a file called "Brief Template" (MS Word format) which students can download and type their briefs in.

## What Your Students Do

Student lawyers (in pairs or singly) read the *Roper vs Simmons* case materials. Attorneys for Roper (Petitioner) write the appellate brief; attorneys for Simmons (Respondent) write the reply brief. There's a "Brief Writing Organizer" which your student can use to help them (see pages A3–A5). You set the cases for oral argument, giving your students a few days to write their briefs. You can either have the losing side write an appellate brief and "file it" (hand it in to you), and then give the other side a day or so to respond, or you can have both sides write and file their briefs at the same time.

---

1 In a criminal case, only the defendant can appeal a conviction. The state cannot appeal an acquittal, as this would violate the Fifth Amendment's "double jeopardy" provision.

2 Appellate courts are required to hear all the appeals filed within their jurisdiction, whereas the USSC—and the state supreme courts—only hear the cases they want to.

3 Appeals deal only with legal issues, not factual ones. For example, the jury found Simmons guilty of murder and sentenced him to death. Factual testimony about how he committed the murder is not appealable. But the issue of whether this or that testimony should or should not have been admitted in evidence is a legal issue, and therefore subject to appeal.

The judges need to read the briefs and case materials and then write out some good, tough, probing questions to ask the lawyers. Then, during the hearings, the lawyers argue their cases and the judges **interrupt** and ask them questions. This is called “oral argument.” Lawyer can use the “Oral Argument Notemaker” to prepare for this hearing (see pages A6–A8).

After argument, each judge should write one opinion—majority (outcome, rule, and rationale), concurring (agreeing with the outcome but for different reasons), and/or dissenting (disagreeing with both the outcome and the reasoning).

### **How Court Opinions Are Organized and Used in Real Life**

In the legal world, after judges write their opinions, they’re usually published in large books (often more than 1500 pages). The books are numbered consecutively, and contain opinions going back to the beginning of the court system. These opinions are then cited by later courts when those courts are in the process of deciding the same or a related issue. The earlier case opinions are precedent for the later ones. The books are organized as follows:

For the Federal District Court (which is the federal trial court) trial opinions can be found in volumes called “Federal Supplement,” which is currently in its third series so it’s called “F.Supp.3d.” Similarly, the circuit court opinions (the intermediate appellate level) are published in Federal Reporter 3rd (F.3d). The fictitious Twentieth Circuit (which will be hearing *Roper vs Simmons* for this activity) would be at this level. The USSC opinions are published in the volumes “U.S.” (United States).

For example, the case of *Atkins v. Virginia*, 536 U.S. 304 (2002) would be found in the 536th volume of USSC cases. The case, which was decided in 2002, begins on page 304. State court decisions also follow a similar numbering system.

### **When and How to Cite Case Law**

Just as with any paper in which a source is quoted, a case citation **MUST** be included in any brief, opinion or oral argument. Your students should use the following rules:

- When writing a brief, the first time a case is referenced, use the full citation. For example, *Atkins v. Virginia*, 536 U.S. 304 (2002). Use italics for the case name and put the date in parenthesis.
- In oral argument, the first time a case is mentioned, use the full case name. For example, “as the U.S. Supreme Court in *Atkins vs Virginia* said ...”
- After the case has been cited once, just use a short case name like *Atkins*.

As the court in *Atkins* held “...”, or

As the court in the *Atkins* case held, “...”

## Assessment and Evaluation

The Grade/Rubric<sup>4</sup> Sheets (Appendix E1–E6) contain the following:

### TEACHER GRADE

- Grades for the oral and written parts of the activity.

### SUMMARY/ANALYSIS

- A student summary of the appeals process, using words, drawings, etc.
- A two-page questionnaire that evaluates the activity and student learning styles, and gives students a chance to critique their classmates.

### SELF GRADE

- Student impressions and experiences while participating in this activity.
- Students grade themselves on their level of preparation and performance.

### ORAL ARGUMENT, LISTENING AND SPEAKING RUBRICS

- Rubric for Briefs and Oral Argument
- Listening/Speaking Rubric for Speech or Oral Argument

## Standards

American Government 12.2.1 and 12.5.1

High School Language Arts Standards

### LA 9-10

Reading Comprehension: 2.3

Writing Applications: 2.3 (a) (b)(d) (f), 2.6 (a) (b) (c)

Listening and Speaking Strategies: 1.1, 1.3

Speaking Applications: 2.5 (a) (b) (d)

### LA 11-12

Reading Comprehension: 2.4

Written and Oral Language Conventions: 1.1

Listening and Speaking Strategies: 1.6, 1.7, 1.8 (b) (c)

Speaking Applications: 2.5 (a) (b) (d)

---

<sup>4</sup> I suggest you tell your students in advance what the assessment criteria will be.

## Case Background and Outcome

At trial, Defendant Christopher Simmons was convicted of murder and sentenced to death by a Missouri jury. On appeal, a Missouri appellate court upheld both the conviction and the death sentence. The Missouri Supreme Court upheld the conviction but overturned the death sentence. The State of Missouri appealed to the U.S. Supreme Court (USSC). The USSC issued a writ of certiorari (agreed to hear the case).

The case was argued on October 13, 2004 and the USSC handed down its decision on March 1, 2005. The outcome was as follows, “The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. The judgment of the Missouri Supreme Court setting aside the sentence of death imposed upon Christopher Simmons is affirmed.”

The 5 to 4 “line-up” was as follows:

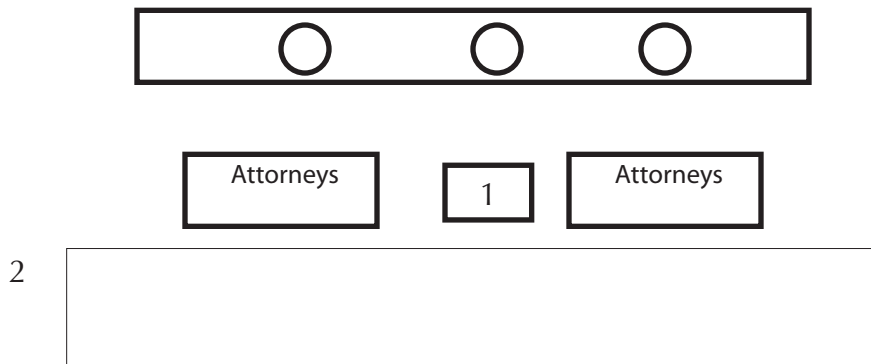
- Mr. Justice Kennedy wrote the majority opinion. Justices Souter and Breyer joined in that opinion.
- Justice Stevens wrote a concurring opinion which was joined by Justice Ginsburg.
- Justice Scalia wrote a dissenting opinion. Justices Thomas and the then Chief Justice Rehnquist joined in that dissent.
- Justice O’ Connor also wrote a dissenting opinion.

Justices write concurring opinions when they agreed with the outcome, but not the reasoning, and dissenting opinion when they disagree with both the outcome and the reasoning.

The issues that your students were asked to address were the same ones that the justices addressed in their opinions. The case materials are excerpts from the actual opinion. The justices’ words were left intact, except where necessary for editing purposes and to make the language more accessible for high school students.

## Setting up an Appellate Courtroom

### CA, Federal and other state courts of appeal (Three-Judge Courts)



1 Podium

2 You can have one or two courts going at the same time. Students sit in the area near their assigned “courtroom” waiting their turn to argue or judge.

# Student Instructions – Moot Court Introduction

## Getting There – The Appellate Courts

In the United States when one side loses or is unhappy with something about the outcome of their trial they have a right to appeal.<sup>1</sup> The lawyer representing the party or parties appealing (called the "appellant" or "petitioner") usually files a Notice of Intent to Appeal with the trial court. A transcript of the trial is prepared and sent to the appellate court.<sup>2</sup> The appellate lawyers file a brief laying out the legal<sup>3</sup> errors made at trial and what law applies in this case. The lawyers representing the other party (called the "respondent" or "appellee") file a reply brief. Then there's oral argument, where the lawyers appear before a three-judge court to present their sides of the case. The appellate judges ask questions and then "take the case under submission" (reserve making a decision until a later date).

