

■ WILMER CUTLER PICKERING HALE AND DORR ■

'Home run' hitters set legal milestone

By Leonard Post
STAFF REPORTER

WHEN SETH WAXMAN argued before the U.S. Supreme Court that juveniles should never be executed, at his counsel table were a solo practitioner from Missouri and two colleagues from his high-powered firm.

In March, the court agreed with his team. *Roper v. Simmons*, 543 U.S. 551.

The swing vote in the 5-4 decision was Justice Anthony M. Kennedy, who wrote the majority opinion. Just 16 years earlier, he and four colleagues had held that it was acceptable to execute those who had reached their 16th birthday. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

Now the majority found that standards of decency had evolved since then, and a national and international consensus existed against executing children.

Led by Waxman, the Wilmer Cutler Pickering Hale and Dorr pro bono team included Washington office firm partner David Ogden and associate Danielle Spinelli. The team also included Jennifer Herndon, a St. Louis solo practitioner whose specialty is capital cases.

The show me state

Herndon, also a professor at Saint Louis University School of Law, had been appointed to represent Christopher Simmons after he had lost state appeals of his conviction for robbery and murder. She unsuccessfully took him through the federal post-conviction process, and then launched a pro bono collateral attack on his conviction in the Missouri Supreme Court. She alleged that the execution of someone who was under 18 when she or he committed a crime was cruel and unusual punishment under both the Missouri and the U.S. constitutions.

She argued that in 2002—after the Missouri courts had affirmed Simmons' conviction—the U.S. high court had decided *Atkins v. Virginia*, 536 U.S. 304, which forbade the execution of the



JAY MALLIN

PRECEDENT SETTERS: Seth Waxman, David Ogden and Danielle Spinelli persuaded the Supreme Court to overturn its own case law regarding the execution of juveniles.



LEGAL THEORIST: Jennifer Herndon hit on a strategy.

mentally retarded because they were not culpable. She noted that in 18 of the 38 states that had the death penalty, it didn't apply to juveniles, and that it was infrequently applied in the other 20 states. Furthermore, of the six other countries that had executed children since 1990, all had since disavowed the practice.

"The arguments were obvious," said Herndon.

The Missouri court agreed and set aside the death sentence; the state appealed to the U.S. Supreme Court. Herndon got more than 50 calls from firms that wanted to participate in the case.

She turned for advice to George Kendall, formerly of the NAACP Legal Defense and Education Fund and now a Holland & Knight pro bono lawyer. He helped her narrow the field to three Washington firms before she settled on WilmerHale.

WilmerHale, Kendall told her, was clearly a "home run" and that Waxman is "one of the great advocates of his generation." He told her that Waxman worked "extremely well with co-counsel."

"[Waxman] is one of the best advocates there is," said State Solicitor James R. Layton, who argued *Roper* on behalf of Missouri. "We've had him on our side when he was [U.S.] solicitor general. It was a little daunting to have him on their side."

As is his custom, Waxman said, he didn't predicate WilmerHale's involvement on being allowed to argue the case. Herndon and Spinelli wrote the first draft, conferencing often with Waxman and Ogden. The WilmerHale trio honed the brief, phone-conferencing with Herndon.

A consensus against executing juveniles had developed along with hard medical and social scientific data, their brief argued.

"The data showed what adults had intuitively known," said Waxman. "That in children, portions of their brains that deal with moral reasoning and long-term consequences are not fully developed.... [T]hey still have an undeveloped sense of responsibility.... Their character isn't yet formed."

Two months before the Oct. 13, 2004, oral argument, Herndon asked Waxman to argue the case. "The shot heard round the world in this litigation was when she won this case in the Missouri Supreme Court," said Waxman, who took the invitation as an honor.

The rest is written in common law. Besides Simmons, 71 other youths were removed from death rows, according to the Death Penalty Information Center.

WilmerHale donated \$1 million in billable hours and out-of-pocket expenses. Herndon stopped counting her hours after she reached 500, long before her work was done. **NLJ**

This article is reprinted with permission from the January 2, 2006 edition of THE NATIONAL LAW JOURNAL. © 2006 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact ALM Reprint Department at 800-888-8300 x6111 or visit www.almreprints.com. #005-01-06-0005