

Missouri Overrules the United States Supreme Court on Capital Punishment for Minors

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Under the U.S. Supreme Court's 1989 decision in *Stanford v. Kentucky*, the Eighth Amendment's cruel and unusual punishments clause does not shield minors 16 or 17 years of age from the death penalty. Holding, astonishingly, that *Stanford* is no longer the law of the land, the Missouri Supreme Court recently reversed the death sentence of a 17-year-old murderer in *Simmons v. Roper*. The U.S. Supreme Court has granted *certiorari* to consider whether *Stanford* survives its own burial by the state court.

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It is emphatically the province and duty of the judicial department to say what the law is.—*Marbury v. Madison*, 5 U.S. 137, 177 (1803)

The interpretation of [the Constitution] enunciated by this Court. . . is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”—*Cooper v. Aaron*, 358 U.S. 1, 18 (1958)

On August 26, 2003, the Missouri Supreme Court, by a four to three vote, held that the United States Constitution forbids the execution of any murderer who was younger than 18 years when he committed the crime. The facts of the case, *State ex rel. Simmons v. Roper*,¹ are stark and simple:

Christopher Simmons. . . was born on April 26, 1976. On September 10, 1993, when he was approximately 17 years and 5 months old, [he] was arrested for the murder of Shirley Crook. Following a botched robbery attempt, [he] kidnapped Ms. Crook, bound, and gagged her. [He] walked Ms. Crook down a railroad trestle, bound her more, and pushed her, while still alive, over the trestle and into the Meramec River. Prior to the robbery, [he] stated to his accomplice that they could commit a robbery and murder and get away with it because they were juveniles [Ref. 1, p 419, dissenting opinion].

Simmons was convicted and sentenced to death, and he exhausted his appeals. Later, the U.S. Su-

preme Court in *Atkins v. Virginia*² overturned its own recent precedent to hold that execution of mentally retarded persons violates the cruel and unusual punishments clause of the United States Constitution. Simmons thereupon petitioned the Missouri Supreme Court for *habeas corpus* relief, arguing that, as he had bragged before the murder, he could not be executed, because being less than 18 years of age is constitutionally indistinguishable from being mentally retarded.

The court agreed. In her opinion for the majority, Judge Laura Denvir Stith first pointed out that *Atkins* was predicated on “the national consensus that evolving standards of decency proscribe imposition of the death penalty on the mentally retarded” (Ref. 1, p 411). Further, she observed, these “evolving standards” were derived by the Supreme Court from the steady shift away from imposition of the death penalty on mentally retarded murderers by the states and by foreign nations. Finally, she noted, a similar shift has occurred with respect to persons who are younger than 18 when they murder:

. . . we find the opposition to the juvenile death penalty of the wide array of groups within the United States. . . to be consistent with the legislative and other evidence that current standards of decency do not permit the imposition of the death penalty on juveniles. We also find of note that the views of the international community have consistently grown in opposition to the death penalty for juveniles. Article 37(a) of the United Nations Convention on the Rights of the Child and several other international treaties and agreements expressly prohibit the practice. . . [Ref. 1, p 411].

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This analysis echoes *Atkins*, in which Justice Stevens for the Court invoked the positions of various religious organizations, the *amicus* argument of the American Association of Mental Retardation, the practices of several foreign nations (from Portugal to New Zealand) and polling data from within the United States to locate an “evolving standard” against execution of persons with mental retardation (Ref. 2, p 316, n 21).

Among the points left unelaborated in both *Atkins* and *Simmons* are: (1) why, in a democracy, unelected judges must intervene to enforce “a national consensus”; (2) how the practices of Portugal or the provisions of treaties the United States has rejected (such as the U.N. Convention on the Rights of the Child, specifically because of its juvenile death penalty proscription) illuminate the text of the United States Constitution; and (3) what can be just about life without parole (the outcome for the defendants in both *Atkins* and *Simmons*) for a class of perpetrators who by judicial declaration have a “lesser ability to reason and . . . lack of informed judgment” (Ref. 1, p 413).

These (and many other) questions would have to be answered if death penalty decisions were legitimate jurisprudence. Instead, they are dreary political maneuvers, with the new or recycled issues in each case (juveniles, persons with mental retardation, allegedly discriminatory application, never-ending procedural nuances) serving as opportunities for abolitionists and retentionists to recapitulate their respective entrenched views. This is pure ideology, dressed up very unconvincingly as constitutional law.

