IN THE SUPREME COURT OF FLORIDA

JESSIE JAMES LIVINGSTON,

Appellant,

v.

CASE NO. 68,323

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT
IN AND FOR TAYLOR COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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SUMMARY OF ARGUMENT

In February of 1987 the Supreme Court accepted review of an Oklahoma case to determine whether it is cruel and unusual to execute a person who committed a murder at the age of 15. The State urges this Court to stay resolution of this appeal until the Court disposes of the Oklahoma case.

In the alternative, the State submits Florida's Juvenile Statute, which mandates that a child of any age who commits an offense punishable by death be treated as an adult for sentencing purposes, is presumed to be valid and is probative of society's acceptance of capital punishment for juveniles. Moreover, the legislature has indicated that by removing juvenile protection from the individuals who commit crimes punishable by death, society's interest in treating juveniles must be subordinated to society's more broad-based and immediate interest in retribution. Finally, this Court must accept the legislature's factual resolution that seventeen year old youths can be deterred from committing crimes punishable by death. To "presume" that all minors are immature and unable to be deterred is inconsistent with common law presumptions and detracts from the individualized sentencing process which death penalty cases warrant.

In sum, society has not rejected capital punishment for juveniles and there is penological justification for exposing minors to the same penalty imposed on adults. Accordingly, the imposition of the death penalty on Appellant does not constitute cruel and unusual punishment as explained by the United States Supreme Court in Gregg, infra.

ARGUMENT

ISSUE

THE IMPOSITION OF THE DEATH PENALTY UPON A PERSON SEVENTEEN YEARS AND EIGHT MONTHS DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

Appellee, hereinafter referred to as the State, is filing this supplemental answer brief in response to this Court's request made at the March 3, 1987 oral argument to brief the following issue raised by appellant for the first time in his reply brief: whether it is cruel and unusual punishment for the State of Florida to apply the death penalty to a defendant who was four months shy of his eighteenth birthday at the time he committed a first-degree murder.

As this Court is well aware, the United States Supreme Court granted certiorari review in a case on February 23, 1987 to decide whether the infliction of the death penalty on an individual who was a child of 15 at the time of the crime constitutes cruel and unusual punishment under the eighth and fourteenth amendments. Thompson v. Oklahoma, Case No. 86-6169, 40 Cr.L. 4183. The Oklahoma courts had answered the question in the negative and had reaffirmed its previous holding in Eddings v. State, 616 P.2d 1159 (Okl.Cr. 1980) that once a child is certified to stand trial as an adult, he may also, without violating the Constitution, be punished as an adult. Thompson v. State, 724 P.2d 780,784 (Okl.Cr. 1986). The United States Supreme Court had once before granted certiorari on the issue of the juvenile death penalty in the Eddings case, however, the case was disposed of on other grounds.

Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed. 2d 1 (1982). Inasmuch as the United States Supreme Court appears to be finally addressing the issue, at least as it applies to 15 year olds on death row, this Court should stay resolution of this appeal until the Supreme Court disposes of the Thompson case.

In the event this Court addresses the eighth amendment issue without the benefit of the Supreme Court's resolution of Thompson, the State respectfully urges this Court to follow the result reached by courts in Maryland, Mississippi, Kentucky, Oklahoma, Georgia, South Carolina, Arizona, Ohio, and Louisiana, that it is not cruel and unusual punishment to impose the death penalty on a juvenile. See Trimble v. State, 300 Md. 387, 478 A.2d 1143 (Md. 1984); Cannaday v. State, 455 So.2d 713, 725(Miss. 1984); Ice v. Commonwealth, Ky., 667 S.W. 2d 671 (1984); Eddings v. State, supra; High v. State, 247 Ga. 289, 276 S.E. 2d 5 (1981); State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979); State v. Valencia, 124 Ariz. 139, 602 P.2d 807, 809 (1979); State v. Harris, 48 Ohio St. 2d 351, 359 N.E.2d 67 (1976); State v. Prejean, 379 So.2d 240 (La. 1970).

