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Brennan v. State: The Constitutionality of Executing Sixteen-Year-Old Offenders in Florida

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I. INTRODUCTION

On March 10, 1995, sixteen-year-old Keith Brennan and eighteen-year-old Joshua Nelson used a baseball bat and a box cutter knife to kill eighteen-year-old Tommy Owens.¹ Owens remained conscious during the attack and pleaded for his life, but neither Brennan, nor Nelson showed any mercy toward him.² Law enforcement officers apprehended Brennan and Nelson a short time after the murder.³ The jury found Keith Brennan guilty as

1. *Brennan v. State*, 24 Fla. L. Weekly S365, S365 (July 8, 1999).
 2. *Nelson v. State*, 748 So. 2d 237, 239 (Fla. 1999).
 3. *Brennan*, 24 Fla. L. Weekly at S365.

charged for the murder of Owens and recommended the death penalty.⁴ The trial judge followed the jury's recommendation and sentenced Brennan to death.⁵ However, on July 8, 1999, the Supreme Court of Florida vacated Brennan's death sentence and reduced his sentence to life imprisonment without the possibility of parole.⁶ The court held that executing Keith Brennan would be cruel or unusual punishment under article I, section 17 of the Florida Constitution because Brennan was only sixteen years old at the time of the murder.⁷

The Supreme Court of Florida made its decision, that executing sixteen-year-old offenders is cruel or unusual punishment, based on the number of juvenile executions that have been carried out in Florida over the last twenty-five years.⁸ The court concluded that executing sixteen-year-old offenders is unusual and therefore a violation of article I, section 17 of the Florida Constitution because no sixteen-year-old offenders have been executed in Florida since 1972.⁹ The court did not examine jury determinations or legislative enactments in making its decision as the United States Supreme Court did in deciding the constitutionality of executing fifteen and sixteen-year-old offenders in *Thompson v. Oklahoma*¹⁰ and *Stanford v. Kentucky*.¹¹

The purpose of this comment is to review the history of the juvenile death penalty and to analyze the arguments surrounding *Brennan v. State*.¹² Part II of this comment will discuss the history of the death penalty for juveniles in the United States Supreme Court and the Supreme Court of Florida. Part III will analyze *Brennan*, including the appellate brief arguments and the opinions of the justices of the Supreme Court of Florida. Finally, Part IV will conclude this comment.

II. HISTORY OF THE DEATH PENALTY FOR JUVENILE OFFENDERS

A. *United States Supreme Court*

In 1988, the United States Supreme Court held that executing an offender who is under sixteen years old at the time of their offense constitutes cruel and unusual punishment in violation of the Eighth

4. *Id.* at S366.

5. *Id.* at S367.

6. *Id.* at S368.

7. *Id.*

8. *See Brennan*, 24 Fla. L. Weekly at S367.

9. *Id.*

10. 487 U.S. 815 (1988).

11. 492 U.S. 361 (1989). *See Brennan*, 24 Fla. L. Weekly at S367-68.

12. 24 Fla. L. Weekly S365 (July 8, 1999).

Amendment of the *United States Constitution*.¹³ In 1989, the Supreme Court held that executing sixteen or seventeen-year-old offenders does not constitute cruel and unusual punishment under the Eighth Amendment.¹⁴ Essentially, the United States Supreme Court has drawn a line at the age of sixteen.¹⁵ The states may not cross this line, but are free to extend the line to a higher age, making it illegal by statute to execute offenders sixteen and older.

1. Thompson v. Oklahoma

On January 23, 1983, fifteen-year-old William Wayne Thompson participated in the murder of Charles Keene, his former brother-in-law.¹⁶ Keene's body was found in a river two weeks later, chained to a concrete block.¹⁷ It was determined that the victim had been shot twice and that his throat, chest, and abdomen had been cut.¹⁸ Thompson was certified to stand trial as an adult in accordance with Oklahoma law.¹⁹ A jury found Thompson guilty of first-degree murder and recommended the death penalty.²⁰ The trial judge sentenced Thompson to death.²¹ On appeal, the Oklahoma Court of Criminal Appeals affirmed Thompson's conviction and sentence.²²

13. *Thompson*, 487 U.S. at 838. See also U.S. CONST. amend. VIII.

14. *Stanford*, 492 U.S. at 380. See U.S. CONST. amend. VIII. Note that the Eighth Amendment of the *United States Constitution* prohibits cruel and unusual punishment while article 1, section 17 of the Florida Constitution prohibits cruel or unusual punishment. Compare U.S. CONST. amend. VIII, with FLA. CONST. art. I, § 17. Also note that references to a defendant's age in this comment refers to the defendant's age at the time of their offense.

15. See *Stanford*, 492 U.S. at 380; *Thompson*, 487 U.S. at 838.

16. See *Thompson v. Oklahoma*, 487 U.S. 815, 860 (1988).

17. *Id.* at 861.

18. *Id.*

19. *Id.* at 861–62. Under title 10, section 1112(b) of the *Oklahoma Statutes*, juveniles could be certified to stand trial as adults if the State could prove “prosecutive merit” of the case and, after considering six factors, the court determined that there were no reasonable prospects for rehabilitation of the child within the juvenile system. OKLA. STAT. tit. 10, § 1112(b) (1981). Numerous witnesses testified about Thompson's prior abusive behavior, which included arrests for assault and battery, attempted burglary, assault and battery with a knife, and assault and battery with a deadly weapon. *Thompson*, 487 U.S. at 861–62. A clinical psychologist testified that the juvenile justice system could not help Thompson. *Id.*

20. *Thompson*, 487 U.S. at 862.

21. *Id.*

22. See *Thompson v. Oklahoma*, 724 P.2d 780 (Okla. Crim. App. 1986).

On certiorari, Justice Stevens of the United States Supreme Court held, in a plurality opinion,²³ that imposing the death penalty on sixteen-year-old offenders constitutes cruel and unusual punishment in violation of the Eighth Amendment of the *United States Constitution*.²⁴ He held that “evolving standards of decency” demonstrate that society opposes capital punishment for offenders under sixteen,²⁵ that imposing the death penalty on offenders under sixteen is disproportional,²⁶ and that imposing the death penalty on offenders under sixteen does not serve the social purposes of capital punishment.²⁷ Hence, executing offenders under sixteen years of age constitutes cruel and unusual punishment in violation of the Eighth Amendment of the *United States Constitution*.²⁸

First, to determine what “evolving standards of decency” were in the United States, Justice Stevens examined legislative enactments and jury determinations.²⁹ He concluded that state laws limiting the rights of fifteen-

23. Justice O'Connor's concurrence in *Thompson* was the swing vote, which helped define the cruel and unusual punishment clause of the Eighth Amendment of the *United States Constitution*. See *Thompson*, 487 U.S. at 848–59. Although she concurred with Justice Stevens' opinion, she was reluctant to adopt it without better evidence. *Id.* at 848–49. She agreed with Justice Stevens, that statistics showing the rarity of executions imposed on offenders under 16 years old support the inference of a national consensus opposing the death penalty for 15-year-olds, but she said that the statistics are not dispositive. *Id.* at 853. Justice O'Connor also agreed with Justice Stevens when he said adolescents are generally less blameworthy than adults. *Id.* However, she said that fact does not necessarily mean all 15-year-olds are incapable of the culpability that would justify imposing capital punishment on them. *Id.* Finally, Justice O'Connor concluded that offenders under 16 should not be executed under a capital punishment statute that fails to specify a minimum age at which one may become eligible for the death penalty. *Thompson*, 487 U.S. at 857–58.

Justice Scalia dissented, saying it is impossible for the plurality to hold, based on legislative enactments, that evolving standards of decency demonstrate society's opposition to imposing the death penalty on offenders younger than 16. *Id.* at 868. This is because 40% of the states and the federal government allow for imposing the death penalty on *any* juvenile tried as an adult. *Id.* On the subject of jury determinations as an indicator of “evolving standards of decency,” Justice Scalia said that the plurality erroneously examined statistics on capital *executions*, which are substantially lower than capital *sentences*. *Id.* at 869. Justice Scalia concluded by saying, although statistics do indicate that imposing the death penalty on offenders under 16 is rare, the Court is not discussing the rarity of capital punishment for offenders under 16, but whether the Eighth Amendment prohibits it entirely. *Id.*

24. *Thompson*, 487 U.S. at 838.

