No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

RON CHRIS FOSTER - PETITIONER

VS.

ROBERT L. JOHNSON, COMMISSIONER OF THE
MISSISSIPPI DEPARTMENT OF CORRECTIONS - RESPONDENT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[x] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court:

United States District Court for the Southern District of Mississippi, Eastern Division

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Undersigned counsel was appointed to represent petitioner pursuant to the Criminal Justice Act of 1964, 18 U.S.C.A. § 3006A.

_____

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(Signature)

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RON CHRIS FOSTER,

Petitioner,

v.

ROBERT L. JOHNSON, COMMISSIONER OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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September 27, 2002

CAPITAL CASE

QUESTIONS PRESENTED

1. Have standards of decency evolved among the States to the point that the imposition of the death penalty on a person for offenses committed when that person was seventeen years of age or younger violates the Eighth Amendment's prohibition against cruel and unusual punishment?

2. Have standards of decency evolved among the States to the point that the imposition of the death penalty on a person for offenses committed when that person was seventeen years of age or younger--without first requiring particularized judicial findings that the defendant is sufficiently mature and morally culpable to be tried and sentenced as an adult--violates the Eighth Amendment's prohibition against cruel and unusual punishment?

3. In deciding on habeas corpus review whether a state court's application of federal law was "reasonable," must the federal court consider the method of reasoning and process used by the state court in reaching its decision, as the Seventh Circuit has held; or may the federal court restrict its review to the reasonableness of the ultimate legal decision rendered by the state court, as did the Fifth Circuit in the Petitioner's case?

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Mississippi Supreme Court Opinions:

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Foster v. State, 687 So.2d 1124 (Miss. 1996).

JURISDICTION

1. The United States Court of Appeals for the Fifth Circuit entered its dispositive opinion on June 6, 2002.

2. A timely petition for rehearing and suggestion for rehearing en banc was filed; an order denying both requests was entered July 2, 2002.

3. The United States District Court had exercised jurisdiction under 42 U.S.C. § 1983, and entered its dispositive opinion and order on January 4, 2001.

4. This Court's jurisdiction is conferred by Section 1254(1) of Title 28, United States Code.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(*Set out in full in Appendix*)

United States Constitution, Amends. VI, VIII & XIV.

STATEMENT OF THE CASE

Procedural History

Ron Chris Foster was convicted and sentenced to death for the capital murder of George Shelton in the Circuit Court of Lauderdale County on January 18, 1991. Foster appealed this decision to the Mississippi Supreme Court. *See Foster v. State*, 639 So.2d 1263 (Miss. 1994). The Mississippi Supreme Court affirmed the conviction, and Foster subsequently filed a petition for writ of certiorari to the United States Supreme Court, which was denied. *Foster v. State*, 639 So.2d 1263 (Miss. 1994), *cert denied*, 115 S.Ct 1365 (1995). A petition for rehearing followed and was also denied. *Foster v. State*, 639 So.2d 1263 (Miss. 1994), *reh'g denied* 115 S.Ct 1992 (1995).

On July 21, 1995, Foster filed a motion for post-conviction collateral relief with the Mississippi Supreme Court under the Mississippi Post Conviction Collateral Relief Act, Miss. Code. Ann. § 99-39-1. The Mississippi Supreme Court denied Foster's request for post-conviction relief. *See Foster v. State*, 687 So.2d 1124 (Miss. 1996).

On October 29, 1997, Foster petitioned the United States District Court for the Southern District of Mississippi for a writ of habeas corpus to vacate the conviction and/or the sentence of death. The District Court denied and dismissed Foster's petition for habeas relief with prejudice on January 4, 2001. Foster filed a Motion to Reconsider on January 16, 2001. The District Court denied this motion on February 20, 2001. Foster filed a Notice of Appeal with the District Court on March 22, 2001. Foster also filed a Motion For Certificate of Appealability (COA) on May 14, 2001. The District Court granted Foster the COA on the ineffective assistance of counsel issue but denied a COA for all other issues. On June 6, 2002, the United States Court of

Appeals for the Fifth Circuit affirmed the District Court's denial of habeas relief, granted a COA on Petitioner's claim of ineffective assistance of counsel based on the failure to file a motion to transfer Petitioner's case to youth court, and denied Petitioner's request for a COA on his Eighth Amendment claim.

Factual History

In the early morning of June 10, 1989, an attempted robbery took place at the Hankins Superette convenience store in Lowndes County, Mississippi. George Shelton, the store's cashier, refused to open the cash register and a struggle ensued with the robber. During the robbery, the robber gained control over a pistol which Shelton kept behind the counter for protection. Shelton was shot and killed. After investigating the crime, officers arrested Ron Chris Foster for the capital murder of Shelton. Foster was ultimately indicted, tried, and convicted of this offense. Foster was seventeen years old when the crime was committed. A Lauderdale County jury imposed the death penalty and Foster was sentenced to die by lethal injection.

Mike Farrow, (Foster's trial attorney) requested a psychological examination of Foster. Farrow's motion for a psychiatric examination included a request for an examination to evaluate whether Foster met *M'Naghten* sanity standards as well as an evaluation of whether Foster exhibited any characteristics of a possible brain disorder that could possibly serve as a mitigating factor in the sentencing phase. In support of this motion, Farrow presented the affidavit of Foster's father. The affidavit stated that Foster, throughout his life, had exhibited "strange and bizarre behavior leading us to question his sanity and emotional health and well being."

The Circuit Court Judge granted the motion for the purpose of determining whether Foster was competent to stand trial under *M'Naghten*, but delayed ruling on whether Foster should have a psychiatric examination for mitigation purposes until the results of the initial *M'Naghten* sanity examination could be obtained. During a motion for continuance, Farrow stated that he planned to call expert witnesses during the mitigation portion of the trial. Nevertheless, the case proceeded to trial with no ruling on the motion for the appointment of a mental health expert for purposes of mitigation during the sentencing phase. Consequently, the only mitigating evidence introduced by Farrow at the sentencing phase of the trial was the testimony of Foster's parents, Steveson and Lillian Foster. Farrow offered little or no evidence to support the other mitigating factors favoring a life sentence rather than death.