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## What You Do (Classroom Instructions)

**Student lawyers:** You read the *Roper vs Simmons* case materials. Alone or in pairs, attorneys for Roper (Petitioner) write the appellate brief; attorneys for Simmons (Respondent) write the reply brief. There's a set of sample forms and a "Brief Writing Organizer" to use as a guide (see A1–A5). Additionally, your teacher may have you use the "Brief Template" which is an MS Word document that's designed for you to type your brief right into. You can download the file at <http://cesqd.org/mootcourt2006.html>.

After you've written and submitted your brief, you'll argue before a three-judge appellate court. This is called "oral argument." Be ready to respond to the judges' questions and to counter your opponents' arguments. Use the "Oral Argument Notemaker" (see A6–A8) to help you. Petitioner argues first, then the Respondent has a turn. After that, both sides have the chance to rebut the other side's arguments. (In real life only the Petitioner has rebuttal because they have the burden.)

**Student judges:** You need to read the briefs and case materials and then write out some good, tough, probing questions to ask the lawyers. Then, during the hearings, the lawyers argue their cases and the judges **interrupt** and ask them questions. This is called "oral argument."

After argument, each judge should write one opinion—majority (outcome, rule, and rationale), concurring (agreeing with the outcome but for different reasons), and/or dissenting (disagreeing with both the outcome and the reasoning).

---

1 In a criminal case, only the defendant can appeal a conviction. The state cannot appeal an acquittal, as this would violate the Fifth Amendment's "double jeopardy" provision.

2 Appellate courts are required to hear all the appeals filed within their jurisdiction, whereas the USSC—and the state supreme courts—only hear the cases they want to.

3 Appeals deal only with legal issues, not factual ones. For example, the jury found Simmons guilty of murder and sentenced him to death. Factual testimony about how he committed the murder is not appealable. But the issue of whether that testimony should or should not have been admitted in evidence is a legal issue, and therefore subject to appeal.

## What You Do (Competition Instructions)

Your team's job is to write two briefs (one for Petitioner/Appellant Roper and one for Respondent Simmons)<sup>1</sup> citing the facts, arguments and case law you think most persuasive for each side. In making your arguments, you need to use and quote from the case materials (pages 1–12.) You can use the "Oral Argument Notemaker" to help you organize your thoughts.

There is also a separate file called, "Brief Template" which can also be downloaded from our Web site at <http://cesqd.org/mootcourt2006.html>. This file (in MS Word format) is designed for you to type your brief right into it.

On competition day you'll come out to the courthouse and present your argument before a three-judge appellate court. This is called "oral argument." Be ready to respond to the judges' questions and counter your opponents' arguments. You'll have a total of six minutes (including rebuttal) to argue. You can divide the time up as you please. If you have a partner, each of you can do part of the argument-in-chief (main argument) and part of the rebuttal, or one of you can do the main argument and one can do the rebuttal. Rebuttal is used only to counter your opponents' argument, not to raise new issues. (In real life only the Petitioner has rebuttal because they have the burden.)

## How Court Opinions Are Organized and Used in Real Life

In the legal world, after judges write their opinions, they're usually published in large books (often more than 1500 pages). The books are numbered consecutively, and contain opinions going back to the beginning of the court system. These opinions are then cited by later courts when those courts are in the process of deciding the same or a related issue. The earlier case opinions are precedent for the later ones. The books are organized as follows:

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For example, the case of *Atkins v. Virginia*, 536 U.S. 304 (2002) would be found in the 536th volume of USSC cases. The case, which was decided in 2002, begins on page 304. State court decisions also follow a similar numbering system.

## When and How to Cite Case Law

When you quote from a case, you need to include a case citation. Use the following rules:

- When writing a brief, the first time you reference a case, use the full citation. For example, *Atkins v. Virginia*, 536 U.S. 304 (2002). Use italics for the case name and put the date in parenthesis.
- In oral argument, the first time you mention a case, use the full case name. For example you would say, "as the U.S. Supreme Court in *Atkins vs Virginia* said ..."
- After you've cited the case once, you can just use a short case name like *Atkins*.
  - As the court in *Atkins* held "...", or
  - As the court in the *Atkins* case held, "...", or
  - As the *Atkins* court held, "..."

---

<sup>1</sup> Written briefs are not required (nor accepted) for the competition, but they're good preparation.

## Roper vs Simmons

### 1 **Instructions**

2 This is your case packet. The trial has already taken place. You are now in the fictitious 20th  
3 Circuit Court of Appeal. The materials that follow have been taken from the court opinion  
4 in this case. To get the flavor of how judges think and write, some of their actual words and  
5 turns of phrase have been kept. Quotation marks (“...”) *along with a case name in italics*  
6 indicates a quote from a previously decided case (“precedent”). In writing your briefs (one  
7 for Petitioner/Appellant Roper and one for Respondent Simmons) cite the facts, reasoning  
8 and case law you think most persuasive for each side. When making your arguments, you  
9 need to use and quote from these materials. **You will find some of the cases are cited more**  
10 **than once. This is especially true when a case has arguments for both sides. Then, the case**  
11 **is cited in both places with the appropriate language for each side.** Legal terms and other  
12 possibly unfamiliar words are defined in [ ] where possible, or in the glossary on pages 13.  
13

14 After you’ve written your briefs, you’ll argue before a three-judge appellate court. This is  
15 called “oral argument.” Be ready to respond to the judges’ questions and your opponents’  
16 arguments. Petitioner argues first, then the Respondent has a turn. After that, both sides have  
17 the chance to rebut the other side’s arguments. (In real life only the Petitioner has rebuttal  
18 because they have the burden.)  
19

### 20 **Parties**

21 *Petitioner:* Donald P. Roper is the Superintendent of the Potosi Correctional Center in the  
22 State of Missouri where Christopher Simmons is incarcerated [in prison].  
23

24 *Respondent:* Christopher Simmons is the 17 year old defendant who was convicted of  
25 murder and sentenced to the death penalty.  
26

### 27 **Facts**

28 At the age of 17, when he was still a junior in high school, Christopher Simmons, the  
29 respondent here, committed murder. About nine months later, after he had turned 18, he  
30 was tried and sentenced to death. Simmons was found to be the instigator [the one who  
31 started it] of the crime. Before its commission, Simmons said he wanted to murder someone.  
32 In chilling, callous [cold-hearted] terms he talked about his plan, discussing it for the most  
33 part with two friends, Charles Benjamin and John Tessmer, then aged 15 and 16, respectively.  
34 Simmons proposed to commit burglary and murder by breaking and entering, tying up a  
35 victim, and throwing the victim off a bridge. Simmons assured his friends they could “get  
36 away with it” because they were minors.  
37

38 The three met at about 2 a.m. on the night of the murder, but Tessmer left before the other  
39 two set out. (The State later charged Tessmer with conspiracy, but dropped the charge in  
40 exchange for his testimony against Simmons.) Simmons and Benjamin entered the home of

1 the victim, Shirley Crook, after reaching through an open window and unlocking the back  
2 door. Simmons turned on a hallway light. Awakened, Mrs. Crook called out, "Who's there?"  
3 In response, Simmons entered Mrs. Crook's bedroom, where he recognized her from a  
4 previous car accident involving them both. Simmons later admitted this convinced him to  
5 murder her.

6  
7 Using duct tape to cover her eyes and mouth and bind her hands, the two perpetrators put  
8 Mrs. Crook in her minivan and drove to a state park. They reinforced the bindings, covered  
9 her head with a towel, and walked her to a railroad trestle spanning the Meramec River.  
10 There they tied her hands and feet together with electrical wire, wrapped her whole face in  
11 duct tape and threw her from the bridge, drowning her in the waters below.

12  
13 By the afternoon of September 9, Steven Crook had returned home from an overnight  
14 trip, found his bedroom in disarray [a mess], and reported his wife missing. On the same  
15 afternoon fishermen recovered the victim's body from the river. Simmons meanwhile was  
16 bragging about the killing, telling friends he had killed a woman "because the bitch seen  
17 my face." The State charged Simmons with burglary, kidnapping, stealing, and murder in the  
18 first degree. He was tried as an adult. The jury having returned a verdict of murder, the trial  
19 proceeded to the penalty phase.

