IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,003

JEROME M. ALLEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY, FLORIDA

AMICUS CURIAE BRIEF OF THE FIFTH JUDICIAL CIRCUIT PUBLIC DEFENDER

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PRELIMINARY STATEMENT

Jerome Allen was 15-years-old at the time of the offense alleged by the prosecution. He was nevertheless sentenced to death. He is the only child under the age of sixteen against whom a death sentence has been imposed in Florida in the last fifteen (15) years. See Initial Brief of Appellant, Allen v. State, Case No. 79,003, p. 50. No execution of such a child has occurred in Florida in over 50 years. Id. at 49. Of the 722 (+) Florida death sentences imposed in the post-Furman v. Georgia, 408 U.S. 238 (1972), era, no case has been upheld by the Florida Supreme Court in which the death penalty was imposed on an offender younger than 16. See Argument, section E, infra. Among the issues raised by Jerome Allen's appeal to this Court are questions addressing the constitutionality of the imposition of capital punishment in the cases of juvenile offenders.

As related by the statement of interest of amicus curiae, infra, the question of the constitutionality of capital punishment in the cases of juvenile offenders is one of substantial importance to the Public Defender for the Fifth Judicial Circuit of Florida due to the Fifth Circuit State Attorney's recurring efforts to have the death penalty imposed on juveniles. The question has been litigated on several occasions by the Amicus Curiae Defender's Office in the Courts of the Fifth Circuit because of the State Attorney's position (See Attachments to Amicus Curiae Brief). In 1992, a hearing on the issue was conducted before Fifth Judicial Circuit Judge Thomas Sawaya in the case of Timothy Cookston, a 15-

year-old against whom the prosecution sought the death penalty. After the hearing, Judge Sawaya prepared a thorough order addressing the issue. Judge Sawaya ruled that under Thompson v. Oklahoma and its progeny, the death penalty was not an available punishment for juvenile offenders under the Florida capital sentencing scheme. Judge Sawaya's order is reported as State v. Cookston, 1 FLW Supp. 8 (Fla. Cir. Ct., May 26, 1992), and a copy is also appended hereto.

The State sought a writ of prohibition in this Court. This Court issued a summary order unanimously denying the State's petition. State v. Sawaya/Cookston, Case No. 80,023 (Fla. Nov. 5, 1992). The hearing transcript and trial court documents and exhibits in Cookston were forwarded to this Court in conjunction with that proceeding and are included in this Court's records. Since the Cookston hearing transcript, documentary submissions and Circuit Court order include facts and analysis relevant to the issue now before the Court, they are relied upon herein. Appellant Allen has also relied upon Judge Sawaya's order in his brief. See Brief of Appellant at 42-43.

This Amicus Curiae Brief discusses the invalidity of capital punishment in the cases of juvenile offenders under the United States and Florida Constitutions and seeks to aid the Court in resolving this important issue. Given the ruling in Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687 (1988), and particularly in light of the opinion of Justice O'Connor, who comprised the fifth vote in Thompson, amicus curiae counsel respectfully submit that

imposition of the death penalty on Jerome Allen and other juvenile offenders under Florida's capital punishment scheme cannot be squared with the eighth amendment. Moreover, given Jerome Allen's status as the only juvenile younger than 16 on Florida's death row, the fact that no death sentence has been imposed on such a child in Florida in over 15 years, and the fact that of the 722 (+) death sentences imposed in Florida post-Furman, none has been affirmed by this Court in the case of a juvenile under 16, this amicus curiae brief submits that Jerome Allen's death sentence violates the prohibition on "cruel or unusual" punishments embodied in the Florida Constitution.

The transcript of the May 20, 1992, hearing in State v. Cookston (during which facts relating to the question of the constitutionality of the execution of juveniles were addressed) is cited herein as "Cookston Tr. ___." All other references in this amicus brief are self-explanatory or are otherwise explained.

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INTRODUCTION

- "Seven hundred twenty-two (722) people have been sentenced to death in Florida" since the enactment of Florida's post-Furman death penalty statute (Cookston May 20, 1992, Hearing Trans., p. 11) (subsequently cited herein as "Cookston Tr.").[1] No case has been affirmed by the Florida Supreme Court involving the imposition of the death penalty on a defendant who was younger than sixteen at the time of the offense -- "There is not one out of those seven hundred twenty-two" (Cookston Tr. 11; see also id. at 29). "The State ... concedes that no case has ever been upheld or affirmed by the Florida Supreme Court [post-Furman] which imposes the death penalty on a child below the age of 16." State v. Cookston, 1 FLW Supp. 8, 9 (Fla. Cir. Ct. May 20, 1992).

- "BE IT RESOLVED, That the American Bar Association opposes ... the imposition of capital punishment" in the cases of offenders who were minors at the time of the alleged crime. (American Bar Association, Section of Criminal Justice, Report of the House of Delegates, Aug., 1983).

- "Our task today ... is to decide the case before us; we do so by concluding that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense." Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 2700 (1988).[2]

- "[T]he United States Supreme Court has released its opinion in Thompson ... holding that the death penalty would not be applied to a murderer who was fifteen years

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[1] See Preliminary Statement, supra, and statement of interest, infra, discussing the relevancy to the current proceeding of the facts developed during the litigation of State v. Cookston.

[2] Justice Kennedy did not participate in Thompson. Four of the eight member Thompson Court joined the lead opinion on the issue of whether the death penalty could be imposed on a child under sixteen. Justice O'Connor separately concurred, adding the fifth vote. Three members of the Court dissented. There is no question about the precedential nature of Thompson. See Cookston, 1 FLW Supp. at 9 ("Thompson clearly is valid constitutional precedent which cannot be disregarded or ignored..."). This Court recognized the precedential nature of Thompson in LeCroy v. State, 533 So.2d 750, 757 (Fla. 1988) -- discussed in subsequent sections of this amicus curiae brief.

old when he committed the offense." LeCroy v. State, 533 So.2d 750, 757 (Fla. 1988).

- "The decision of the United States Supreme Court in Thompson v. Oklahoma, 108 S. Ct. 2687 (1988), is valid constitutional precedent which this court cannot ignore or disregard. It specifically holds that imposition of the death penalty on children under the age of 16 is unconstitutional under the cruel and unusual punishment clause of the Eighth Amendment. Since Mr. Cookston was 15 years old at the time he allegedly committed the capital offense, this pre-trial order which prohibits imposition of the death penalty in this case does not infringe upon the legitimate authority of the State Attorney to decide the appropriate sentence to seek if Mr. Cookston is ultimately convicted...." State v. Cookston, 1 FLW Supp. at 9.

- "The statutory waiver provisions found in Chapter 39 of the Florida Statutes may not be used to validate an unconstitutional sentence of death when it is clear that the legislature never specifically addressed the issue of capital punishment on children under the age of 16 in this or any other statutory scheme." Cookston, 1 FLW Supp. at 9.

The United States and Florida Constitutions prohibit the imposition of "cruel" and "unusual" punishments. See Tillman v. State, 591 So. 2d 167, 169 and n.2 (1991) (Florida's Constitution provides additional protections than the eighth amendment and precludes punishments which are cruel "or" unusual.) In reviewing such issues under the Eighth Amendment, the United States Supreme Court has sought to give effect to "the evolving standards of decency that mark the progress of a maturing society." Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 2691 (1988) (citation omitted); Gregg v. Georgia, 428 U.S. 153, 173 (1976). The Court has accordingly found that the eight amendment prohibits capital punishment in certain cases where such punishments would be

excessive or disproportionate (see Argument, section A, infra, discussing cases in which these principles have been applied).

This Court has also applied such principles, ruling in various instances that the death penalty was an excessive and disproportionate punishment. See e.g., Scott v. Dugger, 604 So. 2d 465, 468-69 (Fla. 1992); Huckaby v. State, 343 So. 2d 29, 33 (Fla. 1977); Mines v. State, 390 So. 2d 332, 334 (Fla. 1980); Jones v. State, 332 So. 2d 615, 619 (Fla. 1976); Miller v. State, 373 So. 2d 882 (Fla. 1979); Thompson v. State, 456 So. 2d 444 (Fla. 1984). Members of this Court have explained that a death sentence is improper under the Florida Constitution when the defendant functions at the level of a child, see Woods v. State, 531 So. 2d 79, 83 (Fla. 1988) (Shaw, Barkett, and Kogan, JJ.) ("The execution of such a person ... violates article I, section 17 of the Florida Constitution."), while this Court unanimously concurred in ruling the death penalty disproportionate in an instance when, because of his impairments, the defendant's functioning was child-like. See Fitzpatrick v. State, 527 So.2d 809, 811-12 (Fla. 1988). See also Argument, section E, infra (discussing precedent from the Florida Supreme Court).

Jerome Allen's case is not one where the defendant merely functions at the level of a child -- Jerome Allen is a child. As the statistics summarized by Appellant Allen's Initial Brief (pp. 47-52) relate, Jerome Allen is now the only exception to the rule that, in practice, there is no death penalty in Florida for juveniles under 16 -- no such child has been sentenced to death in

Florida in over 15 years; no death sentence "has ever been upheld or affirmed by the Florida Supreme Court [post-Furman] which imposes the death penalty on a child below the age of 16," Cookston, 1 FLW Supp. at 9; and Jerome Allen has no contemporaries on Florida's death row. His unique sentence is excessive and disproportionate under any definition of those terms.

The United States Supreme Court's analysis of eighth amendment proportionality principles in Thompson v. Oklahoma resulted in the Court's declaration that the Constitution is violated by the imposition of capital punishment on offenders who were under the age of sixteen at the time of the offense. No decision issued by the United States Supreme Court or any State Supreme Court after the issuance of Thompson has challenged the validity of the Thompson holding. Indeed, as Judge Sawaya cogently noted, judicial decisions addressing the issue after the 1988 ruling in Thompson uniformly hold that Thompson controls resolution. Cookston, 1 FLW Supp. at 9. The trial court's ruling in Jerome Allen's case is conspicuously inconsistent with this precedent.

