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DEATH IS DIFFERENT

Sandra Fischer

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legislatures. *Id.* at 2711. O'Connor acknowledged that Oklahoma has enacted a statute that authorizes capital punishment for murder, without setting any minimum age at which the commission of murder may lead to the imposition of that sentence. *Id.* That State has also, quite separately, provided that 15-year-old murder defendants may be treated as adults in some circumstances. *Id.* Because the State proceeded in this manner, there is a considerable risk that the Oklahoma legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death-eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death-eligibility. *Id.* Justice O'Connor concluded that petitioner and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution. *Id.*

APPLICATION TO VIRGINIA

The Court's conclusion in *Thompson*, that petitioner and others whose crimes were committed before the age of 16 may not be executed pursuant to a capital punishment statute that specifies no minimum age, applies directly to Virginia. No

minimum age for the imposition of the death penalty is expressly stated in the Virginia statutes relating to the death penalty. (see Va. Code Ann. §§ 18.2-31 and 19.2-264.2 to 19.264.5 (Repl. 1983 and Supp. 1987). In addition, §16.1-269(A) of the Virginia Code provides that an offender may be waived from juvenile to criminal court when charged with first-degree murder. Va. Code Ann. § 16.1-269(A) (1982).

Although the opinion in *Thompson* was a plurality, with Justice O'Connor concurring in the judgment only, O'Connor seems to agree with the plurality that "petitioner and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution." 108 S.Ct. at 2711.

Justice O'Connor's concurring opinion leaves the Eighth Amendment question to legislatures and does not conclude that it is unconstitutional per se to execute *any* person who was under the age of 16 at the time of the crime. However, until legislatures address this issue squarely, it appears that a death sentence for an offender who was 1) under the age of 16 at the time of the offense and 2) tried in adult criminal court in a state (such as Virginia) which has not set a minimum age for death-eligibility, would be constitutionally impermissible. (Cecilia A. McGlew)

DEATH IS DIFFERENT

By: Sandra Fischer

The United States Constitution is the cornerstone on which the country bases its conception of justice. The Eighth Amendment forbids the use of "cruel or unusual punishment." However, the definition of "cruel" and "unusual" is not a fixed concept, it is based on "evolving standards of decency which mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The framers of the Constitution did not perceive capital punishment as an unconstitutional penalty for various criminal conduct. This is evidenced by the fact that the Fifth Amendment due process clause speaks of deprivation of "life." Under this framework the death penalty can be held unconstitutional any time the United States Supreme Court decides that "evolving standards of decency" mandate such a decision.

In 1972 the United States Supreme Court held the death penalty, as administered by the states, unconstitutional on Eighth Amendment procedural grounds. The Court's ruling in *Furman v. Georgia*, 408 U.S. 238 (1972) did not hold that the death penalty, per se, violated the Eighth Amendment of the Constitution, but that the sentencing procedure ran a risk that the death penalty would be administered in an arbitrary and capricious manner. *Furman* at 242. By 1976 state legislatures adopted two types of capital punishment statutes. The United States Supreme Court held the mandatory death penalty statutes unconstitutional. *Woodson v. North Carolina*, 428 U.S. 280 (1976). However, the Supreme Court upheld Georgia's. Florida's and Texas' guided jury discretion death penalty statutes which substantially increased the "process" required to convict a defendant to death, including a bifurcated trial composed of a guilt stage and a penalty stage. *Gregg v. Georgia*, 428 U.S. 153 (1976), *Proffitt v. Florida*, 428 U.S. 242 (1976),

Jurek v. Texas, 428 U.S. 262 (1976). The sentencer must make an individualized decision as to the appropriateness of the death penalty in each case, *Zant v. Stephens*, 462 U.S. 862 (1983), and must consider any relevant mitigating factor which may support a sentence of life. *Lockett v. Ohio*, 438 U.S. 586 (1978). The Court has required a higher level of reliability in a death penalty sentencing stage than in other sentencing proceedings because of the unique nature of the death penalty. *Barefoot v. Estelle* 463 U.S. 880, 924 (1983).

Substantively, the Supreme Court held that the sanction must "comport with the basic concept of human dignity at the core of the [Eighth] Amendment." *Gregg*, 428 U.S. at 182. In deciding whether any punishment violates human dignity, the Supreme Court stated that the state must have "penological justification" for enforcing the punishment. *Id.* at 183. With regard to the death penalty, the Court requires that the imposition of the penalty serves as retribution or deterrence of capital crimes. *Id.* (See *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

Ever since states have been actively enforcing the death penalty, litigation has reflected the continuing struggle as society attempts to find a just means to determine which criminals are worthy of death. The United States Supreme Court has imposed both substantive and procedural limitations on the imposition of the death penalty. These procedural and substantive concerns outlined by the Supreme Court lead to the intricacy and complexity of capital litigation. Many of these concerns are directed primarily to insuring fairness at the trial level. In subsequent articles we will address the remaining stages of the capital case.