Foster was seventeen years old on June 10, 1989, when he committed the crime. Foster's counsel, ignorant of the law, failed to make a request to the circuit judge to transfer the case to youth court.

REASONS TO GRANT THE WRIT

I. Standards of decency have evolved among the States such that the imposition of the death penalty on the Petitioner who was seventeen years of age when the subject crime was committed would violate the Eighth Amendment's prohibition against cruel and unusual punishment

In their dissenting opinions in a recent case, three of the Justices of this Court expressed their opinions that it would be appropriate to revisit the rule in *Stanford v. Kentucky*, 492 U.S. 361 (1989) in light of this Court's opinion in *Atkins v. Virginia*, 536 U.S. __ (2002). Justice Stevens opined that

> [g]iven the apparent consensus that exists among the States and in the international community against the execution of a capital sentence imposed on a juvenile offender, I think it would be appropriate for the Court to revisit the issue at the earliest opportunity.

Patterson v. Texas, ___ U.S. ___, 2002 WL 1986618, order denying application for stay of execution and denying petition for writ of habeas corpus (August 28, 2002) Stevens, J., dissenting. Justices Ginsburg and Breyer agreed:

> This Court's decision in *Atkins v. Virginia*, 536 U.S. ___ (2002), made it tenable for a petitioner to urge reconsideration of *Stanford v. Kentucky*, 492 U.S. 361 (1989) . . . . For the reasons stated by Justice Stevens, I think it appropriate to revisit the issue at this time.

Id., Ginsburg and Breyer, JJ., dissenting. Petitioner, Ron Chris Foster, was seventeen years of age at the time that he committed the subject crime, and so urges the reconsideration of *Stanford v. Kentucky* at this time.

A. Petitioner's 8th Amendment Claim Is Not Procedurally Barred

The Fifth Circuit Court of Appeals denied relief on Foster's Eighth Amendment claim, asserting that it was procedurally barred because it was not presented to the trial court. Foster v. Johnson 293 F.3d 766, 790 (5th Cir. 2002). Undersigned counsel submits that, in this respect, the Court of Appeal's decision conflicts with this Court's holding in *Penry v. Lynaugh (Penry I)*, that where "the Constitution itself deprives the State of the power to impose a certain penalty . . . finality and comity concerns [ ] have little force." 492 U.S. 302, 330 (1989).

Moreover, if this Court should determine that the Eighth Amendment prohibits imposition of the death penalty on juvenile offenders as a class, this new constitutional rule would be retroactively applied under *Penry I* and *Teague v. Lane*, 489 U.S. 288 (1989). The retroactive application of this new constitutional prohibition would render moot any concern regarding whether the state court in this case denied Foster's Eighth amendment claims based on independent and adequate state law procedural grounds. *Penry I*, 492 U.S. at 330. Thus, review of Foster's Eighth Amendment claims is not procedurally barred.

B. A National Consensus Now Exists to Not Execute Juvenile Offenders

In 1989, this Court held in *Stanford v. Kentucky* that because no national consensus existed in opposition to the execution of sixteen and seventeen year old offenders, the execution of juveniles for offenses committed at those ages did not offend the Eighth Amendment. 492 U.S. at 373. In arriving at this conclusion, the Court rejected the concept that non-death penalty states could be included in the calculus determining whether a consensus exists. 492 U.S. at 371 n.2.

In *Atkins v. Virginia*, the Court adopted just this approach in determining whether a national consensus exists against the execution of the mentally retarded. 122 S. Ct. 2242, 2249. Applying the *Atkins* approach of counting the jurisdictions that do not permit any capital punishment with the jurisdictions that have capital punishment statutes, it is clear that a national consensus exists against the execution of juvenile offenders.

At the heart of the prohibition against cruel and unusual punishment is the idea that the punishment must be proportional to the crime. *See Atkins*, at 2246-47. The definition of proportionality is found in the standards that currently prevail, not those in force at the time the

Eighth Amendment took effect. *Id.* at 2247. Exactly what standards prevail should be determined by "objective factors to the maximum possible extent." *Id.* (citation omitted).

In applying this proportionality review to determine the unconstitutionality of executing the mentally retarded, this Court considered legislation as the "most reliable objective evidence of contemporary values." *Id.* (citation omitted). In addition to reviewing the legislative trends, this Court considered the positions of organizations with germane expertise, of religious communities, of the world community, and of the American public. *Id.* at 2249, n. 21. Finally, this Court considered its own judgment on the issue. *Id.* at 2247-48. In the end, this Court concluded that the practice of executing the mentally retarded "has become truly unusual, and it is fair to say that a national consensus has developed against it." *Id.* at 2249.

Using all of the same objective standards employed in *Atkins*, it is evident that a national consensus has likewise developed against the execution of juveniles. A comparison of the prevailing views on the issue of executing the mentally retarded with those on the issue of executing juveniles shows that the consensus against the execution of juveniles is equal to if not greater than that against execution of the mentally retarded.

1. Legislation on the Issue of the Juvenile Death Penalty

At the time of *Stanford v. Kentucky*, eleven states established eighteen as the minimum age of eligibility for the death penalty, four states established seventeen as the minimum age, and twenty-two states established age sixteen as the cutoff. *Id.* at 371. One state, New Hampshire, had conflicting statutes at the time, with one statute setting eligibility at age seventeen and one at age eighteen. In *Stanford*, this Court concluded the legislation did not establish a degree of national consensus sufficient to declare the execution of a 16 or 17 year old to be cruel and unusual punishment.