INTEREST OF AMICUS CURIAE
FIFTH JUDICIAL CIRCUIT PUBLIC DEFENDER

The Fifth Judicial Circuit Public Defender's Office is responsible for the representation of indigent clients in criminal cases in five Central Florida Counties -- Citrus, Hernando, Lake, Marion and Sumter. In fiscal year 1991-92 (the most recent period for which statistics are available), the Fifth Circuit Public Defender's Office represented 13,320 clients in felony cases. Forty-five (45) of these cases involved prosecutions on capital

charges. The Fifth Circuit Defender also represented 2,241 clients in juvenile proceedings. The Office defends most felony prosecutions of indigents in the Fifth Circuit, and is responsible for the majority of the Circuit's capital and juvenile cases.

A recurring issue in the Fifth Judicial Circuit has involved the Office of the State Attorney's attempts to secure the imposition of the death penalty in the cases of juvenile offenders. The Fifth Circuit Public Defender has opposed the State Attorney's position in these cases, arguing that the rulings in Thompson v. Oklahoma and its progeny, including this Court's ruling in LeCroy v. State, 533 So.2d 750 (Fla. 1989), do not countenance the imposition of capital punishment on offenders who were younger than sixteen (16) at the time of the alleged offense.

In 1992, as a result of the litigation of the issue in one of these cases, State v. Timothy Cookston, Fifth Judicial Circuit Judge Thomas Sawaya issued an order finding the death penalty inapplicable in the case of a 15-year-old alleged offender. Judge Sawaya's decision is reported as State v. Cookston, 1 FLW Supp. 8 (Fla. Cir. Ct., May 26, 1992). The State thereafter sought a writ of prohibition in this Court. This Court unanimously denied the writ. See State v. Sawaya/Cookston, No. 80,023 (Fla. Nov. 5, 1992) (denying application for writ of prohibition).

This Court did not issue a formal opinion in Cookston. The Fifth Circuit State Attorney's pursuit of the death penalty in the cases of juvenile alleged offenders will thus continue to be a recurring problem in the Fifth Judicial Circuit, despite Judge

Sawaya's thorough analysis. Allen v. State now presents this important constitutional issue to this Court.

Given the Fifth Judicial Circuit Public Defender's responsibilities in juvenile and capital cases and the recurring nature of the issue in the Fifth Circuit, the Fifth Circuit Defender has a substantial interest in the resolution which this Court may afford in the Allen case. Resolution is also of importance to the Fifth Circuit Public Defender due to the hardships to juvenile clients and their families caused by the State Attorney's pursuit of the death penalty in such cases and the wasteful expenditure of the Public Defender's limited resources on the litigation of something that cannot constitutionally be at issue in the cases of juvenile offenders -- the death penalty. See State v. Cookston, 1 FLW Supp. at 9 (discussing the constitutional invalidity of the death penalty in the cases of juveniles under Florida's capital sentencing scheme).

The Fifth Circuit Defender's amicus curiae brief discusses the inapplicability of the death penalty in the cases of juvenile offenders under Florida's capital sentencing scheme, particularly in light of the precepts of the Florida and United States Constitutions. This amicus brief seeks to aid the Court in resolving the significant constitutional issue which the Allen case presents.[3]

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[3] The Appellant and Appellee have consented to the submission of this amicus brief and the appearance in this case of the undersigned amicus curiae. See Fla. R. App. P. 9.370.

ARGUMENT

A. Background

While the eighth amendment's ban on cruel and unusual punishments does not preclude the states from pursuing the death penalty in certain cases, see Gregg v. Georgia, 428 U.S. 153, 187 (1976), the eighth amendment does prohibit the imposition of death sentences for certain crimes or groups of individuals. The United States Supreme Court has found the eighth amendment's prohibition on the imposition of capital punishment applicable to cases where such a punishment would be disproportionate or excessive. In reviewing such issues, the Court has attempted to give effect to "the evolving standards of decency that mark the progress of a maturing society". Gregg, 428 U.S. at 173; Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 2691 (1988).

This fundamental respect for the "evolving standards of decency" embodied in the eighth amendment has led the Supreme Court to conclude that the death penalty is disproportionate in cases of rape, robbery, kidnapping, or any other case in which the life of the victim has not been taken. See Coker v. Georgia, 433 U.S. 584 (1977); Eberhart v. Georgia, 433 U.S. 917 (1977); Hooks v Georgia, 433 U.S. 917 (1977).

Similarly, these eighth amendment proportionality principles have resulted in the ban on capital punishment in the cases of certain classes of defendants. Thus, in cases where the defendant did not intend or attempt to kill, Enmund v. Florida, 458 U.S. 782, 797 (1982), in cases where the defendant is insane, Ford v.

Wainwright, 477 U.S. 399 (1986), and in cases where the defendant does not have the highly culpable mental state necessary for the imposition of capital punishment, Tison v. Arizona, 481 U.S. 137 (1987), the death penalty is prohibited as disproportionate and excessive. These latter types of cases look to the status of the offender, as opposed to the type of offense, in considering whether the death penalty can be imposed.

Children are a group of individuals for whom the death penalty is prohibited. Thompson v. Oklahoma. Because Jerome Allen is in this group, a sentence of death in his case is prohibited under the eighth and fourteenth amendments to the United States Constitution. Such a penalty in the case of Jerome Allen would constitute a cruel, unusual, excessive, and disproportionate punishment.

B. The Eighth Amendment Analysis: Thompson v. Oklahoma

The Thompson court (see n.2, supra) began its analysis of whether the death penalty can be imposed constitutionally in the case of a 15-year-old by noting that the "evolving standards of decency that mark the progress of a maturing society" would guide the Court's resolution. Thompson, 108 S.Ct. at 2692. The Court explained that every state which had enacted a minimum age for imposition of capital punishment in its death penalty legislation had established an age of at least sixteen (16). Thompson, 108 S.Ct. at 2695-96. The Court also cited examples such as the facts that "[i]n no State may a 15-year-old vote or serve on a jury," and that "all States have enacted legislation designating the maximum age for juvenile court jurisdiction at no less than 16," to support

the conclusion that "all of this legislation is consistent with the experience of mankind, as well as the long history of our law, that the normal 15-year-old is not prepared to assume the full responsibilities of an adult." Id. at 2693.

Noting that history showed a remarkable infrequency of cases involving the imposition of capital punishment on juvenile offenders, the Court explained, "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 is now generally abhorrent to the conscience of the community," Thompson, 108 S.Ct. at 2697, while the rare youthful offender who has been subjected to capital punishment has received a sentence which is "cruel and unusual in the same way that being struck by lightning is cruel and unusual." Id. at 2697-98 (citation omitted). Moreover,

> [t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.

Id. at 2696. The Court then noted, "Thus, the American Bar Association and American Law Institute have formally expressed their opposition to the death penalty for juveniles," cited the international abolition of the death penalty in the cases of juvenile offenders, and further explained that "[j]uvenile executions [were] also prohibited in the Soviet Union." Thompson, 108 S.Ct. at 2696.

With this background, the Thompson court directly examined whether, under the eighth amendment, "the juvenile's culpability should be measured by the same standards as that of an adult" and "whether the application of the death penalty to this class of offenders 'measurably contributes' to the societal purposes that are served by the death penalty." Thompson, 108 S.Ct. at 2698, citing Enmund v. Florida, 458 U.S. 782, 798 (1982). The Court discussed the "broad agreement ... that adolescents as a class are less mature and responsible than adults," Thompson, 108 S.Ct. at 2698, and the fact that the Supreme Court itself has consistently held that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult since "inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is more apt to be motivated by mere emotion or peer pressure than is an adult." Id. at 2698-99, discussing Bellotti v. Baird, 443 U.S. 622, 635 (1979), and Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982).

"The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." Thompson, 108 S.Ct. at 2699. Because of "the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children," the conclusion that the death penalty may be appropriate in certain instances "as an expression of society's moral outrage," is "simply

inapplicable to the execution of a 15-year-old offender." Id. at 2699 (emphasis added).

Neither is the deterrence rationale acceptable: the vast majority of homicide cases involve individuals older than sixteen, while "it is fanciful to believe that [a juvenile offender] would be deterred by the knowledge that a small number of persons his age have been executed ..." Id. at 2700.

> In short, we are not persuaded that the imposition of the death penalty for offenses committed by persons under 16 years of age has made, or can be expected to make, any measurable contribution to the goals that capital punishment is intended to achieve. It is, therefore, "nothing more than the purposeless and needless imposition of pain and suffering," Coker v. Georgia, 433 U.S. [584, 592 (1977)], and thus an unconstitutional punishment.

Thompson, 108 S.Ct. at 2700 (footnote omitted).

With her concurring opinion, Justice O'Connor provided the fifth vote (See n.2, supra). Justice O'Connor cited the existence of a national consensus prohibiting the imposition of capital punishment on offenders younger than sixteen, noting that each of the state legislatures which had addressed the issue had set the minimum age for capital punishment at sixteen or above. Thompson, 108 S.Ct. at 2706-07 (O'Connor, J.). "Where such a large majority of the state legislatures have unambiguously outlawed capital punishment for 15-year-olds, and where no legislature in this country has affirmatively and unequivocally endorsed such a practice, strong counterevidence would be required to persuade me that a national consensus against this practice does not exist." Id. (emphasis added).