25. *Id.* at 824–25, 833.

26. *Id.* at 835.

27. *Id.* at 837–38.

28. See *id.* at 838.

29. *Thompson*, 487 U.S. at 823–33. Courts are guided by “evolving standards of decency that mark the progress of a maturing society” in determining what constitutes cruel and unusual punishment. *Id.* at 821 (quoting *Trop v. Dulles*, 356 U.S. 86, 101

year-olds indicate that society regards fifteen-year-olds as less responsible than adults.³⁰ Using statistics, Justice Stevens determined that a majority of the states as well as other countries oppose the death penalty for offenders under sixteen years old, indicating that society was becoming less tolerant of imposing capital punishment on juveniles.³¹ Finally, Justice Stevens said that the rarity of executions of offenders under sixteen years old in the United States indicates that juries oppose imposing capital punishment on such offenders.³²

Next, Justice Stevens discussed the proportionality of the death penalty and the death penalty's contribution to social purposes when imposed on offenders under sixteen.³³ He concluded that juveniles are less culpable than adults are because they are less mature and less responsible than adults.³⁴

(1958)). Courts examine legislative enactments and jury determinations to determine what evolving standards of decency are. *Id.* at 822–23. If evolving standards of decency indicate that society opposes capital punishment for a certain age group, then executing an offender who belongs to that age group constitutes cruel and unusual punishment. *Id.* at 821–23 & nn.4–7.

30. *Id.* at 823–25. At that time, no states allowed 15-year-olds to vote or sit on a jury; in all but one state a 15-year-old could not drive without parental consent; in all but four states a 15-year-old could not marry without parental consent; no state allowed 15-year-olds to purchase pornographic material; all states had enacted legislation designating the maximum age for juvenile court at 16 years old; and no states allowed 15-year-olds to purchase alcohol or cigarettes. *Thompson*, 487 U.S. at 824.

31. *Id.* at 826–31. At that time, 14 states did not allow capital punishment at all; 18 other states had expressly established a minimum age in their death penalty statutes at age 16 at the time of the offense; and in the remaining 19 states, the death penalty was allowed, but no minimum age limit had been set. *Id.* The death penalty had been completely abolished in West Germany, France, Portugal, The Netherlands, and all Scandinavian countries, and was available only for exceptional crimes such as treason in most western countries, including Canada, Italy, Spain, and Switzerland. *Id.*

32. *Id.* at 831. It is estimated that only 18–20 people under the age of 16 at the time of their offense have been executed in the 20th Century, the last such execution taking place in 1948. *Thompson*, 487 U.S. at 832. “The road we have traveled during the past four decades—in which thousands of juries have tried murder cases—leads to the unambiguous conclusion that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community.” *Id.*

33. *Id.* at 833–38.

34. *Id.* at 834–35. Justice Stevens wrote that because of less experience, less education, and less intelligence, teenagers are less able to evaluate the consequences of their conduct and are more apt to be motivated by emotion or peer pressure. *Id.* He cited *Eddings v. Oklahoma*, saying that crimes by juveniles deserve less punishment because adolescents have less capacity to control their conduct and to think in long range terms than adults. *Thompson*, 487 U.S. at 834 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982)). He went on to cite the REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE, 1978 REPORT ON SENTENCING POLICY TOWARD YOUNG OFFENDERS (1978) [hereinafter 1978

Therefore, imposing the death penalty on juveniles is disproportional and hence a violation of the Eighth Amendment.³⁵ Justice Stevens determined that imposing the death penalty on offenders younger than sixteen years old also does not contribute to the social purposes of the death penalty, specifically, retribution and deterrence.³⁶

2. *Stanford v. Kentucky*

*Stanford v. Kentucky*³⁷ involved two consolidated cases.³⁸ In the first case, seventeen-year-old Kevin Stanford and an accomplice robbed a gas station where twenty-year-old Barbel Poore was working as an attendant.³⁹ During and after commission of the robbery, Stanford and his accomplice repeatedly raped and sodomized Poore before Stanford shot her in the face and in the back of the head.⁴⁰ At trial, a corrections officer testified that Stanford said he killed Poore because she lived next door to him and would recognize him.⁴¹ Stanford was transferred and tried as an adult and was convicted of murder, first-degree sodomy, first-degree robbery and receiving stolen property.⁴² He was sentenced to death by the trial judge and his sentence was affirmed by the Supreme Court of Kentucky.⁴³

REPORT] saying that youth crime is not exclusively the offender's fault and that offenses by youths represent a failure of family, school, and the social system. *Id.* at 834 (citing 1978 REPORT).

35. *See id.* at 833–35.

36. *Id.* at 836–38. Retribution is “inconsistent with our respect for the dignity of men’ . . . [g]iven the lesser culpability of the juvenile offender, the teenager’s capacity for growth, and society’s fiduciary obligations to its children.” *Id.* at 836–37 (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)). Justice Stevens said that making younger persons ineligible for the death penalty will not diminish the deterrent value of capital punishment for the vast majority of potential offenders because people under 16 are involved in only about two percent of the arrests made for willful homicide. *Thompson*, 487 U.S. at 837.

37. 492 U.S. 361 (1989).

38. *Id.* at 364 (consolidating *Stanford v. Kentucky*, 734 S.W.2d 781 (Ky. 1987) with *Wilkins v. Missouri*, 736 S.W.2d 409 (Mo. 1987)).

39. *Id.* at 365.

40. *Id.*

41. *Id.*

42. *Stanford*, 492 U.S. at 365–66. Under section 208.170 of the *Kentucky Statutes*, a juvenile could be tried as an adult if the offender is either charged with a Class A felony or a capital crime, or was over 16 and charged with a felony. KY. REV. STAT. ANN. § 208.170 (Michie 1982). In this case, the juvenile court certified Stanford to be tried as an adult after stressing the seriousness of his offense and the unsuccessful attempts of the juvenile system to rehabilitate him for numerous instances of past delinquency. *Stanford*, 492 U.S. at 365.

43. *Stanford*, 492 U.S. at 366.

In the second case, sixteen-year-old Heath Wilkins robbed a convenience store owned and operated by Nancy and David Allen.⁴⁴ His plan was to rob the store and kill whoever was working there because “a dead person can’t talk.”⁴⁵ During the robbery, Wilkins stabbed Nancy Allen, a twenty-six-year-old mother of two, while his accomplice held her.⁴⁶ Allen spoke up to assist the two when they had trouble opening the cash register.⁴⁷ This led Wilkins to stab her three more times in the chest, two of the wounds puncturing the victim’s heart.⁴⁸ When Allen began to beg for her life, Wilkins stabbed her in the throat four times, severing her carotid artery.⁴⁹ Wilkins was certified to stand trial as an adult and was sentenced to death.⁵⁰ The Supreme Court of Missouri affirmed on review, rejecting Wilkins’ Eighth Amendment argument.⁵¹

On certiorari, Justice Scalia of the United States Supreme Court held, in a plurality opinion,⁵² that imposing capital punishment on sixteen or

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 366.

48. *Stanford*, 492 U.S. at 366.

49. *Id.*

50. *Id.* at 367. Under section 211.021(1) of the *Missouri Statutes*, for Wilkins to be tried as an adult, the juvenile court was required to terminate juvenile jurisdiction and certify him under section 211.071. *See* MO. REV. STAT. §§ 211.021(1), 211.071 (1986). That section allowed individuals between 14 and 17 who committed felonies to be tried as adults. *See id.* The juvenile court in this case certified Wilkins relying on the viciousness and violence of the crime, the defendant’s maturity, and the juvenile system’s inability to rehabilitate Wilkins after previous delinquency. *Stanford*, 492 U.S. at 367.

51. *Stanford*, 492 U.S. at 368.

