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TESTIMONY ON THE DEATH PENALTY FOR JUVENILES

OFFERED TO THE SUBCOMMITTEE ON CRIMINAL JUSTICE

REGARDING HOUSE BILL 343 AND RELATED BILLS

UNITED STATES HOUSE OF REPRESENTATIVES

99th CONGRESS

SECOND SESSION, 1985-1986

101955

June 5, 1986

NCJRS

JUN 30 1986

ACQUISITIONS

by

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As a researcher and attorney dealing daily with the complex issue of the death penalty for juveniles, I am pleased and honored to offer this distinguished Subcommittee my views on the appropriateness of this provision in House Bill 343 and related Bills. Based upon my five years of researching this phenomenon, I must recommend against any proposed federal law which would permit the death penalty for juveniles (persons who committed crimes while under age eighteen). All reasonable considerations lead to the conclusion that the death penalty for juveniles does not achieve the desired end of a reduction of violent juvenile crime but does violate basic premises of fairness and justice.

The issue of the death penalty for juveniles is a classic example of conflict between law in practice and law in action. It is a punishment readily available in three-quarters of our capital punishment states but almost never imposed by sentencing juries and judges. Indeed, this wide gulf between what we say and what we do raises the most serious questions concerning the constitutionality and justice of the death penalty for juveniles.

<u>Supreme Court Rulings:</u>

The Supreme Court's attention to capital punishment issues during the past fifteen years is well-known and widely reported. In 1972 the Court held that the death penalty was unconstitutional as then applied but did not decide whether it was unconstitutional for all crimes and under all circumstances. <u>Furman v. Georgia</u>, 408 U.S. 238 (1972).

The Court launched the current era in 1976. <u>Gregg v. Georgia</u>, 428 U.S. 153 (1976). In <u>Gregg</u> a majority of the Court held that death penalty statutes incorporating guided jury discretion do not violate the Eighth Amendment. The Court approved of requirements that the jury consider the characteristics of the offender, including such hypothetical questions as: "Are there any special facts about this defendant that mitigate against imposing capital punishment (<u>e.g.</u>, his youth,...?)." <u>Id.</u> at 197. In a companion case to <u>Gregg</u>, the Court approved of the Texas statute provision that the sentencing jury "could further look to the age of the defendant" in deciding between life imprisonment and the death sentence. <u>Jurek v. Texas</u>, 428 U.S. 262, 273 (1976).

In 1978 the Supreme Court held that sentencing juries and judges must consider all relevant mitigating factors proferred by the defendant, including the youth of the offender. <u>Lockett v. Ohio</u>, 438 U.S. 536 (1978). <u>Lockett</u> held that such unlimited consideration of mitigating factors was constitutionally required, in part because without such a requirement under the Ohio statute "consideration of defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision." <u>Id.</u> at 608.

A few years later the Supreme Court agreed to decide the specific issue of the constitutionality of capital punishment for an offense committed when the defendant was only sixteen years old. Eddings v. Oklahoma, 455 U.S. 104 (1982). In its final holding, however, the Court in Eddings avoided deciding that constitutionality issue and instead sent the case back for resentencing after full consideration of all mitigating factors per Lockett. On the issue of the offender's youth the Eddings Court observed:

> The trial judge recognized that youth must be considered a relevant mitigating factor. But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults. Id. 115-16.

The Eddings majority avoided deciding the consitutionality issue but did require sentencing judges and juries to recognize that "the chronological age of a minor is itself a relevant mitigating factor of great weight." Id. at 116. Chief Justice Burger dissented (joined by Justices Blackmun, Rehnquist and White) and found no constitutional bar to the death penalty for this sixteen-year-old's crime. Id. at 128.

Since Eddings, the Supreme Court has been asked repeatedly to consider the constitutionality issue. The Court refused such a request as recently as January 9, 1986. Roach v. Aiken, 106 S.Ct. 645 (1986). Until and unless such a ruling comes, the determination of the legality of capital punishment for juveniles is left to each individual jurisdiction. The present minimum constitutional mandate is that each jurisdiction must permit the sentencing judge and jury to consider the youth of the offender as a mitigating factor of great weight.

Specific Statutory Provisions:

Within the fifty states and the District of Columbia the statutory law seems fairly well settled. Fifteen of these fifty-one jurisdictions have no valid capital punishment statutes and none in the offing. Included among these fifteen is Vermont since its capital punishment statute predates Furman and is clearly invalid.