Justice O'Connor discussed policy, sentencing statistics, and state and international practices in her opinion, but in the end returned to her legislative theme. She found that because statutory schemes such as the one in Thompson -- a statutory scheme identical in all relevant respects to the Florida scheme at issue in this case (see n.4, infra) -- failed to set a minimum age for the imposition of capital punishment after the juvenile was removed to adult court, the statutes failed to reflect the special care and deliberation which the eighth amendment requires in decisions leading to the death penalty, and a juvenile therefore could not be subjected to capital punishment under such statutes.[4]

Justice O'Connor explained that the eighth amendment could not tolerate the risk that, in enacting a statute authorizing capital punishment without setting any minimum age (cf. Fla. Stat. section 921.141), and in separately providing that juvenile defendants may be treated as adults in some circumstances (cf. Fla. Stat. section

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[4] As discussed subsequently in this submission and as Judge Sawaya carefully explained in his Cookston order, 1 FLW Supp. at 9, the "waiver" to adult court statute relied on by the State and trial court in Jerome Allen's case (Fla. Stat. section 39.02) is the same as the state removal statute at issue in Thompson. Compare Thompson, 108 S.Ct. at 2692 (lead opinion), and at 2710-11 (O'Connor, J., concurring), with Fla. Stat. section 39.02. Indeed, the Supreme Court specifically listed Florida as an example of a state with a removal statute which nevertheless had not established a statutory minimum age for the imposition of capital punishment. See Thompson, 108 S.Ct. at 2695 n.26 (listing, inter alia, Florida and Oklahoma); id. at 2694 n.24 (discussing such removal statutes); id. at 2710-11 (O'Connor, J.) (discussing the deficiencies in such state systems).

39.02), these state legislatures (e.g., Oklahoma's and Florida's,[5]) either failed to realize that their actions would render 15-year-olds death eligible or did not give the question the serious consideration and care that would have been reflected in the explicit choice of a particular minimum age. Thompson, 108 S.Ct. at 2710-11.

> The case before us today raises some of the same concerns that have led us to erect barriers to the imposition of capital punishment in other contexts. Oklahoma has enacted a statute that authorizes capital punishment for murder, without setting any minimum age at which the commission of murder may lead to the imposition of that penalty. The State has also, but quite separately, provided that 15-year-old murder defendants may be treated as adults in some circumstances. Because it proceeded in this manner, there is a considerable risk that the Oklahoma legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death-eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death-eligibility. Were it clear that no national consensus forbids the imposition of capital punishment for crimes committed before the age of 16, the implicit nature of the Oklahoma legislature's decision would not be constitutionally problematic. In the peculiar circumstances we face today, however, the Oklahoma statutes have presented this Court with a result that is of very dubious constitutionality, and they have done so without the earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty. In this unique situation, I am prepared to conclude that petitioner and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution.

Thompson, 108 S.Ct. at 2710-11 (O'Connor, J.).

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[5] And Louisiana's, see State v. Stone, 535 So.2d 362 (La. 1988) (discussed infra); Indiana's, see Cooper v. State, 540 N.E.2d 1216 (Ind. 1989) (discussed infra); and Alabama's, see Flowers v. State, 586 So.2d 978 (Ala. Ct. Crim. Apps. 1991) (discussed infra).

Thus, because the available evidence indicated that there exists a national consensus against capital punishment for crimes committed before the offender was sixteen, Justice O'Connor concluded that Mr. Thompson and others whose crimes were committed before that age could not be subjected to the death penalty under statutes which (like Oklahoma's and Florida's) specified no minimum age for the imposition of such a penalty. Id. at 2710-11. The State and trial court's reliance on such a statute in Allen (See Initial Brief of Appellant, p. 43, discussing trial court's reliance on Fla. Stat. section 39.02) flies in the face of Justice O'Connor's analysis. As Circuit Judge Sawaya summarized: "The state uses this statutory scheme [of Fla. Stat. section 39.02] to attempt to legitimize imposition of the death penalty in this case arguing that capital punishment is statutorily permissible for children over the age of 14.... But a similar statutory scheme brought the defendant in Thompson v. Oklahoma ... into adult court where the sentence of death was ultimately imposed. The [Supreme] Court in Thompson held that the sentence of death imposed under Oklahoma's juvenile waiver statute was unconstitutional.... Justice O'Connor in her concurring opinion addressed this issue when she recognized that 'the State [of Oklahoma] has also, but quite separately, provided that 15-year-old murder defendants may be treated as adults in some circumstances.' Thompson, 108 S.Ct. at 2711. This is what she ultimately concluded about the imposition of the death penalty on children under such statutory schemes: 'The Oklahoma statutes have presented this Court with a result that is

of very dubious constitutionality, and they have done so without the earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty.' Id." Cookston, 1 FLW Supp. at 9.

C. Statutory Insufficiency

William Thompson was fifteen years old at the time of the offense. Jerome Allen was also fifteen years old at the time of the offense. There is no question that death is an unconstitutional penalty for Jerome Allen under the lead opinion in Thompson. And there is no question that death is an unconstitutional penalty for Jerome Allen under the analysis of Justice O'Connor's concurring opinion.

Justice O'Connor's concurrence in Thompson was based on her conclusion that "there is no indication that any legislative body in this country has rendered a considered judgment approving the imposition of capital punishment on juveniles who were below the age of 16 at the time of the offense." Thompson v. Oklahoma, 108 S.Ct. at 2708 (emphasis added). In William Thompson's case, the defendant was certified to stand trial and be treated as an adult under a state statute that allowed 15-year-olds to be so certified. Thompson v. Oklahoma, 108 S.Ct. at 2690. The Oklahoma Court of Criminal Appeals affirmed William Thompson's death sentence with a sweeping assertion akin to the one presented by the State of Florida in Cookston and on which the State and trial court relied in Allen: "once a minor 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. 1986). Capital punishment was included in these "adult punishments." Oklahoma, however, like Florida, had expressly stated no minimum age for the death penalty in its statutes. Thompson v. Oklahoma, 108 S.Ct. at 2695 n.26 (listing the Florida and Oklahoma statutes as examples of statutes that failed to specify a minimum age). Every state which has stated a minimum age for imposition of capital punishment in its statutes, on the other hand, has expressly specified sixteen (16) as that minimum age. Thompson, 108 S.Ct. at 2696 n.30.

As Justice O'Connor's concurrence explained, the fundamental flaw in death penalty statutes such as those of Oklahoma and Florida is their failure to manifest the careful consideration which the eighth amendment requires in decisions involving the death penalty. The Florida and Oklahoma "removal/waiver"(Fla. Stat. section 39.02) and death penalty (Fla. Stat. section 921.141) statutes share this fundamental flaw. Thompson, 108 S.Ct. at 2695 n.26 (listing the Florida and Oklahoma statutes). The pursuit of capital punishment in the case of a 15-year-old under the Florida statutory scheme is as unconstitutional as the pursuit of capital punishment was under the similar scheme involved in Thompson. See Cookston, 1 FLW Supp. at 9 ("Since Florida's legislation is similar to Oklahoma's, a death sentence imposed on a child under 16 pursuant to the Florida statutory scheme would likewise be held unconstitutional.")

The Thompson ruling directly affects each of the states, such as Florida, listed in footnote 26 of the Thompson opinion. Id.,

108 S.Ct. at 2695 n.26. No Florida statute sets the requisite minimum age for imposition of capital punishment; no efforts to pursue the death penalty in states involving statutes which fail to set a minimum age have been found constitutional after Thompson (see discussion infra); and no state which has set a minimum age for death eligibility has set that age at under sixteen. See Thompson, 108 S.Ct. at 2696 n.30. Justice O'Connor specifically held that a minimum age cannot be set "implicitly" on the basis of the ages stated in removal statutes such as Fla. Stat. section 39.02. Thompson, 108 S.Ct. at 2710-11; see also Cookston, 1 FLW Supp. at 9. Oklahoma also had a minimum age for such removal to adult court. Thompson, 108 S.Ct. at 2710-11 (O'Connor, J.). Any argument premised on the "implicit" setting of a minimum age because of the existence of a minimum age for removal in Fla. Stat. section 39.02 fails under Thompson. See Cookston, 1 FLW Supp. at 9.

The lead opinion in Thompson, precluding the death penalty under the eighth amendment in the cases of children younger than sixteen, unquestionably applies to Jerome Allen. Justice O'Connor's concurring opinion also applies to Jerome Allen and other similarly-situated juveniles -- it applies to "petitioner [William Thompson] and others who were below the age of 16 at the time of their offense...." Thompson, 108 S.Ct. at 2711 (O'Connor, J.) (emphasis added). Children "may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution." Id. (O'Connor, J.)

Indeed, each of the state appellate courts which have addressed the issue after the issuance of Thompson have found the imposition of capital punishment unconstitutional in the cases of juveniles in light of the ruling in Thompson. See Cookston, 1 FLW Supp. at 9 ("Each of these courts held, based on Thompson, that the death penalty imposed on 15 year old children under such juvenile waiver statutes is unconstitutional.") Thus, in Flowers v. State, 586 So.2d 978 (Ala. Ct. Crim. Apps. 1991), the Alabama court ruled that the death penalty was unconstitutional in the case of a 15-year-old under the ruling in Thompson. Alabama, like Florida and Oklahoma, is listed in footnote 26 of the Thompson opinion (108 S.Ct. at 2695 n.26) as a state which specified no minimum age for the imposition of capital punishment although, again like Florida and Oklahoma, Alabama's statutes allow a child over 14 to be removed to adult court and treated as an adult. See Flowers, 586 So.2d at 989; see also Thompson, 108 S.Ct. at 2694 n.24 (discussing such removal statutes).

In State v. Stone, 535 So.2d 362 (La. 1988), the Louisiana Supreme Court found that the death penalty could not be pursued constitutionally in the case of an offender who was 15 years old at the time of the offense because of the ruling in Thompson. Louisiana, like Florida, Oklahoma and Alabama, is one of the states listed in footnote 26 of the Thompson opinion (108 S.Ct. at 2695 n.26) as providing no express minimum age for the imposition of capital punishment although, like Florida, Oklahoma, and Alabama, Louisiana has a statute establishing a minimum age (fourteen) for

removal of a juvenile to adult court and treatment of the juvenile as an adult.