52. Justice O’Connor, in her concurring opinion, concluded, “no national consensus forbids the imposition of capital punishment” on 16 or 17-year-old offenders. *Id.* at 381. She cited *Thompson* saying that the most relevant statistic in this case is that every American jurisdiction that has set a minimum age for capital punishment has set it at 16 years old or above. *Id.* at 381 (citing *Thompson v. Oklahoma*, 487 U.S. 815, 849 (1988)).

In Justice Brennan’s dissent, he examined legislative enactments and jury determinations to determine whether “evolving standards of decency” oppose the juvenile death penalty. *Id.* at 382–93. He concluded that imposing the death penalty on juveniles is “unusual” and therefore unconstitutional because statistics show that juveniles account for only about two percent of total executions in the United States. *Id.* at 386–87. Justice Brennan said that imposing the death penalty on 16 or 17-year-old offenders is disproportionate because, in his view, juveniles so generally lack the degree of responsibility for their crimes, that the Eighth Amendment forbids that they receive it. *Stanford*, 492 U.S. at 394–96. He claimed, although individualized consideration exists in capital sentencing, it does not guarantee that immature individuals undeserving of the death penalty will not be sentenced to death. *Id.* at 397. Finally, Justice Brennan concluded that since juveniles are

seventeen-year-old offenders does not constitute cruel and unusual punishment in violation of the Eighth Amendment of the *United States Constitution*.⁵³ In arriving at that conclusion, Justice Scalia, like Justice Stevens in *Thompson*, examined legislative enactments and jury determinations to determine what “evolving standards of decency” were in the United States.⁵⁴ He concluded that legislative enactments and jury determinations indicate that society does not oppose imposing the death penalty on sixteen or seventeen-year-old offenders.⁵⁵ Justice Scalia determined that laws limiting the rights of sixteen and seventeen-year-olds are not proof that it is “categorically unacceptable” to prosecutors and juries to execute minors.⁵⁶ Those laws operate in gross and apply to all individuals.⁵⁷ However, death penalty statutes provide for individualized consideration of each individual person sentenced to death.⁵⁸ An individual’s maturity is appropriately used as a mitigating factor rather than a complete bar to the death penalty.⁵⁹

Justice Scalia stressed the Court’s responsibility to look to the concepts of decency of modern American society as a whole rather than the Court’s own concepts of decency in determining what evolving standards of decency were in America.⁶⁰ He determined that the degree of national consensus, which is sufficient to label a particular punishment cruel and unusual, had not been established in this case.⁶¹ Essentially, Justice Scalia held that the

less culpable than adults, they cannot be executed to satisfy the social purpose of retribution. *Id.* at 403–04.

53. *Id.* at 380.

54. *Id.* at 368–74.

55. *Stanford*, 492 U.S. at 380.

56. *Id.* at 374.

57. *Id.*

58. *Id.* at 375.

59. *Id.*

60. *Stanford*, 492 U.S. at 369. Justice Scalia emphasized in footnote one that American standards of decency are dispositive, rejecting the plurality’s examination of sentencing practices in other countries to determine evolving standards of decency in *Thompson*. *Id.* at 369 n.1. Justice Scalia wrote that the sentencing practices of other nations cannot be used to establish the Eighth Amendment prerequisite that the punishment in question is accepted among Americans. *Id.*

61. *Id.* at 370–72. Fifteen out of 37 states declined to impose the death penalty on 16-year-old offenders and 12 out of 37 declined to impose it on 17-year-old offenders. *Id.* at 370. Justice Scalia compared and contrasted these numbers to cases where the Supreme Court invalidated the death penalty. *Stanford*, 492 U.S. at 371–72. In *Coker v. Georgia*, the Supreme Court struck down capital punishment for the crime of rape holding that Georgia was the only jurisdiction that authorized such a punishment. *Id.* at 371 (citing *Coker v. Georgia*,

petitioners did not meet their heavy burden of establishing a national consensus against capital punishment for people sixteen or seventeen years old at the time of their offense.⁶²

Justice Scalia concluded that the petitioners' argument, that juries' reluctance to impose the death penalty on sixteen and seventeen-year-old offenders is proof of contemporary society's opposition to such punishment, was not supported by evidence because the statistics used by the petitioners carried little significance.⁶³ He determined that since there are far fewer capital crimes committed by juveniles, that there are also far fewer executions of juveniles.⁶⁴ Justice Scalia concluded by saying that the small number of juvenile executions does not mean that society views those executions as categorically unacceptable, but instead, society views imposing the death penalty on individuals under eighteen as something that should be done only in rare instances.⁶⁵

Justice Scalia called it "absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is

433 U.S. 584, 595–96 (1977)). In *Enmund v. Florida*, the Supreme Court struck down capital punishment for a crime in which an accomplice took a life, emphasizing that only eight jurisdictions authorized similar punishment. *Id.* at 371 (citing *Enmund v. Florida*, 458 U.S. 782, 792 (1982)). The Court in *Stanford* noted the Court in *Ford v. Wainwright* struck down capital punishment of the insane saying that "no State in the Union" . . . permitted such punishment." *Id.* at 371 (quoting *Ford v. Wainwright*, 477 U.S. 399, 408 (1986)). However, Justice Scalia likens *Stanford* to *Tison v. Arizona*, where the Supreme Court upheld imposition of capital punishment for major participation in a felony with reckless indifference to human life, noting that only 11 jurisdictions out of those allowing capital punishment rejected its use under such circumstances. *Id.* at 371–72 (citing *Tison v. Arizona*, 481 U.S. 137, 154 (1987)).

62. *Stanford*, 492 U.S. at 370–73.

63. *Id.* at 373–74 (citing VICTOR L. STREIB, IMPOSITION OF DEATH SENTENCES FOR JUVENILE OFFENSES, JAN. 1, 1982–APR. 1, 1989, PAPER FOR CLEVELAND MARSHALL COLLEGE OF LAW (1989)). The current version of Victor L. Streib's report is entitled THE JUVENILE DEATH PENALTY TODAY: DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES, JAN. 1973–JUNE 1999 and is available on the World Wide Web at <www.law.onu.edu/faculty/streib/juvdeath.htm>. Actual executions for crimes committed by those under age 18 made up only two percent of the total number of executions that occurred between 1642 and 1986. *Stanford*, 492 U.S. at 373–74 (citing VICTOR L. STREIB, IMPOSITION OF DEATH SENTENCES FOR JUVENILE OFFENSES, JAN. 1, 1982–APR. 1, 1989, PAPER FOR CLEVELAND MARSHALL COLLEGE OF LAW (1989)). Between 1982 and 1986, out of a total of 2,106 death sentences, only 15 were imposed on people 16 or under at the time of their offense, and only 30 on people who were 17 at the time of their offense. *Id.*

64. *Stanford*, 492 U.S. 373–74.

65. *Id.*

profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards."⁶⁶ He held that statutes proscribing minors from drinking, smoking, etc., make determinations in gross about an individual's maturity.⁶⁷ Essentially, those statutes are necessary to our society because it would be impossible to examine every person individually to determine whether they are mature enough to drink or drive or smoke cigarettes.⁶⁸ However, when imposing the death penalty, states are required to individually consider the maturity of the defendant.⁶⁹ Therefore, Justice Scalia held that the existence of statutes limiting the rights of juveniles does not support the argument that all juveniles are too immature to realize that murdering another person is wrong.⁷⁰

B. *Supreme Court of Florida*

Individual states are bound by the decisions in *Thompson* and *Stanford* and, therefore, may not execute offenders under sixteen years old. However, they may extend the line drawn by the United States Supreme Court by legislative enactment. In 1988, the Supreme Court of Florida decided that it is constitutional under article I, section 17 of the Florida Constitution to execute seventeen-year-old offenders in Florida.⁷¹ Then, in 1994, the Supreme Court of Florida decided that executing fifteen-year-old offenders is unconstitutional under the Florida Constitution.⁷²

1. *LeCroy v. State*

On January 11, 1981, the bodies of John and Gail Hardeman were found in a remote area of Palm Beach County where they had been camping and hunting a week earlier.⁷³ John died from a single shotgun wound to the head and Gail died from three small caliber gunshot wounds to the chest, neck, and head.⁷⁴ When Gail's body was found her trousers had been unzipped and her brassiere had been partially removed.⁷⁵ John's wallet, a

66. *Id.* at 374.

