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In re Stanford
123 S. Ct. 472 (2002) (mem.)
Hain v. Mullin
123 S. Ct. 993 (2003) (mem.)

I. Background

In 1988, the United States Supreme Court in *Thompson v. Oklahoma*[1] found that it was unconstitutional to impose the death penalty on a defendant who was under the age of sixteen at the time the offense was committed.[2] Almost exactly one year later, the Court in *Stanford v. Kentucky* ("*Stanford I*"),[3] despite a vigorous dissent, found that it was constitutional to impose the death penalty on a defendant who was sixteen or seventeen years of age at the time the offense was committed.[4] Therefore, as the twenty-first century approached, the line for the constitutional execution of juveniles was drawn at sixteen years of age.

On August 28, 2002, the Supreme Court denied an application for a stay of execution from a petitioner who was seventeen years of age at the time of the offense.[5] Justice Stevens dissented, as did Justices Ginsburg and Breyer.[6] Justice Stevens renewed Justice Brennan's dissent in *Stanford I* and stated that an "apparent consensus" against the execution of juvenile offenders existed among the states and the international community.[7] Justice Ginsburg, joined by Justice Breyer, agreed with Justice Stevens and added that the Court's recent decision in

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1. 487 U.S. 815 (1988).

2. Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (plurality opinion). Justices Brennan, Marshall, and Blackmun joined in Justice Stevens's opinion. *Id.* at 818. Justice O'Connor concurred in the opinion and found that the available evidence suggested a national consensus that forbade the imposition of the death penalty on defendants who were under sixteen years of age at the time of the offense. *Id.* at 857-58 (O'Connor, J., concurring).

3. 492 U.S. 361 (1989).

4. Stanford v. Kentucky, 492 U.S. 361, 380 (1989) ("*Stanford I*"). Justice O'Connor concurred in this opinion as well and stated that proportionality analysis for these cases may become relevant at some future point. *Id.* at 382 (O'Connor, J., concurring). Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented. *Id.* at 382 (Brennan, J., dissenting).

5. Patterson v. Texas, 123 S. Ct. 24, 24 (2002) (mem.). For a discussion and analysis of *Patterson*, see Janice L. Kopec, Case Note, 15 CAP. DEF. J. 291, 291-92 (2002) (analyzing Patterson v. Texas, 123 S. Ct. 24 (2002)).

6. *Patterson*, 123 S. Ct. at 24 (Stevens, J., dissenting); *id.* (Ginsburg, J., dissenting).

7. *See Patterson*, 123 S. Ct. at 24 (Stevens, J., dissenting) ("I joined [Justice Brennan's dissenting] opinion and remain convinced that it correctly interpreted the law."); *Stanford I*, 492 U.S. at 382 (Brennan, J., dissenting).

Atkins v. Virginia[8] made it possible for the Court to reconsider its decision in *Stanford I*.[9] Nearly two months later, in *In re Stanford* ("*Stanford II*"),[10] the Court considered Stanford's application for an original writ of habeas corpus.[11]

II. Holding

The United States Supreme Court, without a majority opinion, denied Stanford's petition for an original writ of habeas corpus.[12] This time, four Justices stated in dissent that they would have set the application for an original writ for argument.[13] The dissent based its opinion on the Court's recent holding in *Atkins* and concluded that offenses committed by juveniles under the age of eighteen do not merit the death penalty.[14]

III. Analysis

The dissent did not restate the reasons for the Court's opinion in *Atkins*.[15] Instead, it quoted Justice Brennan's dissenting opinion in *Stanford I*.[16] It then compared Justice Brennan's observations with the state of juvenile death sentences in 2002.[17]

A. Justice Brennan's Dissent in Stanford I

Justice Stevens quoted, at length, Justice Brennan's dissent in Stanford's first hearing before the Court in 1989.[18] Specifically, Justice Brennan stated that "juveniles so generally lack the degree of responsibility for their crimes that is a predicate for the constitutional imposition of the death penalty that the Eighth Amendment forbids that they receive that punishment."[19] Justice Brennan continued by examining various rights, such as the rights to vote, to serve on a jury, and to marry without parental consent, that are either banned or strictly restricted to juveniles under the age of eighteen.[20] In his opinion, such legislation

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8. 122 S. Ct. 2242 (2002).