In Cooper v. State, 540 N.E.2d 1216 (Ind. 1989), the Indiana Supreme Court also ruled that under Thompson the death penalty could not be pursued constitutionally in the case of a 15-year-old. Indiana, like Florida, Oklahoma, Alabama, and Louisiana, was also listed in footnote 26 of the Thompson opinion (108 S.Ct. at 2695 n.26) as a state which had not established a statutory minimum age for the imposition of capital punishment although, again like Florida, Oklahoma, Alabama and Louisiana, Indiana had enacted a "removal" statute governing the transfer of juveniles (fourteen-years-old or older) to adult court. The Cooper court summarized, "The Indiana death penalty statute ... did not itself contain a minimum age. Such a statute, Justice O'Connor said, violates the eighth amendment. We are persuaded that Indiana's statute fits under Thompson v. Oklahoma and violates the eighth amendment of the United States Constitution." Cooper, 540 N.E.2d at 1221.

As Circuit Judge Sawaya succinctly noted, "The statutory waiver provisions found in Chapter 39 of the Florida Statutes may not be used to validate an unconstitutional sentence of death when it is clear that the legislature never specifically addressed the issue of capital punishment on children under the age of 16 in this or any other statutory scheme." Cookston, 1 FLW Supp. at 9. And as Judge Sawaya also noted, every court which has addressed the issue after Thompson has held, "based on Thompson, that the death

penalty imposed on 15 year old children under such waiver [to adult court] statutes is unconstitutional." Cookston, 1 FLW Supp. at 9.

The Florida removal statute (Fla. Stat. section 39.02) which allows a child over the age of 14 to be certified for trial as an adult is the same as the statute upon which the State of Oklahoma relied in Thompson and is the same as the "removal" statutes involved in Flowers (Alabama), Stone (Louisiana), and Cooper (Indiana). Florida's statutes, like those of others, provide no minimum age for the imposition of capital punishment. Because Florida has not statutorily established a minimum age "at which the commission of a capital crime can lead to the offender's execution" the "earmarks of careful consideration that [the Supreme Court has] required for ... decision[s] leading to the death penalty" are lacking in the Florida scheme. Thompson, 108 S.Ct. at 2711 (O'Connor, J.). Jerome Allen's death sentence, accordingly, is unlawful under the eighth amendment. Id. at 2711 (O'Connor, J.)

D. The Death Penalty Imposed on Jerome Allen is Invalid Under The Eighth Amendment

> [A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined that adults. 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, 115-16 (1982) (emphasis added), quoted in Thompson, 108 S.Ct. at 2698.

The eighth and fourteenth amendment standards applicable to Jerome Allen's case are embodied in the Thompson opinion. Capital punishment in the case of Jerome Allen, who was fifteen (15) years

old at the time of the alleged offense, would be an excessive, disproportionate, and unconstitutional penalty. "[T]he Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense." Thompson, 108 S.Ct. at 2700 (lead opinion).

Jerome Allen is also not subject to a capital punishment under the concurring opinion of Justice O'Connor. Like the state statutes at issue in Flowers v. State, 586 So.2d 978 (Ala. Ct. Crim. Apps. 1991), Cooper v. State, 540 N.E.2d 1216 (Ind. 1989), State v. Stone, 535 So.2d 362 (La. 1988) (discussed in section C, supra), and Thompson itself, neither Florida's death penalty statute (Fla.Stat. section 921.141), nor any other relevant Florida statute (e.g., Fla. Stat. section 39.02, the "removal" statute relied on by the State and trial court in the Allen case), meets the standard discussed by Justice O'Connor. See Thompson, 108 S.Ct. at 2695 n.26 (listing Florida, Oklahoma, Alabama, Indiana, and Louisiana, inter alia, as states which have established no statutory minimum age for the imposition of capital punishment). As Justice O'Connor put it, death could not be imposed upon one under sixteen "under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution". Thompson, 108 S.Ct. at 2711. "[T]he earmarks of careful [legislative] consideration that [the Supreme Court has] required for decisions leading to the death penalty", id., are as lacking in the relevant Florida statutes as they were in the Oklahoma statute at issue in Thompson.

No Florida statute sets a minimum age below which death is an improper penalty and thus no Florida statute reflects the "careful consideration" required of death penalty legislation under the eighth amendment. Id. at 2710-11 (O'Connor, J.).

Florida's statutes not only do not reflect a legislative consensus approving the imposition of capital punishment on a child such as Jerome Allen, they reflect a legislative consensus against it.[6] In general, Florida's statutory enactments speak to a legislative consensus that children should be treated differently than adults, should be protected, and should be afforded privileges commensurate with their youthful age. The Thompson court itself discussed the separate treatment and unique protections and privileges which children are afforded under our jurisprudence:

> Examples of this distinction [between minors and adults] abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation,....
>
> [A] minor is not eligible to vote, to sit on a jury, to marry without parental consent, or to purchase alcohol or cigarettes.
>
> * * *
>
> All of this legislation is consistent with the experience of mankind, that the normal 15-year-old is not prepared to assume the full responsibilities of an adult.

Thompson, 108 S.Ct. at 2692-93 (footnotes and citations omitted).

Like those national statutes, Florida's statutes highlight the invalidity of capital punishment in this case. Florida's laws

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[6] This legislative consensus was poignantly analyzed by the dissenting opinion of now Chief Justice Barkett in LeCroy v. State, 533 So.2d 750, 758-60 (Fla. 1988). The LeCroy majority opinion is discussed in subsequent portions of this section.

generally seek to protect children, treating them as "minors", and affording them different treatment from that afforded adults. These enactments speak to the general legislative understanding that children are not capable of exercising the judgment and maturity expected of adults. A fifteen (15) year old such as Jerome Allen cannot serve on a jury, Fla. Stat. section 40.01; vote, Fla. Stat. section 97.041; purchase alcoholic beverages, Fla. Stat. section 562.11; wager or bet, Fla. Stat. Sections 550.04 and 551.03; enter into a contract, Fla. Stat. sections 743.01 and 743.07; dispose of property by will, Fla. Stat. section 732.501; or hold judicial office. One whose maturity is expressly deemed legislatively and legally insufficient in all these settings at the same time cannot be considered mature enough to suffer society's ultimate punishment.

Florida has withheld those rights and privileges from children because of their immaturity and lack of judgment. For those same reasons, as the Thompson court concluded, a child such as Jerome Allen of necessity lacks the highly culpable mental state needed for the imposition of capital punishment. In these various settings the Legislature has already so found. Such a legislative consensus, if anything, disfavors the imposition of capital punishment in this case.

Under the construction of the majority and concurring opinions in Thompson it is therefore apparent that capital punishment in this case is an excessive, disproportionate, and invalid punishment. And there can be no dispute about the applicability of

Thompson in this case -- indeed, in LeCroy v. State, 533 So.2d 750 (Fla. 1988), this Court looked to Thompson as the precedent embodying the controlling rule of constitutional law:

> [T]he United States Supreme Court has released its opinion in Thompson ... holding that the death penalty would not be applied to a murderer who was fifteen years old when he committed the offense.

LeCroy, 533 So.2d 750, 757 (emphasis added), citing and discussing Thompson. Although the LeCroy court ultimately held that the death penalty was appropriate in that case under Thompson because Mr. LeCroy was seventeen (17) years old at the time of the offense, it relied on Thompson, applied Thompson, and also recognized that there is merit to the argument that "the [Florida] legislature has not consciously considered and decided that persons sixteen years of age and younger may be subject to the death penalty..." LeCroy, 533 So.2d at 757. If, as in the petition to this Court in Cookston, the Attorney General asserts in Allen that Thompson is not a case of precedential value, this Court has already addressed the State's argument. See LeCroy, 533 So.2d at 757.

Moreover, under a "most narrow grounds" analysis, see Marks v. United States, 430 U.S. 188, 193 (1977); Gregg v. Georgia, 428 U.S. 153, 169 (1976); Kennedy v. Dugger, 933 F.2d 905, 915-16 n.18 (11th Cir. 1991), there can be no serious debate that the concurring opinion of Justice O'Connor (which provided the fifth vote) establishes binding precedent -- the decisions in State v. Stone, 535 So.2d 362 (La. 1988); Cooper v. State, 540 N.E.2d 1216 (Ind. 1989), and Flowers v. State, 586 So.2d 978 (Ala. Ct. Crim. Apps. 1991) (discussed above), so noted, and the United States Supreme

Court itself so acknowledged in Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969 (1989) (relying on and distinguishing Thompson in ruling the death penalty not prohibited under the eighth amendment in the case of 17-year-olds); see also id., 492 U.S. at 381 (O'Connor, J., concurring) (noting the consistency between the rulings in Thompson, which prohibited the death penalty in the cases of 15-year-olds, and Stanford, which did not prohibit it in the case of a 17-year-old).[7] As the Flowers court explained, in light of Stanford, there is no question about the binding nature of Thompson, particularly Justice O'Connor's concurrence. Flowers, 586 So. 2d at 989-90.

"The State concedes that it cannot produce one decision by any court in this country which holds that Thompson is not binding precedent; or questions the validity of Thompson...; or has failed to apply it in appropriate cases." Cookston, 1 FLW Supp. at 9. Judge Sawaya further put to rest any assertion that the decision in Thompson should be ignored with the following analysis:

> The State argues that despite the holding in Thompson v. Oklahoma, 108 S. Ct. 2687 (1988), this court should not apply it as precedent in this particular case because Thompson is a plurality opinion. A plurality opinion is basically one in which less than a majority of the Court concurs in the reasoning used to reach the judgment or final result. In Thompson, the plurality opinion was joined in by Justices Stevens, Marshall,

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[7]Justice O'Connor's concurrence in Stanford also noted that Florida' statutes do not contemplate the death penalty for offenders under sixteen. Stanford, 492 U.S. at 381 (O'Connor, J.), citing Fla. Stat. section 39.02.