67. *Id.* at 374-75.

68. *See id.* at 374.

69. *Stanford*, 492 U.S. at 374-75.

70. *Id.* at 374.

71. *See LeCroy v. State*, 533 So. 2d 750 (Fla. 1988).

72. *See Allen v. State*, 636 So. 2d 494 (Fla. 1994).

73. *See LeCroy*, 533 So. 2d at 752.

74. *Id.*

75. *Id.*

.30-06 hunting rifle, and Gail's .38 revolver were all missing from the scene.⁷⁶ Seventeen-year-old Cleo LeCroy ("LeCroy") and his brother Jon ("Jon"), who had been camping in the area with their parents, assisted in the search for the victims.⁷⁷ During the search, the brothers claimed to be great trackers, and said that if the police let them search alone that they would find the bodies.⁷⁸ Jon found Gail's body, the first body discovered, in the presence of police officers.⁷⁹ The brothers were questioned by the police immediately after discovery of the both bodies.⁸⁰ LeCroy waived his Miranda rights and gave two statements to the police, in which he admitted killing the couple.⁸¹ At trial, significant evidence was introduced demonstrating that LeCroy murdered John and Gail.⁸² The jury recommended life for John's murder and death for Gail's murder.⁸³ The trial judge agreed with the jury's recommendations on both murder counts.⁸⁴ On

76. *Id.*

77. *Id.*

78. *LeCroy*, 533 So. 2d at 752.

79. *Id.*

80. *Id.*

81. *Id.* at 752–53. In his first statement, LeCroy said that he killed John by accident when he fired his gun at a hog and his bullet ricocheted striking John in the head. *Id.* at 752. Regarding Gail, LeCroy's first statement changed three times: first, he said that he killed Gail when she burst on the scene and he did not know who she was; next, he said that she fired at him first; and finally, that he killed her to eliminate a witness. *LeCroy*, 533 So. 2d at 752. He denied touching the bodies or taking anything from them. *Id.* LeCroy said that he told his brother Jon what had happened, but that Jon had nothing to do with the killings. *Id.* at 752–53. After giving his first statement, LeCroy asked almost immediately to give another statement. *Id.* at 753. He waived his Miranda rights again. *Id.* In his next statement, LeCroy told police that he shot Gail after she came on the scene yelling, and that he unzipped Gail's trousers to check for a pulse. *LeCroy*, 533 So. 2d at 753. He also stated that he did take the guns belonging to John and Gail. *Id.*

82. *Id.* At trial, LeCroy's girlfriend testified that LeCroy told her about the killings and taking the money and guns from the victims and that he sold the rifle to an acquaintance, which was later recovered by the police. *Id.* She also testified that LeCroy told her that he burned a pair of his pants because they had blood on them and that he planned to mutilate the barrel of his .22 to prevent identification. *Id.* Weapons experts testified that the barrel of LeCroy's .22 had been mutilated. *LeCroy*, 533 So. 2d at 753. A jail mate testified that LeCroy admitted the killings. *Id.* Contrary to LeCroy's statements, the medical examiner testified that the shots fired at Gail were fired at point blank range, and in two of them, the gun was probably in contact with her body. *Id.*

83. *Id.* at 755.

84. *Id.*

appeal, LeCroy argued that the death penalty imposed on a seventeen-year-old is cruel and unusual punishment.⁸⁵

Writing for the majority⁸⁶ in *LeCroy*, Justice Shaw held that there is no constitutional bar to imposing the death penalty on seventeen-year-old offenders in Florida.⁸⁷ He began by indicating that the sentencing judge gave great weight to the appellant's youth as a mitigating factor, yet the judge found that the appellant was mentally and emotionally mature and understood the difference between right and wrong and the nature and consequences of his actions.⁸⁸ Next, Justice Shaw noted that legislative action in Florida over the last thirty-five years had consistently evolved toward treating juveniles who commit serious offenses as adults, and since 1951, the legislature had repeatedly handled juveniles charged with capital crimes "in every respect as adults."⁸⁹ Then, the court noted that the jury

85. *LeCroy*, 533 So. 2d at 756.

86. Justice Barkett concurred in the majority's finding of guilt, but dissented as to the sentence because he believed that imposing the death penalty on a 17-year-old offender violates both the Eighth Amendment of the *United States Constitution* and article I, section 17 of the Florida Constitution. *Id.* at 758. He concluded that legal disabilities imposed on minors indicate that youthful offenders have not fully developed the ability to judge or consider the consequences of their behavior. *Id.* He said "[w]hen a government withholds the right of a citizen to enjoy certain benefits and privileges because of immaturity and lack of judgment, then for the same reason it also should withhold the imposition of the ultimate and final penalty, which can be imposed only where there is heightened culpability." *Id.* at 759. Justice Barkett agreed with Justice O'Connor's reasoning in her concurrence in *Thompson* when she said that the death penalty should not be imposed on an individual under 16 years old pursuant to the authority of a capital punishment statute that specifies no minimum age. *Id.* at 760 (citing *Thompson v. Oklahoma*, 487 U.S. 815, 857-58 (1988)). Finally, Justice Barkett concluded, saying Florida's legislature must address the statutory minimum age issue before it continues to allow execution of juveniles. *LeCroy*, 533 So. 2d at 760.

87. *Id.* at 758.

88. *Id.* at 756.

89. *Id.* at 756-57. Florida law recognizes distinctions between juveniles and adults, however "section 39.02(5)(c), Florida Statutes (1979-1987), mandates that a child of any age charged with a capital crime 'shall be tried and handled in every respect as if he were an adult.'" *Id.* at 756 (quoting FLA. STAT. § 39.02(5)(c) (1979-1987)) (emphasis in original). The court in *LeCroy* said that the words "in every respect" can only be read as a declaration of legislative intent that offenders under 18 may be subject to the same penalty as adults, including the death penalty. *LeCroy*, 533 So. 2d at 756-57. Legislative history in Florida has consistently shown strong support for treating juveniles as adults when they are involved in serious crimes. *Id.* Prior to 1950, the Florida Constitution vested jurisdiction over all criminal charges against minors in criminal courts. *Id.* at 756. There were no juvenile courts and all juveniles were tried as adults. *Id.* In 1950, the Florida Constitution was amended, essentially creating the juvenile court system. *Id.* This was codified as chapter 39 of the *Florida Statutes*. *LeCroy*, 533 So. 2d at 756 (citing FLA. STAT. § 39 (1951)). Under this

recommended the death penalty for Gail's murder, but not for John's murder, concluding that the jury was able to distinguish between the more aggravated murder of Gail.⁹⁰ "This reflects a community judgment that in this particular case, under these circumstances and for this defendant, the death penalty is appropriate."⁹¹ Justice Shaw determined that the cases cited by LeCroy indicating the rarity at which the death penalty is imposed on minors in Florida does not prove that there is a per se rule against imposing the death penalty on juveniles.⁹² Instead, Judge Shaw determined that the cases cited demonstrated that minors convicted of first-degree murder tend to "exhibit immaturity or other mitigating characteristics which persuade juries and sentencing judges that the death penalty is inappropriate in their specific cases."⁹³ Essentially, the court concluded: 1) LeCroy's maturity was considered as a mitigating factor and he was found to be a mature individual; 2) Florida law has evolved toward treating violent juvenile offenders as adults; and 3) the rarity of juvenile executions does not create a

