

7. UPDATE ON THE JUVENILE DEATH PENALTY

By: Connie de la Vega and Sarah A. Canepa[%]

Introduction

The imposition of the juvenile death penalty and the number of countries practicing it, have been steadily decreasing over the last 10 years. The United States has remained the only country that has continually executed juvenile offenders. In fact, in 2002, the United States was the only country to execute juvenile offenders, all three of whom were executed in Texas. There has been one execution of a juvenile offender in the world this year. Scott Hain was executed in April in Oklahoma. His case will be discussed below. There are currently around 80 inmates on death row in the United States who committed their crime as juveniles. Public support for the juvenile death penalty in the United States has consistently remained low over the last 40 years. A Gallup poll in May 2001 found that 69% of the American Public opposed the juvenile death penalty. The recent international and national developments regarding the juvenile death penalty are summarized in this report.

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A. Developments in International Law

1. Jus Cogens

International human rights advocates argue that international law prohibits the execution of individuals who were younger than 18 years old at the time of the commission of the crime ("juvenile death penalty"). In 2000, the Sub-Commission on the Promotion and Protection of Human Rights affirmed that the prohibition of the juvenile death penalty is customary international law. (The Death Penalty in Relation to Juvenile Offenders, Resolution 2000/17, adopted Aug. 17, 2000, E/CN.4/Sub.2/RES/2000/17 (2000)). The Sub-Commission recognized that several Human Rights Commission Resolutions confirm this customary international law: Question of Death Penalty, Resolution 1999/61, adopted April 28, 1999, E/CN.4/RES/1999/61 (1999); The Question of the Death Penalty, Resolution 2000/65, adopted April 27, 2000, E/CN.4/RES/2000/65 (2000).

Advocates argue that customary international law has risen to the level of *jus cogens* prohibiting the execution of juvenile offenders. A *jus cogens* preemptory norm is defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, opened to signature May 23, 1969, art. 53, 1155 U.N.T.S. 331, 352, 8 I.L.M. 679, 698. Under Article 53 of the Vienna Convention on the Law of Treaties, a norm attains *jus cogens* status when it is: 1) general international law; 2) accepted by a large majority of states as a whole; 3) immune from derogation; and 4) modifiable only by a new norm of the same status. The prohibition of the juvenile death penalty satisfies all these elements. First, the prohibition of the juvenile death penalty is general international law

because of the numerous treaties that prohibit it: International Covenant on Civil and Political Rights (ICCPR); Convention on the Rights of the Child (CRC); Geneva Convention Relative to the Protection of Civilian Persons in Time of War; and American Convention on Human Rights. Also, Resolutions by the Sub-Commission on Human Rights, the Commission on Human Rights, the Economic and Social Council and the General Assembly oppose the juvenile death penalty. Second, nations have exhibited near unanimous acceptance of the prohibition of the juvenile death penalty. In 2002, the United States was the sole violator and in 2001, only three countries (Iran, Pakistan, and the United States) executed juveniles. Third, the prohibition of the juvenile death penalty is non-derogable. Article 4 of the ICCPR states there shall be "no derogation" from Article 6, which prohibits the juvenile death penalty. Fourth, there is no emerging norm of the same status that contradicts the current norm. Accordingly, under the Vienna Convention, the prohibition of the juvenile death penalty is a *jus cogens* norm from which no country is allowed to deviate.

Furthermore, on October 22, 2002, the Inter-American Commission on Human Rights issued a decision, concluding that the execution of offenders under the age of 18 at the time of the crime constitutes a norm of international customary law and a *jus cogens* norm. (Report No. 62/02, Case No. 12.285, *Domingues v. United States*, ¶ 84-85). Previously, in 1987, in *Roach and Pinkerton v. United States*, the Inter-American Commission had recognized that the prohibition of the execution of juveniles constituted a *jus cogens* norm but did not find consensus as to the age of majority for defining this norm. (*Domingues*, ¶ 18). However, the *Domingues* decision firmly established that since 1987, the *jus cogens* norm has evolved to establish 18 as the minimum age for the imposition of the death penalty. (*Domingues*, ¶ 103).