Blackmun, and Brennan.[8] Justice O'Connor concurred in the judgment but not the reasoning of the plurality opinion.

Plurality decisions by the Court are nothing new to constitutional jurisprudence. Many of the Court's landmark Eighth Amendment decision are plurality opinions which have undoubtedly established the law of the land and are followed and applied by courts in all state and federal jurisdictions. For example, Gregg v. Georgia, 96 S. Ct. 1909 (1976), held that the imposition of capital punishment in certain cases may be proper and that in the capital sentencing procedures, the defendant is entitled to individualized treatment. Gregg is a plurality opinion in which only three Justices (Stewart, Powell, Stevens) concurred while the plurality opinion in Thompson was the opinion of four Justices. No court has disregarded or ignored Gregg because it is a plurality opinion and there is no doubt that it is established Eighth Amendment law throughout the United States.

In Proffitt v. Florida, 96 S. Ct. 2960 (1976), another plurality opinion joined in by four Justices, the Court found Florida's capital sentencing scheme to be constitutional. No court has ever intimated that Florida's death penalty scheme is invalid because Proffitt is a plurality decision.

Similarly, the decision in Stanford v. Kentucky is a plurality opinion which holds that the death penalty may be imposed upon convicted murderers who were 16 and 17 years old at the time they committed the capital offense. It is inconceivable that the State would argue to any court that Stanford should be ignored simply because it is a plurality opinion and that children of

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[8] The footnote stated: "Justices Marshall and Brennan have retired and have been replaced by Justices Souter and Thomas. The State suggests that the present constituency of the Court with its 'collective conservative philosophy' toward constitutional jurisprudence will likely overturn Thompson in the future. But this court cannot and should not bend toward the view that trial courts review the decision of the Supreme Court and, following the perceived predilections of individual justices, supplant the salutary doctrine of stare decisis with a study of judicial personalities. Rather, this court must continue the accepted practice of observance of and compliance with the precedent established by the Court. If Thompson is overturned, it should be by the United States Supreme Court. If Thompson should be disregarded by the trial courts of this state, that directive should come from the Florida Supreme Court."

this age should not be subject to capital punishment in Florida.

There are many other examples of plurality decisions rendered by the Court which have been universally recognized as valid constitutional precedent.[9] The plurality opinion in Thompson is no exception. The State concedes that it cannot produce one decision by any court in this country which holds that Thompson is not binding precedent; or questions the validity of Thompson because it is a plurality decision; or has failed to apply it in appropriate cases. The State also concedes that no [post-Furman] case has ever been upheld or affirmed by the Florida Supreme Court which imposes the death penalty on a child below the age of 16. Thus Thompson clearly is valid constitutional precedent which cannot be disregarded or ignored by this court.

Cookston, 1 FLW Supp. at 8-9.

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[9] The footnote stated: "In Woodson v. North Carolina, 96 S. Ct. 2978 (1976), and Roberts v. Louisiana, 96 S. Ct. 3001 (1976), the Court held in both cases that mandatory death sentences are unconstitutional under the Eighth Amendment. The plurality opinion in each case was joined in by only three Justices. It is inconceivable that any court would intentionally disregard these two precedent setting cases simply because they are plurality decision.

In Gardner v. Florida, 97 S. Ct. 1197 (1977), the Court held that a defendant in a capital case has the rights of notice, confrontation, and rebuttal of evidence introduced by the State in capital sentencing proceedings. The plurality opinion was joined in by only three Justices. No court would now deprive a defendant of these rights simply because the Court rendered a plurality decision.

In Lockett v. Ohio, 98 S. Ct. 2954 (1978), the Court held that when restrictions are placed on consideration by the jury of mitigating evidence in a capital case, the defendant is deprived of an individualized and reliable sentencing determination. Despite the fact that this is a plurality opinion, the courts in all jurisdictions have applied it in capital cases and it has even been applied by the Court in a subsequent decision involving Florida's sentencing scheme. See Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).

Other examples of landmark, Eighth Amendment precedent rendered by the Court which are plurality decisions include Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), and Barclay v. Florida, 103 S. Ct. 3418 (1983)."

In short, Thompson is the precedent of constitutional law controlling Jerome Allen's case, as this Court's LeCroy opinion indicates, as the opinions of the state appellate courts in Flowers, Stone, and Cooper hold, and as Judge Sawaya's analysis in Cookston amply shows.

E. Capital Punishment In Jerome Allen's Case Is Prohibited By The Florida Constitution

More than seven hundred and twenty-two (722) individuals have been sentenced to death in Florida since the enactment of the post-Furman capital sentencing statute (Cookston Tr., p. 11). Not one death sentence has been upheld by this Court in a case involving a defendant who was under 16 at the time of the offense (Id.). "The State ... concedes that no case has ever been ... affirmed by the Florida Supreme Court [post-Furman] which imposes the death penalty on a child below the age of 16." Cookston, 1 FLW Supp. at 9.

Because of the recognition that death is "a unique punishment in its finality and in its total rejection of the possibility of rehabilitation," State v. Dixon, 283 So.2d 1, 7 (Fla. 1973), this Court has "examined the proportionality and appropriateness" of the death penalty in various settings, see Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988), and has ruled the death penalty an invalid punishment in cases where it would be disproportionate or excessive. See Scott v. Dugger, 604 So. 2d 465, 468-69 (Fla. 1992); Huckaby v. State, 343 So.2d 29, 33 (Fla. 1977); Mines v. State, 390 So.2d 332, 334 (Fla. 1980); Jones v. State, 332 So.2d 615, 619 (Fla. 1976); Miller v. State, 373 So.2d 882 (Fla. 1979); Thompson v. State, 456 So.2d 444 (Fla. 1984); Fitzpatrick, supra.

The United States Supreme Court held in Thompson v. Oklahoma that, under the eighth amendment, "the death penalty would not be applied to a murderer who was fifteen years old when he committed the offense." LeCroy, 533 So.2d at 757. Capital punishment in the case of a 15-year-old such as Jerome Allen is also disproportionate and excessive under the Florida Constitution. Article I, Section 17 of our Constitution accordingly provides an independent basis for the invalidation of Jerome Allen's sentence.

There can be no more telling testament to the excessiveness and disproportionality of capital punishment in any given case than the fact that of all the capital cases reviewed by this Court in the modern era, no affirmance of the death penalty has involved an offender similarly situated to the defendant now before the Court. To be sure, cases involving children which result in a death sentence have always been rare. See Initial Brief of Appellant, Allen v. State, pp. 47-52. Our juries and judges historically have found pursuit of the death penalty as intolerable in such cases as the United States Supreme Court found it to be in Thompson. And just as surely, the facts that no death sentence has been imposed on a Florida juvenile younger than 16 in over 15 years; that no such juvenile has been executed in Florida in over 50 years; and that Jerome Allen has not one contemporary among the 325 (+) individuals on Florida's death row[10] provide a meaningful and

[10] Initial Brief of Appellant, Allen v. State, pp. 47-52.

substantial testament to the excessiveness and disproportionality of capital punishment in this case.[11]

This Court has explained that Article I, Section 17 of the Florida Constitution prohibits "cruel" or "unusual" punishments. Tillman v. State, 591 So. 2d 167, 169 and n.2 (1991). There is absolutely no question about the unusual nature of the punishment imposed on Jerome Allen.

Its unnecessary nature also leaves little question about its cruelty. The death penalty in the cases of juveniles is a punishment which Florida's juries and judges have historically rejected as unnecessary. The historical and current consensus about the unnecessary nature of the punishment imposed on Jerome Allen demonstrates that "[i]t is ... nothing more than the purposeless and needless imposition of pain and suffering," Thompson, 108 S.Ct. at 2700, quoting Coker v. Georgia, 433 U.S. at 592, and that it is therefore cruel.

Members of this Court have explained that a death sentence is improper under the Florida Constitution when the defendant functions at the level of a child, see Woods v. State, 531 So. 2d 79, 83 (Shaw, Barkett, and Kogan, JJ.) ("The execution of such a person ... violates article I, section 17 of the Florida Constitution."). This Court unanimously concurred that

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[11] Under circumstances akin to those in Jerome Allen's case, the Indiana Supreme Court relied on the proportionality principles of the Indiana Constitution to find the death penalty excessive. Cooper v. State, 540 N.E.2d 1216, 1218-20 (Ind. 1989). This aspect of the Court's opinion was an alternative basis in support of the ruling vacating the death penalty. Cooper, 540 S.E.2d at 1220-21.

proportionality principles precluded the death penalty when, because of his impairments, a defendant so functioned. Fitzpatrick, 527 So.2d at 811-12. Jerome Allen not only functions at the level of a child, he is a child.

The death penalty in his case is foreclosed not only by the Eighth Amendment to the United States Constitution, Thompson v. Oklahoma, but also by Article I, § 17 of the Florida Constitution.

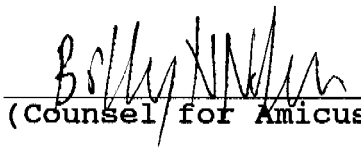
CONCLUSION

As Circuit Judge Sawaya stated, "The decision of the United States Supreme Court in Thompson v. Oklahoma, 108 S.Ct. 2687 (1988), is valid constitutional precedent which ... cannot [be] ignore[d] or disregard[ed]. It specifically holds that imposition of the death penalty on children under the age of 16 is unconstitutional under the cruel and unusual punishment clause of the Eighth Amendment." Cookston, 1 FLW Supp. at 9. Jerome Allen's death sentence violates not only the Eighth Amendment to the United States Constitution, but also the "Cruel or Unusual Punishments" Clause of Article 1, Section 17 of the Florida Constitution.

Although the death penalty in cases of juvenile offenders is remarkably rare, the question recurs in the Fifth Judicial Circuit of Florida due to the State Attorney's position that it should be imposed on juveniles. The Amicus Curiae Fifth Circuit Public Defender respectfully submits that there can be little reasonable debate about the validity of Appellant Allen's submissions on this

issue. Amicus Curiae accordingly prays that this Court rule the cruel, excessive, disproportionate and unusual punishment imposed on Jerome Allen invalid under the United States and Florida Constitutions.