20  
21 The State sought the death penalty. As aggravating factors, the State argued that the murder was  
22 committed for the purpose of receiving money, was committed for the purpose of avoiding,  
23 interfering with, or preventing lawful arrest of the defendant, and involved depravity of  
24 mind [wicked] and was outrageously and wantonly [deliberate] vile, [nasty] horrible, and  
25 inhuman. The State called Shirley Crook's husband, daughter, and two sisters, who presented  
26 moving evidence of the devastation her death had brought to their lives.

27  
28 In mitigation, Simmons' attorneys first called an officer of the Missouri juvenile justice  
29 system, who testified that Simmons had no prior convictions and that no previous charges  
30 had been filed against him. Simmons' mother, father, two younger half brothers, a neighbor,  
31 and a friend took the stand to tell the jurors of the close relationships they had formed with  
32 Simmons and to plead for mercy on his behalf. Simmons' mother, in particular, testified to  
33 the responsibility Simmons demonstrated in taking care of his two younger half-brothers and  
34 of his grandmother and to his capacity to show love for them.

35  
36 During closing arguments, both the prosecutor and defense counsel addressed Simmons'  
37 age, which the trial judge had instructed the jurors they could consider as a mitigating  
38 factor. Defense counsel reminded the jurors that juveniles of Simmons' age cannot drink,  
39 serve on juries, or even see certain movies because "the legislatures have wisely decided  
40

1 that individuals of a certain age aren't responsible enough." Defense counsel argued that  
2 Simmons' age should make "a huge difference to [the jurors] in deciding just exactly what  
3 sort of punishment to make." In rebuttal, the prosecutor gave the following response: "Age,  
4 he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you?  
5 Mitigating? Quite the contrary I submit. Quite the contrary."

6  
7 The jury recommended the death penalty, finding the State had proved each of the three  
8 aggravating factors submitted to it. The trial judge accepted the jury's recommendation and  
9 imposed the death penalty.

## 10 11 **Legal/Procedural Background**

12 Simmons moved to have his death penalty sentence set aside. The court found no constitutional  
13 violation ... and denied the motion. Then in 2002, the U.S. Supreme Court (the Court) held  
14 that the Eighth and Fourteenth Amendments prohibit the execution of a mentally retarded  
15 person. *Atkins v. Virginia*, 536 U.S. 304 (2002). Simmons filed a new petition to set aside his  
16 death penalty sentence. He argued that using the Court's reasoning in the *Atkins* case, the  
17 Constitution also prohibits the execution of a juvenile who was under 18 when the crime was  
18 committed. This petition was granted and Simmons' death sentence was set aside. Simmons  
19 was resentenced to "life imprisonment without eligibility for probation, parole, or release."  
20 In our case, Roper, on behalf of the State of Missouri, now appeals.

## 21 22 **Questions Presented**

23 Does the Eighth Amendment bar execution of juveniles? In answering this question, discuss  
24 the issues of: national consensus, the proportionality of the crime and the punishment, and  
25 international authorities. **The focus in this case is whether juveniles should be treated as a**  
26 **category (where the same rule on the death penalty applies to every juvenile) or whether**  
27 **each juvenile should be judged based on his/her own actions.**

## 28 29 **Case Law (Precedent)**

### 30 31 ***Death penalty precedent:***

32 *Furman v. Georgia*, 408 U.S. 238, (1972)

33 **Issue:** Does the 8th Amendment apply to the States?

34  
35 **Holding/Quote:** Yes. The Eighth Amendment says: "Excessive bail shall not be required, nor  
36 excessive fines imposed, nor cruel and unusual punishments inflicted." The amendment is  
37 applicable to the States through the Fourteenth Amendment.

1 *Atkins v. Virginia*, 536 U.S. 304 (2002)

2 **Issue:** What does the 8th Amendment guarantee?

3  
4 **Holding/Quote:** The Eighth Amendment guarantees individuals the right not to be subjected  
5 to excessive sanctions. By protecting even those convicted of heinous [horrible] crimes,  
6 the Eighth Amendment reaffirms the duty of the government to respect the dignity of all  
7 persons.

8  
9 *Weems v. United States*, 217 U.S. 349, (1910)

10 **Issue:** How are the 8th Amendment and the issue of proportionality\* related?

11  
12 **Holding/Quote:** The right {to be free from excessive sanctions}\* flows from the basic idea  
13 that “punishment for crime should be graduated and proportioned to the offense.”

14  
15 *Trop v. Dulles*, 356 U.S. 86 (1958)

16 **Issue:** How does the U.S. Supreme Court interpret the phrase “cruel and unusual punishment?”

17  
18 **Holding/Quote:** The prohibition against “cruel and unusual punishments,” like other  
19 expansive language in the Constitution, must be interpreted by looking at its words, history,  
20 tradition, and precedent. The Court said it is necessary and correct to refer to “evolving  
21 standards of decency” when deciding which punishments are so out of proportion as to be  
22 cruel and unusual.

23  
24 *Thompson v. Oklahoma*, 487 U.S. 815 (1988)

25 **Issue:** Do our standards of decency allow us to execute juveniles under the age of 16?

26  
27 **Holding/Quote:** No. A plurality of the Court determined that our standards of decency do  
28 not permit the execution of any offender [criminal, wrongdoer] who was under the age of  
29 16 at the time he/she committed the crime. This opinion indicated that States that had laws  
30 setting a minimum age for the death penalty had set the age at 16 or above. The Court also  
31 said that it would offend civilized standards of decency to execute a person who was less  
32 than 16 years old at the time of his or her offense. Further, this standard goes along with  
33 the views of respected professional organizations and other nations including Europe. The  
34 opinion further noted that juries almost never imposed the death penalty on offenders under  
35 16; the last such execution was in 1948, 40 years prior.

36  
37 The Court stressed that the reasons why juveniles are not trusted with the privileges and  
38 responsibilities of an adult, also explain why their irresponsible conduct is not as morally  
39 reprehensible as that of an adult. According to the Court, the lesser culpability [guilt] of  
40 offenders under 16 made the death penalty an inappropriate punishment. The Court also

1 found that because it was unlikely that offenders under 16 made “the kind of cost-benefit  
2 analysis” where they thought about the possibility that they could be executed, the death  
3 penalty was not an effective means to prevent murders. The Court set aside the death sentence  
4 that had been imposed on the 15-year-old offender.

5  
6 *Stanford v. Kentucky*, 492 U.S. 361 (1989)

7 **Issue:** Do our standards of decency allow us to execute juveniles between 16 and 18?

8  
9 **Holding/Quote:** Yes. The Court over a dissenting opinion joined by four Justices, looked to  
10 contemporary standards of decency in this country and concluded the Eighth and Fourteenth  
11 Amendments did not proscribe [did not forbid] the execution of juvenile offenders between  
12 15 and 18.

13  
14 **Issue:** Is there a national consensus against executing juveniles between 16 and 18?

15  
16 **Holding/Quote:** No. Of the 37 States that had the death penalty, 22 permitted the death  
17 penalty for 16-year-old offenders, and 25 permitted it for 17-year-old offenders. These  
18 numbers, in the Court’s view, indicated there was no national consensus that executing 16  
19 and 17 year olds was cruel and unusual punishment.

20  
21 *Penry v. Lynaugh*, 492 U.S. 302 (1989).

22 **Issue:** Do our standards of decency allow us to execute the mentally retarded?

23  
24 **Holding/Quote:** Yes. The same day the Court decided *Stanford v. Kentucky*, it held that the  
25 Eighth Amendment did not mandate [did not require] a categorical exemption from the  
26 death penalty for the mentally retarded. *Penry v. Lynaugh*, 492 U.S. 302 (1989). In reaching  
27 this conclusion, it said that only two States had laws banning the execution of mentally  
28 retarded persons convicted of a capital offenses. According to the Court, those two States  
29 even when added to the 14 States that had no capital punishment at all, did not show that  
30 there was a national consensus.