statute violations of law committed by a child, then defined as individuals under 17 years of age, were removed from criminal courts and placed in either juvenile courts or in county courts in those counties without juvenile courts. *Id.* (citing FLA. STAT. § 39 (1951)). Section 39.02(6) of the *Florida Statutes* gave the juvenile court discretion to transfer felony charges against juveniles 14 or older to criminal courts, except when juveniles age 16 commit a crime which would be a capital offense if committed by an adult, in which case the juvenile "shall be [sic] transferred." *Id.* (citing FLA. STAT. § 39.02(6) (1951)). In 1955, the legislature amended section 39.02(6), deleting "sixteen years or older" and providing that any child, irrespective of age, indicted for an offense punishable by death or life imprisonment by a grand jury shall be tried in a criminal court. *Id.* at 756–57 (citing FLA. STAT. § 39.02(6) (1955)). That section was further amended in 1967 providing that the juvenile court shall be without jurisdiction and the child shall be handled in every respect as if he were an adult whenever an indictment is returned by a grand jury charging a child of any age with a violation of Florida law punishable by death or life imprisonment. *Id.* (citing FLA. STAT. § 39.02(6) (1969)). In 1973, chapter 39 was substantially rewritten returning exclusive original jurisdiction of charges against juveniles to the circuit court. *LeCroy*, 533 So. 2d at 757 (citing FLA. STAT. § 39 (1973)). The court could then try any juvenile fourteen years old or older as an adult on any criminal offense. *Id.* (citing FLA. STAT. § 39 (1973)). A child was redefined as anyone under 18 years of age. *Id.* In 1978, chapter 39 was rewritten providing that any child tried as an adult would be subject to prosecution, trial, and sentencing as an adult. *Id.* (citing FLA. STAT. § 39 (Supp. 1978)). Finally in 1981, the legislature further amended chapter 39 providing that if a juvenile was convicted of any crime punishable by life in prison or death, that the child "shall be sentenced as an adult." *Id.* (citing FLA. STAT. § 39.02(5)(c) (1981)).

90. *LeCroy*, 533 So. 2d at 757.

91. *Id.*

92. *Id.*

93. *Id.* at 757.

per se rule banning juvenile capital punishment.⁹⁴ Based on these conclusions the court held that there is no constitutional ban against imposing the death penalty on seventeen-year-old offenders in Florida.⁹⁵

2. Allen v. State

On December 10, 1990, fifteen-year-old Jerome Allen and two accomplices stole a car, robbed a gas station, and, during the robbery, shot one of the gas station's employees, Stephen DuMont.⁹⁶ DuMont died from the shotgun wound. However, before dying, he was able to describe his assailants and the car that they drove.⁹⁷ Deputies apprehended Allen and searched his house where they found a sawed-off shotgun and ammunition.⁹⁸ However, experts could not say whether DuMont had been killed with the gun that was recovered.⁹⁹ The jury found Allen guilty of first-degree murder, among other violent crimes.¹⁰⁰ During the penalty phase, one of Allen's accomplices testified that although Allen did not shoot DuMont, he was the one who urged the other accomplice to do so to prevent being identified.¹⁰¹ The jury recommended the death penalty on a seven-to-five vote.¹⁰² During the sentencing hearing, a forensic psychologist testified that Allen had a traumatic, chaotic childhood, that his father violently attacked him on occasion, and that Allen suffered from behavioral and learning disorders.¹⁰³ The psychologist also noted that Allen suffered head trauma that may have resulted in organic brain injury or neurological problems, and that he had a low Intelligence Quotient.¹⁰⁴ Allen's mother testified that Allen sometimes went into a daze and often suffered from fainting spells.¹⁰⁵ The trial court sentenced Allen to death.¹⁰⁶

94. *See id.* at 756–57.

95. *LeCroy*, 533 So. 2d at 756–57.

96. *See Allen v. State*, 636 So. 2d 494, 495 (Fla. 1994).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Allen*, 636 So. 2d at 496.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Allen*, 636 So. 2d at 496.

The court held, *per curiam*,¹⁰⁷ that because the death penalty is hardly ever imposed on fifteen-year-old offenders, it is either cruel or unusual punishment if imposed on offenders who are under the age of sixteen at the time of the crime.¹⁰⁸ Therefore, the court concluded that the death penalty is prohibited for fifteen-year-olds by article I, section 17 of the Florida Constitution.¹⁰⁹ “We cannot countenance a rule that would result in some young juveniles being executed while the vast majority of others are not, even where the crimes are similar.”¹¹⁰

III. BRENNAN V. STATE

A. *Facts and Procedural History*

Sixteen-year-old Keith Brennan and eighteen-year-old Joshua Nelson wanted to leave the city of Cape Coral, so they devised a plan to steal Tommy Owens’ car.¹¹¹ On March 10, 1995 they lured Owens to a remote spot, and began to beat Owens with a baseball bat.¹¹² Owens pleaded with Nelson and Brennan for his life and told them to take his car, but after a discussion Nelson and Brennan decided to kill Owens to avoid being caught by the police.¹¹³ After tying Owens up, Brennan cut Owens’ throat with a box cutter knife.¹¹⁴ Owens remained conscious during the stabbing and begged Nelson to hit him again with the bat so that he would be knocked

107. In his special concurrence, Justice Overton said that the United States Supreme Court’s decision in *Thompson* demands that the Supreme Court of Florida hold that executing a 15-year-old is unconstitutional. *Id.* at 498. He stated that under the Florida Constitution, the proper constitutional dividing line is under the age of 16. *Id.*

In his special concurrence, Justice Grimes agreed with Justice Overton, that *Thompson* demands that the court rule that it is unconstitutional to execute one under 16 years of age. *Id.* However, he said he was unwilling to accept the notion that the Florida Constitution prohibits imposing the death penalty upon a person below the age of 16 under all circumstances. *Id.*

108. *Allen*, 636 So. 2d at 497.

109. *Id.* (citing *Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991)). At that time, more than a half century had passed since Florida last executed an offender younger than 16. *Id.* Since then only two death penalties have been imposed on such individuals, and both were overturned. See *Ross v. State*, 386 So. 2d 1191 (Fla. 1980); *Vasil v. State*, 374 So. 2d 465 (Fla. 1979).

110. *Allen*, 636 So. 2d at 497.

111. *Brennan v. State*, 24 Fla. L. Weekly S365, S365 (July 8, 1999).

112. *Id.*

113. *Nelson v. State*, 748 So. 2d 237, 239 (Fla. 1999).

114. *Id.*

unconscious before the stabbing continued.¹¹⁵ Nelson complied with Owens' request; he and Brennan continued to strike Owens with the bat.¹¹⁶ After the beating and stabbing, Nelson and Brennan dragged Owens' body under nearby bushes.¹¹⁷ They then picked up Tina Porth and Misty Porth in Owens' car, and drove to New Jersey after stopping in Daytona Beach.¹¹⁸ Law enforcement officers later apprehended Nelson and Brennan in New Jersey.¹¹⁹

Brennan was charged with first-degree premeditated murder, first-degree felony murder, and robbery with a deadly weapon.¹²⁰ The Porth sisters testified that, during the trip, Nelson and Brennan informed them that they had killed Owens.¹²¹ Brennan gave a taped confession in which he admitted his involvement in the murder but denied that there was any prior plan to kill Owens.¹²² The confession was played to the jury during trial and Brennan was found guilty on all three counts.¹²³

At the time of the crime, Brennan was a sophomore in high school.¹²⁴ He had no significant history of prior criminal activity and his juvenile records showed only prior crimes against property.¹²⁵ During the penalty phase, Brennan presented evidence that his mother committed suicide when he was two years old, that she suffered from severe depression, and that he had been institutionalized.¹²⁶ He also presented evidence that he was sexually molested by his older brother when he was eight and was allegedly "picked on" by others.¹²⁷ In 1993, he received inpatient care for alcohol and drug addiction.¹²⁸

The jury recommended the death penalty by a vote of eight-to-four after hearing all the evidence.¹²⁹ Among the aggravators, the trial judge found that "the capital felony was especially heinous, atrocious, or cruel" and "the

115. *Id.*

116. *Id.*

117. *Brennan*, 24 Fla. L. Weekly at S365.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Brennan*, 24 Fla. L. Weekly at S365-66.

123. *Id.* at S366.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Brennan*, 24 Fla. L. Weekly at S366.

