

The Final End of Juvenile Executions

ROPER v SIMMONS

Jonathan Northover

“The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.” With these few and simple words the Supreme Court of the United States brought to an end the execution of juveniles.

In a decision which surely puts the aims of justice before those of fossilised constitutional niceties the Supreme Court has finally, and not without some surprise, declared that it is a breach of the 8th Amendment ban on “cruel and unusual punishment” to execute a person who committed their offence when they were aged under 18 years.¹

In 1993, when aged 17 years, Christopher Simmons committed a brutal and apparently premeditated murder in Missouri. By the time of his trial he was 18. He was convicted and sentenced to death. Like countless other defendants on death row, he was thereafter involved in the labyrinthine procedures of the death penalty appeal system. In 1997, he was denied post-conviction relief² and he appeared to have reached the end of the appeals process when the federal courts denied Simmons’ petition for a writ of habeas corpus.³ The decision of the Supreme Court in *Stanford v. Kentucky* 492 U.S. 361 (1989) had expressly upheld the right of the individual states to execute those who committed their offences at ages 16 or 17.

Then in 2002, the Supreme Court held in *Atkins v. Virginia* 536 U.S. 304 (2002) that it was unconstitutional under the 8th Amendment to execute those suffering from mental retardation. In reaching its decision the majority held, as in previous cases, that punishment must be proportionate to the offence and that in deciding whether a punishment is excessive the standards to be applied are not those of 1789 when the Bill of

Rights was adopted but are to be judged by current standards. As Chief Justice Warren explained in *Trop v. Dulles* 356 U.S. 86 (1958) “The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” Applying this test, and paying particular regard to changes in state legislation and the actions of juries, the Court held that a national consensus had developed against the imposition of the death penalty on a person who was mentally retarded, and accordingly declared that the practice was unlawful.

Seeing a window of opportunity, Simmons filed a new petition for state post-conviction relief arguing that the same reasoning as had been applied in *Atkins* to the mentally retarded should be applied to juvenile defendants. In the Supreme Court of Missouri something very unusual happened. Not

only did the Court agree with Simmons’ arguments but the state Supreme Court took it upon itself to decide that given the opportunity to revisit its decision in *Stanford*, the US Supreme Court would also agree that the execution of juveniles now constituted a breach of the 8th Amendment and would therefore

overrule its previous decision.⁴

The case therefore came before the US Supreme Court on an appeal by the State of Missouri. In death penalty appeals the votes of most of the judges can easily be determined in advance. Justices Stevens, Souter, Ginsburg and Breyer can be relied upon to decide the case from a position of consistent opposition to the death penalty. On the other side, Rehnquist CJ and Justices Scalia and Thomas are fundamentally opposed to the way in which the majority has interpreted the 8th Amendment. They are firm believers in the rights of the individual states to decide whether they want to kill their citizens and believe that the states should

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be free from interference from the courts in their pursuit of this constitutional right.

The crucial votes in such cases are those of Justices Kennedy and O'Connor. Kennedy used to vote along with the conservatives and was an ally of Scalia but increasingly he has voted with the anti-death penalty judges. O'Connor is another conservative who can be won over to the anti-death penalty lobby on occasions but is unreliable as an ally. O'Connor voted against the d.p. for 15 year olds in *Thompson v. Oklahoma* 487 U.S.815 (1988) but for the d.p. for 16 and 17 year old in *Stanford v. Kentucky* (above) as did Kennedy. In her concurring opinion, O'Connor held out some hope for the future when she said "The day may come when there is such legislative rejection of the execution of 16 or 17 year old capital murderers that a clear national consensus can be said to have developed."⁵ The question therefore was which way would she vote on this occasion?

In the event, Kennedy not only voted with the majority in a 5-4 split, he actually drafted the majority opinion in which 4 other Justices concurred. For the minority, Scalia J wrote his usual withering critique of the methods used by the majority to justify their decision. Rehnquist CJ and Thomas J, again following their usual path concurred with Scalia J. Disappointingly O'Connor also dissented although on slightly different grounds from the rest of the minority.

The majority saw no reason why they should not revisit their earlier decision in *Sandford* particularly in light of the decision in *Atkins v. Virginia* (above) in which the Court declined to follow its decision in *Penry v. Lynaugh* 492 U.S. 302 (1989) on the execution of those suffering from mental retardation. By contrast, the minority were dismissive of the very idea of revisiting this issue "barely 15 years" after *Sandford*. The majority opinion is based on the application of three principles, all of which had been applied in *Atkins*. First, the principle of the "evolving standards of decency", secondly by noting the "objective indicia of society's standards" as expressed in legislative enactments and state practice with respect to executions and thirdly that the Justices' own judgment had to be brought to bear on the question

of the acceptability of the death penalty under the Eighth Amendment.