31  
32 *Atkins vs Virginia*. 536 U.S. 304 (2002)

33 **Issue:** Have standards of decency changed since 1989 so that we now think that executing  
34 the mentally retarded is cruel and unusual punishment?

35  
36 **Holding/Quote:** Yes. The Court held that standards of decency have changed since *Penry*  
37 *v. Lynaugh* and now are that the execution of the mentally retarded is cruel and unusual  
38 punishment. This is true in part because now (in 2002) only a minority of States permitted  
39 the death penalty for mentally retarded, and even in those States it was rare. On that basis,  
40

1 the Court determined that executing mentally retarded offenders “has become truly unusual,  
2 and it is fair to say that a national consensus has developed against it.”

3  
4 **Simmons argues:**

5 Just as the Court in the *Atkins v Virginia* case reconsidered [and changed their minds about  
6 the death penalty for the mentally retarded], it is time now to reconsider the issue of  
7 executing juveniles between the ages of 16 to 18 and declare the juvenile death penalty  
8 unconstitutional. Simmons’ arguments fall into three categories: Proportionality, National  
9 Consensus and International Authorities.

10  
11 **Proportionality**

12 Simmons argues that our “evolving standards of decency” are that **juveniles as a category**  
13 are different from adults. It is partly for this reason that executing juveniles is cruel and  
14 unusual punishment in violation of the 8th Amendment.

15  
16 *Johnson v. Texas*, 509 U.S. 350 (1993)

17 **Holding/Quote:** There are three general differences between juveniles under 18 and adults  
18 show that juvenile offenders cannot be classified among the worst offenders. First, as  
19 any parent knows and as the scientific studies tend to confirm, a lack of maturity and an  
20 underdeveloped sense of responsibility are found in youth more often than in adults and are  
21 more understandable among the young. These qualities often result in rash, hasty, not very  
22 well thought-out actions and decisions. The second area of difference is that juveniles are  
23 more likely to give in to negative influences and outside pressures, including peer pressure.

24  
25 *Eddings v. Oklahoma*, 455 U.S. 104 (1982)

26 **Holding/Quote:** “Youth is more than a chronological fact. It is a time and condition of life  
27 when a person may be most susceptible to influence and to psychological damage.”

28  
29 *Erik Erikson’s book, Identity: Youth and Crisis* (1968)

30 The third broad difference is that the character of a juvenile is not as well formed as that of  
31 an adult. The personality traits of juveniles are less fixed.

32  
33 *Thompson v. Oklahoma*, 487 U.S. 815 (1988)

34 **Holding/Quote:** The Court recognized the importance of these characteristics (quoted above)  
35 with respect to juveniles under 16, and relied on them to hold that the Eighth Amendment  
36 prohibited the imposition of the death penalty on juveniles below that age.

1 **National Consensus:**

2 Simmons argues that there is a national consensus against the death penalty. This change in  
3 our attitudes about the death penalty since 1989 (*Stanford v Kentucky*) is shown statistically  
4 by the number of states that prohibit death penalty.

5  
6 In 2002 (the year of the *Atkins v Virginia* case) there are:

7  
8 30 States that prohibit the death penalty for the mentally retarded as follows: 12 States  
9 had gotten rid of the death penalty altogether and 18 allowed it but excluded the mentally  
10 retarded.

11  
12 Similarly, 30 States prohibit the juvenile death penalty as follows: 12 States that have gotten  
13 rid of the death penalty altogether and 18 that allow it, but by law or court decision, exclude  
14 juveniles.

15  
16 Even in the 20 States that allow it, the practice of executing the mentally retarded was  
17 infrequent. Since *Penry*, (1989) only five States had executed offenders known to have an  
18 IQ under 70. Even in the 20 States that allow the execution of juveniles, the practice is  
19 infrequent. Since *Stanford* (1989), six States have executed prisoners for crimes committed  
20 as juveniles. In the past 10 years, only three have done so: Oklahoma, Texas, and Virginia.  
21 [see V. Scheib's Internet site on death penalty statistics, page 12 of this document].

22  
23 Further, in December, 2003 the Governor of Kentucky decided to spare the life of Kevin  
24 Stanford, and reduced his sentence to one of life imprisonment without parole, with the  
25 declaration that "we ought not be executing people who legally were children." By this act  
26 the Governor ensured Kentucky would not add itself to the list of States that have executed  
27 juveniles within the last 10 years even by the execution of the very defendant whose death  
28 sentence the Court had upheld in *Stanford v. Kentucky*.

29  
30 The rejection of the juvenile death penalty in the majority of States, the infrequency of its  
31 use even where it remains on the books, and the consistent trend toward getting rid of it, is  
32 enough evidence that today our society views juveniles, as categorically less culpable than  
33 the average criminal.

34  
35 **International Authorities and the history of the Constitution**

36 What role do treaties, the laws of other countries and the writings of the founding fathers  
37 play in helping decide constitutional issues today?

1 **Holding/Quote:** Another reason why the death penalty is too harsh a punishment for  
2 offenders under 18 is shown by the fact that the United States is the only country in the  
3 world that continues to allow the juvenile death penalty. While the task of interpreting  
4 the Eighth Amendment remains the Court’s responsibility, the Court does look to the laws  
5 of other countries and to international authorities as helpful for its interpretation of the  
6 Eighth Amendment’s prohibition of “cruel and unusual punishments.” In the *Atkins v Virginia*  
7 case, the Court recognized that “within the world community, the death penalty for crimes  
8 committed by mentally retarded offenders is overwhelmingly disapproved.” Also, in the  
9 *Thompson v Oklahoma* case, the Court noted that the views of the international community  
10 are useful in determining whether a punishment is cruel and unusual.

11  
12 *Article 37 of the United Nations Convention [agreement] on the Rights of the Child*

13 **Holding/Quote:** Article 37 of the United Nations Convention on the Rights of the Child,  
14 which every country in the world has ratified except for the United States and Somalia,  
15 contains a prohibition on capital punishment for crimes committed by juveniles under 18.  
16 Only seven countries other than the United States have executed juvenile offenders since  
17 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and  
18 China. Since then, each of these countries has either gotten rid of capital punishment for  
19 juveniles or said that they wouldn’t execute them. It is fair to say that the United States now  
20 stands alone in a world that has turned its face against the juvenile death penalty.

21  
22 *Constitutional History*

23 **Holding/Quote:** Over time, from one generation to the next, the Constitution has come  
24 to earn, as James Madison dared to hope, the highest respect of the American people. See  
25 *The Federalist No. 49*. The Constitution sets forth the ideas and ideals which are unique to  
26 America such as federalism, [division of powers between states and federal government]  
27 separation of powers [checks and balances], specific rights for those accused of crimes, and  
28 broad provisions to protect individual freedom and preserve human dignity. These ideas are  
29 central to the American experience and remain essential to our present-day self-definition  
30 and national identity. One reason we honor the Constitution, then, is because we know it  
31 to be our own.

32  
33 Finally, if the meaning of the Eighth Amendment had been frozen when it was originally  
34 drafted, 7-year-old children could be executed today. See *Stanford v. Kentucky*, (describing  
35 the law at the time the Amendment was adopted, 1791). But the evolving standards of  
36 decency prevent us from reading the 8th Amendment (a critically important part of the Bill  
37 of Rights) that way now. While we can argue about how fast or slow our Constitution is  
38 changing, we must agree that it does change over time.

