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PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: KEVIN N. STANFORD, Petitioner V. KENTUCKY

CASE NO: 87-5755

PLACE: WASHINGTON, D.C.

DATE: March 27, 1989

PAGES: 1 - 49

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IN THE SUPREME COURT OF THE UNITED STATES

KEVIN N. STANFORD,

Petitioner

v. : No. 87-5765

KENTUCKY

Washington, D.C.

Monday, March 27, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:41 o'clock p.m.

APPEARANCES:

FRANK W. HEFT, JR., ESQ., Louisville, Kentucky; on behalf of the Petitioner.

FREDERIC J. COWAN, ESQ., Attorney General of Kentucky, Frankfort, Kentucky; on behalf of the Respondent.

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C O N T E N T S

P R O C E E D I N G S

(1:41 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-5765, Kevin Stanford v. Kentucky.

Mr. Heft, you may proceed whenever you're ready.

ORAL ARGUMENT OF FRANK W. HEFT, JR.

ON BEHALF OF THE PETITIONER

MR. HEFT: Mr. Chief Justice, and may it please the Court.

The issue in this case is whether the Eighth Amendment prohibits the imposition of the death penalty on a juvenile who was 17 at the time of committing a capital offense.

One point of agreement for all members of the Court in Thompson v. Oklahoma is that there is some age below which a juvenile's crime can never be punished by death. Thus, the issue in this case is not whether a line should be drawn specifying a minimum age for the death penalty, but where the line should be drawn, and the Petitioner submits that the line should be drawn at the age of 18 because it is the most objective. It is the most justifiable. It is the most logical line that's capable of resolving the issue presented in this case.

As the briefs in -- filed in this case indicate, 18 is a very conservative age for determination as to when a person attains full maturity. Indeed, the maturation process is a continuing one that lasts until a person is into their early to mid 20s.

QUESTION: One would hope maybe even longer sometimes.

(Laughter.)

MR. HEFT: Yes, Your Honor. You're absolutely correct.

As human beings, we are simply incapable of making infallible judgments. Consequently, our society and the legal system are imperfect. Yet, in striving for perfection and in order to ensure fundamental fairness in the operation of our criminal justice system, jurisprudence in capital cases has consistently demanded certainty and reliability not only in capital sentencing procedures and trials, but in the outcome as well. However, a constitutionally acceptable degree of reliability and certainty cannot be attained in a case in which the state seeks the execution of a person who is under the age of 18 at the time of committing a crime.

The uncertainty about when a particular juvenile has fully developed and has fully evolved into

an adult has caused society to draw a bright line. That line is an expression of society's confidence and society's certainty that those under the age of 18 do not possess an adult's level of emotional, intellectual and cognitive development. And it is because of the uncertainty as to when a child actually evolves into an adult that society has drawn this bright line; the boundary has been drawn because of this uncertainty.

The uncertainty extends not only in matters as everyday life, such as voting rights or the right to sit on a jury, but certainly it extends to the area of capital punishment and sentencing. Eighteen is that point in a person's life where society feels comfortable and confident in assuming that one is ready to assume the privileges, rights and responsibilities of adulthood.

The failure of the Court to set 18 as the minimum age for the imposition of capital punishment puts society in a position it has sought to avoid, and that is of making an error in determining when a child has actually evolved into an adult. That risk of error we submit is simply intolerable in a capital case especially where society has chosen to err, if it does so, on the side of caution by creating a boundary between childhood and adulthood.

We simply cannot attain a sufficient level of

constitutional certainty and reliability in death penalty cases unless 18 is established as a minimum age for imposition of the death penalty and thereby eliminate the risk that a child who has not evolved into an adult is exposed to capital punishment.

QUESTION: And there has to be an element of --it -- it's arbitrary somewhere, isn't it?

MR. HEFT: Yes, Your Honor. There's no denying.

QUESTION: If you draw a bright line, it has to be arbitrary.

MR. HEFT: That's correct.

QUESTION: The day before he attains 18 he could commit his crime and not be executed.

MR. HEFT: That's correct, Your Honor.

QUESTION: If he did it the day -- a day later, he might be.

MR. HEFT: Our argument is that a -- the person who has not attained the age of 18 certainly shouldn't be executed.

And you're quite correct. There is an element of arbitrariness in any type of line-drawing. It's unavoidable. But as the Court noted in Salom v. Helm, that line-drawing is a problematical issue, it's a difficult issue, but it is one that exists in Eighth

Amendment cases.

And it seems to me that notwithstanding any arbitrariness, it's a justifiable arbitrariness and it's a permissible arbitrariness because society has made that choice. It has drawn that line in so many other aspects of our lives because the person who is 17 years old, 11 months and 364 days cannot vote under any circumstances, but a person who is 18 years old and one day can vote.

QUESTION: Can he drive --

QUESTION: But the difference, Mr. Heft --

QUESTION: Can he drive in the commonwealth?

MR. HEFT: Pardon me, Your Honor?

QUESTION: Can a 17 year old drive in the Commonwealth of Kentucky?

MR. HEFT: Yes, Your Honor. Yes.

QUESTION: So, they haven't drawn it there.

MR. HEFT: No, not as far as operation of a motor vehicle, Your Honor.

QUESTION: Mr. Heft, the difference in the --in the examples that you give is this. We -- we don't have a mechanism where -- whereby the individual cases can be -- can be individuated. In -- with -- with respect to voting, for example, you don't -- there's no registrar you can go before to say, well, even though

you're not quite 18, are you nevertheless mature enough.