9. *Patterson*, 123 S. Ct. at 24 (Ginsburg, J., dissenting); *see also* Atkins v. Virginia, 122 S. Ct. at 2242, 2252 (holding that execution of mentally retarded violates Eighth Amendment).

10. 123 S. Ct. 472 (2002) (mem.).

11. *In re* Stanford, 123 S. Ct. 472, 472 (2002) (mem.) ("*Stanford II*").

12. *Id.*

13. *Id.* at 475 (Stevens, J., dissenting). Justice Souter was the fourth Justice willing to hear oral arguments on the issue. *Id. See generally Patterson*, 123 S. Ct. at 24 (indicating that Justices Stevens, Ginsburg, and Breyer dissented).

14. *Id.* at 472-73, 475.

15. *Id.* at 473.

16. *Id.* at 473-74; *see Stanford I*, 492 U.S. at 382-405 (Brennan, J., dissenting).

17. *Stanford II*, 123 S. Ct. at 474-75 (Stevens, J., dissenting).

18. *Id.* at 473 (citing *Stanford I*, 492 U.S. at 382-405 (Brennan, J., dissenting)).

19. *Id.* (quoting *Stanford I*, 492 U.S. at 394 (Brennan, J., dissenting)).

20. *Id.* (quoting *Stanford I*, 492 U.S. at 394 (Brennan, J., dissenting)). Justice Brennan found

was evidence that juveniles are "more vulnerable, more impulsive, and less self-disciplined than adults . . . without the same 'capacity to control their conduct and to think in long-range terms.' "[21] Justice Brennan found that society draws a dividing line at the age at which it is reasonable to assume that a person possesses the ability to make, and can take responsibility for, judgments.[22]

B. Atkins v. Virginia

Four months before *Stanford II*, the Court in *Atkins* held that the imposition of the death penalty on the mentally retarded was a violation of the Eighth Amendment because it constitutes cruel and unusual punishment.[23] The Court first examined its conclusions in *Penry v. Lynaugh*,[24] in which it found that fourteen states did not institute the death penalty and two states expressly banned the imposition of the death penalty on the mentally retarded.[25] It then compared *Penry*'s findings to the situation in June of 2002, at which time it found that nineteen additional states had passed laws banning the imposition of the death penalty on the mentally retarded.[26] The Court decided that the legislative trend was evidence of society's views that the mentally retarded are "categorically less culpable than the average criminal" and that a national consensus against executing the mentally retarded had developed since its decision in *Penry*.[27]

The Court also agreed, on its own, with the national consensus.[28] First, it found that two common justifications for the death penalty, retribution and deterrence, do not apply equally to the mentally retarded as they do to the average murderer.[29] It then found that the mentally retarded face a greater risk

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that all but two states had a uniform age of majority at eighteen or above, that no state lowered its voting age or juror-eligibility age below eighteen, that only four states allowed persons under eighteen to marry without parental consent, that thirty-seven states required a patient to be eighteen or over in order to consent validly to medical treatment, that thirty-four states required parental consent before a person below eighteen was allowed to drive, that forty-two states prohibited the sale of pornographic material to persons under eighteen, and that states where gambling was legal generally did not allow persons under eighteen to participate in gambling activities. *Id.* (quoting *Stanford I*, 492 U.S. at 394-95 (Brennan, J., dissenting)).

21. *Id.* (quoting *Stanford I*, 492 U.S. at 395 (Brennan, J., dissenting) (quoting TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 7 (1978))).

22. *Id.* at 474 (quoting *Stanford I*, 492 U.S. at 396 (Brennan, J., dissenting)).

23. *Atkins*, 122 S. Ct. at 2252.

24. 492 U.S. 302 (1989).

25. *Atkins*, 122 S. Ct. at 2248 (citing Penry v. Lynaugh, 492 U.S. 302, 334 (1989)).

26. *Id.* at 2248-49.

27. *Id.* at 2249.

28. *Id.* at 2252.