Respectfully submitted,



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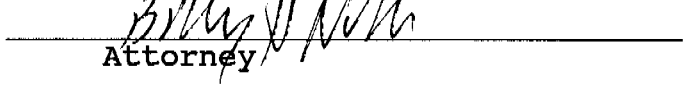
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Christopher Quarles, Assistant Public Defender, Counsel for Appellant, Office of the Public Defender, 112 Orange Ave., Suite A, Daytona Beach, FL 32114, and Kellie Nielan, Assistant Attorney General, Counsel for Appellee, Department of Legal Affairs, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, this 3rd day of February, 1993.



Attorney

Criminal law—Murder—Sentencing—Defendant's motion for pretrial order precluding death penalty granted—Imposition of death penalty on person under age 16 at time offense was committed is unconstitutional under cruel and unusual punishment clause of Eighth Amendment—Plurality opinion of United States Supreme Court so ruling is binding constitutional precedent—Pretrial order prohibiting imposition of death penalty does not infringe on legitimate authority of State Attorney to decide the appropriate sentence to seek where circumstances establish that death penalty would be unconstitutional

STATE OF FLORIDA, Plaintiff, vs. TIMOTHY BRIAN COOKSTON, Defendant. 5th Judicial Circuit, in and for Marion County, FL. Case No. 92-279-CF-A-W. May 26, 1992. Thomas D. Sawaya, Circuit Judge. Jim Phillips, Assistant State Attorney, Ocala, FL, for the Plaintiff. Trish Jenkins and Billy Nolas, Ocala, FL, for the Defendant.

ORDER PRECLUDING THE DEATH PENALTY

The defendant, Timothy Cookston, is charged with first-degree murder and the State of Florida has not, as yet, waived the death penalty. Therefore, he has applied to this court for a pre-trial order precluding a sentence of death in the event he is ultimately convicted. The pertinent facts necessary to a resolution of the issue of whether the death penalty is an appropriate sentence in this particular case are not complex. The defendant was indicted on February 5, 1992 for the murder of a human being alleged to have occurred on January 26, 1992. The defendant's date of birth is March 13, 1976 thus making him fifteen (15) years of age at the time of the alleged offense.

The defendant contends that imposition of the death penalty in this case would violate the constitutional prohibition against cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution. His argument is premised on *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) which specifically holds that "the Eighth and Fourteenth Amendments[1] prohibit the execution of a person who was under 16 years of age at the time of his or her offense." Id. at 2700. The State of Florida argues that *Thompson* is a plurality decision and is thus not binding precedent upon this or any other court. The State also contends that this court does not have the authority to enter the requested order because it would impermissibly infringe upon the discretionary authority which the State Attorney has to seek the death penalty in any given first-degree murder case. Additionally, the State takes the position that the legislature has enacted a statutory scheme in Chapter 39, Florida Statutes, which sets the age limit for application of the death penalty at fourteen (14) years of age.

A. *Thompson v. Oklahoma*: Imposition Of The Death Penalty On Children Under The Age Of 16 Is Unconstitutional.

When the Court considers constitutional issues involving application of the cruel and unusual punishment clause, it generally emphasizes that while the authors of the Eighth Amendment provided a nucleus around which a body of constitutional standards and principles may be developed, they did not establish or define the parameters of this proscription.[2] Thus this task has been left to future generations of constitutional jurists who must discern the meaning of the cruel and unusual punishment clause by considering the "evolving standards of decency that mark the progress of a maturing society." *Thompson*, 108 S. Ct. at 2691 quoting *Trop v. Dulles*, 78 S. Ct. 590, 598 (1958). See also *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989); *Weems v. United States*, 30 S. Ct. 544 (1910).

The Court has developed a multi-standard approach to constitutional analysis under the "evolving standards of decency" doctrine. This is particularly true in relation to death penalty cases where the Court has applied one or more standards to determine the validity of this punishment. Under the contemporary consensus approach the court analyzes empirical data such as legislation which adopts, restricts, or forbids application of the death penalty as well as jury sentencing behavior in returning penalty verdicts in cases where the state seeks the death penalty.[3] Through this analysis the court will determine whether contemporary society as a whole accepts or rejects this form of punishment.

Under another very broad category of constitutional analysis, the Court considers the individual views of the Justices concerning [illegible] penalty [illegible] the ongoing of cruel and unusual punishment. The independent methodology of the Justices includes proportionality analysis which is utilized to determine whether the penalty is disproportionate to the severity of the criminal offense committed,[4] and a utilitarian analysis which determines whether the penalty furthers the acceptable goals of punishment (in the case of capital punishment, those goals are retribution and deterrence).[5]

The majority in *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) utilized all of these approaches when it considered for the first time whether a sentence of death imposed on a 15 year old child constitutes cruel and unusual punishment.[6] The Court's analysis of all the factors and data involved in application of these various approaches led it to conclude that "it would offend civilized standards of decency to execute a person less than 16 years old at the time of his or her offense." 108 S. Ct. at 2696. Thus imposition of the death penalty on such persons would be cruel and unusual punishment prohibited by the Eighth Amendment.

The concurring opinion of Justice O'Connor conceded that a national consensus against imposition of the death penalty on children below the age of 16 probably does exist. But she was nevertheless reluctant to go so far as to establish such a consensus as a matter of constitutional law without further evidence. Justice O'Connor did conclude, however, that "petitioner and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution." *Thompson*, 108 S. Ct. at 2711. Florida, like Oklahoma, has not enacted a statute which specifically sets a minimum age under which the death penalty may not be imposed. Therefore, a sentence of death for Mr. Cookston would not only be unconstitutional under the standards applied in the plurality decision in *Thompson*, it would meet the same fate under the standard adopted by Justice O'Connor.

While the Court in *Thompson* established 16 as the age under which the death penalty may not be imposed, the Court subsequently decided *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989) (plurality opinion) wherein it held that children 16 years of age and over at the time they committed the capital offense could be subject to the death penalty. Thus it now appears, when the decisions in *Thompson* and *Stanford* are considered together, that the constitutional bright line above and below which the death may or may not be imposed is 16 years of age at the time the offense is committed.

B. Plurality Decisions Of The United States Supreme Court Do Constitute Valid Precedent Which Establish the Law of The Land.

The State argues that despite the holding in *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988), this court should not apply it as precedent in this particular case because *Thompson* is a plurality opinion. A plurality opinion is basically one in which less than a majority of the Court concurs in the reasoning used to reach the judgment or final result. In *Thompson*, the plurality opinion was joined in by Justices Stevens, Marshall, Blackmun, and Brennan.[7] Justice O'Connor concurred in the judgment but not the reasoning of the plurality opinion.

Plurality decisions by the Court are nothing new to constitutional jurisprudence. Many of the Court's landmark Eighth Amendment decisions are plurality opinions which have undoubtedly established the law of the land and are followed and applied by courts in all state and federal jurisdictions. For example, *Gregg v. Georgia*, 96 S. Ct. 2909 (1976), held that the imposition of capital punishment in certain cases may be proper and

that in the capital sentencing procedures, the defendant is entitled to individualized treatment. *Gregg* is a plurality opinion in which only three Justices (Stewart, Powell, Stevens) concurred while the plurality opinion in *Thompson* was the opinion of four Justices. No court has disregarded or ignored *Gregg* because it is a plurality opinion and there is no doubt that it is established Eighth Amendment law throughout the United States.

In *Proffitt v. Florida*, 96 S. Ct. 2960 (1976), another plurality opinion joined in by four Justices, the Court found Florida's capital sentencing scheme to be constitutional. No court has ever intimated that Florida's death penalty scheme is invalid because *Proffitt* is a plurality decision.

Similarly, the decision in *Stanford v. Kentucky* is a plurality opinion which holds that the death penalty may be imposed upon convicted murderers who were 16 and 17 years old at the time they committed the capital offense. It is inconceivable that the State would argue to any court that *Stanford* should be ignored simply because it is a plurality opinion and that children of this age should not be subject to capital punishment in Florida.

There are many other examples of plurality decisions rendered by the Court which have been universally recognized as valid constitutional precedent.[8] The plurality opinion in *Thompson* is no exception. The State concedes that it cannot produce one decision by any court in this country which holds that *Thompson* is not binding precedent; or questions the validity of *Thompson* because it is a plurality decision; or has failed to apply it in appropriate cases. The State also concedes that no case has ever been upheld or affirmed by the Florida Supreme Court which imposes the death penalty on a child below the age of 16. Thus *Thompson* clearly is valid constitutional precedent which cannot be disregarded or ignored by this court.

C. The Waiver Provisions Of Chapter 39, Florida Statutes.

Florida law does contain a statutory scheme which allows children over the age of 14 to be certified for trial as if the child were an adult. Section 39.022 (5)-(6), Fla. Stat. Specifically, the statute states that when the waiver procedure has been properly followed, "the child shall thereafter be subject to prosecution, trial, and sentencing as if the child were an adult." Section 39.022(5)(a), Fla. Stat. The state uses this statutory scheme to attempt to legitimize imposition of the death penalty in this case arguing that capital punishment is statutorily permissible for children over the age of 14.

But a similar statutory scheme brought the defendant in *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) into adult court where the sentence of death was ultimately imposed. The Court in *Thompson* held that the sentence of death imposed under Oklahoma's juvenile waiver statute was unconstitutional.

Justice O'Connor in her concurring opinion addressed this issue when she recognized that "the State has also, but quite separately, provided that 15-year-old murder defendants may be treated as adults in some circumstances." *Thompson*, 108 S. Ct. at 2711. This is what she ultimately concluded about the imposition of the death penalty on children under such statutory schemes: "The Oklahoma statutes have presented this Court with a result that is of very dubious constitutionality, and they have done so without the earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty." *Id.* Since Florida's legislation is similar to Oklahoma's, a death sentence imposed on a child under 16 pursuant to the Florida statutory scheme would likewise be held unconstitutional.