Whereas, here you're talking about the situation where a jury in every case, in fact, even before the jury, you -- you have to have a judge say that this juvenile can be tried as an adult. That determination is first made. Then afterwards, a jury can consider the individual characteristics of this person and can say, even though this person is only 17 years and nine months, we think this person is mature enough to be held liable. That's totally different from voting or any other area I can think of. We have an individuating procedure in place at two stages.

MR. HEFT: But the theory is constant, Your Honor, whether we are talking about the imposition of capital punishment or criminal sanctions, and also whether or not we are talking about voting rights or the ability to sit on a jury.

It seems to me that this case is a perfect example of why individual considerations don't work, why the safeguards that are presently in place don't work.

QUESTION: (Inaudible) perfect example. For all I know, the jury considered this very thoroughly and thought this individual -- although normally I personally -- and I suppose most jurors -- would -- would not vote for -- for that in -- in the case of a

youthful offender. The jury, for all we know, considered this and said we think this person was mature enough.

MR. HEFT: Your Honor, let me answer this in --with -- in two different ways.

First of all, the primary safeguard against arbitrary imposition of capital -- of capital punishment is the introduction of mitigating evidence. But here, as I have pointed out in the brief, that safeguard was --was hollow because mitigating evidence was excluded unjustifiably. And the mitigating evidence that I'm talking about is testimony from a -- inmate on Kentucky's death row about rehabilitation programs within the adult criminal system. He not only knew about that information, but he had personal experience with the Petitioner before this crime occurred and after this crime occurred. Surely that is relevant mitigating evidence, but the jury wasn't allowed to hear that.

Not only that, as I -- as I've pointed out in the brief, youth as a mitigating circumstance under Kentucky's death penalty statute is also a hollow safeguard because it operates on a sliding scale insofar as it protects an individual -- theoretically protects an individual who is 16. It is also protects an individual who is 30. The --

QUESTION: You would have to be bound by your

18 year old rule even if the jury, for example, were shown evidence that this individual went around bragging I don't have to worry about the death penalty because I'm only 17 years old, 17 and 11 months, and they can't get me for another month. Even though the jury had that evidence in front of it, or -- or the jury had the evidence that this individual was selected to do the killing because this individual could not get it being one month short of 18.

This seems to me a much more arbitrary system of justice than -- than the one we have now. And you're putting this forward in the -- in the interest of being more equitable? It doesn't seem equitable to me at all.

MR. HEFT: I think it is equitable, Your Honor. I don't think we are asking the Court to carve particularly new or novel ground. We are asking the Court to rely on common sense, experience and what our society has -- our society has made a decision that individuals who are under 18 are children. They have not evolved into adults, and people on the other side of the line of 18 have evolved into adults.

QUESTION: (Inaudible) a decision that where we have no individuating mechanism, that's the line we'll use. But here we have an individuating mechanism, a jury that consider -- can consider in each case the

particular individual. If we could do that in voting, I'd be willing to have a voting age of 13 if you had somebody that would consider each individual voter. I can -- you know, I can think of some 15 year olds I'd like to have vote and maybe some 30 year olds I wouldn't.

(Laughter.)

MR. HEFT: Your Honor, with respect to the consideration that the jury might have given mitigating circumstances, there's no guarantee here what, if any, consideration they gave those mitigating circumstances and the extent --

QUESTION: But that -- that's true, Mr. Heft, with respect to adults. You'll have mitigating evidence come in as to adults, and there's no guarantee that the jury gave it any particular consideration.

MR. HEFT: Well, the -- I think the answer was -- was very obvious, and it was the one that trial counsel proposed in this case, Your Honor. Trial counsel asked the Judge to acquire the jury to make specific findings as to the existence of mitigating circumstances or the absence of those circumstances. In that way, we would at least have -- be assured that the jury did actually consider --

QUESTION: But your argument goes to the whole concept of mitigating circumstances in capital cases.

It's not peculiar to juvenile or 16 or 17 year old capital defendants.

MR. HEFT: Your Honor, I -- I think, as the Court stated in Eddings, that youth is not just another mitigating circumstance. It should be the pervasive factor in a case when the state is trying to seek capital punishment for a juvenile. It can't be treated categorically like every other mitigating circumstance. The Court I think --

QUESTION: You're asking to have it treated categorically in saying that it should be categorically ruled out.

MR. HEFT: I'm asking -- I --

QUESTION: Are you not?

MR. HEFT: Yes, that's correct. But if the jury is to consider youth as a mitigating circumstance, it needs to go beyond the plain -- the meaning -- the plain words "you are to consider the defendant's age." How do we know what weight the jury gave to the mitigating circumstance of youth?

QUESTION: How do we know what weight the jury gives to any mitigating circumstance? The -- you can say that about any capital defendant presumably that we can't be sure that -- just how the jury looked at this particular factor, but it's not peculiar to youth.

MR. HEFT: I -- I think it -- it's particularly special in the case of a juvenile where -- who the state is trying to execute. We need to be absolutely certain that the jury takes into account all of the relevant mitigating circumstances. We don't have that assurarce in dealing with juveniles in the present -- under the present system of procedural and in substantive safeguards.

They -- juveniles should not be treated categorically or lumped in together with adults for all -- for all purposes, particularly in capital punishment purposes. I think that's -- that's a fundamental flaw in -- in the present system. They are treatec absolutely the same. There is no distinction. Youth is just another mitigating circumstance, and I don't think that's what the Court had intended in Eddings when it said that juries have to give great weight to mitigating -- youth as a mitigating circumstance. It's -- it's a mitigating circumstance above and beycnd other mitigating statute -- circumstances that the -- the states might proscribe.