29. *Id.* at 2251; *see also* Kristen F. Grunewald, Case Note, 15 CAP. DEF. J. 117, 119-20 (examining Atkins v. Virginia, 122 S. Ct. 2242 (2002)). The Court in *Atkins* found that retribution does not apply because society considers the mentally retarded less culpable than the average criminal, and that deterrence does not apply because the mentally retarded have a diminished ability

than the average murderer of being wrongly executed because they face a greater risk of giving false confessions, possess a diminished ability to present mitigating evidence, may be unable to provide meaningful assistance to their counsel, and could appear to the jury to be poor witnesses and unremorseful defendants.[30] The Court found that all these factors, if viewed in the context of society's "evolving standards of decency," showed that execution of the mentally retarded constitutes cruel and unusual punishment in violation of the Eighth Amendment.[31]

C. *Justice Stevens's Dissent in* Stanford II

The dissent stated that not only did Justice Brennan's observations apply as forcefully and correctly in 2002 as they did in 1989, but that the evidence in 2002 served to strengthen his argument.[32] The dissent first determined that "the trend tends to require individuals to be older, rather than younger" in according legal obligations and responsibilities to juveniles.[33] The dissent also cited scientific evidence that indicates that adolescent brains are not fully developed, which can cause erratic behaviors and thought processes, and scientific data that further supports Justice Brennan's opinion that adolescents should be considered "more vulnerable, more impulsive, and less self-disciplined than adults."[34]

The dissent found that a national consensus against the execution of juvenile offenders had developed since Stanford's first appearance before the Court in 1989.[35] Specifically, the dissent found that no state had lowered the death-eligible age to sixteen or seventeen between 1989 and 2002.[36] The dissent further stated that the attention state legislatures were giving to the issue of juvenile executions was "remarkable" because the legislatures were taking action despite the fact that juvenile offenders make up only two percent of the total population on death row.[37] The dissent also found that legislatures that

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to understand and learn from experiences or to control impulses and that the mentally retarded are thus less likely to be able to conform their actions to the severity of the death penalty. *Atkins*, 122 S. Ct. at 2251.

30. *Atkins*, 122 S. Ct. at 2251-52; *see also* Grunewald, *supra* note 29, at 120.

31. *Atkins*, 122 S. Ct. at 2252; *see* U.S. CONST. amend. VIII.

32. *Stanford II*, 123 S. Ct. at 474 (Stevens, J., dissenting).

33. *Id.* (citing U.S. NATIONAL SURVEY OF STATE LAWS 418-22, 478-88 (Richard Leiter ed., The Gale Group, 4th ed. 2001)).

34. *Id.* (citing Supplemental Brief for Petitioner at 3-5; *Stanford I*, 492 U.S. at 395 (Brennan, J., dissenting)).

35. *Id.*

36. *Id.* (citing VICTOR L. STREIB, THE JUVENILE DEATH PENALTY TODAY: DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES, JANUARY 1, 1973-SEPTEMBER 30, 2002 (updated Jan. 9, 2003), *at* http://www.law.onu.edu/faculty/streib/juvdeath.htm). Justice Stevens relied on a version that was updated on October 9, 2002. *Stanford II*, 123 S. Ct. at 474.

37. *Id.* The dissent noted that the low percentage should have meant that the issue would draw minimal interest from the public and from the legislatures, but that instead the opposite was

addressed the subject acted "uniformly against the execution of those who were under 18 when they committed their offense."[38] Finally, the dissent cited a 2001 poll that indicated that the majority of Americans disapprove of the use of the death penalty against juvenile offenders.[39] Justice Stevens concluded by stating that he did not believe that offenses committed by juveniles under the age of eighteen merit the death penalty and that "[t]he practice of executing such offenders is a relic of the past and is inconsistent with evolving standards of decency in a civilized society."[40]