Appendix A arrays the thirty-six capital punishment states according to their establishment of a minimum age of the offender at the time of the offense for eligibility for capital punishment. No minimum age whatsoever is established in nine of these capital punishment states, leaving them only with the old

common-law age minimums of seven and fourteen for any criminal liability.

Of the twenty-seven states which do establish a minimum age, ten states use age eighteen directly in their capital punishment statutes. Another eight states have established age fourteen as the minimum through their juvenile court waiver statutes or their exclusive or concurrent jurisdiction provisions. While this does operate to establish a minimum age for capital punishment, it is more precisely a minimum age for any criminal court jurisdiction. It would appear that no specific consideration was given to the narrower issue of a minimum age for capital punishment. The rest of these twenty-seven states are scattered throughout the ages of fifteen, sixteen and seventeen except for Mississippi at age thirteen, Montana at age twelve, and Indiana at age ten.

Lower Court Cases:

Case law in these death penalty jurisdictions has developed in a fairly inconsistent fashion. Prior to the Supreme Court's decision in Eddings several state supreme courts had addressed the issue of the death penalty for juveniles. In 1977 the Nebraska court interpreted their death penalty statute to apply to a sixteen-year-old offender but held that youth, in combination with the absence of any significant criminal record, should "mitigate strongly against the imposition of the death penalty." State v. Stewart, 197 Neb. 497, 513, 250 N.W.2d 849, 866 (1977).

A 1980 Georgia case dealt with a sixteen-year-old offender sentenced to death for murdering a police officer in the course of a robbery. Lewis v. State, 246 Ga. 101, 268 S.E.2d 915 (1980). Although the case was reversed on another issue, a concurring justice noted that only one sixteen-year-old had been sentenced to death under Georgia's 1973 statute (and that case had been reversed for jury instruction errors), and then opined "that the death penalty has been so rarely imposed upon persons under seventeen as to make the death sentence in this case excessive and disproportionate and hence unconstitutional." Id. at 921.

Lower court decisions since Eddings have gone in at least four directions. Some have erroneously read Eddings to have decided that capital punishment of juveniles was acceptable under the United States Constitution. See, e.g., High v. Zant, 250 Ga. 693, 300 S.E.2d 654 (1983); State v. Battle, 661 S.W.2d 487 (Mo. 1983). This proposition is, of course, precisely the issue presented to but not decided by the Court in Eddings. Other lower courts have agreed that Eddings left that question undecided and then went on to decide the constitutionality issue themselves, to the detriment of the young offenders before them. See, e.g., Prejean v. Blackburn, 743 F.2d 1091 (11th Cir. 1984); Trimble v. State, 478 A.2d 1143 (Md. 1984).

A third group has relegated the matter totally to their legislatures, finding no restrictions from Eddings or any other source. See, e.g., Cannaday v. State, 455 So.2d 713 (Miss. 1984). The fourth group has focussed upon the Eddings holding that youthfulness of the offender is to be given great weight as a mitigating factor. These cases typically have then gone on to find that mitigating factor to be a compelling reason in the case before them to reduce the juvenile's sentence from the death penalty to a lesser penalty. See, e.g., State v. Valencia, 132 Ariz. 248, 645 P.2d 239 (1982).

In sum, no court has yet found an absolute bar in any state or federal constitution to the execution of juveniles. However, courts generally have found a variety of non-constitutional reasons both for not sentencing the juveniles to death at trial and for reversing juvenile death sentences on appeal.

Executions of Juveniles, 1642 - 1986:

Despite its clear availability in law, capital punishment of juveniles has been extremely rare in comparison to executions of adults. The first execution of a juvenile was that of Thomas Graunger, age sixteen, in Plymouth Colony in 1642 for the crime of beastiality. The last execution of a juvenile was that of Jay Kelly Pinkerton, age seventeen at the time of his crime, in Texas on May 15, 1986.

During this 344 year period about 15,000 persons have been executed, only 276 of whom have been juveniles (under age eighteen at the time of their crimes). The youngest at time of crime was James Arcene, a Cherokee Indian hanged at Fort Smith, Arkansas, on June 26, 1885. Arcene had participated in robbery/murder when only age ten but, having avoided capture for twelve years, was twenty-two when finally hanged.

The most famous case is that of fourteen-year-old George Junius Stinney, Jr., executed in South Carolina on June 16, 1944, after being convicted of murdering a young white girl. The guards had considerable difficulty strapping the small black child (five feet one inch, ninety-five pounds) into the electric chair made for adults. As his electrocution began, Stinney's death mask slipped down to reveal the crying face of a frightened seventh-grader.