In comparison, today sixteen states have established eighteen as the minimum age of death eligibility, five states have established seventeen as the minimum age, and seventeen states have established sixteen as the minimum age.[1] Not one state has lowered the age of eligibility to either 16 or 17, despite the green light to do so in *Stanford*. Instead, state legislatures have moved in precisely the opposite direction.[2]

Since *Stanford*, five states have created new law forbidding the juvenile death penalty. Most recently, Indiana raised its statutory minimum age from 16 to 18 years old.[3] The Montana Legislature did the same thing in 1999.[4] When New York reinstated the death penalty in 1995, its statute set the minimum age at eighteen for eligibility of the death penalty.[5] The State of Kansas' 1994 reenactment of the death penalty likewise set the minimum age for death penalty

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[1] Streib, Victor L., *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-June 30, 2002* (July 15, 2002) (unpublished manuscript available at http://www.law.onu.edu/faculty/streib/juvdeath.pdf).

[2] Id.

[3] S.426, 112th Leg., Reg. Sess., 2002 In. Laws.

[4] H.B. 374, 1999 Leg., Reg. Sess., 1999 Mt. Laws.

[5] N.Y. Crim. Proc. Law §400.27 (McKinney 2002).

eligibility at eighteen.[6] Finally, the State of Washington abolished the juvenile death penalty in a Washington Supreme Court ruling. *State v. Furman*, 858 P.2d 1092, 1103 (Wash. 1993). The Washington legislature has done nothing to overturn the court's decision. Furthermore, the District of Columbia, the military courts, and the federal government all proscribe the death penalty for those under age eighteen.

[6] Kan. Crime. Code Ann. §21-4622 (Vernon 2001).

In addition to the definitive action taken by these five states, all legislative efforts in other states show a trend towards abolition of the juvenile death penalty. In *Brennan v. State*, 754 So. 2d 1, 7 (Fla. 1999), Florida raised its minimum age for eligibility for the death penalty from 16 to 17 years of age. Ten states that currently use the death penalty are considering legislation to raise the minimum age for eligibility to eighteen: Arizona, Arkansas, Florida, Kentucky, Mississippi, Missouri, Nevada, Pennsylvania, South Carolina, and Texas. This is the most legislative attention the issue has been given in twenty years.[7]

Paired with the twelve states that do not permit capital punishment for persons of any age, a total of twenty-eight states currently prohibit the execution of juvenile offenders, while twenty-two states seem to allow such executions. This closely parallels the numbers on the mental retardation issue at the time of *Atkins*, with thirty states prohibiting the execution of the mentally retarded compared to twenty jurisdictions permitting such executions. In *Atkins*, these numbers prompted this Court to conclude:

> The large number of states prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.

Id. at 2249.

2. Consistency of the Trend Away From Executing Juveniles

In considering the importance of the legislative movement, this Court commented in *Atkins* that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." *Id.* at 2249. The large number of states banning executions of the

[7] Streib, Victor L., *The Juvenile Death Penalty Today*, p. 7.

mentally retarded "carries even greater force" when the overwhelming support such legislation received is considered. *Id.*

A similarly large amount of support is seen in recent legislative efforts to abolish the juvenile death penalty. The Indiana legislation was passed by a vote of 44-3 in the Senate and 83-10 in the Assembly.[8] The Montana legislation passed by a margin of 44-5 in the Senate and 85-15 in the Assembly.[9] Even in Washington, where the action was accomplished by the Washington Supreme Court, all Justices of the Court concurred in the decision abolishing the juvenile death penalty. *State v. Furman*, 858 P.2d 1092 (Wash. 1993).

In Florida, the bill[10] passed the Senate 34-0, but the House of Representatives did not vote on the measure by the end of the session. Even in Texas, the only state that executes juvenile offenders with any regularity, the bill[11] passed the House 72-42 before becoming stalled in the Senate without a vote. In New Hampshire, the legislature voted to abolish the death penalty completely in 2000, thereby necessarily including juveniles.[12]

Like the trend away from executing the mentally retarded, the efforts to end the executions of juveniles are receiving near unanimous support. This fact strengthens the impact of the position already taken by over half of the states outlawing the juvenile death penalty.

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[8] Indiana State Legislature Archive (2002), 7/16/2002 SB 0426.
[9] Montana Legislative Archive (1999) Detailed Bill Information HB 374.
[10] SB 1212 (2002).
[11] H.J. of Tex., 77th Leg., R.S. page 3098 (2001).
[12] HB 1548.

3. The Practice of Executing Juveniles Has Become "Unusual"

The second factor used by this Court in *Atkins* to bolster the strong legislative stance against executing the mentally retarded was the fact that the practice of carrying out such executions is uncommon. *Id.* at 2249. This factor also bolsters the case against executing juvenile offenders. Of the twenty-two states that retain the death penalty for juvenile offenders, only two have used this punishment with any frequency – Texas and Virginia. They have carried out 14 of the 19 juvenile executions in the United States since 1976. Texas is responsible for eleven of the executions, and Virginia for three.[13]

Five other states have carried out only one execution each – Georgia, Louisiana, Missouri, Oklahoma, and South Carolina.[14] Clearly, these states are not closely tied to the punishment. Before these modern day singular executions, Louisiana last executed a juvenile in 1948, Georgia in 1957, Missouri in 1921, and South Carolina in 1948. Oklahoma had never executed a juvenile offender prior to 1999.[15]

This leaves fifteen "death states" that have not carried out a single juvenile execution, although permitted by law. Of these states, eight of them have no juvenile offenders on their death row, two states have one such offender, and four states have two each.[16] As evidence of the continuing trend away from juvenile executions, in the last year, Virginia overturned the death sentence of its only juvenile on death row.[17] Furthermore, the reversal rate for death

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[13] Streib, Victor L., *The Juvenile Death Penalty Today*, pp. 4-5 (Table 1).

