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Recent Developments: Stanford v. Kentucky: Imposition of Capital Punishment on an Individual for a Crime Committed at Sixteen or Seventeen Years of Age Does Not Violate Eighth Amendment

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Recent Developments

***Stanford v. Kentucky:* IMPOSITION OF CAPITAL PUNISHMENT ON AN INDIVIDUAL FOR A CRIME COMMITTED AT SIXTEEN OR SEVENTEEN YEARS OF AGE DOES NOT VIOLATE EIGHTH AMENDMENT**

In *Stanford v. Kentucky,* 492 U.S. ___, 109 S. Ct. 2969 (1989), the Supreme Court, in a plurality opinion delivered by Justice Scalia, who was joined by Chief Justice Reinquist, Justice White and Justice Kennedy, held that sentencing a person to death for a crime committed while the offender was sixteen or seventeen years of age did not constitute cruel and unusual punishment as prohibited by the eighth amendment. The Court reviewed legislative enactments concerning capital punishment to establish a national consensus that such punishment does not violate evolving standards of decency of modern American society.

The Court considered two consolidated cases. In the first case, Kevin Stanford was seventeen years old in January, 1981, when he and an accomplice repeatedly raped and sodomized a twenty year-old female attendant during the robbery of a gas station. Afterwards, they drove the attendant to a secluded area where Stanford shot her, point-blank in the face and in the back of the head.

A Kentucky statute provides that a juvenile can be tried as an adult if he is charged with a Class A felony or capital crime, or is over sixteen years of age and charged with a felony. Ky. Rev. Stat. Ann. § 208.170 (Michie/Bobbs-Merrill 1982). Applying this statute, a Kentucky juvenile court waived juvenile jurisdiction and transferred the case for trial as an adult. Convicted of murder, first-degree sodomy, first-degree robbery and receiving stolen property, Stanford was sentenced to death and forty-five years in prison. *Stanford,* 109 S. Ct. at 2973. The Kentucky Supreme Court held, in affirming the death sentence, that the juvenile court had properly certified Stanford for trial as an adult, since "'there was no program or treatment appropriate for appellant in the juvenile justice system.'" *Id.* (quoting *Stanford v. Kentucky,* 734 S.W.2d 781, 792 (Ky. 1987)).

In the second case, Heath Wilkins, at the age of sixteen, in July, 1985, stabbed to death a twenty-six year old mother of two who was working in a convenience store that she and her husband owned and operated. Under Mo. Rev. Stat. § 211.071 (1986), which permits individuals between fourteen and seventeen years of age who have committed felonies to be tried as adults, the juvenile court terminated juvenile-court jurisdiction and certified Wilkins for trial as an adult. After Wilkins entered guilty pleas to charges of first-degree murder, armed criminal action and carrying a concealed weapon, the trial court determined that the death penalty was appropriate. The Supreme Court of Missouri held that the punishment imposed did not violate the eighth amendment and affirmed the sentence. *Id.* at 2974.

Both Stanford and Wilkins contended that imposition of the death penalty on criminals who were juveniles at the time they committed their crimes, violated the eighth amendment prohibition against cruel and unusual punishment. The Supreme Court has interpreted the eighth amendment "'in a flexible and dynamic manner.'" *Id.* (quoting *Gregg v. Georgia,* 428 U.S. 153, 171 (1976)), and determined that a particular punishment violates the amendment when it is contrary to the "'evolving standards of decency that mark the progress of a maturing society.'" *Id.* (quoting *Trop v. Dulles,* 356 U.S. 86, 101 (1958) (plurality opinion)).

To determine "evolving standards of decency," the Court looked first to statutes passed by state legislatures. The Court found that fifteen of the thirty-seven states allowing capital punishment do not impose it on sixteen year old offenders, and twelve of those states do not impose it on seventeen year old offenders. Thus, the majority of states allowing capital punishment *do* extend capital punishment to sixteen and seventeen year old offenders. The Court found similar congressional sentiment on this issue reflected in 18 U.S.C. § 5032 (Supp. V 1982), which permits sixteen and seventeen year olds, after appropriate findings, "to be tried and punished as adults for *all* federal offenses, including those bearing a capital penalty that is not limited to eighteen year olds." *Id.* at 2976. The Court concluded that, based on the pattern of federal and state laws, the national consensus previously considered sufficient to label a punishment cruel and unusual had not been established.

Stanford argued both that the laws did not establish a settled national consensus, and that the application of enacted statutes should be considered by the Court. Since the death sentence is rarely imposed on persons under eighteen, Stanford claimed that the death penalty for such offenders was categorically unacceptable to prosecutors and jurors. The Court held, to the contrary, that the reluctant application of death penalty statutes to minors indicated that the considerations which led Stanford to believe that the death penalty should *never* be imposed on offenders under eighteen are the same considerations which lead prosecutors and juries to believe that it should *rarely* be imposed. *Id.* at 2977.

The Court was also unpersuaded by Stanford's reliance on state laws which set eighteen as the legal age for engaging in activities such as driving, drinking alcoholic beverages, and voting. The Court considered those laws irrelevant, because they operate in gross, i.e., they do not conduct individualized maturity tests for each driver, drinker, or voter. In contrast, the Court noted that the criminal justice system requires individualized consideration.

Twenty-nine States, including both Kentucky and Missouri, have

codified this constitutional requirement in laws specifically designating the defendant's age as a mitigating factor in capital cases. Moreover, the determinations required by juvenile transfer statutes to certify a juvenile for trial as an adult ensure individualized consideration of the maturity and moral responsibility of sixteen and seventeen year-old offenders before they are even held to stand trial as adults.

Id. at 2978.