We would -- we would submit that it is constitutionally acceptable in determining evolving standards of decency to utilize 18 as the age barrier for capital punishment because of its widespread

acceptance as the dividing line between childhood and adulthood. In exempting persons under 18 from capital punishment, society has -- the Court would be making a determination that is consistent with the purposes of the dividing line that is presently in place.

The objective factors that the Court has already heard in the prior arguments support the Petitioner's conclusion. Only six states at the present time set the minimum age of capital punishment at below 18. Twenty-six states and the District of Columbia preclude the execution of juveniles.

QUESTION: Now, does that -- the 26 states and the District of Columbia -- does that include some states which preclude the execution of everybody?

MR. HEFT: Yes, Your Honor.

QUESTION: So, how many in your list that preclude the execution of juveniles authorize it for adults?

MR. HEFT: There are 12, Your Honor.

QUESTION: So, it's 12 versus what? Six?

MR. HEFT: Yes, Your Honor.

Moreover, international opinion widely rejects the execution of juveniles. In the amicus brief filed by Amnesty International, it shows overwhelming support for 18 as the minimum age for capital punishment. In

the chart submitted by Amnesty International, 143 out of 180 nations rejected capital punishment for people under 18. That seems --

QUESTION: How many of those rejected capital punishment totally?

MR. HEFT: I -- I believe there were approximately 20, Your Honor.

QUESTION: Twenty who had no capital punishment at all?

MR. HEFT: Yes, Your Honor.

We would submit that considering the ethnic, religious, cultural, social and political differences between the nations of the world, it seems a particularly strong, particularly objective factor in determining that capital punishment should be found unconstitutional for juveniles in this country because that age barrier that has been erected by the international community is a common bond that transcends all of the differences between nations of the world.

We would further submit that 18 is the most justifiable and the most logical line that the Court can draw. Children evolve into adults. The maturation process is a gradual one which gives rise to significant emotional, intellectual and cognitive development which extends into a person's 20s. Thus, we cannot say with a

degree of constitutional certainty or reliability required in capital cases that a juvenile, a person under 18, is so much like an adult that it is permissible to subject them to the death penalty.

QUESTION: That's again why we have juries. And juries sometimes won't execute a 25 year old who they think is -- is -- is too childlike. That's why we have juries.

MR. HEFT: Your Honor, I -- I think it makes a lot of sense not only as a matter of social policy, but of a -- as a matter of constitutional law to set the age of -- of 18. Society has already created a presumption that people under 18 -- they are not adults. They have not evolved into adulthood. The maturation process has run its course.

QUESTION: Once again, it has created that presumption in areas where it has no individuating procedure. But here we have an individuating procedure.

MR. HEFT: There's less reason I think to reject that presumption in capital punishment because it seems to me that the risk of any error in a capital case is too much. If one juvenile were wrongly executed because he or she was not -- or erroneously decided to be mature, that's too much of a risk.

QUESTION: If any risk of error is too much,

we just better abandon the criminal law. Nobody can guarantee perfection in any human endeavor. You can't really mean that.

MR. HEFT: We have less perfection certainly when juveniles are subjected to the death penalty.

QUESTION: Well, I -- I think -- I think you do mean your statement that any risk of error is too much, and -- and the conclusion that leads to is that capital punishment is impermissible, which is not a conclusion we've accepted.

Incidentally, as far as those nations that --if we were governed by the other nations of the world, how many of those -- what is the lineup with respect to the permissibility of capital punishment at all for juveniles or anybody else?

MR. HEFT: A number of the nations. I'm not sure of the exact figures.

QUESTION: How many -- how many other besides the United States currently allow it? Do you have any idea?

MR. HEFT: Allow capital punishment at all?

QUESTION: Yes, yes.

MR. HEFT: I'm not sure, Your Honor.

QUESTION: My impression is it's not very many.

MR. HEFT: That's correct, but I couldn't give

you a specific figure.

Juveniles demonstrate tremendous resilience. They have a substantial capacity for change, intellectual development and emotional growth. That's the true essence of adolescence. Thus, when a juvenile is subjected to the death penalty, our society cannot be absolutely certain in terms of the constitutional reliability of imposing capital punishment that a juvenile is so irredeemable or has so much evolved into an adult that the finished product of that childhood is what is being subjected to capital punishment.

Neither can we -- we be certain as human beings that the level of maturity experienced by a particular juvenile or exhibited by a particular juvenile is commensurate with that of an adult. There's too much room for error.

Society presumes by its extensive regulations of the lives of juveniles that they are an unfinished product and that the maturation process is still continuing. Juveniles are still developing as persons. They are simply -- and for that reason society has determined that they are not capable of exercising the same privileges and responsibilities of adults. We don't expect them to act as adults. We don't treat them as adults.

Ard those restrictions are a manifestation that society has substantial doubt that a person who is under 18 has actually evolved into an adult because a person under the age of 18 simply has not lived long enough for society to be certain that it is dealing with the completed individual or the finished product of the maturation process.

Ard that's consistent with Eighth Amendment jurisprudence that requires the Court to consider the dignity of man because society must be certain if capital punishment is to be imposed that it is dealing with the finished product of the maturation process, a fully evolved and mature adult. We can't reach that level of certainty in juvenile cases because of the age barrier or the -- the dividing line between childhood and adulthood.

QUESTION: I take it it's sort of irrelevant to your argument how many states permit it and how many don't.

MR. HEFT: It's a factor certainly for the Court to consider, but that is not the be all and the end all. That's not the end of the inquiry, Your Honor.

Eighteen --

QUESTION: Largely irrelevant then.