[14] Streib, Victor L., *The Juvenile Death Penalty Today*, pp. 4-5 (Table 1).

[15] Streib, Victor L., *Death Penalty for Juveniles* (Indiana University Press 1987).

[16] Fact Sheet: The Juvenile Death Penalty in the United States (The American Bar Association 2002).

[17] Washington Post, 9/25/01. From the Death Penalty Information Center at www.deathpenaltyinfo.org.

sentences imposed on juvenile offenders is 86%,[18] and juvenile death sentences have dropped in 2001 to only 1.8% of the total number of death sentences imposed in the United States since 1973.[19]

What these statistics show is that in most of the states that do retain the juvenile death penalty, there is no perceived need to pursue legislation barring such executions because it is not an issue. This Court recognized this fact in *Atkins*, and after noting that the execution of the mentally retarded is uncommon, recognized that "there is little need to pursue legislation barring the execution of the mentally retarded in those States [that do allow such executions]." *Atkins*, 122 S. Ct. at 2249. Likewise, there is little need for concerned organizations and members of the public to demand change, although support for such change may be high, and public opposition to executing the mentally retarded and juveniles may be high.

4. Other Objective Factors Support the Legislative Trends Away From Sanctioning Use of the Juvenile Death Penalty

In *Atkins*, after considering legislative support for abolishing the death penalty for mentally retarded offenders, this Court looked at "[a]dditional evidence [that] makes it clear that this legislative judgment reflects a much broader social and professional consensus." *Atkins*, 122 S. Ct. at 2249, n.21. Examining the same additional evidence as it relates to the juvenile death penalty reveals a similar consensus against the use of this punishment.

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[18] Streib, Victor L., *The Juvenile Death Penalty Today*, p. 9.
[19] *Id.*, p. 14.

a. Organizations With Germane Expertise Have Adopted Official Positions Opposing the Imposition of the Death Penalty Upon a Juvenile Offender.

Opposition to the juvenile death penalty by expert organizations has been longstanding. In his *Stanford* dissent, Justice Brennan cited the following organizations, among others, that filed amicus briefs urging an end to juvenile executions:

> American Bar Association, Child Welfare League of America, National Parents and Teachers Association, National Council on Crime and Delinquency, Children's Defense Fund, National Association of Social Workers, National Black Child Development Institute, National Network of Runaway and Youth Services, National Youth Advocate Program, American Youth Work Center, American Society for Adolescent Psychiatry, American Orthopsychiatric Association, Defense for Children International - USA, National Legal Aid and Defender Association, National Association of Criminal Defense Lawyers, Office of Capital Collateral Representation for the State of Florida, International Human Rights Law Group, and Amnesty International.

Stanford, 492 U.S. at 389, n.4.

Since *Stanford*, the list of such organizations has grown. The Constitution Project, a bipartisan nonprofit organization that seeks consensus on controversial legal and constitutional issues, established a blue-ribbon committee to develop reforms to address wrongful convictions in death penalty cases.[20] In its publication *Mandatory Justice, Eighteen Reforms to the Death Penalty*, the group explicitly recommended barring the death penalty for persons under the age of 18 at the time of the crime to reduce the risk of wrongful execution, ensure that the death penalty is reserved for the most culpable offenders, and to effectuate the deterrent and retributive

[20] The 30-member Death Penalty Initiative committee describes itself in its mission statement: "We are supporters and opponents of the death penalty, Democrats and Republicans, conservatives and liberals. We are former judges, prosecutors, and other public officials, as well as journalists, scholars, and other concerned Americans. We may disagree on much. However, we are united in our profound concern that, in recent years, and around the country, procedural safeguards and other assurances of fundamental fairness in the administration of capital punishment have been significantly diminished."

purposes of the death penalty.[21] The American Psychiatric Association, The American Academy of Child and Adolescent Psychiatry, The National Mental Health Association, The National Center For Youth Law, The Coalition for Juvenile Justice, and The American Humane Association have all joined this position and support the abolition of the juvenile death penalty.

b. Widely Diverse Religious Communities Oppose the Juvenile Death Penalty

This Court commented on the number of different religions that filed amicus briefs in support of stopping executions of the mentally retarded. *Atkins*, 122 S. Ct. at 2249, n.21. Religious opposition to the juvenile death penalty dates back at least to the time of *Stanford*, where the following groups filed amicus briefs advocating an end to executing juveniles:

> American Baptist Church, American Friends Service Committee, American Jewish Committee, American Jewish Congress, Christian Church (Disciples of Christ), Mennonite Central Committee, General Conference Mennonite Church, National Council of Churches, General Assembly of the Presbyterian Church, Southern Christian Leadership Conference, Union of American Hebrew Congregations, United Church of Christ Commission for Racial Justice, United Methodist Church General Board of Church and Society, United States Catholic Conference, and West Virginia Council of Churches.

Stanford, 492 U.S. at 389, n.4.

c. The World Community Overwhelmingly Opposes the Execution of Juveniles

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[21] The Constitution Project, *Mandatory Justice, Eighteen Reforms to the Death Penalty*, p.11(2001). Can be accessed on line at www.ConstitutionProject.org.

The execution of juvenile offenders has all but ended in every nation but the United States.[22] Although domestic differences are small between the statutory bars on executing mentally retarded and juvenile offenders, the juvenile bar has so much more universal, codified support that it has achieved customary international law and, indeed, jus cogens status. The International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights, and the U.N. Convention on the Rights of the Child (CRC) expressly prohibit the death penalty for juvenile offenders. The United States soon will be the only country in the world that has not ratified the CRC, as Somalia, the only other holdout, recently signed the CRC and announced its intention to quickly ratify the treaty. One hundred and ninety-one nations have adopted the fundamental standards articulated in this treaty.[23]

In the last decade, the United States has executed more juvenile offenders than all other nations combined. Since 1990, only seven countries are reported to have executed persons who were under 18 years of age at the time of the crime – The Democratic Republic of Congo, Iran, Nigeria, Pakistan, Yemen, Saudi Arabia, and the United States. The nations of Pakistan and Yemen have since abolished the juvenile death penalty, while Saudi Arabia and Nigeria deny that they have executed juvenile offenders.