The State specifically relies upon the in-depth analysis of the eighth amendment issue discussed in the Trimble opinion, a case briefly mentioned by the State in oral argument. Trimble was the same age as appellant, i.e. seventeen years and eight months, when he repeatedly struck his female victim with a baseball bat and then slit her throat. The Maryland trial judge imposed the death penalty after finding that the three mitigating circumstances (Trimble had

not previously been found guilty of a crime of violence, Trimble's youthful age, Trimble's antisocial personality and substance abuse by history) did not outweigh the two aggravating circumstances (the victim was a hostage taken in the course of kidnapping and Trimble had committed the murder while committing rape and sexual offense in the first degree). Trimble, supra at 1146, 1154. On appeal, Trimble maintained that imposing the death penalty on persons under eighteen years of age constituted cruel and unusual punishment in violation of the eighth amendment. In addressing this issue, the Court of Appeals of Maryland reviewed the Supreme Court's opinions, particularly Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and correctly concluded the test for an eighth amendment analysis was two-fold: First, the court had to ascertain, using objective indicia to the extent possible, society's evolving standards of decency with respect to capital punishment of juveniles. Second, the court then had to satisfy itself that the imposition of the death penalty on juveniles does, in fact, serve a penological purpose.

In addressing the first prong, the court focused first on what it deemed to be one of the more probative gauges of society's standards, i.e. the state legislature's acts. In Gregg, supra, the Supreme Court commented that legislative judgment was not only entitled to a presumption of validity, but it was also persuasive evidence that at least that segment of society had not rejected capital punishment. Gregg, 49 L.Ed.2d at 876. Maryland, as well as twenty-eight of the thirty-nine death penalty states, including Florida, permit the execution of juveniles in some circumstances. This constituted one

indication that contemporary society had not rejected capital punishment of juveniles. Trimble, supra at 1160-61. Second, the court attempted to draw conclusions from jury verdicts in capital cases, but found the data ambiguous. At the time of the Trimble opinion, seventeen of the approximately 800 death row inmates committed their offense while under the age of eighteen. Consequently, the court suggested this data demonstrated a general reluctance on the part of juries to sentence juveniles to death. Id. at 1161. Third, the court commented on the international perspective and the reluctance of a majority of countries to execute juveniles. Reiterating again that the legislative judgment was the most probative evidence of societal standards, the court stated it was unable to conclude that society's contemporary standards of decency had rejected capital punishment of juveniles. What is particularly noteworthy was the court's recognition of the importance of objective and not subjective indicia:

> Moreover, we must not lose sight of the purpose of this limited inquiry in the context of judicial review of a statute: we are to determine only whether society has rejected capital punishment of juveniles, not whether society should reject it, not whether society eventually will reject[it], nor whether were we legislators rather than judges [we] would reject it.

Id.

In addressing the second prong of the two-tier eighth amendment analysis, the court quoted extensively from that portion of the Gregg opinion wherein the Supreme Court explained the two principal social purposes of the death penalty: retribution and deterrence of

capital crimes:

> In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.
>
> "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy-of self-help, vigilante justice, and lynch law". Furman v. Georgia, supra, [408 U.S.] at 308, [92 S.Ct. at 2761](Stewart, J., concurring).
>
> Retribution is no longer the dominant objective of the criminal law, Williams v. New York, 337 U.S. 241, 248[69 S.Ct. 1079, 1084, 93 L.Ed. 1337] (1949), but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men.
>
> Furman v. Georgia, 408 U.S. at 394-395[92 S.Ct. at 2806-2807](Burger, C.J., dissenting); Id., at 452-54 [92 S.Ct. at 2835-2836](Powell, J., dissenting); Powell v. Texas, 302 U.S., at 531, 535-536[88 S.Ct. at 2153, 2155-2156](plurality opinion). Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.
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> * * * * * * *
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> Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And

> there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.
>
> The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts. Furman v. Georgia, supra, [408 U.S.] at 403-405[92 S.Ct. at 2810-2812](Burger, C.J. dissenting). Indeed, many of the post-Furman statutes reflect just such a responsible effort to define those crimes and those criminals for which capital punishment is most probably an effective deterrent.
>
> Gregg v. Georgia,428 U.S. at 183-86, 96 S.Ct. at 2929-31, 49 L.Ed.2d at 880-82.(footnotes omitted).