1 **Roper argues:**

2  
3 Establishing a categorical rule forbidding the execution of any offender for any crime  
4 committed before his 18th birthday, no matter how deliberate, wanton, or cruel the offense  
5 is incorrect, using evidence of current societal values, moral proportionality analysis [does  
6 the punishment fit the crime], or the two together.  
7

8 Although a majority of the States don't allow capital punishment of 17-year-old offenders,  
9 there is no consensus that executing a 17 year old is unconstitutional. Adolescents as a class  
10 are undoubtedly less mature, and therefore less culpable for their misconduct, than adults.  
11 But there is no evidence questioning the reasonable conclusion reached by many state  
12 legislatures: that at least some 17-year-old murderers are mature enough to deserve the death  
13 penalty in an appropriate case. Nor has it been shown that juries are incapable of figuring  
14 out a youthful defendant's level of maturity or of weighing the mitigating characteristics  
15 associated with youth.  
16

17 **Proportionality**

18 Roper argues that while it is perhaps correct that the mentally retarded have limitations that  
19 may make the death penalty appropriate for them (see *Atkins* below), juveniles are not the  
20 same as the mentally retarded. Therefore, to compare them is inappropriate.  
21

22 *Atkins vs Virginia*, 536 U.S. 304 (2002)

23 **Issue:** What effect does a retarded person's mental limitation have on whether they should  
24 receive the death penalty?  
25

26 **Holding/Quote:** Mentally retarded persons have below average intelligence and major  
27 limitations in skills such as communication, self-care, and self-direction. Because of their  
28 limitations, mentally retarded persons are less able to understand and process information,  
29 to communicate, to learn from experience, to engage in logical reasoning, to control  
30 themselves, and to understand the reactions of others. The Court concluded that given these  
31 limitations it is doubtful that allowing the execution of mentally retarded persons would  
32 serve the goals of preventing future murders by the mentally retarded and punishing them  
33 for committing such murders. Mentally retarded offenders' limitations so diminish their  
34 personal moral culpability that it is highly unlikely that such offenders could ever deserve  
35 the ultimate punishment, even in cases of capital murder. And these same limitations made  
36 it very unlikely that the threat of the death penalty would deter mentally retarded persons  
37 from committing capital crimes.  
38  
39  
40

1 *Trop v. Dulles*, 356 U.S. 86 (1958)

2 **Issue:** Are juveniles different than the mentally retarded when it comes to the death penalty?

3  
4 **Holding/Quote:** Yes. Juveniles can be distinguished from [are different from] the mentally  
5 retarded. In determining that capital punishment of offenders who committed murder before  
6 age 18 is “cruel and unusual” under the Eighth Amendment, the issue is whether laws  
7 allowing such executions go against our modern “standards of decency.” The Court has held  
8 that this analysis should be based on laws passed by state legislatures.

9  
10 **National Consensus**

11 Roper argues statistics do not show a national consensus against the death penalty.

12  
13 **Holding/Quote:** In the 1989 case of *Stanford v Kentucky*, the Court held that the execution  
14 of 16- or 17-year-old capital murderers did not violate the Eighth Amendment. At that time  
15 (1989), 25 States did not permit the execution of under-18 offenders, including 13 that  
16 prohibited the death penalty altogether. The Court noted that the day may come when most  
17 states pass laws prohibiting the execution of 16- or 17-year- old murderers, thus showing  
18 that a clear national consensus has developed, but that day had not yet arrived.

19  
20 In 2002, only 18 States—or 47% of States that permit capital punishment—have legislation  
21 prohibiting the execution of offenders under 18. Words have no meaning if the views of less  
22 than 50% of death penalty States can constitute a national consensus.

23  
24 Additionally, no cases dealing with whether or not the Constitution limits the death penalty  
25 have counted States that have eliminated the death penalty entirely. And with good reason.  
26 That 12 States prohibit executions says something about consensus against the death penalty,  
27 but nothing—absolutely nothing—about consensus that offenders under 18 deserve to be  
28 spared from such a penalty. What might be relevant [important to the point], perhaps, is  
29 how many of those States permit 16- and 17-year-old offenders to be treated as adults with  
30 respect to other crimes. {They all do.} Indeed, some even require that juveniles as young as  
31 14 be tried as adults if they are charged with murder.

32  
33 *Gregg v. Georgia*, 428 U.S. 153 (1976)

34 **Issue:** Where is the first place the Court should look for a national consensus on the death  
35 penalty?

36  
37 **Holding/Quote:** The reason to look at state laws first is obvious and fundamental: “In a  
38 democratic society, legislatures, not courts, are designed to respond to the will and the  
39 moral values of the people.”

1 *Witherspoon v. Illinois*, 391 U.S. 510 (1968)

2 **Issue:** Where else should the Court look for a national consensus on the death penalty?

3  
4 **Holding/Quote:** For a similar reason the Court has, when they tried to determine society's  
5 moral standards, looked to what juries do: "Juries maintain a link between contemporary  
6 community values and the penal [criminal law] system"

7  
8 **International Authorities and the history of the Constitution:**

9 What role do treaties, the laws of other countries and the writings of the founding fathers  
10 play in helping deciding constitutional issues today?

11  
12 *International Covenant [agreement] on Civil and Political Rights (ICCPR)*

13 **Holding/Quote:** The ICCPR (December 19, 1966), was ratified by the U.S. Senate, but with  
14 a reservation that reads: "The United States reserves the right, subject to the Constitution,  
15 to impose capital punishment on any person ... including such punishment for a crime  
16 committed by persons below eighteen years of age." The Senate and the President—who under  
17 our Constitution have the power to enter into treaties, see Art. II, Sec. 2—have included this  
18 reservation because in their opinion, the U.S. should still be allowed to execute juveniles. This  
19 suggests that our country has not reached a national consensus on the question. The Court  
20 noted that the reservation to the ICCPR was made in 1992 and remains in place today.

21  
22 *Article 37 of the United Nations Convention on the Rights of the Child*

23 **Holding/Quote:** It is also worth noting that, in addition to barring the execution of under-  
24 18 offenders, the United Nations Convention on the Rights of the Child prohibits punishing  
25 them with life in prison without the possibility of release.

26  
27 *Harmelin v. Michigan*, 501 U.S. 957 (1991)

28 **Holding/Quote:** the "Cruell and Unusuall Punishments" provision of the English Declaration  
29 of Rights was originally meant to describe those punishments "out of [the Judges'] Power"—  
30 that is, those punishments that were not authorized by law, but that were carried out by the  
31 government or the judges anyway. Under that reasoning, the death penalty for under-18  
32 offenders would easily survive this challenge.

## Table of Citations

|  |                       |
|--|-----------------------|
| Atkins v. Virginia, 536 U.S. 304 (2002)  | [pages 3,4,5,6,7,8,9] |
| Furman v. Georgia, 408 U.S. 238, (1972)  | [pages 3]             |
| Weems v. United States, 217 U.S. 349 (1910)  | [pages 4]             |
| Trop v. Dulles, 356 U.S. 86 (1958)   | [pages 4,10]          |
| Thompson v. Oklahoma, 487 U.S. 815 (1988)  | [pages 4,6,8]         |
| Stanford v. Kentucky, 492 U.S. 361 (1989)  | [pages 5,7,8,10]      |
| Penry v. Lynaugh, 492 U.S. 302 (1989)  | [pages 5,7]           |
| V. Scheib: The Juvenile Death Penalty Today:<br>Death Sentences and Executions for Juvenile Crimes,<br>January 1, 1973-December 31, 2004, No. 76, p. 4 (2005),<br>available at <a href="http://www.law.onu.edu/faculty/streib/documents/JuvDeathDec2004.pdf">http://www.law.onu.edu/faculty/streib/documents/JuvDeathDec2004.pdf</a> . | [pages 7]             |
| Johnson v. Texas, 509 U.S. 350 (1993)  | [pages 6]             |
| Eddings v. Oklahoma, 455 U.S. 104 (1982)   | [pages 6]             |
| Article 37 of the United Nations Convention on the Rights of the Child,<br>contains an express prohibition on capital punishment for crimes<br>committed by juveniles under 18. Nov. 20, 1989,<br>1577 U.N.T.S. 3, 28 I.L.M. 1448, 1468-1470<br>(entered into force Sept. 2, 1990)   | [pages 8,11]          |
| The Federalist No. 49  | [pages 8]             |
| Gregg v. Georgia, 428 U.S. 153 (1976)  | [pages 10]            |
| Witherspoon v. Illinois, 391 U.S. 510 (1968)   | [pages 11]            |
| International Covenant on Civil and Political Rights (ICCPR),<br>Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976)  | [pages 11]            |
| Harmelin v. Michigan, 501 U.S. 957, 973-974 (1991)   | [pages 11]            |