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[22] Amnesty International, "Fact Sheet" (2002).
[23] Amnesty International, *The Death Penalty Worldwide* (2002).

In the last three years, the number of nations to execute juvenile offenders has dropped significantly, to a mere three: Iran, the Democratic Republic of Congo, and the United States. Moreover, just this past year, Iran stated that it no longer executes juvenile offenders, and the leader of the Democratic Republic of Congo commuted the death sentences of four juvenile offenders.

Continued juvenile executions violate international law, thus isolating the United States from the international community. The near unanimous position of the world community supports the legislative and other trends in this country showing an overwhelming consensus against the execution of juveniles.

d. Public Opinion Shows a Consensus Among Americans that We Should Not Be Executing Juvenile Offenders.

Scientific studies confirm that the majority of Americans believe that the death penalty should not apply to juveniles.[24] In one study, only 35% of death-qualified mock jurors were willing to sentence 17-year-old defendants with the death penalty.[25] More recent studies substantiate this trend. A 2001 study showed that "while 62% back the death penalty in general, just 34% favor it for those committing murder when under the age of 18."[26] The same study cites a 2001 survey by the Princeton Survey Research Associates, which showed that 72% favored the death penalty for at least the most serious murders, but only 38% wanted it applied to offenders under eighteen.[27] Similarly, a May 2002 Gallup poll showed that more than two-thirds of Americans, 69%, oppose the practice of executing juveniles.[28]

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[24] *See, e.g.*, Skovron, Sandra Evans, Joseph E. Scott, and Francis T. Cullen. *Crime and*

Public opinion is also revealed in the actions of juries. The rate of juvenile death sentencing fluctuated greatly in the years following the reinstatement of the death penalty, and slowed to an average of approximately 2% of the total number of death sentences in the mid-1980s. In the mid to late 1990s, the rate ranged from approximately 2% to 6%. In the last few years, however, the juvenile death penalty sentencing rate has declined significantly to an average of 1.7% per year. Thus far in 2002, no juvenile death sentences have been verified.[29]

Delinquency, October 1989 v.35 n.4 pp.546-561.

[25] Finkel, N.J., Hughes, K.C., Smith, S.F., & Hurabiell, M.L., "Killing kids: The juvenile death penalty and community sentiment." *Behavioral Sciences and the Law*, 12, 5-20 (1994).

[26] Smith, Tom W., "Public Opinion of the Death Penalty for Youths." National Opinion Research Center, University of Chicago, prepared for the Joyce Foundation, p. 2 (December 2001).

[27] *Id.*

[28] Gallup News Service, "Slim Majority of Americans Say Death Penalty Applied Fairly," (May 20, 2002).

[29] Streib, Victor L., *The Juvenile Death Penalty Today*, p. 14.

These statistics demonstrate that not only is the public opposed in theory to the execution of juveniles, but in fact, they often in practice refuse to execute a juvenile offender.

It is clear, through the number of states that do not have the death penalty, the number of states who have the death penalty but who do not allow its imposition on juveniles, the number of states who have not conducted a juvenile execution, the number of states who have no juveniles on their death rows, the number of states to have legislatively or judicially raised the death penalty minimum age (despite the invitation in *Stanford* to raise it), and consistent public polls that there is a national consensus in this country against the execution of juvenile offenders. Therefore, the execution of juvenile offenders violates evolving standards of decency, and thus the Eighth Amendment. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) ("evolving standards of decency . . . mark the progress of a maturing society").

C. Well-Established Research on Adolescent Brain Development Reinforces the Eighth Amendment's Evolving Standards of Decency Which Now Forbid the Death Penalty for 17-Year-Olds.

1. The Human Brain Continues to Evolve into the Early Twenties With the Mental Ability to Control Impulses Developing Last.

In an original habeas corpus petition now pending in this Court in *Stanford v. Parker*, No. 01-10009, Petitioner Stanford refers to scientific research on adolescent brain development. Stanford's brief att 23-25. Earlier stages of this research were relied upon by this Court in *Thompson v. Oklahoma*, 487 U.S. 815, 833-838 (1988) (Stevens, J., plurality opinion). During the ensuing years since *Thompson* and *Stanford*, this research has continued and has reinforced the earlier findings.

The new research findings come chiefly from magnetic resonance imaging (MRI) of both the structural and functional varieties. Numerous news articles describe recent MRI studies comparing adolescent brains to adult brains and which suggest a connection between teen behavior and brain development. *See e.g.*, Matt Crenson, *Brain Changes Shed Light on Teen Behavior*, The Times-Picayune, December 31, 2000, p. A-18; Daniel R. Weinberger, *Teen Brain Lacks Impulse Control*, Seattle Post-Intelligencer, March 13, 2001, ed.; Shankar Vedantam, *Are Teens Just Wired That Way?*, The Washington Post, June 3, 2001, sec. A.

Structural MRI has revealed that the brain changes as one matures, that different parts change at different times, and that the frontal lobes (and more particularly the pre-frontal lobes) along with a subcortical area, the striatum, change most dramatically between an sample of youths ages 12 to 16 and a sample of adult ages 22 to 30. *See, e.g.*, E.R. Sowe1l, P.M. Thompson, C.J. Holmes, T.L. Jernigen, & A.W. Toga, *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neuroscience 859 (1999). Functional MRI uses similar techniques to observe changes in brain activity and has found that changes in those areas indicative of maturation continue to take place during late adolescence and into early adulthood.