Trimble, supra at 1162-63. With respect to retribution, the court acknowledged that society's "moral outrage" may be lessened to an extent by the youthful age of the perpetrator, however, the court concluded society's interest in retribution applied equally to juvenile cases. "In extreme cases, the benign goals of the juvenile system are subordinated to the more broad-based and immediate interest in retribution. In short, a particularly heinous act can take the juvenile outside of the protective umbrella of the juvenile system." Id. at 1163. With respect to deterrence, the court distinguished Trimble's youth from the facts in Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982):

> This is not a case like Enmund where the deterrent function of the criminal law could not operate because the defendant did not intend to kill the victim. Trimble's culpability level was unaffected by his age, which was only four months from the age of majority. Imposition of the death penalty in this instance will send a message to others contemplating similar acts that society will respond harshly to their actions. In

> short, we believe that seventeen-year-old youths can be deterred from committing brutal rape-murders, so the legislature's judgment in that regard is not a purposeless act.

Trimble, supra at 1164.

After completing its two-tier analysis, the Maryland court concluded it was not cruel and unusual punishment to impose the death penalty on a juvenile simply because of that person's chronological age. The court emphasized a case-by-case approach afforded the juvenile the individualized consideration essential to death penalty cases and, more importantly, avoided the "arbitrary line-drawing that is endemic to any hard-and-fast distinction between juveniles and non-juveniles." Id.

Perhaps what is most interesting about the Trimble case is that the United States Supreme Court denied Trimble's petition for writ of certiorari on February 19, 1985. 105 S.Ct. 1231 (1985). Consequently, until Thompson is decided, the State contends it is quite reasonable to surmise that the United States Supreme Court approves of Maryland's conclusion and likewise believes that the execution of seventeen year old juveniles is constitutional.

The State submits that none of Appellant's arguments in his reply brief demonstrate that Maryland or any of the other states are incorrect in concluding first, that society has not rejected capital punishment as a means of enforcing the criminal law for juvenile offenders, and second, that capital punishment of juveniles does in fact serve a penological purpose. First, Appellant's reply brief wholly fails to recognize the most probative objective indicia of society's evolving standards of decency: the Florida Legislature's

attitude concerning the execution of minors. While Florida has recognized in its juvenile statute a need to "treat" rather than "punish" juvenile offenders (Chapter 39 of the Florida Statutes), that philosophy has been limited by the reality that all juveniles cannot be helped. See Ice, supra at 680. Section 39.02(5)(c)(1) of the Florida Statutes mandates that a child of any age indicted for violating a Florida law punishable by death or by life imprisonment "shall be tried and handled in every respect as if he were an adult." Section 39.02(5)(c)(3) expressly speaks to punishment in such cases: "If the child is found to have committed the offense punishable by death or by life imprisonment, the child shall be sentenced as an adult." As the Supreme Court stated in Gregg, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, the courts must presume its validity. "A heavy burden rests on those who would attack the judgment of the representatives of the people." Gregg, 49 L.Ed.2d at 876. The State contends Appellant has in no way rebutted the presumption of constitutional validity afforded sections 39.02(5)(c)(1) and (3). Moreover, the fact that a majority of all the states and a substantial majority of those states providing for capital punishment approve of capital punishment for juveniles in some circumstances is highly probative evidence of societal standards. Trimble, supra at 1160-1161.

Second, Appellant's contention that there has been a decline in the number of children executed since the early 50's must be viewed in conjunction with the fact that the number of all executions declined

during that time. See Gregg, 49 L.Ed.2d at 879 n.26. Moreover, "the relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment per se. Rather, the reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases." Id. at 879. The State submits the fact that only thirty-three juveniles are currently on death row does not indicate society's rejection of capital punishment for juveniles, but only indicates that juries and judges both have properly been considering one's young age a mitigating circumstance and has found a particular individual's maturity level to be such that it outweighed other aggravating circumstances.