128. *Id.*

129. *Id.*

capital felony was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification.”¹³⁰ The trial judge also considered six statutory mitigators and twenty-five nonstatutory mitigators.¹³¹ Age as a statutory mitigator was given great weight, while the statutory mitigator of lack of significant criminal history was given moderate weight.¹³² Although the trial judge gave significant weight to Brennan’s young age and his lack of significant prior criminal history, the court concluded that he “wielded a baseball bat and [a] box cutter to murder another young man.”¹³³ The trial court followed the jury’s recommendation and sentenced Brennan to death for the first-degree premeditated murder charge.¹³⁴

B. Appellate Brief Arguments

1. Appellant’s Initial Brief

Brennan’s primary argument with respect to the constitutionality of the juvenile death penalty was that imposing the death penalty on sixteen-year-old Brennan constitutes cruel and/or unusual punishment in violation of article I, section 17 of the Florida Constitution and the Eighth and Fourteenth Amendments of the *United States Constitution*.¹³⁵ This was “Issue P” of Brennan’s argument.¹³⁶ Brennan adopted the rationale set forth in *Allen*,¹³⁷ which said that executing a sixteen-year-old is a violation of article I, section 17 of Florida’s Constitution because executing such a person is “unusual” due to the rarity of executions of sixteen-year-olds in Florida.¹³⁸ Brennan indicated that in the last twenty-five years only three other sixteen-year-olds were sentenced to death in Florida, and none of them were executed.¹³⁹ He concluded that imposing the ultimate penalty on only

130. *Id.*

131. *Id.* at S373 n.2.

132. *Brennan*, 24 Fla. L. Weekly at S366.

133. *Id.*

134. *Id.*

135. Appellant’s Initial Brief at 24, *Brennan v. State*, 24 Fla. L. Weekly S365 (1999) (No. 90-279).

136. *Id.*

137. *Id.* at 25. See *Allen*, 636 So. 2d at 494.

138. Appellant’s Initial Brief at 25–29. See FLA. CONST. art. I, § 17.

139. Appellant’s Initial Brief at 27–28. In each case, the offender was re-sentenced to life in prison. See *Farina v. State*, 680 So. 2d 392 (Fla. 1996); *Morgan v. State*, 639 So. 2d 6 (Fla. 1994); *Morgan v. State*, 537 So. 2d 973 (Fla. 1989); *Morgan v. State*, 453 So. 2d 394

one sixteen-year-old in twenty-five years is “cruel, unusual, and disproportional” and is prohibited by the Florida Constitution and the *United States Constitution*.¹⁴⁰

2. Appellee’s Answer Brief

In its answer brief, the State argued that Brennan failed to meet his heavy burden of demonstrating that imposing the death penalty on sixteen-year-old offenders is cruel and/or unusual under article I, section 17 of the Florida Constitution or under the Eighth and Fourteenth Amendments of the *United States Constitution*.¹⁴¹ The State began its argument by stressing that in *Stanford*, the United States Supreme Court has already rejected Brennan’s argument—that it is cruel and unusual to execute a sixteen-year-old.¹⁴² The State especially stressed the fact that Brennan was only eight days short of being seventeen when he killed Owens.¹⁴³ Next, the State addressed Brennan’s use of *Allen* in its argument, which said that it is unconstitutional to execute a sixteen-year-old in Florida because no sixteen-year-old offenders who have been sentenced to death in the last twenty-five years have been executed.¹⁴⁴ In response, the State argued that no one under twenty has been executed in Florida in the last twenty-five years either.¹⁴⁵ “Surely this does not mean that the death penalty cannot be imposed on anyone nineteen or younger.”¹⁴⁶ The State then argued that Brennan’s argument finds no support in legislative enactments because legislative enactments in Florida have “consistently evolved toward treating juveniles charged with serious offenses as if they were adult criminal defendants.”¹⁴⁷ Then, the State said that Brennan’s argument, that the death penalty has not been *carried out* on a sixteen-year-old offender in the last twenty-five years, is not as important as how many times it has been *imposed*, which has been

(Fla. 1984); *Morgan v. State*, 392 So. 2d 1315 (Fla. 1981); *Brown v. State*, 367 So. 2d 616 (Fla. 1979).

140. Appellant’s Initial Brief at 28.

141. Appellee’s Answer Brief at 9, *Brennan v. State*, 24 Fla. L. Weekly S365 (1999) (No. 90-279).

142. *Id.* at 5 (citing *Stanford v. Kentucky*, 492 U.S. 361 (1989)).

143. *Id.*

144. *Id.* at 6.

145. *Id.*

146. Appellee’s Answer Brief at 6.

147. *Id.* at 7 (quoting *LeCroy v. State*, 533 So. 2d 750, 757 (Fla. 1988)). See *supra* note 89.

seven times in the last twenty-five years.¹⁴⁸ The State stressed that none of the other sixteen-year-olds had their sentence reduced based solely on their age.¹⁴⁹

3. Appellant's Reply Brief

Brennan began his reply brief by indicating that the issue of imposing the death penalty on a sixteen-year-old offender has not been addressed or resolved in Florida (although it was decided in the United States Supreme Court); the court in *Farina* avoided that issue.¹⁵⁰ Brennan then argued that *Allen* supports the inference that rarity of executions of a particular age group demonstrates that it is cruel or unusual punishment to execute members of that age group and that such execution is prohibited by the Florida Constitution.¹⁵¹ He said that although the State cited *Stanford* for the proposition that the federal constitution does not prohibit execution of a sixteen-year-old, that case has never been cited by a Florida appellate court.¹⁵²

C. Analysis of *Brennan v. State*

1. Justice Shaw Announced the Judgment of the Court

The majority of the court held that imposing the death penalty on Brennan, for a crime committed when he was sixteen years of age, would constitute cruel or unusual punishment in violation of article I, section 17 of the Florida Constitution.¹⁵³ In arriving at that conclusion the Supreme Court of Florida was guided by the holding in *Allen*, which said that imposing the death penalty on a fifteen-year-old would be cruel or unusual punishment under the Florida Constitution because it is almost never imposed on fifteen-year-olds in Florida.¹⁵⁴ Essentially, the court in *Brennan* determined that

148. Appellee's Answer Brief at 8. Henry Brown (one time), James Morgan (four times), James Farina (one time so far), and Brennan. *Id.*

149. *Id.* at 8-9.

150. Appellant's Reply Brief at 1, *Brennan v. State*, 24 Fla. L. Weekly S365 (1999) (No. 90-279).

151. *Id.* (citing *Allen v. State*, 636 So. 2d 494 (Fla. 1994)).

152. *Id.* at 1-2.

153. *Brennan v. State*, 24 Fla. L. Weekly S365, S368 (July 8, 1999).

154. *See id.* at S367 (citing *Allen v. State*, 636 So. 2d 494, 497 (Fla. 1994)). *Allen* held that over a half century had passed since a 15-year-old was executed in Florida, and that whatever the reasons for the rarity of such executions that the court could not "countenance a

sixteen-year-olds are executed so rarely (a sixteen-year-old has not been executed in Florida since 1940) that the court is compelled to adopt the same conclusion arrived at in *Allen*.¹⁵⁵ The court rejected the State's argument that executing a juvenile was no different than executing a woman since both are so uncommon, saying that the law itself recognizes that children are not as responsible for their acts as are adults.¹⁵⁶

The majority then attacked the State's argument, that it is constitutional to execute a sixteen-year-old offender in Florida because the United States Supreme Court has already decided that it is constitutional to execute such an offender in *Stanford*.¹⁵⁷ The court said that, to the contrary, the *Stanford* opinion supports the determination that imposing the death penalty on sixteen-year-old offenders in Florida is unconstitutional.¹⁵⁸ The court arrived at that conclusion saying that the plurality in *Stanford* concluded that the constitutionality of capital punishment statutes depends on the individualized consideration given to the defendant's circumstances, and that Florida statutes are devoid of any such individualized consideration.¹⁵⁹ The majority in *Brennan* argued that, in *Stanford*, the plurality determined that juvenile transfer statutes ensure consideration of a defendant's individual maturity and moral responsibility.¹⁶⁰ Based on that cite from *Stanford*, the Supreme Court of Florida held in *Brennan* that it is unconstitutional to execute a juvenile under Florida law because section 985.225(1)(a) of the *Florida Statutes* neither sets a minimum age for the death penalty nor sets forth criteria to ensure individualized consideration of the defendant's maturity and moral responsibility.¹⁶¹

rule that would result in some young juveniles being executed while the vast majority of others are not, even where the crimes are similar." *Allen*, 636 So. 2d at 497.