2. The 59th Session of United Nations Commission on Human Rights

At the United Nations Commission on Human Rights in spring 2003 the United States attempted to remove language condemning the execution of juvenile offenders contained in last years resolution under Agenda item 13, the Rights of the Child. The United States Delegation attempted to strong arm the European Union and GRULAC into voting with them to eliminate the language. However, both the European Union and the GRULAC did not yield to the pressure from the United States. The United States then called for a vote on paragraph 35(a) of the resolution on the Rights of the Child, regarding the juvenile death penalty. (E/CN.4/2003/RES/86 ¶ 35) The vote was 51 to 1, the United States being the only vote against the retention of the paragraph.

During the debate on the floor, after the vote was taken, several countries made statements. The representative from Ireland "regretted that voting was demanded" and that the deletion of the paragraph was "not acceptable" (*United Nations Press Release; Commission on Human Rights Adopts Resolution on the situation in Iraq; Concludes Substantive Work*, Press Release, 25 April 2003, Afternoon at 9-10.) The representative from Uruguay speaking on behalf of the Group of Latin American and Caribbean Countries (GRULAC) agreed with European Union's statement and further stated that the administration of the death penalty as applied to juvenile offenders was against "the norms of international society." *Id.* In addition, the representative from Syria also stated that they supported European Union's statement that the resolution should be adopted by consensus. *Id.*

B. Recent Developments Domestically Regarding Juvenile Offenders
Christopher Simmons

One of the significant developments in the abolition of the juvenile death penalty took place recently in the Missouri Supreme Court. Mr. Simmons is represented by Jennifer L. Brewer and Patrick J. Berrigan. The Court in *Simmons v. Roper*, 2003 Mo. LEXIS 123 found the death penalty for juvenile offenders constituted cruel and unusual punishment and violated the 8th amendment to the United States Constitution. The opinion focused on the developments during the past fourteen years since *Stanford v. Kentucky* 492 U.S. 361 (1989) where U.S. Supreme Court ruled the death penalty for offenders over the age of 16 was constitutional and *Thompson v. Oklahoma*, 487 U.S. 815 (1988) where the Court ruled that death penalty for offenders under the age of sixteen constituted cruel and unusual punishment and therefore violated the 8th amendment.

The Missouri Court applied the United States Supreme Court's reasoning in *Atkins v. Virginia*, 536 U.S. 304 (2002) regarding the execution of mentally retarded offenders. In *Atkins*, the Court found that a national consensus had emerged against the execution of mentally retarded offenders. They compared the U.S. Supreme Courts earlier decision in *Penry v. Lynaugh*, 492 U.S. 302 to the Courts reasoning in *Atkins*. Similarly the Missouri Supreme Court felt that a national consensus had developed since *Stanford* case had been decided. Relying on the Scalia's opinion in *Stanford*, where he recognized that the concept of cruel and unusual punishment should be determined from current standards of decency. *Simmons*, 2003 LEXIS at 13 (citing *Stanford v. Kentucky*, 492 U.S. at 370-77) The Missouri Court stated that the standards of decency have evolved since the United States Supreme Court had last addressed the issue as was evident in

the change in the number of states that still allow the juvenile death penalty. *Simmons*, 2003 LEXIS at 2.

The Missouri court decided the analysis used in *Atkins* closely resembled *Thompson v. Oklahoma* rather than *Stanford v. Kentucky*. Based on the principles set forth in *Atkins*, *Thompson*, *Penry* and *Stanford* the Missouri Court analyzed the constitutionality of the juvenile death penalty and found that it violated the 8th amendment. During the course of the analysis, the Missouri Supreme Court looked at the both the National and International Consensus on the issue. The court recognized that the international community has consistently opposed the juvenile death penalty. The Court cited the Article 37(a) of the United Nations Convention on the Rights of the Child as expressly prohibiting the practice, and acknowledged that several other international treaties and agreements prohibit the practice. The opinion further went on to acknowledged that in the past few years, officially sanctioned executions of juvenile offenders have only taken in place in the U.S. and two other countries and that five of the seven executions took place in the United States. *Simmons*, 2003 Mo. LEXIS at 40.

