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FACTS

Petitioner, in concert with three older persons, actively participated in a brutal murder when he was 15 years old. The evidence disclosed that the victim had been shot twice, and that his throat, chest, and abdomen had been cut. He also had multiple bruises and a broken leg. His body had been chained to a concrete block and thrown into a river where it remained for almost four weeks. Each of the four participants was tried separately and each was sentenced to death. Since petitioner was considered a "child" as a matter of Oklahoma law, the District Attorney filed a statutory petition with the trial court to have him tried as an adult. The petition was granted and Thompson was certified to stand trial as an adult. Thompson was convicted of first degree murder and sentenced to death.

HOLDING

Whether the "cruel and unusual punishment" prohibition of the Eighth Amendment made applicable to the States by the Fourteenth Amendment, prohibits the execution of a person who was under 16 years of age at the time of his or her offense.

A plurality of the members of the Court, Justice Stevens joined by Justice Brennan, Justice Marshall and Justice Blackmun, guided by the thinking in *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 598, 2 L.Ed.2d 630 (1958) that "evolving standards of decency . . . mark the progress of a maturing society," concluded that the Eighth Amendment prohibition against cruel and unusual punishment applies to prohibit the execution of a person who was under 16 years of age at the time of his or her offense.

The plurality examined state statutes, (particularly those of the 18 states that have considered the question of a minimum age for imposition of the death penalty, and have uniformly required that a defendant must have attained at least the age of 16 at the time of the capital offense to be eligible for the death penalty) to support its conclusion that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community.

Citing *Bellotti v. Baird,* 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the plurality discussed the accepted proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. *Thompson v. Oklahoma*, 108 S.Ct. 2687 at 2688. The reasons enumerated for this reduced culpability are inexperience, less education and less intelligence which result in the teenager being less able to evaluate the consequences of his or her conduct, while at the same time leaving them more vulnerable to peer pressure or more apt to be motivated by mere emotion. *Id.*

Further in its analysis, the plurality quotes *Gregg v. Georgia,* 428 U.S. 153, 183, 96 S.Ct. 2909, 2929-30, 49 L.Ed.2d 859 (1976) "The death penalty is said to serve two principal social purposes; retribution and deterrence of capital crimes by prospective offenders." 108 S.Ct. at 2699. But the Court finds that the application of the death penalty to this class of offenders does not measurably contribute to the essential purposes underlying the penalty. *Id.* at 2689. Considering the lesser culpability attributed to children, as well as the teenager's capacity for growth and society's fiduciary obligations to its children, the Court found the retributive purpose underlying the death penalty simply inapplicable to the execution of a 15-year-old offender. Moreover, the Court found the deterrence rationale for the penalty equally unacceptable with respect to such offenders. Statistics demonstrate that the vast majority of persons arrested for willful homicide are over 16 at the time of the offense. *Id.* at 2688. The court reasoned, the likelihood that a teenage offender has considered a cost-benefit analysis as to the possibility of execution for his conduct is virtually non-existent due to the small number of juveniles executed in the 20th century. *Id.* The plurality concluded that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense.

Justice O'Connor concurred in the judgment. She agreed with both the plurality and the dissent on two fundamental propositions: 1) That there is some age below which a juvenile's crimes can never be constitutionally punished by death, and 2) that precedents require this age to be determined in light of the "evolving standards of decency that mark the progress of a maturing society." (*Id.* at 2691 quoting *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958).

Although Justice O'Connor expressed her view that a national consensus forbidding the execution of any person for a crime committed before the age of 16 very likely does exist, she was "reluctant to adopt this conclusion as a matter of constitutional law without better evidence than we now possess." 108 S.Ct. at 2706.

Although statistics support the inference of a national consensus opposing the death penalty for 15-year-olds, Justice O'Connor feels they are not dispositive. O'Connor complained that the statistics relied on by the plurality do not indicate how many juries have been asked to impose the death penalty for crimes committed below the age of 16 or how many times prosecutors have exercised their discretion to refrain from seeking the death penalty in cases where statutory prerequisites might have been proved. *Id.* at 2708. Without such data, said O'Connor, raw execution and sentencing statistics cannot allow the Court reliably to infer that juries are or would be significantly more reluctant to impose the death penalty on 15-year-olds than on similarly situated older defendants. *Id.*

O'Connor recognized the special qualitative characteristics of juveniles that justify legislatures in treating juveniles differently from adults and admitted that this factor is relevant to Eighth Amendment proportionality analysis. However, she suggested that these characteristics vary widely among different individuals of the same age, and that the court should not substitute its inevitably subjective judgment about the best age at which to draw a line in the capital punishment context for the judgments of the nation's legislatures. *Id.* at 2709.

O'Connor declined to resolve the Eight Amendment question and left it to be addressed in the first instance by the

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 execu tion. *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 inforcing 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.