155. *Brennan*, 24 Fla. L. Weekly at S367. The court in *Brennan* said that the last reported case where the death penalty was imposed and carried out on a 16-year-old defendant was in *Clay v. State*, 196 So. 2d 462 (Fla. 1940), which was over 55 years ago. *Id.* The court also noted that in the last 25 years, only three other 16-year-old defendants were sentenced to death and none of those sentences were carried out. *Id.* See also, *supra* note 139.

156. *Brennan*, 24 Fla. L. Weekly at S367 (citing *Allen v. State*, 636 So. 2d 494, 497 (Fla. 1994)).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* (citing *Stanford v. Kentucky*, 492 U.S. 361, 375 (1989)). The Kentucky and Missouri statutes considered in *Stanford* specifically provided for individualized consideration before transferring juveniles to be tried as adults. *Stanford*, 492 U.S. at 375 n.6.

161. See *Brennan*, 24 Fla. L. Weekly at S367-68. Section 985.225(1)(a) of the *Florida Statutes* provides that a child of any age may be indicted for a capital crime and shall

The Legislature's failure to impose a minimum age, the legislative mandate that a child of any age indicted for a capital crime shall be subject to the death penalty, and the failure to set up a system through our juvenile transfer statutes that "ensure[s] individualized consideration of the maturity and moral responsibility" render our statutory scheme suspect under the federal constitution and the reasoning of *Stanford* as it applies to sixteen-year-old offenders.¹⁶²

Finally, the court noted that a proportionality analysis requires the court to compare the totality of the circumstances of the case at hand with other capital cases (similar defendants, facts, and sentences).¹⁶³ The court concluded that the inherent problem of upholding the death penalty in *Brennan* is highlighted by the fact that the death penalty has not been upheld for any other defendant who was sixteen at the time of the crime, i.e., there are no similar cases to compare it to.¹⁶⁴ Therefore, the court declined to conduct a proportionality analysis.¹⁶⁵

Essentially, since the death penalty is almost never imposed on defendants who are Brennan's age, and when imposed in the last twenty-five years the sentence has been subsequently vacated, the court decided that it could not impose the death penalty on Brennan consistently with Florida's case law and constitution.¹⁶⁶ The death sentence was therefore vacated and reduced to life imprisonment without a possibility of parole.¹⁶⁷

2. Justice Anstead Specially Concurred

Justice Anstead concurred in the majority's opinion and noted the soundness of the court's reasoning based on its holding in *Allen*.¹⁶⁸ However, Justice Anstead wrote a separate opinion because he believes in an alternative basis for holding that it is unconstitutional to

be handled in every respect as an adult including sentencing. FLA. STAT. § 985.225(1)(a) (1999).

162. *Brennan*, 24 Fla. L. Weekly at S368 (quoting *Stanford v. Kentucky*, 492 U.S. 361, 375 (1989)).

163. *See id.* (citing *Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991)).

164. *Id.*

165. *Id.*

166. *Id.* (citing *Allen v. State*, 636 So. 2d 494, 497 (Fla. 1994)).

167. *Brennan*, 24 Fla. L. Weekly at S368.

168. *Id.* (Anstead, J., concurring).

execute a juvenile sixteen years of age in the state of Florida.¹⁶⁹ He based his argument on “society’s traditional values” and examined the rights society has historically prescribed to children.¹⁷⁰ He concluded that “based upon the enormous value we place on our children, and our historically consistent treatment of children differently from adults for virtually all legal purposes, but especially for purposes of assessing responsibility and meting out punishment for criminal acts, that the constitutional line should be drawn at age seventeen.”¹⁷¹ Justice Anstead determined that our laws have consistently shown that a person only becomes sufficiently mature to accept the responsibilities and privileges of adulthood at age eighteen.¹⁷² That line, he said is consistent with our traditional attitude towards children and represents our “determination not to give up on our children.”¹⁷³

Justice Anstead continued, stressing that we must stand by the line we have already drawn, which is at seventeen, even when it becomes difficult to do so as in a case where a horrible crime has been committed by a juvenile.¹⁷⁴ He said that “in standing firm we demonstrate the strength of our commitment to our children” and then quoted Justice Barkett in *LeCroy*, when he said, “[w]hen a government withholds the right of a citizen to enjoy certain benefits and privileges because of immaturity and lack of judgment, then for the same reason it also should withhold the imposition of the ultimate and final penalty, which can be imposed only where there is heightened culpability.”¹⁷⁵ Justice Anstead concluded saying that to allow

169. *Id.*

170. *See id.*

171. *Id.* “Florida law protects seventeen-year-olds and those who are younger, treating them as minors and children.” *Brennan*, Fla. L. Weekly at S374 n.14 (quoting *LeCroy v. State*, 533 So. 2d 750, 759 (Fla. 1988) (citing FLA. STAT. §§ 1.01(14), 39.01(7) (1987)). For example, an unmarried 17-year-old cannot vote, serve on a jury, etc. *See* FLA. STAT. §§ 1.01(13), 39.01(12) (1999).

172. *Brennan*, 24 Fla. L. Weekly at S369.

It is no coincidence, for example, that we use the age of eighteen as the cutoff for child dependency and for the legal requirement of parents to take care of their children, as well as a dividing line for a countless number of other legal distinctions based upon a firmly established public policy of placing limitations upon and extending special protections to the young and immature.

Id.

173. *Id.*

174. *Id.*

175. *Id.* (quoting *LeCroy v. State*, 533 So. 2d 750, 759 (Fla. 1988) (Barkett, J., concurring in part, dissenting in part)).

capital punishment of juveniles below eighteen years old would be hypocrisy and would destroy society's values.¹⁷⁶

3. Chief Justice Harding Concurred in Part and Dissented in Part

Chief Justice Harding concurred with Brennan's conviction but dissented as to his sentence.¹⁷⁷ He said that although he concurred in the *Allen* decision and its reasoning, he now believes it to be flawed.¹⁷⁸ Chief Justice Harding now believes that this issue should be resolved based on Florida's legislative history on the subject as suggested in *Stanford*.¹⁷⁹ He concluded that an analysis of the unusual element should include more than just asking how often the death penalty is imposed.¹⁸⁰

Chief Justice Harding pointed out several problems with the reasoning in *Allen*, which was adopted by the majority in this case.¹⁸¹ First he noted that the *Allen* standard does not allow for a change in public opinion on the issue because once the standard is put in place it can never be changed if citizens change their minds.¹⁸² Essentially, once a punishment is held to be "unusual," it will not be imposed anymore and will remain "unusual" forever.¹⁸³ The second flaw results if the state decides to alter its method of execution.¹⁸⁴ Under *Allen*, the first time a new method of punishment is used it will be considered unusual and thus subject to constitutional scrutiny since it has never been used before.¹⁸⁵

Chief Justice Harding then cited to the concurring opinions in *Allen*, written by Justice Grimes and Justice Overton, which provided that the issue of executing sixteen-year-olds is controlled by *Thompson*.¹⁸⁶ Chief Justice Harding agreed with Justice Grimes' and Justice Overton's opinion and said that because there is no federal constitutional bar against executing a sixteen-year-old offender, the better way to resolve this issue in Florida is to determine whether the legislature has spoken on the subject.¹⁸⁷ Chief Justice

176. See *Brennan*, 24 Fla. L. Weekly at S369.

177. *Id.* (Harding, C.J., concurring in part, dissenting in part).

178. See *id.*

179. *Id.*

180. *Id.*

181. *Brennan*, 24 Fla. L. Weekly at S369-71.

182. *Id.*

183. See *id.*

184. *Id.* at S369-70.

185. *Id.*

186. *Brennan*, 24 Fla. L. Weekly at S370.