MR. HEFT: No, I'm not saying it's irrelevant,

Your Honor. It's a factor that the Court has identified in Enmund and Coker that it has to consider. But the Court also noted that in the final analysis, the determination of what's -- what constitutes evolving standards of decency under the Eighth Amendment is for the Court's determination guided by those objective factors.

Eighteen is the -- as the minimum age for capital punishment would -- would unequivocally resolve doubt in the favor of juveniles and eliminate the risk that a juvenile who has not evolved into an adult is subjected to capital punishment.

As far as the imposition of the death penalty is concerned, we would submit that it has no deterrent or -- or retribution value to people under 18. Deterrence, as we noted in our brief, is -- is only remotely possible. It's only a remote possibility as far as juveniles are concerned because of the present approximately 2,200 members or inhabitants of our country's death row, only just barely over 1 percent are juveniles.

But the reason why the deterrence rationale is inapplicable to juveniles lies beyond mere statistics and goes to what is the essence --

QUESTION: What do the statistics prove at all

about the death penalty being a deterrent to juveniles? That there are only 1 percent of juveniles on death row -- you would have to compare that to other universes surely to get anything out of it.

MR. HEFT: It seems to me, Your Honor, that the fact that there are so few juveniles on death row reflects our society's reluctance to inflict the death penalty on juveniles.

QUESTION: Well, it might reflect that, or it might reflect the fact that very -- a much smaller percentage of juveniles than adults commit offenses which could be capital crimes in the first place.

MR. HEFT: That point goes precisely to why deterrence -- the deterrence rationale is inapplicable to juveniles, Your Honor.

QUESTION: Would you explain it?

MR. HEFT: Well, it's -- it seems to me that juveniles, by virtue of their immaturity, by virtue of their age, inexperience and lack of judgment, do not appreciate the long-term consequences of their action --

QUESTION: Well --

MR. HEFT: -- in the same -- I'm sorry.

QUESTION: That -- that's certainly an argument that at least seems to move in that direction. But I don't see how that ties to the statistics at all.

MR. HEFT: Well, the -- the statistics in and of themselves, Your Honor, seem to me to -- to indicate a societal response that juvenile cases are viewed differently even when the state is seeking capital punishment.

QUESTION: But wouldn't you have to compare the 1 percent with the number of juvenile cases in which capital punishment could have been imposed or the number -- the universe of juvenile offenders?

MR. HEFT: That -- that certainly would be the ideal, Your Honor, but we don't have the capability at this point of making that type of statistical analysis. But it still seems to me significant that when you look at the -- the -- who inhabits our death rows and find that only 1 percent of that population are juveniles, that's -- I think that's significant in and of itself.

QUESTION: Would you say the same thing if we examined death row and found that only 1 percent of the inhabitants were over 60, that the death penalty really doesn't deter people who are over 60?

MR. HEFT: Well, I -- I think -- my answer would be that, as far as the deterrence rationale is concerned, that applies to juveniles again because the -- the difference in their emotional and intellectual development has posed --

QUESTION: But then it's because of the juvenile nature that you're talking about, not because of the statistics.

MR. HEFT: That's true in the sense that I think the statistics reflect society's recognition of the differences between juveniles and adults.

There is widespread agreement that juveniles are less mature and less responsible than adults, and that's the --

QUESTION: Mr. Heft, but on the statistics, what again is the figure? It's 1 percent of the 2,200, so there are about 24 or 25. How many -- how many juveniles?

MR. HEFT: There are -- according to Legal Defense Func's latest publication, Death Row U.S.A., there are 31.

QUESTION: Thirty-one is all.

MR. HEFT: Yes, Your Honor.

QUESTION: Thank you.

MR. HEFT: There's widespread agreement --

QUESTION: Of those, how many are seven -- were 17 at the time of the murder?

MR. HEFT: Twenty-three by my count, Your Honor. The -- there is -- there are five 16 year olds, two 15 year olds and one is unknown.

Widespread agreement -- there is widespread agreement that juveniles are less mature and less responsible than adults. That is the reason why society has undertaken pervasive control and regulation of the juveniles' lives.

QUESTION: Is there widespread agreement that as a result of that, deterrence is irrelevant? I mean, it would seem to me that if -- if a young adult is -- is impulsive and has poor judgment, that maybe deterrence is more important, not less.

MR. HEFT: Your Honor, I would separate the --I would not categorize juveniles as young adults. A young adult I would categorize as someone 18 to 25, and I think our society recognizes the difference between --

QUESTION: All right, a young person.

MR. HEFT: As far as acting impulsively, that -- that is trait of adolescence. It's a trait of juvenile conduct and behavior. And I think society --

QUESTION: But why is deterrence less relevant when you have an impulsive nature? I -- I don't understand that.

MR. HEFT: That -- first of all, that's the essence of juvenile conduct. But I think it goes beyond just simply the emotional and intellectual development of juveniles --

QUESTION: It seems to me -- but you're saying that juveniles can be so dangerous that therefore we shouldn't have the ultimate deterrent.

MR. HEFT: No.

QUESTION: And to me that just doesn't follow.

MR. HEFT: No, I'm not arguing that, as far as retribution is concerned, that society does not have the right to expect some type of --

QUESTION: We're talking about deterrence.

MR. HEFT: The psychiatric literature that we've cited in our brief has indicated that deterrence does not -- is not a -- is not applicable to juveniles because they don't -- they have absolutely no fear of death. They don't -- they have no fear of death in their ordinary -- ordinary lives. It has no deterrent value to their everyday lives, and therefore would have no deterrence to criminal conduct because of the -- the particular makeup, psychological makeup, of juveniles. And I think that's all part and parcel of the lack of maturity so that an individual who is a young adult, 18 to 25, has had an opportunity and would be expected to -- to be at a higher level of maturity than someone who's 17 or under.