Of all 276 juveniles executed, 65% of the offenders were black and 90% of their victims were white. Although all were under age eighteen at time of crime, 55% were age seventeen and another 26% were age sixteen. Murder was the crime in 80% of the cases, rape in 15% of the cases. Forty-two juveniles have been executed for rape or attempted rape; all of the offenders were black and all of their victims were white.

Execution of juveniles has occurred in thirty-six jurisdictions from California to New York and from Minnesota to Florida. However, the south region has accounted for 64% of all

juvenile executions. Georgia is by far the individual state leader with thirty-eight juvenile executions. Next in line are North Carolina, Ohio and Virginia with nineteen each.

The actual execution rate for crimes committed while under age eighteen is described in Appendix B. Beginning with the 1890's, the total number of juvenile executions each decade ranged from twenty to twenty-seven, comprising 1.6% to 2.3% of all executions. Then the number of all executions rose dramatically during the 1930's to 1,670 for the decade, and the number of juvenile executions also rose reaching a total of forty, still only 2.4% of the total.

The peak for juvenile executions was in the 1940's. The total number reached fifty and the percentage of all executions reached 3.9%. Following this decade, the number of total executions per decade dropped precipitously and juvenile executions dropped even more dramatically. Only sixteen juveniles were executed in the 1950's (2.2% of all executions) and only three juveniles were executed in the 1960's (1.6% of all executions). Juvenile executions ended temporarily on May 7, 1964, with the Texas execution of James Echols, age seventeen at the time of his crime of rape.

All executions ended temporarily in 1967 but resumed with the January 1977 execution of Gary Gilmore in Utah. Of the fifty-eight executions from January 1977 through May 1986, only three have been juvenile executions, that of Charles Rumbaugh in Texas on September 11, 1985, James Terry Roach in South Carolina on January 10, 1986, and Jay Kelly Pinkerton in Texas on May 15, 1986.

<u>Juveniles Currently on Death Row</u>:

As of May 30, 1986, a total of thirty-one persons were on death row for crimes committed while under age eighteen. This total of thirty-one condemned persons under the typical juvenile court age is the lowest of any time in recent history. In December, 1983, thirty-nine of the 1,289 persons then on death row (3.0%) had been under age eighteen at the time of their crimes. In December, 1984, the number was thirty-three of the 1,464 persons then on death row (2.3%). In December, 1985, the number was thirty-two of the 1,642 persons now on death row (1.9%). In May, 1986, the number is down to thirty-one of the 1,714 persons now on death row (1.8%). Note also that three of these thirty-one juveniles have recently had their death sentences vacated on appeal and are currently awaiting resentencing.

Thus, even though the adult death row population continues to grow by about 170 persons each year, the juvenile death row population continues to shrink. In 1984, only three juveniles were sentenced to death (Rushing in Louisiana, Brown in North Carolina and Thompson in Oklahoma). Similarly, only three juveniles were sentenced to death in 1985 (Ward in Arkansas, Livingston and Morgan in Florida). These were years in which

about 300 adults were being sentenced to death. As of May 30, no juveniles have been sentenced to death in 1986.

This extremely low rate of juvenile death sentences apparently stems from the reluctance of prosecutors to bring capital cases and of juries to return capital sentences against juveniles. Three-fourths of the capital punishment states still legally authorize such juvenile death penalties but their criminal justice systems seem more and more unwilling to impose them. However, several juveniles sentenced to death many years ago have now almost exhausted their appeals and may face execution in the near future.

Appendix C presents some basic information about these condemned juveniles. Three-fourths (23/31) of them were seventeen at the time of their crime and over half (17/31) are black. All but one are males. All were convicted and sentenced to death for murder, almost always committed in combination with other crimes. Almost all were convicted of capital murder under the felony-murder doctrine.

Prognosis for Change:

The death penalty for juveniles is changing from a rare phenomenon to an almost extinct phenomenon. Such states as New Jersey and Oregon have recently enacted a minimum age of eighteen for the death penalty. While twenty-six states still permit executions for crimes committed while under age eighteen, several of those states (e.g., Georgia and South Carolina) are currently considering legislative amendments to raise their minimum age to eighteen. Judicial interpretations of existing state statutes invariably give strong weight to the mitigating factor of youth of the offender. The beginnings of a legal trend seem clear.

Actual death sentences imposed by judges and juries on juveniles are down to three or less a year, about 1% of the approximately 300 death sentences imposed each year. This sentencing rate for juveniles is so low that, due primarily to a high reversal rate, the proportion of juveniles to adults on death row is rapidly decreasing. In the most recent period, December, 1983, to May, 1986, the adult death row population increased by 35% (from 1,250 to 1,683) while the juvenile death row population decreased by 21% (from thirty-nine to thirty-one).