## Glossary

**perpetrators** = people who carry out crimes. (page 2)

**aggravating factors** = increase the level of guilt or blame which means a longer sentence. Sentences for crimes usually have three terms (2, 3 or 4 years, for example). The middle term is usually given unless there are facts about how the crime was committed or about the Defendant that make him or her “worse than average.” (page 2)

**mitigation** = mitigating factors decrease the level of guilt/blame and shorten a sentence. (page 2)

**mitigating factor** = is a fact about how the crime was committed or about the Defendant that make him or her better than average. (page 2)

**national consensus** = what the majority or general public thinks about an issue (There may or may not be agreement (consensus) on a given issue, ie immigration.) (page 3)

**proportionality** = the punishment should fit [be in proportion to] the crime (page 3)

**international authorities** = law of other countries, treaties, U. N. agreements (page 3)

**excessive sanctions** = punishment that is too harsh (page 4)

**expansive language** = broad, wide ranging, (page 4)

**evolving standards of decency** = accepted ways of behaving in our society. These change (evolve) as our society changes. What was accepted 200 years ago when the Constitution was written, may be different in the 21st century. (page 4)

**plurality** = the most votes (but not more than 50% which is called a majority). On the The Court, a majority opinion is when 5 or more justices sign the **same** opinion. If there are 5 or more votes for a certain outcome (upholding the death sentence, for example), but there is more than 1 opinion for the “winning” side, we use the term “plurality” instead of a majority. (page 4)

**morally reprehensible** = culpable, wrong, bad, shameful, despicable, blameworthy (page 4)

**dissenting opinion** = an opinion written by a justice or justices that disagree with the outcome. They are on the “losing” side. (page 5)

**categorical exemption** = something that applies to a person because he/she is a member of group or class of people. In *Roper*, the issue is whether minors (as a class of people) should **not** be given (are exempt from receiving) the death penalty. (page 5)

**remains on the books** = laws that are no longer enforced but have not be repealed (gotten rid of) by the legislature. (page 7)

**categorical rule** = a law that applies to a person because they are a member of a group or class, i.e., all males must register for the draft. (page 9)

**mitigating characteristics** = the fact that young people typically tend to be rash and easily led, should lesson their guilt. (page 9)

**ratified (treaty)** = approved. When the US president signs a treaty it takes a 2/3 vote of the Senate to be ratified. Then the US must comply with (do what the treaty says) (page 11)

**reservation** = part of a signed treaty that a country (i.e., the US) will not comply with, even though they have signed the treaty. (page 11)

## Appellate Brief Format

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5

6 IN THE TWENTIETH CIRCUIT COURT OF APPEALS

7 IN AND FOR THE UNITED STATES OF AMERICA

8 DONALD P. ROPER, )

9 Petitioner )

NO. 06-456

10 vs. )

APPELLATE BRIEF

11 )

CHRISTOPHER SIMMONS, )

12 Respondent )

13 )

\_\_\_\_\_ )

### 14 Introduction

15 Defendant CHRISTOPHER SIMMONS, was convicted of the heinous and premeditated  
16 murder of Shirley Crook. The lower court overturned Simmons' death sentence on the grounds  
17 that sentencing a 17 year old to the death penalty violates the Eighth Amendment. We appeal.

### 18 Facts

19 Simmons decided he wanted to murder someone and began talking about the plan. . .

### 20 Legal Argument

21 There are several reasons why the Eighth Amendment's prohibition on "cruel and  
22 unusual punishment" does not require a blanket ban on executing minors. First "legislatures,  
23 not courts, respond to the moral values of the people." *Gregg v. Georgia*, 428 U.S. 153 (1976)...

24 Wherefore, Petitioner prays that the decision of the lower court be reversed, and the  
25 death penalty for CHRISTOPHER SIMMONS be reinstated.

26 Dated: October 17, 2006

27

Adam Smythe

Adam Smythe

Attorney for Donald P. Roper

28

**Reply Brief Format**

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5

6 IN THE TWENTIETH CIRCUIT COURT OF APPEALS

7 IN AND FOR THE UNITED STATES OF AMERICA

|   |   |             |
|---|---|-------------|
| 8 DONALD P. ROPER,                              | ) |             |
|   | ) |             |
| 9                                   Petitioner  | ) | NO. 06-456  |
|   | ) |             |
| 10 vs.  | ) |             |
|   | ) | REPLY BRIEF |
|   | ) |             |
| 11 CHRISTOPHER SIMMONS,                         | ) |             |
|   | ) |             |
| 12                                   Respondent | ) |             |
|   | ) |             |
| 13 _____  | ) |             |

14 **Introduction**

15 Defendant CHRISTOPHER SIMMONS, was accused and convicted of the premeditated  
16 murder of Shirley Crook. The lower court overturned Simmons death sentence on the grounds  
17 that sentencing a 17 year old to the death penalty violates the Eighth Amendment.

18 **Facts**

19 Simmons was a minor when he committed this crime. . . .

20 **Legal Argument**

21 There are several reasons why executing minors violates not only society's "standards  
22 of decency", *Trop v. Dulles*, 356 U.S. 86 (1958), but also the Eighth Amendment's prohibition  
23 on "cruel and unusual punishment." First . . . .

24 Wherefore, Respondent prays that the lower court's decision to overturn Christopher  
25 Simmons' death sentence, be upheld.

26 Dated: October 17, 2006

27 La Kisha Johnston  
La Kisha Johnston  
Attorney for Respondent

28

# Writing a Legal Brief – Overview

## Parts of a Brief<sup>1</sup>

A legal brief should consist of four parts.

- Introduction
- Short statement of facts
- Body of the legal argument(s) with citations
- Conclusion (summary of grounds with request restated)

### INTRODUCTION

The introduction tells the Court what you want it to do (for example, overturn the lower court ruling) and gives a very short summary of the legal grounds (reasons) for this request.

“Petitioner Donald P. Roper, on behalf of the State of Missouri requests that the Court reverse the lower court’s ruling and reinstate Simmons death sentence, on the grounds that ...”

### FACTS

Use the facts most helpful to your side.

- Petitioner (Roper/Missouri) some details about the crime and how horrible it was.
- Respondent (Defendant Simmons) was a minor.

### BODY OF THE LEGAL ARGUMENT WITH CITATIONS

Address each issue. Begin each one with a topic sentence (very short summary) in your own words. Use the “Brief Writing Organizer” to help you. Feel free to address the issues and any order and to address issues together. The national consensus and the proportionality issues go well together. It also works to address international law and national consensus together.

### CONCLUSION

Summarize the ground for relief (the legal reasons why the court should grant your prayer (request) and the relief sought (what you want the court to do).

Use “Wherefore, the Petitioner or the Respondent respectfully requests that ...”

## Citing Case Law in Your Argument

### HOW TO CITE CASES

There are fairly standard ways that cases are cited in briefs (see page iv of your “Moot Court Introduction”).

### USING CATCH PHRASES

the instant case (this case, *Roper vs Simmons*)

---

<sup>1</sup> There is a sample brief and format in this packet (see pages A1–A2).

## Brief Writing Organizer

Use this organizer to brainstorm and organize your thoughts before typing your brief.

### INTRODUCTION

The introduction tells the court what you want it to do and gives a short explanation of the legal reasons why. Begin with proper wording, "Petitioner/Respondent requests that ... (insert what court should do) on the grounds that ... (insert reasons)."

### FACTS

Use the facts most helpful to your side.

- Petitioner (Roper/Missouri) some details about the crime and how horrible it was.
- Respondent (Defendant Simmons) was a minor.

### LEGAL ARGUMENTS

You should argue all three points and cite cases as you see fit. Begin each argument with a topic sentence and end with a conclusion (see next page for more writing space). For example:

"There is a national consensus that the death penalty should not be applied to juveniles because ..."

**LEGAL ARGUMENTS**

Continue your argument here and then use the back, if needed.

**CONCLUSION**

Summarize your legal points and end with a what you want the court to do.

“Wherefore, the Petitioner/Respondent respectfully requests that the court ...”