Similarly, the Court rejected Stanford's reliance on public opinion polls, the views of public interest groups and the positions of professional associations as indicia of a national consensus, declaring them insufficient foundations on which to rest constitutional law. "A . . . national consensus so broad, so clear and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and application of laws) that the people have approved." *Id.* at 2979.

Finally, the Court deemed it unnecessary to conduct a proportionality test: to examine whether "there is a disproportion between the punishment imposed and the defendant's blameworthiness." *Id.* at 2980. This test is used only where there is objective evidence of a societal consensus against the penalty; no such evidence existed in this case. *Id.*

In a strong dissent, Justice Brennan criticized the Court's reliance on legislative enactments to determine that the capital punishment of sixteen or seventeen year old offenders did not offend "'evolving standards of decency.'" *Id.* at 2982 (quoting *Trop v. Dulles*) This approach returned to the task of defining eighth amendment protection to the very political majorities the framers sought to deny such power. "'One's right to life, liberty, and property, . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.'" *Id.* at 2987 (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)). Furthermore, the dissent indicated that the plurality's discussion of state laws was distorted since it failed to account for the fifteen states (and the District of Columbia) which do not authorize capital punishment at all. *Id.* at 2982-83.

Justice Brennan also characterized the Court's review of legislative enactments to establish a national consensus as incomplete. He argued that the rare application of the death sentence for youthful offenders, the decisions of respected organizations in relevant fields that the penalty was unacceptable, and its rejection by governments around the world, were strong indications that the execution of adolescents violated contemporary standards of decency and should have been included in the Court's analysis. *Id.* at 2984-85.

The dissent criticized the plurality's refusal to conduct proportionality analysis. "There can be no doubt at this point in our constitutional history that the eighth amendment forbids punishment that is wholly disproportionate to the blameworthiness of the offender." *Id.* at 2987. The dissent noted that in American society, juveniles are treated differently from adults. As a class, they do not have the level of maturation and responsibility presumed in adults. "'The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.'" *Id.* at 2988 (quoting *Thompson v. Oklahoma*, 487 U.S.___, 108 S. Ct, 2687, 2699 (1988)). In Brennan's view, "[j]uveniles very generally lack that degree of blameworthiness that is . . . a constitutional prerequisite for the imposition of capital punishment under our precedents concerning the eighth amendment proportionality principle." *Id.* at 2992.

In a plurality opinion, the United States Supreme Court ruled that the imposition of the death penalty on offenders who were sixteen or seventeen years old at the time they committed their crimes did not violate the eighth amendment's prohibition against cruel and unusual punishment, because such penalty was not considered cruel and unusual at the time the Bill of Rights was adopted, and no national consensus against the execution of such youthful offenders had been established.

—Mary Jo Murphy

Gray v. State: COURT UPHELD TRIAL JUDGE'S DISCRETION IN REFUSING TO REQUIRE A PROSECUTOR TO TESTIFY OR BE CROSS-EXAMINED FOR ALLEGED DISCRIMINATION IN SELECTING JURORS

In *Gray v. State*, 317 Md. 250, 562 A.2d 1278 (1989), the Court of Appeals of Maryland held that a prosecutor is not required to testify under oath or be subjected to cross-examination when offering non-discriminatory explanations for the striking of black venirepersons from the jury panel.

Isaac Gray, a black male, was tried in the Circuit Court for Howard County for the first degree rape of a white woman. Upon completion of the jury selection process, Gray moved for a mistrial, alleging that since the prosecutor had used four of his peremptory challenges to strike black jurors from the panel, the state must advance an explanation for these challenges. *Id.* at 252-53, 562 A.2d at 1279. Relying on *Swain v. Alabama*, 380 U.S. 202 (1965), the trial judge held that a prosecutor was not required to give explanations for the exercise of peremptory challenges. *Gray*, 317 Md. at 253 n.2, 562 A.2d at 1279 n.2. Despite the court's ruling, the prosecutor volunteered a non-discriminatory reason for one of his strikes and noted that the jury, as impaneled, included one black juror and one black alternate juror. *Id.* at 253, 562 A.2d at 1280. The trial judge denied the defendant's motion and Gray was subsequently convicted.

Gray filed a motion for a new trial. At the hearing, Gray argued that *Batson v. Kentucky*, 476 U.S. 79 (1986), decided after Gray's trial on the merits, was applicable to the facts of his case. *Gray*, 317 Md. at 253, 562 A.2d at 1280. *Batson* held that where the totality of the circumstances surrounding a prosecutor's exercise of peremptory challenges established a prima facie case of racial discrimination, the burden was on the state to justify the challenges with a non-discriminatory explanation. Gray argued that a prima facie showing had been established and, therefore, the state was required to provide a racially neutral reason for the challenge. The prosecutor denied the allegations of discrimination and stated his reasons for striking each of the black jurors. The trial judge denied the motion for a new trial, based on his belief that *Batson* was not meant to be applied retroactively, and that, notwithstanding *Batson*, the ratio of black jurors to the other jurors exceeded the ratio of blacks to all persons living in the county at that time. *Id.* at 253-54, 562 A.2d at 1280.

On appeal, the court of special appeals vacated the judgment and remanded the case for a determination of whether Gray had established a prima facie showing of racial discrimination, and, if so, whether the state had sufficiently rebutted the showing, in accord with the two-part test of *Batson*. *Id.* at 254, 562 A.2d at 1280. At this hearing, counsel for the defendant requested, pursuant to a witness subpoena which had been served on the prosecutor, that the prosecutor be placed under oath before giving his reasons for his jury strikes and that while under oath, he be subject to cross-examination. Gray argued that there was a guaranteed right to an adversarial hear-