Courts in other states have applied *Thompson* in declaring unconstitutional death penalties imposed on children pursuant to statutory schemes similar to those enacted in Florida and Oklahoma. See e.g., *State v. Stone*, 535 So.2d 362 (La. 1988); *Cooper v. State*, 540 N. E. 2d 1216 (Ind 1989); *Flowers v. State*, 586 So. 2d 978 (Ala. Ct. Crim. App. 1991). Each of these courts held, based on *Thompson*, that the death penalty imposed on 15 year old children under such juvenile waiver statutes is unconstitutional.

The decision in *LeCroy v. State*, 533 So.2d 750 (Fla. 1988) does not offer anything of precedential value to death sentences imposed on children under 16. Although the court in *LeCroy* did legitimize application of Florida's waiver statute to a death sentence imposed on a child who was 17 years of age at the time he committed the capital offense, the court limited its decision to "the case at hand". *Id.* at 756. In doing so the court specifically stated that "whatever merit there may be in the argument that the legislature has not consciously considered and decided that persons sixteen years of age and younger may be subject to the death penalty, and that issue is not present here, it cannot be seriously argued that the legislature has not consciously decided that persons seventeen years of age may be punished as adults." *Id* at 757. Furthermore, the court in *Lecroy* recognized *Thompson* as "holding that the death penalty would not be applied to a murderer who was fifteen years old when he committed the offense." *Id.*

D. Validity Of A Pre-trial Order Prohibiting Imposition Of The Death Penalty In Cases Where Such A Sentence Would Be Unconstitutional.

Resolution of the issue of whether a pre-trial order prohibiting the death penalty in this case would impermissibly infringe upon the discretionary authority of the State Attorney is dependent upon resolution of the issue whether imposition of that penalty on a child less than 16 years of age is unconstitutional. If it is prohibited by the constitution, the State's argument may readily be dismissed because an unconstitutional penalty is no option and the State has no discretion in whether or not to seek it. Thus if a certain sentence is unconstitutional, the State will be prohibited from seeking that penalty at any stage of the proceedings and an order entered in the pre-trial stages containing such a prohibition would certainly be proper and valid. See *Brown v. State*, 521 So.2d 110 (Fla. 1988). Since this court has decided in accordance with *Thompson* that imposition of the death penalty on Mr. Cookston would be unconstitutional, the State's argument has no merit.

E. Conclusion.

The decision of the United States Supreme Court in *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) is valid constitutional precedent which this court cannot ignore or disregard. It specifically holds that imposition of the death penalty on children under the age of 16 is unconstitutional under the cruel and unusual punishment clause of the Eighth Amendment. Since Mr. Cookston was 15 years old at the time he allegedly committed the capital offense, this pre-trial order which prohibits imposition of the death penalty in this case does not infringe upon the legitimate authority of the State Attorney to decide the appropriate sentence to seek if Mr. Cookston is ultimately convicted. The statutory waiver provisions found in Chapter 39 of the Florida Statutes may not be used to validate an unconstitutional sentence of death when it is clear that the legislature never specifically addressed the issue of capital punishment on children under the age of 16 in this or any other statutory scheme.

Accordingly, it is

ORDERED AND ADJUDGED that the State of Florida is prohibited from seeking the death penalty in this case.

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[8]The Fourteenth Amendment does not specifically prohibit cruel and unusual punishment. It simply makes the Eighth Amendment and others applicable to the individual states. It appears to be a common practice of the Court to lump the two together when discussing constitutional rights and liberties. Nevertheless, it is clear that the Eighth amendment proscription against cruel and unusual punishment must be observed by each state as well as the Federal Government. See *Thompson v. Oklahoma*, 108 S. Ct 2687, n. 1 at 2690 (1988) citing *Robinson v. California*, 82 S. Ct. 1417 (1962).

[9]See *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989); *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988). In *Stanford*, the Court recognized that Eighth Amendment jurisprudence does allow for consideration of those forms of punishment which were considered cruel and unusual at the time the Bill of Rights

was adopted. This is often referred to as the historical method of interpreting the cruel and unusual punishment clause. The Court has, however, rejected the historical approach as the sole interpretive guide when it adopted a more expansive view of the clause in *Weems v. United States*, 30 S. Ct. 544 (1910) and *Trop v. Dulles*, 78 S. Ct. 590 (1958). This expanded view now encompasses both the historical method and the "evolving standards of decency." doctrine. *See Stanford, supra.*

But since the convicted murderers in *Stanford* were over the age of 16, the Court found that this standard would not apply because at the time the Bill of Rights was adopted, "the common law set the rebuttable presumption of incapacity to commit any felony at the age of 14, and theoretically permitted capital punishment to be imposed on anyone over the age of 7." *Stanford*, 109 S. Ct. at 1974.

[3]See *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989) (plurality opinion); *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (plurality opinion); *Gregg v. Georgia*, 96 S. Ct. 2909 (1976) (opinion of Stewart, Powell, & Stevens, JJ.).

When the Court in *Thompson* considered these indicators of contemporary standards of decency, it found that 14 states do not allow capital punishment at all, 19 states authorize capital punishment with no age limit, and 18 states expressly establish a minimum age below which the death penalty may not be imposed. Of those states which have enacted minimum age limitations, all of them require that the defendant have attained at least the age of 16 at the time the capital offense was committed.

Consideration of the second societal factor—the behavior of juries—revealed to the Court that of the 1,393 death sentences handed down by juries in this country during the years 1982 through 1986, only five of them involved defendants less than 16 years of age at the time of the offense. The Court concluded that this small number of defendants received sentences that were cruel and unusual.

[4]See *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (plurality opinion); *Enmund v. Florida*, 102 S. Ct. 3368 (1982); *Coker v. Georgia*, 97 S. Ct. 2861 (1977) (plurality opinion). *In Enmund*, the Court held that the death penalty imposed on a defendant convicted of robbery which resulted in a death was disproportionate when this particular defendant neither took the life, attempted to take the life, nor intended to take the life. In *Coker*, the Court held that the penalty of death imposed for the crime of rape is grossly disproportionate to that crime and, therefore, unconstitutional.

[5]*See Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (plurality opinion); *Coker v. Georgia*, 97 S. Ct. 2861 (1977) (plurality opinion). See also *Penry v. Lynaugh*, 109 S. Ct. 2934, 2955 (1989) (opinion of O'Connor, J.)

[6]In this case, the defendant was one of four participants in a brutal murder. Each was found guilty and sentenced to die. The defendant was 15 at the time of the offense and his death sentence was imposed by a jury that found the murder especially heinous, atrocious and cruel.

[7]Justices Marshall and Brennan have retired and have been replaced by Justices Souter and Thomas. The State suggests that the present constituency of the Court with its "collective conservative philosophy" toward constitutional jurisprudence will likely overturn *Thompson* in the future. But this court cannot and should not bend toward the view that trial courts review the decisions of the Supreme Court and, following the perceived predilections of individual justices, supplant the salutary doctrine of stare decisis with a study of judicial personalities. Rather, this court must continue the accepted practice of observance of and compliance with the precedent established by the Court. If *Thompson* is overturned, it should be by the United States Supreme Court. If *Thompson* should be disregarded by the trial courts of this state, that directive should come from the Florida Supreme Court.

[8]In *Woodson v. North Carolina*, 96 S. Ct. 2978 (1976) and *Roberts v. Louisiana*, 96 S. Ct. 3001 (1976) the Court held in both cases that mandatory death sentences are unconstitutional under the Eighth Amendment. The plurality opinion in each case was joined in by only three Justices. It is inconceivable that any court would intentionally disregard these two precedent setting cases simply because they are plurality decisions.

In *Gardner v. Florida*, 97 S. Ct. 1197 (1977) the Court held that a defendant in a capital case has the rights of notice, confrontation, and rebuttal of evidence introduced by the State in capital sentencing proceedings. The plurality opinion was joined in by only three Justices. No court would now deprive a defendant of these rights simply because the Court rendered a plurality decision.

In *Lockett v. Ohio*, 98 S. Ct. 2954 (1978) the Court held that when restrictions are placed on consideration by the jury of mitigating evidence in a capital case, the defendant is deprived of an individualized and reliable sentencing determination. Despite the fact that this is a plurality opinion, the courts in all jurisdictions have applied it in capital cases and it has even been applied by the Court in a subsequent decision involving Florida's sentencing scheme. *See Hitchcock v. Dugger*, 107 S. Ct. 1821 (1987).

Other examples of landmark, Eighth Amendment precedent rendered by the Court which are plurality decisions include *Caldwell v. Mississippi*, 105 S. Ct. 2633 (1985) and *Barclay v. Florida*, 103 S. Ct. 3418 (1983).

* * *

Criminal law—Abuse of an aged person by exploitation through improper or illegal use or mismanagement of persons's funds, assets or property—Plain and ordinary meaning of terms "use" [illegible] to be understood by person of ordinary intelligence—Phrase "improper or illegal" fails to convey sufficiently definite meaning as to prescribed conduct—Statute is unconstitutionally vague

STATE OF FLORIDA, vs. JAMES BRYAN CUDA, Defendant. 7th Judicial Circuit, in and for Volusia County, FL. Case No. 91-6027. July 31, 1992. Shawn L. Briese, Circuit Judge. Sean Daly and Elizabeth Blackburn, Asst. State Attorneys. Flem K. Whited, for the Defendant.