The majority noted that 30 States already prohibited the juvenile death penalty (12 who had rejected the d.p. altogether and 18 who although retaining the d.p. nevertheless had already banned juvenile executions). They also noted that in the last ten years only three states (Oklahoma, Texas and Virginia) had executed prisoners for crimes committed as juveniles. The Court pointed out that even Kevin Stanford himself had had his death sentence commuted by the Governor to life imprisonment without parole.

On the other hand the Court accepted that there was at least one difference in the evidence of consensus in *Atkins* and the present case, namely the rate of abolition of the d.p. In the 13 years between *Penry v. Lynaugh* (1989) and *Atkins* (2002) 16 states had moved to abolish the d.p. for the mentally retarded. By contrast only 5 states that permitted juvenile executions at the time of *Stanford* (1989) had banned them by 2004. Nevertheless, the Court said that this change was still significant pointing out that the "consistency of the direction of change" was more important than the number of states involved. The trend towards abolition of juvenile executions carried special force particularly in the light of the general popularity of anticrime legislation. There was also a simple explanation for the slower pace of abolition of the juvenile d.p. When the Supreme Court considered *Penry* only two d.p. states had prohibited the execution of the mentally retarded whilst by contrast at the time of the decision in *Sandford* in the same year, 12 d.p. states had already prohibited the execution of any juvenile under 18. Therefore the argument went, the impropriety of the juvenile d.p. had already gained wider recognition in 1989 than the impropriety of executing the mentally retarded. On the basis of "the objective indicia of consensus" the Court concluded that today's society does regard juveniles as "less culpable than the average criminal."

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Child and that only seven other countries had executed juvenile offenders since 1990⁶. Finally in acknowledging the “overwhelming weight of international opinion against the juvenile d.p.”, the Court referred specifically to the law of the United Kingdom in which the d.p. for children was abolished long before it was finally abolished for adults.⁷

The minority represented in the dissenting opinion of Scalia J attacked the approach of the majority on a number of grounds. The minority believes that the meaning of the Constitution should be a matter of certainty to be determined according to “a purely originalist approach” and not subject to change at the whim of a bunch of judges. To this, Stevens and Ginsburg JJ is a separate very short opinion point out that this approach would continue to justify the execution of children as young as seven! The minority continue by lambasting the majority for finding “on the flimsiest evidence” that a national consensus now exists against the juvenile d.p. which could not be discerned 15 years ago, for substituting their own judgment for that of the states’ legislatures and worst of all for listening to the views of foreign courts and legislatures who have all gone soft on juvenile crime. Its final wrath is reserved for the fact that the majority adding “insult to injury” affirmed the decision of the Missouri Supreme Court “without even admonishing that court for its flagrant disregard of our precedent in *Stanford*. It was pointed out that this had always been a prerogative reserved for the US Supreme Court itself.⁸

O’Connor’s dissent agreed that the court was wrong not to admonish the lower court for failing to follow precedent, disagreed with Scalia about the relevance of international law and opinion and accepted the view of the majority that the judges have a “constitutional obligation” to judge for themselves whether the d.p. is excessive punishment for a particular offence or class of offenders. Her main reason for joining the dissenting judges was that in her opinion little had changed since 1989 so as to indicate a change in public opinion and that it was wrong to conclude that just because some juvenile offenders might not deserve to die for their

crimes that therefore all juveniles, however heinous their crimes and however apparently able to appreciate the full horror of what they had done should as a group also be spared the death sentence. In this way she distinguished her views in respect of the mentally retarded where she had accepted, in joining the majority opinion in *Atkins*, that such a group can be treated as a class apart.

This is a historic decision in the fight against the death penalty. In the space of three years two important categories of offenders have been removed from the threat of such an appalling punishment. Much remains to be done. There are hundreds of people on death row who would almost certainly be able to show they are mentally retarded and never got a chance at trial to prove it and now cannot find a lawyer to argue for them. By the very nature of their condition many of them would not be able to appreciate that they have good arguments to put forward. The fight for justice for all on death row has a long way to go.

Mark George, Barrister
Garden Court North
Manchester



¹ The transcript is available on the website of the Death Penalty Information Centre at www.deathpenaltyinfo.org

² *State v. Simmons*, 944 S.W. 2d 165,169 (en banc), cert. denied, 522 U.S. 953 (1997).

³ *Simmons v. Bowersox*, 235 F. 3d 1124, 1127 (CA8), cert. denied, 534 U.S. 924 (2001).

⁴ *State ex rel. Simmons v. Roper*, 112 S.W. 3d 397 (2003) (en banc)

⁵ 492 U.S. 361,381

⁶ Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the D.R. of Congo and China.

⁷ Children & Young Persons Act 1933, confirmed in the Criminal Justice Act 1948.

⁸ *State Oil Co. v. Khan* 522 U.S. 3,20 (1997)