A copy of an affidavit from Dr. Ruben C. Gur, Professor and Director of Neuropsychology in the Department of Psychiatry of the University of Pennsylvania Health System, has been submitted to this Court in the pending *Stanford* matter, and is included in the appendix to this petition. Dr. Gur's summary of the evidence from the recent MRI research reveals:

> Increase in white matter continues well into late adolescence, and the frontal lobes are the last to myelinate. The behavioral significance of this neuroanatomical finding is that the very brain system necessary for inhibition and goal-directed behavior comes "on board" last and is not fully operational until early adulthood (about 18-22 years).

Affidavit of Dr. Ruben C. Gur, app., ex. 141a.

We know that the prefrontal cortex is most important for "executive functioning" including planning, and using judgment, controlling impulsiveness, etc. Now we see that there is an objective basis for the common knowledge that teenagers tend to have a lot less of these qualities than adults, both in terms of the structure of the brain (which is manifestly more immature in the prefrontral area in adolescents than adults) and function of the brain.

Confirming what every parent of a teenager knows, the scientific research has concluded that adolescents actually think differently from adults. D. Keating, *Adolescent Thinking*, in "At the Threshold," 54-89 (S. Feldman et al. Eds., 1990); W. Overton, *Competence and Procedures*, in "Reasoning, Necessity and Logic," 1-32 (W. Overton ed. 1990). These recent neurological studies conclude that the adolescent brain is not fully developed and, among other things, undergoes major reorganization in the area associated with social behavior and impulse control. *See Physical Changes in Adolescent Brains May Account for Turbulent Teen Years*, McClean Hospital Study Reveals, http://www.mclean.harvard.edu/PublicAffairs/TurbulentTeens.htm; National Institute of Mental Health, *Teenage Brain: A Work in Progress*, 2/6/01, http://www.nimh.nih.gov/publicat/teenbrain.cfm.

To a certain degree, this latest research simply confirms what we have always known or suspected about the brain development of 17-year-o1ds. While they often appear to be "fully-grown" physically and may seem to be functioning as adults, their judgment and impulse-control are simply not that of adults. Granted, they may know "right from wrong" under an infancy defense or an insanity test, but they nonetheless are lacking in fully adult-level functioning of their brains. They may make horrible decisions, and they act on impulse, without thinking clearly about the consequences.

2. Legitimate Objectives of Punishment Are Not Served by Imposing Adult Capital Punishment Upon Offenders Who Do Not Have Adult Mental Abilities.

The pending *Stanford* petition contains arguments about deterrence and retribution, the objectives of capital punishment which have been accepted by this Court. *Stanford* brief, pp. 20-27. The targets of these punishment objectives are 17-year-olds whose brains are not fully developed, particularly as to judgment and impulse control. Elkhonon Goldberg's *The Executive Brain: Frontal Lobes and the Civilized Mind* (Oxford University Press 2001) describes the frontal lobes as "the CEO of the brain" and concludes that those lobes "cannot fully assume their leadership role" until they are mature. *Id.* at 144-145.

It further appears that adolescents such as Petitioner typically do not come up even to the standards of their 17-year-old peers. Other factors in their lives often hold back their mental development even further, making them even less culpable mentally than others their age. *See, e.g.*, ABA Task Force on Youth in the Criminal Justice System, *Youth in the Criminal Justice System* 39-46 (Chicago: American Bar Association) (2001).

If the objective is general deterrence of similarly homicidal behavior by other 17-year-olds in the future, executing Stanford or Ron Chris Foster simply will not have that effect. The delayed brain development described above negatively impacts impulse control. The theory of deterrence, in direct contrast, assumes a person's ability to conduct an on-the-spot cost/benefit analysis and to control or redirect impulses. Not surprisingly, *Thompson* rejected the deterrence rationale as simply unacceptable for young offenders. *Thompson v. Oklahoma*, 487 U.S. 815, 837-838 (Stevens, J., plurality opinion).

The other prong of the general deterrence theory is that the execution of any one offender deters the behavior of all other potential offenders, including those older than age seventeen. However, if this Court completely abolishes the execution of all juvenile offenders, this would reduce executions nationally by about 2%. See Streib, *The Juvenile Death Penalty Today*, p. 4. That is, 98% of executions would continue to occur and would continue to have whatever impact they might have on these older potential offenders. A 2% reduction would have no significant impact on whatever deterrent effect might arguably exist.

Given the extensive research findings on capital punishment during the past several decades, the only legitimate objective that retains any credibility is retribution. However, this Court also has noted that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." *Thompson v. Oklahoma*, 487 U.S. at 835 (footnote omitted). Given what we have learned since 1989 about adolescent brain development, this conclusion from *Thompson* is even more persuasive. Retribution is to be commensurate with the offender's personal culpability. *Enmund v. Florida*, 458 U.S. 782, 798-800 (1982).

Seventeen-year-olds simply do not and can not have a sufficient level of personal culpability to fully deserve the maximum adult punishment known to our legal system.

3. Informed by the Recent Research on Adolescent Brain Development, the Death Penalty for 17-Year-Old Offenders is Contrary to Contemporary Standards of Decency.

This Court should also take into consideration the parallel issue of mental retardation and the international law setting. *See Stanford* brief at 27 & 29. When added to the above-discussed concerns about adolescent brain development, these issues argue strongly that the juvenile death penalty is not in accord with contemporary standards of decency in this country or literally anywhere in the world.

It is impossible to separate the legal analysis of the death penalty for the mentally retarded, *see Atkins, supra*, from the death penalty for juveniles. Both are physically able to commit terrible crimes, but neither has the level of mental development to be held fully responsible and to receive the maximum punishment for those crimes. Both juvenile and mentally retarded offenders have "the mind of a child," albeit often in the body of an adult. A national consensus opposing the death penalty for each group has become manifest, as recognized for the mentally retarded in *Atkins,* and recognizing that neither children nor those with the minds of children should receive the maximum adult punishment.