IV. General Application

Justices Stevens's dissent from the denial of a stay in *Patterson* was joined only by Justices Ginsburg and Breyer.[41] The Stevens dissent in *Stanford II* gained another supporter in Justice Souter.[42] The Stevens dissent appeared to predict that a petition for a writ of habeas corpus would be granted for the next case involving a juvenile capital defendant.[43] In *Hain v. Mullin*,[44] however, a petition for a writ of certiorari was denied to a juvenile capital defendant, Scott Allen Hain ("Hain").[45] Because the petition was denied without an opinion, supporting or dissenting, it is perhaps important that Hain's appeal to the Court of Appeals for the Tenth Circuit was framed in terms of whether the International Covenant on Civil and Political Rights ("ICCPR") applied to juvenile defendants in the United States.[46]

Justice Stevens has already indicated, based on his strong language at the conclusion of his dissent, that he would find an Eighth Amendment violation in cases of juvenile executions.[47] Justices Souter, Ginsburg, and Breyer would almost certainly make the same finding based on the fact that they joined in

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true. *Id.* at 474-75.

38. *Stanford II*, 123 S. Ct. at 475 (Stevens, J., dissenting).

39. *Id.* (citing TOM W. SMITH, PUBLIC OPINION OF THE DEATH PENALTY FOR YOUTHS 2, 6, National Opinion Research Center, University of Chicago (Dec. 2001)). This poll is available at http://www.norc.org/issues/Death_Penalty.pdf) (last visited Mar. 17, 2003).

40. *Id.*

41. *Patterson*, 123 S. Ct. at 24.

42. *Stanford II*, 123 S. Ct. at 472.

43. Five votes are required to grant a stay of execution. Four votes are required to grant a petition for a writ of habeas corpus.

44. 123 S. Ct. 993 (2003).

45. Hain v. Mullin, 123 S. Ct. 993, 993 (2003) (mem.); *see* Hain v. Gibson, 287 F.3d 1224, 1242 (10th Cir. 2002) (stating that defendant was seventeen years old at time of crime).

46. *Hain*, 287 F.3d at 1242. The Tenth Circuit ruled that the ICCPR was not binding on Oklahoma or federal courts. *Id.* at 1242-43. Hain also argued that imposing the death penalty for crimes committed while the defendant was a juvenile violates peremptory norms of international law, known as *jus cogens*, but the Tenth Circuit rejected that claim as well. *Id.* at 1243-44.

47. *See Stanford II*, 123 S. Ct. at 475 (Stevens, J., dissenting) (stating: "We should put an end to this shameful practice.").

Justice Stevens's dissent.[48] The deciding vote, if a future hearing arises on the issue, may come from Justice O'Connor. Justice O'Connor chose only to concur in the judgment in *Stanford I*.[49] At the time, Justice O'Connor stated:

> The day may come when there is such general legislative rejection of the execution of 16- or 17-year old capital murderers that a clear national consensus can be said to have developed. Because I do not believe that day has yet arrived, I concur in . . . the Court's opinion, and I concur in its judgment.[50]

Justice O'Connor further stated that the Court has "a constitutional obligation to conduct proportionality analysis."[51] Justice O'Connor clarified that "specifically identified age-based statutory classifications [are] 'relevant to Eighth Amendment proportionality analysis.' "[52]

Perhaps more importantly, Justice O'Connor joined in the majority opinion in *Atkins*.[53] It is difficult to determine how she would decide on the issue of juvenile executions given her decisions in *Atkins* and *Stanford II*. One may anticipate, however, that at some point she would be amenable to a convincing argument that a national consensus, disapproving of the execution of juveniles, has arisen.

V. Application in Virginia

In Virginia, the minimum age for a defendant to qualify for the death penalty is sixteen.[54] However, the age of the defendant, at the time she committed the offense, is considered a potential mitigating factor for juries to consider during the sentencing phase of trial.[55] Virginia has sentenced five juveniles to death.[56]

Assuming that the General Assembly does not change the statutes to abolish execution of juveniles, a capital defense attorney can avoid the execution of her juvenile client in one of three ways. First, the jury can impose a life sentence. The second possibility is for the Supreme Court of Virginia to overturn a death sentence after conducting a proportionality review. Third, the

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48. *See id.* at 472.

49. *Stanford I*, 492 U.S. at 380 (O'Connor, J., concurring).

50. *Id.* at 381-82.

51. *Id.*

52. *Id.* at 382 (quoting *Thompson*, 487 U.S. at 854 (O'Connor, J., concurring)).