The death penalty is society's ultimate act of despair. When it is imposed on a juvenile, it manifests

a hopelessness of absolutely no possibility of change and development which is fundamentally inconsistent with the true essence of adolescence. That is a resiliency which is reflected in continuous growth, development and maturation. As human beings, we are incapable of making an infallible determination that a person under 18 is so much like an adult or so far beyond the possibility of all change that he or she can justifiably be subjected to the death penalty.

QUESTION: Well, I don't think that's really true. You're saying that the death penalty is never imposed by our society except upon people who -- who cannot be corrected so that they won't do it again.

MR. HEFT: I think that's a --

QUESTION: I think that's just not true. I think sometimes we execute people that you know won't commit the crime of murder again, but the crime they've committed is so heinous that society decides to impose capital punishment. I mean, it may be the killing of a wife or some person. You know it will never happen again, but --

MR. HEFT: I think the inquiry has to be -- go beyond the nature of the crime, whether it be heinous, atrocious or whatever, and look to the individual. And in this particular case, there was a finding by the

juvenile jucge that the Petitioner was amenable to treatment.

QLESTION: Well, I understand. I'm just -- I'm just questioning your -- your general proposition that -- that a touchstone of whether we -- our society as a whole imposes capital punishment -- we only do so when the person cannot be induced never to commit that kind of murder again. I -- I just don't think so. I think, you know, if Adolf Hitler had come in and said I promise I'll never do it again, and we believed him, I think we would still impose capital punishment.

MR. HEFT: I -- I think there that recognizes the distinction between juveniles and adult. Juveniles, as I've indicated earlier, have a tremendous capacity for change. Change is expected. It evolves through the maturation process. And therefore that potential for change, that potential for rehabilitation is much greater in juveniles. And therefore there's absolutely less reason or no justification for imposing the death penalty on them at such a young and tender age.

For purposes of the Eighth Amendment, it is entirely appropriate for the Court to set 18 as the minimum age for the imposition of capital punishment because it will unequivocally eliminate the possibility of executing a child who has not fully matured into an

adult or who does not possess an adult's level of maturity, emotional and intellectual development and whose moral culpability cannot, therefore, be considered commensurate with an adult. Setting 18 as the minimum age for capital punishment --

QUESTION: Of course, you're -- you're arguing for 365 days, aren't you?

MR. HEFT: Yes, Your Honor.

QUESTION: Three sixty-six in leap years.

MR. HEFT: Yes, Your Honor. But I should point out --

QUESTION: That -- that -- that's your margin.

MR. HEFT: We are asking the Court to draw the line at 18, Your Honor, yes.

Setting 18 as the minimum age for capital punishment advances the -- the objectives of Eighth Amendment jurisprudence, that is, confidence, certainty and reliability in the outcome of the proceedings. And we, therefore, urge the Court to rule that juveniles under the age of 18 cannot be executed.

Thank you.

QUESTION: Thank you, Mr. Heft.

General Cowan, we'll hear now from you.

ORAL ARGUMENT OF FREDERIC J. COWAN

ON BEHALF OF THE RESPONDENT

MR. COWAN: Mr. Chief Justice, and may it please the Court.

What is at stake in this case before the Court today is this Court's long-established jurisprudence of individualized consideration in matters of death penalty cases focusing on the nature of the crime and the personal culpability of the individual.

To accept Petitioner's point of view, this Court would have to accept the notion that suddenly at age 18 individuals become sophisticated, mature and responsible as adults. Not only does that notion fly in the face of common sense, it also flies in the face of a national consensus that does exist which is that individuals mature and grow at different rates depending upon who they are and what their individual circumstances are.

The Petitioner would have this Court draw a line, a bright line, that would exempt categorically all individuals in a certain class depending upon one factor, namely, chronological age that is not related or not directly or necessarily related to the individual culpability of the particular defendant.

This case that is before the Court today shows what a mistake it would be to shift the focus of jurisprudence away from individual culpability. Kevin

Stanford committed these crimes with deliberateness and intention, with purposefulness. His motive was to eliminate a witness. He was mature and sophisticated enough to sodomize and terrorize a young woman, calm and calculated enough to allow her to smoke a cigarette before executing her, and calm enough to return to the scene of the crime and steal some 300 cartons of cigarettes.

In addition, the trial judge in fact, after hearing all the evidence and considering all the circumstances before the court, made a finding -- and this at Joint appendix page 111 -- that this individual was beyond rehabilitation whether in or outside of an institution.

QUESTION: Are there any scientific studies to verify that people at that age 17 are not amenable to treatment?

MR. COWAN: Your Honor, I am not aware of any, and I think the point that is raised with respect to rehabilitation is very much the question of if someone at age 17 is amenable to rehabilitation, does that mean that someone at age 19 is not. Clearly that also -- I don't think there's any scientific basis to demonstrate that that's true, and it certainly flies in the face of common sense.

QUESTION: Is there a scientific basis that you can have a hardened criminal, a well-set sociopathic personality at the age of 17?

MR. COWAN: Your Honor, I believe there is although I must say I -- I cannot cite you chapter and verse as --

QUESTION: None has been cited that I see.

MR. COWAN: Your Honor, I can only point to this particular case and this particular individual where there was a long history of going in and out of institutions providing him with opportunities to be rehabilitated. In fact, in this particular case, the individual was in a treatment program just prior to the time of the crime. There was testimony in the record in the -- in the hearing process that some 86 percent of the people who went through that program were successfully treated. He was one of the 14 percent apparently who was not.