Whether the death penalty for juveniles is now considered to be cruel and unusual is measured largely by "the evolving standards of decency that mark the progress of a maturing society". Trop v. Dulles, 356 U.S. 86, 101 (1958). The trends in legislation and sentencing indicate the clear direction in which these standards are evolving. An additional indicator is the official position of the American Bar Association, adopted in August 1983, opposing the death penalty for crimes committed while under age eighteen. This position had already been adopted by the American Law Institute and many other prestigious organizations. Recent opinion polls of lawyers and law students

reveal strong support (68% and 61%) for capital punishment in general but less than half of each group supports capital punishment for crimes committed while under age eighteen.

Worldwide, the United States stands almost alone in permitting juvenile executions. Not only are they prohibited by almost every other nation but they are also condemned by several international treaties, by the United Nations and by Pope John Paul II. At the time of the recent execution of James Terry Roach in South Carolina, commutation of his sentence was urged by these agencies as well as by Sister Theresa and former President Jimmy Carter.

Questionable Constitutionality:

Careful examination of the constitutional justifications for the death penalty for adults reveals their inapplicability to the death penalty for juveniles. The empirical evidence is overwhelming that the death penalty is not a greater general deterrent to murder than is long-term imprisonment but some persons continue to cling to their intuitive belief that it is. Even if they were correct in the case of adults, they are not correct for juveniles.

From what we know about adolescent psychology, teenagers have no meaningful concept of death and thus don't understand the threatened penalty. To the degree to which they know that certain behavior could result in their death, they often seem attracted to it. Witness their persistent involvement in dangerous driving, ingestion of dangerous drugs, suicide attempts, etc. In contrast, teenagers try to avoid at all costs being "grounded" or deprived of their liberty even for a weekend. It seems obvious that teenagers would be much more threatened by long-term imprisonment (no cars, no girlfriends, no parties, etc.) than by some fantasized perception of death.

The primary reason why our society strongly supports the death penalty in general is retribution, defined broadly as a sense of justice and the need for legal revenge against the offender. On this issue it seems generally clear that "Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults." Eddings v. Oklahoma, 455 U.S. 104, 115 n.111 (1982). Throughout the history of Anglo-American criminal law, less mentally competent persons (such as the mentally ill, the retarded and the young) have never been perceived as deserving the full force of criminal punishment.

The argument for the death penalty as the ultimate means of incapacitating juvenile offenders from committing future offenses simply asks for too much punishment for too little additional result. Juvenile murderers have one of the lowest recidivism rates of any offenders and long-term imprisonment of them is more

than adequate incapacitation.

The death penalty unequivocably rejects the alternative of rehabilitative efforts to reshape the offender into an acceptable member of society. This may be a reasonable decision when the offender is a forty-six year old, three-time loser who shows no desire or ability to change. However, the essential nature of teenagers is that they will grow and mature, almost always in directions more acceptable to society. To unequivocably reject rehabilitation for teenagers is to deny the fundamental characteristics of that transitional stage of life.

As a result of increasing societal rejection of this penalty and a general lack of justifications for it, the imposition of the death penalty upon juveniles is a prime example of an arbitrary, capricious and freakish punishment. Juveniles commit about 1,300 to 1,700 criminal homicides each year, about 9% of the 18,000 to 20,000 yearly total. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS (1974-1984). They receive approximately three death sentences each year, about 1% of the total. And, as Appendix C indicates, those juveniles who do receive the death sentences are most likely to be armed robbers who impulsively shoot their victims and not mass murderers or torturers.

Perhaps the only question remaining is the specific age at which the line should be drawn for capital punishment. Age eighteen seems by far to be the obvious choice. Eighteen is the juvenile court age for thirty-nine states and is the most common age for majority for noncriminal purposes. Eighteen is the age used in international treaties and by almost all other countries.

It seems clear that a firm line must be drawn and not simply be left to an after-the-fact deliberation concerning the maturity of a particular teenager. This is the approach used in comparable areas of law. The mature seventeen-year-old is not permitted to vote but the immature eighteen-year-old is. Chronological age, not mental maturity, is the sole determinant for voting, drinking alcoholic beverages, getting married, buying a house, and scores of other adult rights and privileges. To deny the citizen under age eighteen all of these adult rights and privileges but nonetheless impose the harshest of adult punishments raises the most serious questions of constitutionality, fundamental fairness and justice.