This Court has been split in the past over the importance of comparative and international law in examining our national consensus concerning the death penalty. In *Atkins*, the views of the international community were taken into account. *Atkins*, 122 S. Ct. at 2249 n.21. The

United States, represented in the juvenile execution issue almost exclusively by Texas, and to a lesser degree by Virginia, is essentially alone in the world in imposing the death penalty upon juvenile offenders. We feebly respond to the resulting international criticism by trying to explain that juvenile executions are only 2% of all American executions, that only one or two states actually engage in this practice, and that the vast majority of Americans do not allow their state or federal governments to engage in such un-American acts. Now is the time for this Court to acknowledge that our national standards of decency no longer permit the execution of juvenile offenders anywhere in the United States. It is an odious practice that has essentially ended throughout American except for a pair of holdout states, and they must now be brought into line with American values and standards.

In summary, brain development continues typically through the teenage years and into the early twenties, with impulse control commonly developing last. General deterrence theories are simply inapplicable to 17-year-olds, since their stage of brain development does not lend itself to rational, cost/benefit analyses. American standards of decency, informed by the international community, now reject the imposition of the death penalty upon those with such immature brain development.

II. Imposition of the death penalty on the Petitioner who was seventeen years of age at the time the subject crime was committed--without first requiring particularized judicial findings that the Petitioner is sufficiently mature and morally culpable to be tried and sentenced as an adult--would violate the Eighth Amendment's prohibition against cruel and unusual punishment

In the alternative to his claim that the Eighth Amendment generally prohibits the execution of juvenile offenders, Foster claims that the Eighth Amendment, at a minimum,

requires particularized findings regarding a juvenile offender's maturity and moral culpability before the death penalty may be constitutionally imposed.

A. Petitioner's Alternative Eighth Amendment Claim Is Not Procedurally Barred

For the reasons stated above regarding Petitioner's claim that the Eighth Amendment generally bars the imposition of the death penalty on juvenile offenders, Foster's alternative Eighth Amendment Claim is likewise not procedurally barred. If this Court should determine that the Eighth Amendment requires particularized findings regarding a juvenile offender's maturity and moral culpability before the death penalty may be constitutionally imposed, then, under the rule in *Penry I*, the procedural default bar does not apply. Thus, review of Foster's Eighth Amendment claim is not procedurally barred.

B. The Eighth Amendment, as Interpreted by *Stanford v. Kentucky*, at a minimum, Requires Particularized Findings Regarding A Juvenile Offender's Maturity and Moral Culpability Before Imposition of the Death Penalty

The Petitioner in this case, whether due to trial counsel's ineffectiveness or a systemic flaw, was not provided a mechanism for particularized findings regarding his maturity and moral responsibility before he was held to stand trial as an adult. This Court's decision in *Stanford*, interpreting the Eighth Amendment, indicates that the presence of a particularized review mechanism to determine the "maturity and moral culpability" of an accused is sufficient to overcome the Eighth Amendment's prohibitions. *Stanford*, 492 U.S. at 375. Consequently, the absence of the application of the Mississippi juvenile transfer statute, and its particularized findings requirement to Foster, renders the death sentence imposed in this case unconstitutional under the Eighth Amendment.

III. The Court should resolve the split among the Circuit Courts of Appeal as to the appropriate standard by which a federal habeas court should review a state court's application of federal law in favor of the Seventh Circuit rule which would lead to a different result on the Petitioner's Sixth Amendment ineffective assistance claims.

Because Foster filed his petition for federal habeas corpus relief after the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), federal habeas review in his case was governed by this statute. The statute reads in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254 (d)(1). In *Williams v. Taylor*, 529 U.S. 362, 384-89 (2000), this Court issued the most definitive teaching to date regarding the standard under 28 U.S.C. § 2254 with regard to granting habeas relief. In deciding whether the state court's decision relating to the Petitioner's ineffective assistance of counsel claims was "contrary to" or an "unreasonable application of" *Strickland v. Washington*, 466 U.S. 668 (1984), under the objective standard required by *Williams*, the Court of Appeal's opinion did not address whether it was required to look exclusively to the objective reasonableness of the state court's ultimate conclusion or whether it was also required to consider the method and process by which the state court arrived at its conclusion. Rather, the Court of Appeals in this case focused only on the ultimate legal

conclusion that the Mississippi Supreme Court reached. *See generally Foster v. Johnson*, 293 F.3d 766, 781-89 (5th Cir. 2002).

A. There is a Split Among the United States Circuit Courts of Appeal on the Important Federal Issue of the Appropriate Standard for Federal Habeas Courts To Review State Court Applications of Federal Law

In denying Foster's request for relief relating to his claims of ineffective assistance of counsel based on trial counsel's failure to seek a transfer to youth court, the Fifth Circuit clearly disagreed with the Mississippi Supreme Court's determination that the failure to request the transfer did not constitute deficient performance under the first prong of *Strickland*. *Foster,* 293 F.3d at 789. However, despite its disagreement with the state court's reasoning and process in reaching its ultimate legal conclusion, the Fifth Circuit speculated that the trial court likely would not have granted the request to transfer and therefore found no prejudice under the second prong of *Strickland*. *Id.* Likewise, in affirming the denial of Foster's ineffective assistance claim based on the failure to present mental health testimony in mitigation, the Fifth Circuit focused on the ultimate legal conclusion reached by the Mississippi Supreme Court rather than the reasoning and process by which the *Strickland* analysis was conducted. *Id.* at 783.