Due to the fact that the Missouri Supreme Court based its analysis of legality of the death penalty for juvenile offenders on the U.S. constitution, rather than the Missouri constitution, it remains to be seen how the decision will affect the practice in the rest of the United States.

Scott Hain

The execution of Scott Hain has been the only execution of a juvenile offender to date in the United States this year. Scott Hain was sentenced to death for the 1987 deaths of two restaurant workers. Scott Hain was 17 when he committed his crime. Though Scott's co-defendant, Lambert ultimately killed the victims, Hain received the death penalty. Mr.

Hain was executed on April 3, 2003. On the day of his execution the 10th circuit Court of Appeals granted Mr. Hain a stay based on inadequate federal funding for his clemency request filed by his attorney Steve Presson. However, the Supreme Court in a special session summarily denied his appeal and Scott was executed later that night.

Kevin Stanford

Kentucky Governor Paul Patton on June 18, 2003 announced that he planned to commute Kevin Stanford's sentence before he left office. Patton stated that he would not sign the death warrant based on Stanford's age at the time of the offense. Kevin was 17 at the time of the crime. Fourteen years ago, the United States Supreme court by deciding Kevin Stanford's case, upheld the death penalty for juvenile offenders. Mr. Stanford is represented by Gail Robinson and Margaret O'Donnell.

Nanon Mckewn Williams

Recently, in Mr. William's state habeas corpus appeal to the United States Supreme Court, his attorneys Walter Long and Mark Olive, raised the issue of using international law to interpret the 8th amendment. Though the Court in *Stanford v. Kentucky*, 492 U.S. 361 (1989) found that international practices were not relevant to their decision, Mr. William's argues that *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) overruled the previous decision when it found international opinion to be significant in interpreting the evolving standards of decency for determining what constitutes cruel and unusual punishment under the 8th amendment. Mr. William's further argued that the abolition the practice of executing juvenile offenders has a greater consensus on an international level, then the abolition of the execution of mentally retarded offenders. Mr. Williams also argues that the Inter-American

Commission on Human Rights decision in Domingues is determinative on this issue.

Three *Amicus Curiae* briefs were filed in support of Mr. Williams, including one representing former Nobel Peace Prize Laureates. In the *Amicus Curiae* brief filed by Connie de la Vega, on behalf of Human Rights Advocates, Human Rights Watch, Minnesota Advocates for Human Rights, Human Rights Committee, Bar of England & Wales further elaborated on relevance of international law in determining the legality of the juvenile death penalty. (*brief available at: www.humanrightsadvocates.org*) The prohibition of the practice of the juvenile death penalty has risen to the level of *jus cogens*, a preemptory norm in international law. The preemptory norm invalidates the United States reservation regarding Article 6(5) of the International Covenant on Civil and Political Rights. (International Covenant on Civil and Political Rights, Article 6(5), Dec. 19, 1966, 999 U.N.T.S. 171). Virtually every other country in the world has acknowledged that practice of the juvenile death penalty violates international law. The Court should consider the United State's obligation to comply with the *jus cogens* norm.

Another *amicus curiae* brief was filed on behalf of Nobel Peace Prize Laureates: American Friends Service Committee, Mairead Corrigan-Maguire, Amnesty International, Adolfo Perez Esquivel Archbishop, Desmond Tutu, Joseph Rotblat, and Jody Williams. They were represented by Clive Stafford Smith.

This brief is testament international opinion, especially in the field of human rights, and alerts the Supreme Court Justices to the relevance and importance of respecting internationally agreed standards of human rights and morality regarding the prohibition of the death penalty for offenders under the age of 18. It is argued that the United States regularly asserts the universality of human rights and the "non-negotiable demands of human dignity" as stated by President Bush, and therefore the

Supreme Court should consider internationally agreed standards of human rights when evaluating whether a practice offends "evolving standards of decency".

Conclusion

The increase in international pressure and the recent developments domestically may force the United States Supreme Court to reexamine the issue and finally acknowledge impact of international law on domestic practices like the juvenile death penalty.