The future trend seems fairly clear. The death penalty for juveniles is a fast-fading era of the American criminal justice system. The question is not whether, but when, we will put it behind us as we move forward in step with the evolving standards of decency that mark the progress of a maturing society. If the federal government is now to adopt the death penalty for the federal crime of murder, it should nonetheless remain in step with that progress. It can do so only by establishing a minimum age of eighteen at time of crime for the death penalty for federal crimes.

APPENDIX A

MINIMUM AGE OF OFFENDER REQUIRED BY THIRTY-SIX CAPITAL PUNISHMENT JURISDICTIONS

Age at Offense	Jurisdiction	Total
18:	California, Colorado, Connecticut, Illinois, Nebraska, New Jersey, New Mexico, Ohio, Oregon and Tennessee	10
17:	Georgia, New Hampshire and Texas	3
16:	Nevada	1
15:	Louisiana and Virginia	2
14:	Alabama, Arkansas, Idaho, Kentucky, Missouri, North Carolina, Pennsylvania and Utah	8
13:	Mississippi	1
12:	Montana	1
10:	Indiana	1
No Minimum:	Arizona, Delaware, Florida, Maryland, Oklahoma, South Carolina, South Dakota, Washington and Wyoming	9
	Total:	36

NOTE: The following jurisdictions have no capital punishment statutes: Alaska, District of Columbia, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, West Virginia and Wisconsin. The capital punishment statute in Vermont predates Furman and is clearly invalid.

APPENDIX B

JUVENILE AND TOTAL EXECUTIONS IN THE UNITED STATES BY DECADE, 1890s - 1980s

Decade	Total Executions	Juvenile Executions	Percentage
1890s	1,215	20	1.6%
1900s	1,192	23	1.9%
1910s	1,039	24	2.3%
1920s	1,169	27	2.3%
1930s	1,670	40	2.4%
1940s	1,288	50	3.9%
1950s	716	16	2.2%
1960s	191	3*	1.6%
1970s	3	0	0%
1980s	58	3*	5.2%
Totals:	8,541**	206**	2.4%

* The six juveniles executed from 1960 through the present were all age seventeen at time of crime. Four were executed in Texas, a state which does not classify seventeen-year-olds as juveniles.

** Current as of May 30, 1986. An additional 70 juveniles were executed prior to 1890.

APPENDIX C

JUVENILES ON DEATH ROW AS OF MAY 30, 1986

State	Name	Age at Crime	Race	Crime
Alabama	Davis, Timothy	17	White	Rape/Murder
	Jackson, Carnel	16	Black	Robbery/Murder
Arkansas	Ward, Ronald	15	Black	Rape/Murder
Florida	Livingston, Jesse	17	Black	Robbery/Murder
	Magill, Paul	17	White	Rape/Murder
	Morgan, James	16	White	Rape/Murder
Georgia	Burger, Chris	17	White	Robbery/Murder
	Buttrum, Janice	17	White	Robbery/Murder
	*High, Jose	16	Black	Kidnap/Murder
	Legare, Andrew	17	White	Burglary/Murder
Indiana	*Thompson, Jay	17	White	Burglary/Murder
Kentucky	Stanford, Kevin	17	Black	Rape/Murder
Louisiana	Prejean, Dalton	17	Black	Murder
	Rushing, David	17	White	Robbery/Murder
Maryland	Trimble, James	17	White	Rape/Murder
Mississippi	Jones, Larry	17	Black	Robbery/Murder
	Tokman, George	17	White	Robbery/Murder
Missouri	Lashley, Fred	17	Black	Robbery/Murder
New Jersey	Bey, Marko	17	Black	Rape/Murder
North Carolina	Brown, Leon	15	Black	Rape/Murder
	Oliver, John	17	Black	Robbery/Murder
	Stokes, Fred	17	Black	Robbery/Murder
Oklahoma	Thompson, Wayne	15	White	Kidnap/Murder
Pennsylvania	Aulisio, Wayne	15	White	Kidnap/Murder
	Hughes, Kevin	16	Black	Rape/Murder
Texas:	*Burns, Victor	17	Black	Robbery/Murder
	Cannon, Joseph	17	White	Robbery/Murder
	Carter, Robert	17	Black	Robbery/Murder
	Garrett, Johnny	17	White	Rape/Murder
	Graham, Gary	17	Black	Robbery/Murder
	Harris, Curtis	17	Black	Robbery/Murder

* These juveniles have had their sentences vacated on appeal and are currently awaiting resentencing.