187. *Id.*

Harding then examined the legislative history of the juvenile death penalty in Florida by focusing on the information set forth in *LeCroy*.¹⁸⁸ He concluded that Florida's legislative history reveals a distinct cutoff line between offenders that are sixteen and older and those younger than sixteen.¹⁸⁹

Chief Justice Harding then compared the rationale in *LeCroy* to the rationale in *Allen* concluding that the two opinions are in conflict.¹⁹⁰ In *Allen* the court concluded that juveniles are treated differently than adults.¹⁹¹ Under Florida law, a juvenile is defined as any unmarried person who has not yet reached the age of eighteen.¹⁹² Chief Justice Harding determined that under the logic of *Allen*, all juveniles, including seventeen-year-olds, fall into the purview of the *Allen* test.¹⁹³ The majority in *Brennan* and in *Allen* said that no fifteen or sixteen-year-old offenders have been executed in over twenty-five years and therefore, it is unconstitutional to execute such offenders.¹⁹⁴ However, no seventeen-year-olds have been executed in over twenty-five years either.¹⁹⁵ Thus it seems that the holding in *Allen* would prevent a seventeen-year-old offender from being executed, despite *LeCroy*'s holding to the contrary.¹⁹⁶

Chief Justice Harding determined that since the courts in *LeCroy* and *Stanford* based their decisions on legislative enactments, that the reasoning in those cases is more persuasive than *Allen*.¹⁹⁷ He determined that according to current figures, the contemporary consensus is very similar to that of 1989 when *Stanford* was decided.¹⁹⁸ Since 1989, two more states have actually altered their laws to allow for capital punishment of sixteen-year-olds bringing that number to a total of twenty-four states out of forty

188. *Id.* See also *supra* note 89.

189. *Brennan*, 24 Fla. L. Weekly at S370.

190. *Id.*

191. *Id.*

192. *Id.* See also FLA. STAT. § 985.03(7) (1999).

193. *Brennan*, 24 Fla. L. Weekly at S370.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at S371. *LeCroy* and *Stanford* examined legislative enactments to determine what society viewed as acceptable punishment, while *Allen* examined the number of executions of 16-year-olds. *Stanford v. Kentucky*, 492 U.S. 361, 370-77 (1989); *LeCroy v. State*, 533 So. 2d 750, 756-57 (Fla. 1988); *Allen v. State*, 636 So. 2d 494, 497 (Fla. 1994). Chief Justice Harding is essentially saying that legislative enactments in Florida over the last 50 years are a better indicia of what society considers to be acceptable punishment rather than tallying the number of 16-year-olds executed over the last 25 years. *Brennan*, 24 Fla. L. Weekly at S371.

198. *Brennan*, 24 Fla. L. Weekly at S371.

that allow capital punishment.¹⁹⁹ Those figures reaffirm the holdings in *Stanford* and also *LeCroy*, that there is no consensus against executing sixteen-year-old offenders.²⁰⁰

Chief Justice Harding finally argued that in attempting to distinguish *Stanford* from this case, the majority relied on only one single aspect of Justice Scalia's reasoning (that juvenile transfer statutes ensure individualized consideration).²⁰¹ While it is undisputed that transfer statutes ensure individualized consideration of defendants, Chief Justice Harding believes that the United States Supreme Court was concerned with the general concept of individualized consideration of maturity and moral responsibility, using juvenile transfer statutes only as an example of individualized consideration, not as a constitutional requirement.²⁰² Chief Justice Harding concluded that in Florida, the legislature has designated age as a statutory mitigating circumstance, which, in his view, satisfies Justice Scalia's concerns regarding individualized testing.²⁰³

4. Justice Wells Concurred in Part and Dissented in Part

Justice Wells concurred in the affirmance of guilt, but joined Chief Justice Harding's dissent as to Brennan's sentence.²⁰⁴ Specifically, Justice Wells argued that the majority's reliance on *Allen* as precedent in *Brennan* is clearly wrong and an abuse of the doctrine of *stare decisis*.²⁰⁵ He argued that *Allen* is precedent for cases involving people under sixteen while *LeCroy* is precedent for *Brennan*.²⁰⁶ Justice Wells agreed with the majority's concern for society's values for children, but said that the court has a responsibility

199. *Id.* at S374 n.23. Chief Justice Harding said that since 1989, three more states have allowed for capital punishment but set a minimum age at 18, two states have moved from having a minimum age of seventeen to having no minimum age, and Washington has decided that no juveniles may be put to death. *Id.* Forty states allow capital punishment. *Id.* Out of those, 19, including Florida, have no express minimum age limit. *Id.* The highest courts in Alabama, Arizona, South Carolina, and Virginia have upheld cases where 16-year-old defendants were sentenced to death. *Brennan*, 24 Fla. L. Weekly at S374 n.23. Vermont no longer permits capital punishment for the crime of murder. *See id.*

200. *Id.* at S371.

201. *Id.* (citing *Stanford v. Kentucky*, 492 U.S. 361, 374-77 (1989)).

202. *Id.* Individualized consideration in capital sentencing is a constitutional requirement. *Stanford*, 492 U.S. at 375.

203. *Brennan*, 24 Fla. L. Weekly at S371.

204. *Id.* at S372 (Wells, J., concurring in part, dissenting in part).

205. *Id.*

206. *Id.*

to exercise the doctrine of separation of powers.²⁰⁷ He argued, since the United States Supreme Court has already determined that the death penalty is constitutional, whether or not to have the death penalty is a legislative decision, which must be made by the individual state legislatures, not by members of the court.²⁰⁸ Justice Wells determined that since the people are imposing the punishment, it should be the people, through their elected representatives, who decide the punishment.²⁰⁹ He concluded that in this case, the majority, by one vote, has not sufficiently shown due respect to “the ‘authority’ of the legislature and assumes too much authority.”²¹⁰

IV. CONCLUSION

By vacating Keith Brennan’s death sentence and holding it to be cruel or unusual punishment under the Florida Constitution to execute sixteen-year-old offenders using the rarity of executions standard, the Supreme Court of Florida has accomplished the following. First, it has banned the execution of sixteen-year-old offenders forever in Florida, unless the court decides to review this issue again on certiorari and uses a standard other than the rarity of executions standard.²¹¹ Second, the rarity of executions standard, if applied consistently, makes it impossible for Florida to ever initiate a new method of execution.²¹² This is because, if Florida attempts to use lethal injection, for example, as its method of execution instead of the electric chair, such method of punishment, which has not yet been used in Florida, will be rare and unusual.²¹³ Based on that standard, courts could, in theory, find that a new, more humane method of execution is unconstitutional solely because it has never been used before.

It is unclear why the Supreme Court of Florida did not examine jury determinations and legislative enactments in this case to resolve this issue. It is also unclear why the court would use the rarity of executions standard when it has had a hand in producing the statistics upon which it relies.²¹⁴

207. *Id.* at S371.

208. *Brennan*, 24 Fla. L. Weekly at S371.

209. *Id.*

210. *Id.* at S372.

211. *See supra* text accompanying notes 185–86.

212. *See supra* text accompanying notes 187–88.

213. *Id.*

214. *See Farina v. State*, 680 So. 2d 392 (Fla. 1996); *Morgan v. State*, 639 So. 2d 6 (Fla. 1994); *Morgan v. State*, 537 So. 2d 973 (Fla. 1989); *Morgan v. State*, 453 So. 2d 394 (Fla. 1984); *Morgan v. State*, 392 So. 2d 1315 (Fla. 1981). The Supreme Court of Florida

Juries in Florida have recommended the death penalty six times over the last twenty-five years for sixteen-year-old offenders, including Brennan, but the Supreme Court of Florida has vacated the sentence each time on technicalities having nothing to do with the defendant's age thereby preventing the executions from being carried out.²¹⁵ Finally, it is unclear why, under the standard adopted by the court, it is not unconstitutional to execute *all* offenders under the age of twenty.²¹⁶

It is apparent that there is more than one standard that may be applied to determine whether punishment is cruel or unusual. However, to maintain the doctrine of *stare decisis* it is the court's duty to develop the most sensible and most fair standard and apply it consistently.²¹⁷

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vacated Morgan's death sentence four times, Farina's death sentence once, and Brennan's once after the juries had recommended the death penalty.

215. *Id.*

216. *See supra* text accompanying notes 148 & 198.

217. *See supra* text accompanying note 208.