To rely on an age alone -- a bright line of age alone, is unlike this Court's previous decisions in Enmund v. Florida, Tison v. Arizona where, for example, the culpability -- the question was based upon the personal culpability as it related to the individual's participation in that crime. Age in itself is an imperfect proxy, if you will, or a symbol of factors

that are more important such as maturation, sophistication, ability to appreciate the seriousness of the crime, and the consequences of the crime.

We all know as a matter of common experience that maturity exists on both sides of that line and sophistication exists on both sides of that bright line the Petitioner wishes to draw. The sentencer, in fact --

QUESTION: Once again, have there been any psychological studies or sociological studies that bear that out, or are you asking us to rely on -- on our -- on our own judgment and our own knowledge?

MR. COWAN: Your Honor, I think it is fair in this case to rely on your own judgment and your own knowledge and your own intuitive sense in that we know that individuals do vary at different ages.

QUESTION: And I would ask the same question about the deterrent value of the death penalty so far as a 16 year old is concerned or a 17 year old.

MR. COWAN: Your Honor, I think there is no --there's nothing that I am aware of that indicates one way or another as far as the deterrent value separating juveniles from adults. I would only say to you that if there is a deterrent value, I see no reason why it would not apply to juveniles as well as to adults.

In particular, in this case you had a -- you

had a juvenile who was street wise, who had been in and out of the criminal justice system for a number of years who was capable of making the kinds of rational decisions that he made in this particular case.

I believe it's important to avoid in thinking about these problems the notion of stereotypes and thinking about the average 17 year old or the average 16 year old. What we are talking about here is the juvenile such as the one who is before us who was, in fact, the most sophisticated, who had been -- had seen the various aspects of the criminal justice system, who acted with the kind of deliberation and performed the kinds of acts that he did.

Another thing I think is important to think about in determining whether a bright line is a good test is to consider that if that test is developed, it seems to me that you're writing into the Constitution a principle that will guarantee injustice, and by that I mean take the example of two individuals who both commit jointly a crime, a murder, one 17, one 18. Let us suppose that the 18 year old is unquestionably less culpable than the 17 year old. He didn't pull the trigger. He didn't plan the crime, but he was there in such a way as to exhibit the extreme indifference to human life as in Tison.

The Petitioner would have this Court say that the 17 year old shall be exempt, the clearly more culpable of the two, and the 18 year old will be, in fact, put to death even though he is clearly less culpable. Or compare -- and I would suggest to you that a case like that will present itself to this Court if a bright line is drawn, and the opponents of the death penalty will be before you asking you to rule out the capital punishment for the older one on the grounds that it is freakish and arbitrary to do so.

Compare this case Stanford versus Tison. Can we say with any degree of assurance, if we have a bright line, that the type of culpability exhibited by Stanford is less than that -- or excuse me -- is -- is less than that exhibited by the Tison brothers in their particular case? I think not.

Or take Jose Hyde, the original case that was before this Court, the -- someone who was thought to be 17 from Georgia and then it was discovered that, no, he was perhaps 19. Is today he any different now just because the fact happened to be discovered? Is the crime any different? Is his degree of culpability any different because now he is eligible for the death penalty and under Petitioner's point of view would not be?

Your Honor, as legislatures -- legislatures can draw lines like this. They can draw such lines for reasons of policy. They can draw such lines for whatever reason they want to. They may wish to exhibit mercy, and that is fine and that is wise and acceptable. But the Constitution -- the Constitution is an instrument of justice, not an instrument of mercy. And I think that that is what Petitioners are asking here.

This Court has recognized in California v. Brown that very principle, in fact, where it held that a defendant did not have an Eighth Amendment right to have put before the jury considerations of sympathy and considerations of mercy.

The Petitioner seeks to convert what is, in fact, a mitigating factor, that of youth, into a constitutional prohibition. And I see no reason why we could not talk about other mitigating factors and attempt to convert those into constitutional prohibitions as well.

QUESTION: Mr. Attorney General, what do you say about the Petitioner's complaint that they weren't allowed to put on mitigating evidence?

MR. COWAN: Your Honor, the evidence that he was not allowed to put on -- the bulk of that evidence

related to the witness' proposed testimony of what it was like to be on death row. And in addition, his contacts with the Petitioner were very minimal. The trial Judge in that case made a determination that the evidence was not competent and that it was cumulative. We cannot, it seems to me, fashion or attempt to fashion a rule to tell a trial judge that you can -- you have to let everything in no matter what is offered. Surely, as a matter of constitutional law, a trial Judge should be able to continue to follow the rules -- normal rules of evidence, and that was what was done in this case.

QUESTION: General Cowan, do you think -- is it your view that Thompson v. Oklahoma is wrong?

MR. COWAN: Your Honor, it's -- I would have to take each of the positions. I -- I believe that the plurality decision was incorrect, Your Honor. But even assuming that it was correct, I think that -- that in this particular case we are talking about significant differences because in -- as you recall, in Thompson v. Oklahoma, there was not a single state that had, in fact, set the line below the age of 16. Here we have six states out of 18 that have explicitly addressed the question where the line has been drawn below the age of 18.

In addition, Your Honor, one of the points

that was very clear -- clearly made in the plurality of the Thompsor case by Justice Stevens was the fact that there was no state that treated 15 year olds other than initially in the juvenile process, in the juvenile jurisdiction. That is not true with respect to 17 year olds. Seventeen year old murderers -- there are some 20 states -- about 20 states who either automatically waive a 17 year old murderer to adult court or who have no jurisdiction over that at that -- at that time. So, we have an entirely different situation, it seems to me, than we did in Thompson.