# Giving an Oral Argument – Overview

## Parts of an Argument

Your oral argument will be very similar to your brief. The main differences are that you will be addressing the judges in person, you'll have to respond to their questions and your opponents arguments, and you'll have time for rebuttal (a presentation where you explain what's wrong with your opponents' arguments).

An oral argument consists of the same four parts as the brief.

- Introduction
- Short statement of facts
- Body of the legal argument(s) with citations
- Conclusion (summary of grounds with request restated)

### INTRODUCTION

The introduction tells the Court what you want it to do (i.e., overturn the lower court ruling) and a gives a very short summary of the legal grounds (reasons) for this request. The judges are addressed as "Your Honors."

"Your Honors, Petitioner Donald P. Roper, on behalf of the State of Missouri requests that this Court reverse the lower court's ruling and reinstate Simmons death sentence, on the grounds that ..."

### FACTS

Use the facts most helpful to your side.

- Petitioner (Roper/Missouri) details about the crime and how horrible it was.
- Respondent (Defendant Simmons) was a minor

### BODY OF THE LEGAL ARGUMENT WITH CITATIONS

Use the "Oral Argument Notemaker" to brainstorm what questions the judges might ask and your responses to your opponents' arguments.

### CONCLUSION

Summarize the ground for relief (the legal reasons why the court should grant your prayer (request) and the relief sought (what you want the court to do).

"In conclusion, executing juveniles does not violate the 8th Amendment's prohibition on cruel and unusual punishment in that ... Therefore, the State of Missouri respectfully requests that the Simmons death penalty sentence be reinstated. Thank you."

## Citing Case Law in Your Argument

Cases are cited in oral argument in the same way they're cited in briefs (see page iv of your "Moot Court Introduction"). You can use legal "catch phrases" like "the instant case", "on point"

## Speaking

Oral argument is a persuasive speech designed to get the judges to rule in your favor. Good lawyers:

- Make eye contact
- Speak slowly and clearly
- Advocate for their side, have passion

## Oral Argument Notemaker

Use this form to make notes on how to answer the judges' questions and respond to your opponents' arguments (use back if necessary). You can also outline your rebuttal here.

| Judge Questions/Your Opponents' Arguments | Your Response |
|---|---------------|
|   |               |

| Judge Questions/Your Opponents' Arguments | Your Response |
|---|---------------|
|   |               |

## Sample Courtroom Dialog for Appellate Argument

The room is arranged as a courtroom (see Appellate Court Diagram, Appendix D). The lawyers are seated at counsel table (appellant at the right, respondent on the left).

All are present except the three judges. The Clerk/Timer (CI/Timer) stand and speaks.

|                 |   |
|-----------------|---|
| <b>CI/Timer</b> | All rise. The Court of Appeal for the Twentieth Circuit is now in session.<br><br>The Honorable Luke George, Presiding Judge; the Honorable June Sommers and Stan Nord presiding. |
|-----------------|---|

*All three judges enter the courtroom and sit down. The PJ (presiding judge) raps the gavel once.*

|                 |   |
|-----------------|---|
| <b>CI/Timer</b> | Please be seated and come to order. Calling the case of Roper vs Simmons. |
| <b>PJ</b>       | Counsel, please state your names and appearances for the record.          |

*Lawyers stand. (Lawyers ALWAYS stand when addressing the judges.)*

*Each in turn says:*

|              |  |
|--------------|--|
| <b>Attys</b> | Good morning your honors, Adam Smythe, representing the Petitioner in this action. I will be delivering the argument-in-chief (main argument).<br><br>Good morning your honors, Chau Nguyen, representing the Petitioner in this action. I will be delivering the rebuttal argument.<br><br>Good morning your honors, José Martinez, representing the Respondent in this action. I will be delivering part of both the argument-in-chief and the rebuttal.<br><br>Good morning your honors, LaKisha Johnston, representing the Respondent in this action. I will also be delivering part of both the argument-in-chief and the rebuttal.<br><br>Good morning your honors, Dalbir Singh, I'll be your clerk and official timer this morning.<br><br>Good morning your honors, Fran Jones, I'm the unofficial timer. |
| <b>PJ</b>    | Before we begin, I'm going to read some preliminary instructions.  |

*PJ reads instructions or asks to skip reading them. Then the PJ addresses the P Attys.*

|               |  |
|---------------|--|
| <b>PJ</b>     | Mr. Smythe, please proceed with your argument. |
| <b>P Atty</b> | Yes, your honor                                |

*Adam Smythe stands and delivers his argument-in-chief.*

On this team only Mr. Smythe is delivering the main argument.

Personnel are:

(PJ) Presiding Judge (P Atty) P Petitioner's attorney; (R Atty) Respondent's attorney; (Attys) All or some of the attorneys

After Mr. Smythe has delivered his arguments-in-chief, then the PJ asks the R Atty(s) to give their arguments.

|               |   |
|---------------|---|
| <b>PJ</b>     | Mr. Martinez please proceed with your argument. |
| <b>P Atty</b> | Yes, your honor.                                |

*Mr. Martinez and then Ms. Johnston stand and deliver their arguments-in-chief.*

On the Martinez/Johnston team, Martinez and Johnston are sharing both the main argument and the rebuttal.

*Then the PJ addresses P Attys*

|           |  |
|-----------|--|
| <b>PJ</b> | Ms. Nguyen you may proceed with rebuttal. Remember that this time may only be used to rebut opposing counsel's argument and not to raise new issues. |
|-----------|--|

*Ms. Nguyen delivers her rebuttal.*

On the Smythe/Nguyen team, only Ms. Nguyen is doing the rebuttal.

*When she is finished (or time is called) the PJ addresses the R Attys*

|           |   |
|-----------|---|
| <b>PJ</b> | Ms. Johnston you may proceed with rebuttal. |
|-----------|---|

*When Ms. Johnston and then Mr. Martinez have finished rebuttal (or time is called) the PJ addresses everyone:*

|                 |  |
|-----------------|--|
| <b>PJ</b>       | This concludes the oral argument in Roper vs Simmons. Thank you counsel. |
| <b>CI/Timer</b> | All rise.  |

*After the judges are off the bench.*

|                 |                    |
|-----------------|--------------------|
| <b>CI/Timer</b> | You may be seated. |
|-----------------|--------------------|

## Fill-in Courtroom Dialog for Appellate Argument

The room is arranged as a courtroom (see Appellate Court Diagram, Appendix D). The lawyers are seated at counsel table (appellant at the right, respondent on the left).

All are present except the three judges. The Clerk/Timer (Cl/Timer) stand and speaks.

|                 |  |
|-----------------|--|
| <b>Cl/Timer</b> | All rise. The Court of Appeal for the Twentieth Circuit is now in session.<br>The Honorable _____ presiding. |
|-----------------|--|

*All three judges enter the courtroom and sit down. The PJ (presiding judge) raps the gavel once.*

|                 |   |
|-----------------|---|
| <b>Cl/Timer</b> | Please be seated and come to order. Calling the case of Roper vs Simmons. |
| <b>PJ</b>       | Counsel, please state your names and appearances for the record.          |

*Lawyers stand. (Lawyers ALWAYS stand when addressing the judges.)*

*Each in turn says:*

|              |   |
|--------------|---|
| <b>Attys</b> | Good morning your honors, _____, representing the Petitioner in this action. I will be delivering the _____.<br>Good morning your honors, _____, representing the Petitioner in this action. I will be delivering the _____<br>Good morning your honors, _____, representing the Respondent in this action. I will be delivering the _____<br>Good morning your honors, _____, representing the Respondent in this action. I will be delivering the _____<br>Good morning your honors, _____, I'll be your clerk and official timer this morning.<br>Good morning your honors, _____, I'm the unofficial timer. |
| <b>PJ</b>    | Before we begin, I'm going to read some preliminary instructions.   |

*PJ reads instructions or asks to skip reading them. Then the PJ addresses the P Attys*

|               |   |
|---------------|---|
| <b>PJ</b>     | _____, please proceed with your argument. |
| <b>P Atty</b> | Yes, your honor                           |