With respect to the penological justification for executing minors, Appellant asks this Court to presume that all persons eighteen and under are immature and therefore unable to be deterred. Appellant suggests this presumption is only fair since the State has, in effect, presumed immaturity for purposes of voting, marriage, possessing alcohol, etc. With respect to criminal culpability and liability, this Court in Clay v. State, 143 Fla. 204, 196 So. 462 (1940) refused to "presume" that a sixteen year old could not be sentenced to electrocution merely because of his age. The Clay opinion notes:

> It is well established at common law that a child under the age of 7 years is conclusively presumed to be incapable of committing a crime; the common law rule raises a presumption of incapacity of an infant between the ages of 7 and 14; and the presumption is that the incapacity after 7 years of age decreases with the progress of his years.

Id. at 463. Appellant, well over 14, certainly would not have been entitiled to such a presumption under common-law and is not entitled to one now pursuant to Clay. Furthermore, it is entirely proper for a state to prohibit juveniles from voting, etc., inasmuch as the state has a legitimate interest in setting such age limits. There is no economically feasible way that each state can test every person who wants to vote, get married, drink, etc. to ensure that each person is mature enough to act responsible in exercising that right. Thus, there is a "rational basis' for setting an age limit on such privileges and for "presuming" minors are not mature enough to enjoy those rights. On the other hand, it is economically feasible to individually assess the maturity level of a juvenile before the court for sentencing. To not individually assess each defendant's maturity leveland character would result in arbitrary sentencing. Thus, there are sound legal principles which justify a presumption of maturity in some situations and an individual assessment of maturity for capital sentencing purposes.

The great variance between maturity levels of individual adolescents was previously noted by Justice Powell in his dissent in Fare v. Michael, C., 442 U.S. 707 (1974), where he stated:

> Minors who become embroiled with the law range from the very young up to those on the brink of majority. Some of the older minors become fully streetwise, hardened criminals, deserving no greater consideration than that properly accorded all persons suspected of crime. Other minors are more of a child than an adult. As the Court indicated in In re Gault, 387 U.S. 1 (1967), the facts relevant to the care to be exercised in a particular case vary widely. They include the minor's age, actual maturity, family environment, education, emotion and

> mental stability, and, of course, any prior record he might have." 442 U.S. at 734, n.4.

In the case sub judice, the record amply supported a conclusion that Appellant was sophisticated, smart, mature and suffered no defect of reasoning because of the fact that he was four months shy of adulthood. Moreover, a review of Appellant's actions the entire day of the murder rebuts Appellant's contention that he acted impulsively. Finally, a review of Appellant's juvenile record proves he certainly is one of those "older" minors mentioned by Justice Powell, a "fully streetwise, hardened criminal," deserving no greater consideration than that properly accorded capital defendants four months older.

Finally, Appellant's citation to numerous psychologists and other authorities to suggest that capital punishment does not deter all juveniles is unpersuasive in an eighth amendment analysis. As stated in Gregg, 49 L.Ed.2d at 882 "the value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." (emphasis added) The Florida Legislature is of the belief that the death penalty serves as a deterrent for persons of all ages. Pursuant to Gregg, this Court must accept the legislature's resolution of this complex factual issue.

In sum, the State contends that society has not rejected capital punishment for juveniles and that the imposition of the death penalty in this instance measurably serves society's weighty interests in

both retribution and deterrence. For eighth amendment purposes the punishment is therefore constitutionally permissible.

CONCLUSION

Based on the foregoing the State respectfully requests this Court to (1) stay resolution of this appeal until the United States Supreme Court disposes of Thompson, supra or (2) to follow the approach taken by Maryland and other states and hold that execution of a person four months shy of his eighteenth birthday does not constitute cruel and unusual punishment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by hand delivery to David A. Davis, Assistant Public Defender, P.O. Box 671, Tallahassee, Florida, 32302 on this the 26th day of March, 1987.

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