QUESTION: In Kentucky, how many do you have on death row now?

MR. COWAN: Total, Your Honor? We have approximately 34 or 35.

QUESTION: And how many are under 18?

MR. COWAN: There is -- there is one. There is this Petitioner, Your Honor. Well, he's -- was under 18 at the time that he committed the crime.

I might say while on the subject of --

QUESTION: Kentucky -- General Cowan, Kentucky is a state that has expressly addressed the age at which one is to be subjected to capital punishment.

MR. COWAN: Yes, Your Honor.

QUESTION: And it had done so at the time of

the commission of this offense?

MR. COWAN: Your Honor, it's a little bit complicated, but let me explain very briefly, if I can. At the time of the commission of this offense, Kentucky had no explicit minimum in effect. This was in 1981 that the offense was committed. At that time, the only effective statute on the books was KRS 208.170 which is the juvenile transfer statute. In that statute, Your Honor, the statute very explicitly sets out that individuals under the age of 16 who committed capital offenses -- and it used the word "capital offenses" --may be waived to adult court if other factors are considered.

Five -- Section 5(c) of that statute also explicitly says that once the trial judge -- having had the case waived to him, once the trial judge refuses to send it back to juvenile court, then the case will proceed against that -- that individual as against any other defendant.

Quite clearly, Kentucky in that statute alone demonstrated its awareness that it, in fact, it was dealing with capital offenders under the age of 16. And, of course, we're talking about one that's 17.

At that time, also Kentucky, to be quite clear with you and quite -- quite candid, Kentucky had adopted

In 1980 the Unified Juvenile Code, delayed its effective date until 1982. In that code, it said that there would be an 18 year old minimum for -- for juvenile death penalty. That was delayed. The 1982 general assembly deferred it until 1984, and it was only in 1986 with an effective date in 1987 that Kentucky adopted a minimum age of 16. But Kentucky now has the minimum age of 16. At the time of the commission of the offense, there was no effective minimum in effect.

In discussing consensus analysis in trying to determine what is the best approach to determining what societal values are, the Court it seems to me has to be quite cautious in trying to reach that decision. The Constitution shall not catch a pendulum at one end of its swing and freeze that notion into law.

The attitude in this society about youth is very much in a state of flux and has been for a number of years. And we see movement in the various legislatures. It is commonplace I think to -- to hear people say youth are growing up so much faster today. They're so much more sophisticated. They're exposed to so many more types of things. And I think common experience tell us that that is the case.

Under Gregg v. Georgia, the Petitioner has a heavy burden to demonstrate that there is a national

consensus against the execution of 17 year olds. As I have pointed out, six out of the 18 states that expressly have expressed -- have -- have expressly drawn a line have done so at 17 or below. Eighteen other states allow on their face for the execution of those under the age of 18. I believe those 18 should be counted in determining a national consensus.

But even if one were to follow the type of analysis in the plurality in Thompson or the concurrence in Thompson, I think that we have to realize that significant evidence relating to the interpretation of those 18 states' statute has been overlooked because they do, as in Kentucky's case that was in effect then explicitly recognized the notion of capital offense in those juvenile transfer statutes.

When we talk about -- when we talk about consensus, we do have to at some point go beyond mere counting, and I think the Court has to consider what the particular nature of the crime -- nature of the punishment is. And it seems to me that punishment should be something that is patently offensive to the national conscience or so revolting or abhorrent or such an aberration that we can comfortably say that it is cruel and unusual under the Eighth Amendment.

If you take, for example, a case of -- suppose

we had a felony limit that was set in order to be tried as a felony, and every state in the Union had $300 set as the minimum for someone to be tried as a felony, but one state had $100 -- so it was 49 to 1 -- then surely it would not be unconstitutional for that one state to express -- to have that $100.

We must recognize in -- in doing consensus analysis, recognize the notion of federalism that is central to our -- central to our constitutional scheme. As was noted by Justice O'Connor in Tennessee v. Garner, the Eighth Amendment is not violated every time a state reaches a conclusion different from the majority of its sisters over how best to administer its criminal laws.

The Petitioner's bright line analysis I believe is further flawed, and I think these are some of the comments that Justice Scalia was getting to when looking at the question of eligibility for juries or eligibility for voting, these sorts of things. I might point out, of course, that there is at least one very distinct age that we know that is virtually nationwide -- I think nationwide now, and that's 21 years old in order to purchase alcoholic beverages.

But the point is that all these things are passed depending upon what the particular harm or what the particular circumstance is. And as Justice Scalia

noted, they are done for a purpose of administrative convenience, the 18 year olds for voting and driving and -- and this sort of thing. It would be best I think for all of us if we can make an individualized determination for voting, for serving on a grand jury, whatever it happens to be, as to who was really mature enough and sophisticated enough to be able to do that. But clearly the transaction costs of that are too high.

But the criminal justice system -- the very premise of the criminal justice system is based upon an individualized consideration of each individual. That's what it's set up for. That's what it is capable of doing, and that's what it should do. And that's why we ask that it be continued in this particular case.

And I might add particularly -- and this Court has recognized -- in dealing with problems of crimes and punishment, we're dealing with an entirely different matter than we are in dealing with things like juries --serving on a jury and voting and whatnot.

QUESTION: Well, on the juries -- how about an age limit on the jury?

MR. COWAN: On serving on a jury, Your Honor?

QUESTION: Yes, sir.

MR. COWAN: Well --

QUESTION: That tries the juvenile.

MR. COWAN: Oh, serving on a -- that tries the juvenile?

QUESTION: A jury of his peers.