The approach taken by the Fifth Circuit Court of Appeals for applying section (d)(1) of the AEDPA--focusing on the ultimate legal conclusion reached by the state court--is contrary to that determined to be appropriate by the en banc Seventh Circuit. *Lindh v. Murphy*, 96 F.3d 856, 871 (7th Cir. 1996) (en banc), *reversed on other grounds*, 521 U.S. 320 (1997). There is also a split between the *en banc* Seventh Circuit in *Lindh* and other circuits. *See Long v. Humphrey*,

184 F.3d 758, 760-61 (8th Cir. 1999); *O'Brien v. Dubois*, 145 F.3d 16, 25 (1st Cir. 1998). In *Lindh*, the Seventh Circuit Court of Appeals held that the "reasonableness" of a court's application of federal law must be measured, at least in part, by determining whether a state court provided "a responsible, thoughtful answer reached after a full opportunity to litigate." *Id*. *Lindh* formulated this approach by comparison to the good faith standard of *United States v. Leon*, 468 U.S. 897 (1984), and indeed the analogy is apt in habeas corpus cases involving the "unreasonable application" standard of section 2254(d)(1).

The Court of Appeals in the instant case aligned itself with Chief Judge Posner's concern that a process-focused approach to reasonableness "would place the federal court in just the kind of tutelary relation to the state courts that [ADEPA] was designed to end." *Hennon v. Cooper*, 109 F.3d 330, 334-35 (7th Circ. 1997). But by rejecting *de novo* federal review in favor of review based on "reasonableness" in ADEPA, Congress could hardly escape from the "view over the shoulder" approach about which Chief Judge Posner is concerned. In other contexts--for example, the review of warrants (*see, e.g.*, *United States v. Leon*, 468 U.S. 897 (1984)), in tort claims (*see e.g. Bombardier Corp. v. Krummel*, 206 F.3d 548, 552 (5th Cir. 2000)), the review of counsel's performance under *Strickland*, itself *(see e.g. Lockett v. Anderson*, 230 F.3d 695, 715(5th Cir. 2000) (information held by counsel important to assessment of reasonable strategy under *Strickland*))--it would be an unremarkable proposition that whether a decision was "reasonable" would include, at least to some extent, questions such as the information available to the decision maker and the process used to analyze that information. So too in this context.

B. Under the Standard for the Review of State Court Applications of Federal Law **prescribed by the Seventh Circuit in *Lindh*, Petitioner Should Be Granted Relief on his Ineffective Assistance Claims**

If this Court resolves the circuit split on the appropriate standard for determining objective unreasonableness under ADEPA in favor of the Seventh Circuit rule, then Foster should be granted relief on his ineffective assistance claims.

1. Ineffective Assistance Claim Based On Failure to File Motion To Transfer to Youth Court

As to Foster's claim of ineffective assistance based on his trial counsel's failure to file a motion to transfer the case to youth court, the Fifth Circuit strongly disagreed with the Mississippi Supreme Court's resolution of the deficient performance prong of *Strickland* and found that "in the circumstances of the instant case, there is no conceivable strategic justification for foregoing available procedures for obtaining a transfer to juvenile court." *Foster v. Johnson*, 293 F.3d 766, 789 (5th Cir.2002). Indeed, the Court of Appeals' decision expressed "concern about the reasonableness of the Mississippi Supreme Court's determination" on this point. *Id.* However, the Fifth Circuit ultimately affirmed the Mississippi Supreme Court's denial of relief based on simple speculation that the state court would not have granted the request to transfer if Foster's trial counsel had made the motion. *Id.*

Given the Fifth Circuit's strong disagreement with the Mississippi Supreme Court's resolution of the deficient performance prong of *Strickland* and its concern about the reasonableness of the state court's determination, under the standard prescribed by *Lindh* which requires the state court to be "responsible" and "thoughtful" in its application of federal law, the Court of Appeals would have been compelled to conclude that the Mississippi Supreme Court unreasonably applied *Strickland*. Thus, Foster would be entitled to relief on this claim.

Moreover, considering all of the factors under Mississippi law which bear on the decision to transfer a juvenile's case to the youth court, the finding of the Mississippi Supreme Court that Foster was not prejudiced by his attorney's failure to file a motion to transfer is objectively unreasonable under *Strickland*. After all, Ron Chris Foster was a 17-year old child with an IQ of 80 and the mental age of less than 13 years old at the time the crime was committed. His co-defendant, Vincent Harris, was 15 years of age. The boys rode a bicycle to rob a convenience store where both were known by the clerk. Neither carried a weapon. The Mississippi Supreme Court's decision that Foster suffered no prejudice is clearly objectively unreasonable.

2. Ineffective Assistance Claim Based On Failure to Develop Mental Health Evidence for Mitigation

In determining whether Foster's trial counsel had performed deficiently under *Strickland* by failing to follow-up on his motion for the appointment of a mental health expert to assist in the development of mitigation evidence, the Mississippi Supreme Court's conclusion that Foster's trial counsel had made a tactical decision to not investigate psychological evidence based on information contained in a report from the state mental hospital (Whitfield) was rank speculation. As the Fifth Circuit and the District Court pointed out:

> [I]f the Mississippi Supreme had known that "[Foster's trial counsel] had moved for funds to obtain a mental health expert to aid in the mitigation phase" after the Whitfield report was completed "and that the trial court proceeded to trial without ruling and without objection from [Foster's trial counsel]," then the Mississippi Supreme Court "would not have concluded that . . . [Foster's trial counsel] made a reasonable decision not to pursue further psychological testing."

Foster, 293 F.3d at 779 (*quoting Foster v. Puckett*, No. 4:97CV22LN (S.D. Miss. January 4, 2001)). Considering that its reasoning was not informed by knowledge of a critical fact of

record material to the determination, it cannot be held that the Mississippi Supreme Court provided "a responsible, thoughtful answer" as required by *Lindh* to the question of whether Foster's trial counsel performed deficiently under *Strickland* by failing to follow-up on his motion for the assistance of a mental health expert to develop mitigation evidence. Therefore, under the standard prescribed by *Lindh*, Foster would be entitled to relief on this claim.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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