In any event, Judge Stith for the *Simmons* majority went on to posit that the death penalty for persons younger than 18 serves no constitutionally legitimate purpose, since killers that young are less likely to be deterred:

. . . the imposition of the death penalty on 16-year-olds and 17-year-olds has become so unusual in the last decade that the likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually non-existent [Ref. 1, p 413, citation omitted].

Not all that “non-existent,” as the defendant in the very case before the court had explicitly performed just such a “cost-benefit analysis.” Nonetheless, Judge Stith’s rhetoric succeeded in, formally at least, paralleling the *Atkins* approach, in which Justice Stevens had declared (without any discernible sup-

porting evidence) that persons with mental retardation are inherently less deterred by the death penalty (Ref. 2, pp 319–21).

Having thus, for Eighth Amendment purposes, alchemized the status of being younger than 18 into mental retardation, Judge Stith then ruled:

[T]his Court finds the Supreme Court *would* today hold such executions are prohibited by the Eighth and Fourteenth Amendments. It therefore sets aside Mr. Simmons’ death sentence. . . [Ref. 1, p 400, emphasis added].

The Missouri Supreme Court consists of seven judges, who elect one of their number to serve as Chief Justice for a two-year term. Judge Stith is currently serving as Chief Justice.

Understandably, the three dissenting judges were taken aback: “This Court is bound by the U.S. Supreme Court’s decision in *Stanford v. Kentucky* and simply has no authority to overrule that decision” (Ref. 1, p 419, dissenting opinion of Judge William Ray Price, Jr.) But that is exactly what the majority had done. Not only that, but the *Simmons* majority went out of its way to repudiate Supreme Court precedent by turning upside down the customary jurisprudential discipline of deciding a case on the narrowest dispositive grounds—in this case, state constitutional law rather than federal constitutional law: “Because the Eighth and Fourteenth Amendments afford Mr. Simmons relief, this Court need not reach Mr. Simmons’ alternative argument that, even if his execution is not barred by the Eighth Amendment, it is barred by. . . the Missouri Constitution” (Ref. 1, p 46, n 20).

The Missouri Supreme Court evidently was issuing a constitutional ruling for the nation.

Existing Law and Supreme Court Authority

Current law is clear. In *Stanford v. Kentucky*, consolidated cases from Kentucky and (ironically) Missouri in 1989, the U.S. Supreme Court declared:

We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Accordingly, we conclude that such punishment does not offend the Eighth Amendment’s prohibition against cruel and unusual punishment [Ref. 3, p 380].

Stanford, like so many of the modern Supreme Court’s decisions, was a five-to-four vote, with a biting dissent. Prior to the early 1960s, five-to-four votes were rare. Dissents too were less common and,

when issued, tended to be restrained and rooted more in objective legal doctrine than in subjective ideology.⁴

Further, on the death penalty, as on many contemporary issues, the Supreme Court's position is continuously in flux, generating uncertainty and an impression of compromise (politics), not principle (law). A year before *Stanford*, the Court had overturned the death sentence of a 15-year-old murderer in *Thompson v. Oklahoma*.⁵ Seven justices voted the same way in *Stanford* and *Thompson*. Justice Kennedy voted with the *Stanford* majority to uphold the death sentence but had taken no part in *Thompson*, as he was a recent arrival on the Court at that time.

Only Justice O'Connor switched sides. In concurring opinions, she approved the death penalty for 16- and 17-year-olds in *Stanford* after having rejected it for a 15-year-old in *Thompson*, not strictly because he was 15 but because Oklahoma law did not specify a minimum age for death penalty eligibility.

This, of course, leaves constitutional law unclear as to capital punishment for 15-year-olds in any state that does provide for a reasonable (to Justice O'Connor) minimum age. It also leaves one scratching one's head over exactly where such a fractured Court perceives its authority to pick (and shift) among 15 or 16 or 17 years of age as a constitutional cutoff—or ultimately perhaps age 25, since there is accumulating evidence that the frontal lobes, implicated in judgment and self-control, may not be fully developed until the mid-20s.⁶

Further, Justice O'Connor's reasoning in her *Thompson* concurrence, like that of Justice Stevens a few years later for the Court in *Atkins*, drew heavily on the views of international organizations and the practices of other nations, along with soft data such as polling results, to reach a constitutional interpretation. In *Stanford*, by contrast, Justice Scalia for the Court looked mainly to contemporary state legislative trends, flatly rejecting foreign views and practices as a basis for United States constitutional interpretation (Ref. 3, p 369, n 1).