*One of the P Attys stands and delivers his/her argument-in-chief (main argument). Then, if appropriate, the other P Atty stands and delivers his/her argument-in-chief.*

Personnel are:

(PJ) Presiding Judge (P Atty) P Petitioner's attorney; (R Atty) Respondent's attorney; (Attys) All or some of the attorneys

After the P Atty(s) have delivered their arguments-in-chief, then the PJ asks the R Atty(s) to give their arguments.

|               |   |
|---------------|---|
| <b>PJ</b>     | _____, please proceed with your argument. |
| <b>P Atty</b> | Yes, your honor.                          |

*The R Atty(s) stand and deliver their arguments-in-chief. Then the PJ addresses P Atty(s):*

|           |  |
|-----------|--|
| <b>PJ</b> | _____, you may proceed with rebuttal. Remember that this time may only be used to rebut opposing counsel's argument and not to raise new issues. |
|-----------|--|

*When P Atty(s) have finished rebuttal, (or time is called) the PJ addresses R Atty:*

|           |                                       |
|-----------|---------------------------------------|
| <b>PJ</b> | _____, you may proceed with rebuttal. |
|-----------|---------------------------------------|

*When R Atty(s) have finished rebuttal (or time is called) the PJ addresses everyone:*

|                 |  |
|-----------------|--|
| <b>PJ</b>       | This concludes the oral argument in Roper vs Simmons. Thank you counsel. |
| <b>CI/Timer</b> | All rise.  |

*After the judges are off the bench:*

|                 |                    |
|-----------------|--------------------|
| <b>CI/Timer</b> | You may be seated. |
|-----------------|--------------------|

Name \_\_\_\_\_

Overall Grade \_\_\_\_\_

## Grade/Rubric Sheet for Moot Court the Appellate Process

### PERFORMANCE AND WORK PRODUCT

#### **Attorneys:**

Oral Argument \_\_\_\_\_ /50

- Had well organized argument that was easy to follow
- Appeared knowledgeable on issues; was able to respond well to questions
- Showed poise, passion and persuasiveness
- Countered opponents arguments in rebuttal
- Cited cases (if required)

Written Brief \_\_\_\_\_ /50

- Showed clear reasoning
- Made all important arguments
- Was well written and edited
- Used proper format
- Cited cases to support arguments (if required)

Total \_\_\_\_\_ /100

#### **Judges:**

Bench Performance \_\_\_\_\_ /50

- Asked the lawyers good questions
- Had good judicial temperament (looked an acted like a judge)

Written Opinion \_\_\_\_\_ /50

- Showed clear reasoning
- Covered all important issues
- Was well written and edited
- Used proper format
- Cited cases to support arguments (if required)

Total \_\_\_\_\_ /100

SUMMARY AND ANALYSIS GRADE ( ) \_\_\_\_\_

- A) Summary of Appellate Process
- B) Activity and Learning Evaluation
- C) Analysis of participant performance

SELF GRADE ( ) \_\_\_\_\_

- Self-Assessment Sheet

Name \_\_\_\_\_

Due on \_\_\_\_\_

## **Self-Assessment for Moot Court Exploring the Appellate Process**

### YOUR JOURNAL

- 1 Describe your ideas on how appellate process works. Tell whether you think it is effective and fair and your reasons for your opinion.
- 2 Write about your personal experiences, impressions, and thoughts during and after participating in the appellate process.

### SELF GRADE

Please grade yourself on a scale of 1 to 5 (with 5 being the best) for your **participation** in the “Moot Court – Exploring the Appellate Process,” focusing on how well you prepared for and performed your part.

I feel my grade for Moot Court should be \_\_\_\_\_ because....

## **Questionnaire for Moot Court Exploring the Appellate Process**

- A. Summarize the appellate process. Use graphs, flowcharts, pictures, graphics, essays, music, dance, electronics media, or a combination of these. Be creative!
- B. Evaluate the activity and your learning style (Please attach sheet.)

### ***The Activity***

1. How valuable was the simulation in helping you understand the appeals process?
2. What worked well in the simulation? Why?
3. What didn't work well? Why?
4. What was your favorite part? Least favorite? Explain why.
5. What things made you most frustrated about oral arguments? The appeals process in general?
6. Did participating in this activity change any preconceived ideas you had about how the appeals process works? What were they and how did they change?
7. How would you improve this activity for next year?

### ***Your Learning Style***

Think about how you like to learn (reading, listening to lectures, participating in simulations, a combination of those) when you answer the following questions.

8. Did taking part in this activity give you a better overall idea of how the appeals process works than reading or listening to lectures would have. Why/why not?
9. In terms of remembering details and vocabulary (for example, what "brief" means), which form(s) of learning works best for you? Why?
10. Five years from now, do you think you'll remember more about how appeals work than you would have from just reading and lectures? Explain.
11. Is your understanding of the appeals process deeper and/or broader than it would have been had you learned about it through reading and lectures? Why/why not?
12. Was doing this activity more enjoyable than reading and lectures? Why/why not?
13. Did doing this activity make you want to come to class more? Why/why not?

C. Analyze the Participants

List the judges and the lawyers whose courtroom presentations you watched and/or participated in. Comment on each person's overall performance. Include specific examples. (Use the back if necessary.)

Name \_\_\_\_\_

Overall Grade \_\_\_\_\_

## **Rubric for Briefs and Oral Argument**

Evaluate the presentation on a 1 to 5 scale (5 is the highest) using the following criteria:

### **Preparation and Organization of Main Argument**

Introduces all attorneys using introduction form \_\_\_\_\_

Begins with overview of issues \_\_\_\_\_

Gives brief summary of facts \_\_\_\_\_

Makes request for relief (what you want the court to do) \_\_\_\_\_

Has clear main argument that shows good grasp of legal principles \_\_\_\_\_

Cites authorities (cases) \_\_\_\_\_

### **Answering questions**

Shows ability to think on feet \_\_\_\_\_

Responds well to the judges (shows understanding of judges' questions) \_\_\_\_\_

Weaves questions into argument \_\_\_\_\_

Transitions smoothly between answers and prepared argument \_\_\_\_\_

Uses questions to his/her advantage (ie to point out weaknesses in opponent's position) \_\_\_\_\_

### **Performance and Persuasiveness**

Makes eye contact \_\_\_\_\_

Has pleasant and audible tone of voice \_\_\_\_\_

Has good rate of speaking, pronunciation, grammar \_\_\_\_\_

Uses advocacy tone (strongly arguing one's side without being obnoxious) \_\_\_\_\_

Avoids reading as much as possible \_\_\_\_\_

Uses notes effectively (ie to get quotes exactly right) \_\_\_\_\_

Uses time effectively \_\_\_\_\_

Uses natural gestures, abstains from annoying mannerisms, has good posture \_\_\_\_\_

### **Courtroom Conduct**

Has appropriate attire \_\_\_\_\_

Exhibits proper counsel table behavior (assists co-counsel, pays attention when not presenting) \_\_\_\_\_

Avoids inappropriate use of first person and slang \_\_\_\_\_

Is deferential towards the bench \_\_\_\_\_

Name of speaker \_\_\_\_\_

## **Listening/Speaking Rubric for Speech or Oral Argument**

While listening to your classmates speak, evaluate the speeches on a 1 to 5 scale (5 is the highest) using the following criteria:

1. The speech/argument was well organized. \_\_\_\_\_
2. The speaker presented evidence (cited cases) to back up his/her points and quoted from the materials. \_\_\_\_\_
3. The arguments were logical and coherent. \_\_\_\_\_
4. The speech anticipated your concerns and addressed them. \_\_\_\_\_
5. The speaker used language that was correct, clear and appropriate. \_\_\_\_\_
6. The speaker did not use logical fallacies in the speech (e.g. false cause and effect, red herring, overgeneralization, bandwagon effect. \_\_\_\_\_
7. The speaker had good diction (pronounced words clearly and spoke loudly enough to be heard). \_\_\_\_\_
8. The speaker used effective and interesting language and had a speaking style that was enjoyable to listen to. \_\_\_\_\_
9. You were persuaded by what the speaker said and/or the manner in which he/she delivered the speech. \_\_\_\_\_