53. *Atkins*, 122 S. Ct. at 2244. Justice Kennedy also joined in the majority opinion. *Id.*

54. *See* VA. CODE ANN. § 18.2-10(a) (Michie Supp. 2002) (stating that defendant must have been sixteen years of age or older at time offense was committed to qualify for death penalty).

55. *See* VA. CODE ANN. § 19.2-264.4(B)(v) (Michie 2000) (stating that age of defendant at time of commission of capital offense is fact in mitigation).

56. *See* Edmund P. Power, *Too Young to Die: The Juvenile Death Penalty After* Atkins v. Virginia, 15 CAP. DEF. J. 93, 103 n.86 (2002) (listing cases in which juveniles have been sentenced to death).

execution of juvenile offenders can be declared unconstitutional. The Supreme Court of Virginia has made it nearly impossible for capital defendants to convince the courts that proportionality demands a life sentence.[57] This is true even if the defendant is a juvenile.[58] Although the four-person dissent in *Stanford II* appeared to open the door for an unconstitutionality argument, the denial of a writ in *Hain* suggests that more time may be needed before such a claim is successful.

In every case involving a sixteen- or seventeen-year old defendant, a capital defense attorney must object because the Stevens dissent in *Stanford II*, despite *Hain*, suggests that the Supreme Court might, in the foreseeable future, reconsider the constitutionality of such juvenile executions. Attorneys are urged strongly to observe all the necessary procedures for such objections in order to avoid waiver of the claims or procedural default on appeal.[59] The attorney must make sure all objections are timely and raised on direct appeal.

VI. Conclusion

The issue of juvenile executions is likely to be a contentious issue for the foreseeable future. The United States Supreme Court is likely to address this issue again in what could be another close vote. Capital defense attorneys who are representing juvenile offenders are strongly encouraged to contact the Virginia Capital Case Clearinghouse for motions to declare the juvenile death penalty unconstitutional.[60]

VII. Epilogue

On April 2, 2003, the Tenth Circuit voted 2-1 to stay Hain's execution while it considered his latest appeal.[61] The State of Oklahoma appealed to the Supreme

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57. *See generally* Cynthia M. Bruce, *Proportionality Review: Still Inadequate, But Still Necessary*, 14 CAP. DEF. J. 265 (2002) (examining proportionality review, or lack thereof, in Virginia).

58. *See* Jackson v. Commonwealth, 499 S.E.2d 538, 555 n.6 (Va. 1998) (stating that its proportionality review was not limited to records in cases in which defendants were sixteen years of age when offenses were committed, but, instead, considered age as one of many relevant factors). *But see Jackson*, 499 S.E.2d at 555 (Hassell, J., dissenting in part and concurring in part) (finding that review of cases involving sixteen-year-old defendants indicated that Jackson's sentence was disproportionate).

59. *See generally* Ashley Flynn, *Procedural Default: A De Facto Exception to Civility?*, 12 CAP. DEF. J. 289 (2000) (describing how attorney's civility can lead to procedural default).

60. For a general overview of *Atkins* and its applicability to juvenile death sentences, see Power, *supra* note 56.

61. Robert E. Boczkiewicz & Bob Doucette, *Condemned Man Gets Last-Minute Delay*, THE DAILY OKLAHOMAN, Apr. 3, 2003, at 1A, 2003 WL 17307520. Hain's latest appeal sought federal funds for a second clemency hearing. *Id.*

Court; the Court granted the State's application to vacate the stay of execution.[62] Justices Stevens, Souter, Ginsburg, and Breyer, however, voted to deny the application to vacate the stay of execution.[63] On April 3, 2003, Hain was put to death.[64]

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62. Mullin v. Hain, No. 02a848, 2003 WL 1786241, at *1 (U.S. Apr. 3, 2003) (mem.).

63. *Id.* (stating that Justices Stevens, Souter, Ginsburg, and Breyer "would deny the application to vacate the stay of execution").

64. Gina Holland, *Man Who Killed As Teen Put to Death*, THE ASSOCIATED PRESS ONLINE, Apr. 4, 2003, *at* 2003 WL 18221096.