Perhaps this lack of decisiveness, consistency, and coherence invited the Missouri Supreme Court's action.

That lower court's decision, based on its notion of what the Supreme Court "would" (will) do, is all the more striking for involving one of the relatively few issues in which one actually cannot foretell the Su-

preme Court's decision with reasonable confidence. Hence, it seems to be more a goad than a prediction.

The Supreme Court roster at the time of *Thompson* in 1988 was Chief Justice Rehnquist and Associate Justices Brennan, White, Marshall, Blackmun, Stevens, O'Connor, and Scalia. Justice Kennedy was added to make a full Court of nine for *Stanford* a year later. Today, Justices Brennan, White, Marshall, and Blackmun are gone, replaced by Justices Souter, Ginsburg, Thomas, and Breyer, roughly an equal ideological swap.

The Court has, of course, granted *certiorari* in the *Simmons* case.⁷ It is by no means guaranteed that the Court's current lineup will remain intact by the time its decision issues, probably in June 2005. This is one reason the Missouri court's prognostication is bold, to say the least.

Another reason is the intriguing fact that the Court has repeatedly declined over the years to grant *certiorari* on this question, notwithstanding that only four votes are necessary to do so and that four incumbent justices have already prejudged the matter, pronouncing the juvenile death penalty "shameful. . . relic of the past. . . inconsistent with evolving standards of decency in a civilized society."⁸ Recent cases have included denials of *habeas* relief in 2002 for a 17-year-old murderer in *In re Stanford*⁸ and a 17-year-old murderer in *Patterson v. Texas*⁹ and denial of a stay of execution in 2003 for a 17-year-old murderer in *Mullin v. Hain*.¹⁰

The four justices openly eager to overturn *Stanford v. Kentucky* would not want to docket a case until confident they have the fifth vote (Justice O'Connor's). Customarily, a decent interval must pass before the Court will set aside *stare decisis*, so a reaffirmation of *Stanford* would be a substantial setback, restarting the clock.

Does the granting of *certiorari* in *Simmons* signal that Justice O'Connor has indeed switched sides (again) and that *Stanford* is therefore doomed? Not necessarily. It may be that the pro-*Stanford* justices (possibly including Justice O'Connor) have voted to hear *Simmons*, not to reexamine *Stanford* so much as to try to restore constitutional order under *Marbury v. Madison*.

Kevin Stanford, now 40 years old and the protagonist in *Stanford v. Kentucky* and *In re Stanford*, is probably little concerned about the outcome and not just because "[t]he number of people executed in the United States in any given year has yet to exceed the

number killed by lightning.”¹¹ His death sentence was commuted by outgoing Kentucky Governor Paul E. Patton on June 21, 2003.¹²

As a 17-year-old in January 1981, Stanford had robbed a gas station. He and one of his two accomplices raped the night cashier, Baerbel Poore, 20 years of age, in the station toilet, then drove her into the woods and shot her twice in the head. The robbery netted \$143.07 in cash, 300 cartons of cigarettes, and a can of gas. Ms. Poore had been working the night shift to support her infant daughter.

Psychiatry and the Death Penalty

However *Simmons* is decided, death penalty jurisprudence overall has become an increasingly unseemly political free-for-all.

In a recent California death penalty appeal, two justices, citing *Atkins*, declared that the “mental deficiencies” associated with paranoid schizophrenia “are comparable in severity to mental retardation.”¹³ Mental retardation at what IQ level? Paranoid schizophrenia in decompensation or in a residual phase? Such questions do not seem significant to judges. Meanwhile, the law is closing in on announcing that, for purposes of the death penalty at least, mental retardation and being under 18 are (like paranoid schizophrenia) mental illnesses.

Most people have strong opinions on a matter such as the death penalty, but personal opinions are not professional expertise.

As psychiatrists, are we assisting justice, and are we doing psychiatry and forensic psychiatry justice, by continuing to enlist in a meandering ideological fray that drifts ever farther from not only coherent legal principles and standards, but also any tenable moorings in research or clinical psychiatry?

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