MR. COWAN: The age minimum? Your Honor, I simply don't think there's any way that we can put that into a -- in a matter of constitutional law by saying that people have to --

QUESTION: It just happens to be the jury of your peers is a part of constitutional law.

MR. COWAN: Yes, Your Honor, I suppose it's --

QUESTION: And this man did not get a jury of his peers.

MR. COWAN: Your Honor, I --

QUESTION: Is that true?

MR. COWAN: Your Honor, I would respectfully disagree with you and say, no, it's not because I think it depends on what your definition of your peers are. And I don't think that we should be in a position where we say that anyone under the age of 18 should be allowed to serve on -- on the jury.

A national consensus does exist I believe and it -- it is shown and the national consensus is that youths do, in fact, mature at different rates depending upon their individual circumstances. And it is shown objectively by the fact that all states -- all states

--allow 17 year old murderers to be tried as adults. And except for those states that have a minimum of 18 and a death penalty, they all expose those 17 year olds to their maximum penalty authorized by law.

Your Honors, in Kentucky's case, we gave full individualized consideration to Kevin Stanford, and we fully considered the matters relating to his youth and all the mitigating circumstances relating to any explanation that he might have going that would diminish his personal responsibility for the crime. Not only was there a transfer hearing, at which a full record was developed, there was a circuit court hearing, a trial level hearing. There was a motion on whether to retransfer him. The grand jury reindicted him because it was not informed the first time that it had the opportunity to send him back. And the jury itself gave full individualized consideration to him.

I would ask the Court to make a note of the instructions at joint appendix 100 and 101. That --those instructions laid out 20 mitigating factors -- 20 mitigating factors -- for the jury to consider, including the fact that he was of very youthful age, he was only 17 years old, that he was led into the crime by another person, that he was emotionally immature, that because of his age, he was capable of changing, and some

16 other factors. Every single one of the mitigating factors asked for by the defendant was granted in this case verbatim, word for word.

Kentucky also --

QUESTION: General, may I get back to my other question? Is there any principal way in which we can decide in your favor here and keep Thompson v. Oklahoma on the books?

MR. COWAN: Your Honor, I think -- I think there -- there is, and I think that it has to do with the national consensus. If you believe there was a national consensus against the execution of 15 year olds, the evidence supporting a national consensus against the execution of 17 years olds is significantly less.

QUESTION: And what about 16?

MR. COWAN: Sixteen? It is also significantly less although, of course, there is a difference of three states in talking about the states that have directly addressed the question.

In Kentucky's case, however -- and this addresses Justice O'Connor's point -- the -- there was an explicit rejection of the 18 year minimum, and I think that certainly that is a matter of some note.

In conclusions, I would like to say that

Kentucky gave full individualized consideration as required by the Constitution under Eddings and Lockett to this individual. They provided, in fact, protections beyond the constitutional minimum. The bright line test proposed by Petitioners, it seems to me, destroys a key tenet of Eighth Amendment analysis based upon individualized consideration. The Constitution is very much an instrument of justice, not an instrument of mercy. And finally, common sense dictates that youths mature at different rates, and that is reflected in a national consensus that youth may be treated as adults in all these various circumstances.

For the reasons we have stated, Your Honors, I would like to --

QUESTION: May I just ask you one other question? Your entire argument has been based on the national consensus aspect of the analysis. Do you think that is the only test by which the Court should judge whether punishment is cruel and unusual?

MR. COWAN: Your Honor, I am not sure how --what other way to proceed other than -- because under Tropp v. Dulles, which this Court has always followed in talking about evolving standards of decency, we have to reach some determination as to what those evolving standards of decency are. And I certainly think this

Court is free to make that determination as it best sees fit.

However, I think the way of looking at objective indicia first at the very beginning is -- is the most appropriate way, and particularly at legislatures, since they are the best expression we have in this Nation of the expression of the popular will.

I think it would be very difficult to determine and fashion some other type of analysis. This Court I suppose -- I don't -- I don't ask you to do this, but you could commission all kinds of public opinion polls, but that certainly is not something --

QUESTION: Well, did the Court use the national consensus approach prior to the capital punishment cases?

MR. COWAN: I'm sorry. I didn't hear your question.

QUESTION: Did the Court use this national consensus approach prior to the capital punishment cases?

MR. COWAN: I don't believe so, not in terms, Your Honor, of trying to count states and that sort of thing.

QUESTION: What do you suppose prior to this -- this national consensus approach, what principal basis would there have been for putting content into

these --this part of the Constitution?

MR. COWAN: Well, I think that the --

QUESTION: Or do you think there is anything? It's strictly a matter of Gallup polls and the like.

MR. COWAN: Well, I -- I think the Court has to look at legal history and a variety of things along --along those lines that it I believe did under Weems and Tropp v. Dulles. I don't think -- I think that's about as well as we can do if we're trying to discern what, in fact, are evolving standards of decency.

My point is with respect to those, however, that with -- at least as far as juveniles are concerned, we know that society is in a state of flux with -- with reference to their particular attitude about those juveniles. We know, for example, that we have to -- or I shouldn't say we know. We have to consider new types of problems that come up in our society, whether they be problems of drugs or problems with drunken driving and this sort of thing. And it is very -- the Court must be very cautious as far as freezing into constitutional law some particular aspect that says that this is a cruel and unusual punishment.

For the reasons that I've stated, Your Honors, we ask that you affirm the judgment below.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, General Cowan.

The case is submitted.

(Whereupon, at 2:37 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 87-5765 - KEVIN N. STANFORD, Petitioner V. KENTUCKY

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BY Judy Freilicher

(REPORTER)