ORDER

THIS CAUSE came to be heard on March 2, 1992 pursuant to a hearing on Defendant's Motion to Dismiss based on the contention that the involved statute is "void for vagueness". This Court, upon consideration of the involved statute, the factual allegations in support of the charge, argument of counsel, provided caselaw, and further research, finds as follows:

The defendant, on December 9, 1991 was charged with abuse of an aged person by exploitation in violation of section 415.111(5) *Fla.Stat.* (1991). The specifications of the charge are as follows:

> In that James Cuda a/k/a Jay Cuda, on or between August 1989 and October 1991, within Volusia County, Florida, did knowingly or wilfully exploit an aged person, to-wit: Elsie E. Harvey, by the improper or illegal use or management of the funds, assets, property, power of attorney, or guardianship of such aged person, to-wit: did illegally use or manage the funds, assets, property or power of attorney given to him by Elsie E. Harvey for profit.

An affidavit, in the court file, completed by a state attorney investigator, evidently supplied the basis for the charge. The affidavit alleges that the defendant befriended the eighty-eight year old victim and eventually convinced the victim to invest and loan substantial sums of money ($498,756.00 in investments and $421,000.00 in loans) to limited partnerships. Proported investment experts interviewed by the investigator indicated that the victim's assets were mismanaged. Tax free unit trusts and insured bonds and blue chip stocks were sold to provide the investment/loan funds. The result was significant capital gains tax liability, the lack of diversification with higher risk, less liquidity, less income, and loan notes set beyond the victim's actual life expectancy. Interviews with the victim's doctor, yardman, housekeeper, and neighbors indicate impaired mental status. The doctor believes the victim qualifies as an aged person under Chapter 415 *Fla.Stat.* (1991).

Section 415.111(5) *Fla.Stat.* (1991) provides:

> Any person who knowingly or willfully exploits an aged person .... by the improper or illegal use or management of the funds, assets, property, power of attorney, or guardianship of such aged person...for profit, commits a felony of the third degree...

Section 415.102 *Fla.Stat.* (1991) provides the only statutorily applicable definitions:

> (3) "Aged person" means a person 60 years of age or older who is suffering from the infirmities of aging as manifested by organic brain damage, advanced age, or other physical, mental, or emotional dysfunctioning to the extent that the person is impaired in his ability to adequately provide for his own care or protection.
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> * * * *
>
> (9) "Exploitation" means, but is not limited to, the improper or illegal use or management of an aged person's....funds, assets, or property or the use of an aged person's .... power of attorney or guardianship for another's or one's own profit or advantage.

It should be initially noted that there is no Florida case dealing with the constitutionality of the above cited statute. Likewise, this Court has been unable to locate any case authority outside of Florida which deals with a vagueness challenge to a similar statute. This Court begins its analysis of the issue with the fundamental principle that penal statutes must be strictly construed. *Per-*

THE TAMPA TRIBUNE

Marion/Alachua

Tuesday, September 17, 1991

Rule out death for boy, lawyer says

By STEPHEN THOMPSON
Tribune Staff Writer

OCALA — State Attorney Brad King is expected to decide by Friday whether his office will seek the death penalty in the case of a 14-year-old boy accused of gunning down a Starke courier.

Assistant public defenders representing Quinton Lewis Massey asked Monday that death by electric chair be ruled out as a possible punishment even before the teenager goes on trial, forcing King into an early decision on the death penalty issue.

Massey was 13 when he was indicted in February on charges of first-degree murder and armed robbery in the shooting death of Eddie Taylor Jackson Jr., 29. An alleged accomplice, James E. McNair, 18 at the time, was also indicted, but charges against him have been dropped.

Jackson, 29, was with his 4-year-old son when he was shot outside the Suwannee Swifty, 1971 W. Silver Springs Blvd., the night of Jan. 18.

King was in court on Monday along with public defenders to decide on the issue.

Assistant Public Defender Billy Nolas cited a recent U.S. Supreme Court ruling that outlaws the death penalty if the defendant is 15 years old or younger.

Nolas said it would be a waste of resources for both sides to prepare for the penalty phase — which would include the possibility of death — when the death penalty is prohibited by the Supreme Court in the first place.

But King said a simple solution would be for Massey to go to trial first — and have a jury determine his guilt — and then decide on the penalty phase.

King also said it was his decision — not the court's — whether to ask a jury for a recommendation for the death penalty.

King said neither he nor Assistant State Attorney Jim Phillips, who prosecutes capital cases for the office, has taken a position on Massey's penalty, one way or the other.

But Nolas said the death penalty remains an option unless prosecutors waive their right to ask for it.

Assistant Public Defender William Miller said, "The state has not come to me and said, 'We're not going to seek the death penalty,' " suggesting prosecutors were keeping their options open.

Miller said he was also told there was no offer to plead the case.

Circuit Judge Thomas D. Sawaya, who presided over Monday's hearing, said he finds the Supreme Court decision binding, but suggested he would wait for King's decision before ruling.

Teen-ager's attorneys stake his life on recent Supreme Court ruling

By Laura Kauffmann
Staff writer

OCALA — Quinton Massey hasn't gone to trial yet, but his attorneys are fighting for his life.

At issue is whether Massey, who is now 14, can be sentenced to death if convicted of killing a 29-year-old Starke man during a robbery last January.

The teen's attorneys argue that a recent U.S. Supreme Court decision says that the primary test of constitutionality may be society's acceptance of capital punishment for juveniles and that such punishment is not, in fact, acceptable.

Only five of the 1,393 people sentenced to death in the United States from 1982 to 1986 were under 16 at the time the crime was committed. Even so, Massey's attorneys — Assistant Public Defenders Billy Nolas, William Miller and Tricia Jenkins — are anxious for a circuit judge to rule on the matter because the State Attorney's Office has not yet waived the death penalty in the case.

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No minimum in Florida

Florida is currently one of 19 states with the death penalty but no established minimum age for its use. Eighteen other states have the death penalty but have set the minimum age for execution at 16 or older at the time of the crime.

Both the American Bar Association and the American Law Institute oppose execution of juveniles. The practice has also been outlawed in the Soviet Union.

The 51-member board of governors of the Florida Bar Association has not taken a position on capital punishment for juveniles, but a spokesman from the bar's Tallahassee office said that capital punishment as such is not something on which the organization would normally take a stand.

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Age isn't the concern

Rick Custureri, president of the Marion County Bar Association, deferred comment to members of the association's criminal law committee because he practices mostly family law.

Paul Guilfoil, a private criminal defense attorney and member of the criminal law committee, said local opinion falls into two camps: those against capital punishment regardless of age and those in favor of it.

"In talking to the attorneys I know, there's almost uniform agreement among defense attorneys that there should not be capital punishment," Guilfoil said. "State attorneys and law enforcement personnel feel that there should be more of it. If you're not in favor of capital punishment, you're not in favor of capital punishment for children."

"I just wish there were some other way," he said.

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Defense ploys failed

Earlier this week, Massey's attorneys hoped to find another way, either through a ruling by Circuit Judge Thomas Sawaya that the death penalty will be precluded in the case, or by getting State Attorney Brad King to state, on the record, that he would not seek the death penalty when Massey goes to trial.

Neither happened.

Instead, Sawaya said he wanted more time to research the matter, and King, who complained that only the state attorney is empowered to waive the death penalty at the pre-trial stage, said he would make up his mind by Friday.

If King, in fact, does not waive the death penalty, then Sawaya said he will rule on the motion to have it precluded.

Sawaya must decide if the Supreme Court decision in Thompson v. Oklahoma applies to Massey.

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Supreme court grounds

Nolas' motion is grounded on a 4-1-3 Supreme Court decision which reversed the death sentence for a 15-year-old, William Wayne Thompson, who was sentenced to die for the murder of his brother-in-law, Charles Keene.

A plurality of the justices (Justices John Paul Stevens, Thurgood Marshall, Harry Blackmun and William Brennan) ruled that imposing the death penalty on a 15-year-old offender is "now generally abhorrent to the conscience of the community." Writing separately, Justice Sandra Day O'Connor also voted to overturn Thompson's death sentence, stating that "strong counter-evidence would be required to persuade me that a national consensus against this practice does not exist."

Justices Antonin Scalia, William Rehnquist and Byron White dissented.

Nolas believes that the decision, along with two similar cases, fixes a line between juveniles and adults for the purposes of execution at the age of 16 or above.

BIG SUN
Ocala Star-Banner ★ Wednesday, May 13, 1992

Lawyers for teen-ager fight death penalty

OCALA — Timothy Cookston's public defenders want prosecutors barred from seeking the death penalty when the teen-ager goes to trial for allegedly strangling a 72-year-old widow last Janaury.

Circuit Judge Thomas Sawaya is scheduled to consider the matter this morning.

In their request to preclude the death penalty, Assistant Public Defenders Tricia Jenkins and Billy Nolas cite the same U.S. Supreme Court decision they used last fall when arguing against capital punishment for another client, Quinton Massey. That decision prohibits the death penalty for anyone under 16 at the time of the offense.

Massey, convicted by a jury in October, was 13 at the time he shot and killed a 29-year-old Starke man during a robbery in January 1991. Cookston was 15 at the time of his arrest.

BIG SUN
Ocala Star-Banner ★ Thursday, May 21, 1992

Life hinges on judge's weekend

By Laura Kauffmann
Staff Writer

OCALA — Florida law allows certain teenagers to be tried as adults, but once convicted of a capital crime, does that mean they can be put to death as well?

A circuit court judge said he'll spend his Memorial Day weekend in a university law library trying to figure that one out.

His decision, expected early next week, may make a world of difference to Timothy Cookston, one of two Marion County teens who may face the death penalty if convicted on unrelated first-degree murder charges.

Fifth Circuit Judge Thomas Sawaya said Wednesday he has "an opinion basically written" but wants more time to research what the Legislature had in mind when it set up a "waiver provision" for teens as young as 14 who have been indicted of a capital crime.

That provision allows teens to be transferred to criminal court and, once there, be subject to "prosecution, trial and sentencing as if the child were an adult."

But Billy Nolas, one of Cookston's public defenders, said getting juveniles into adult court is as far as the provision goes.

"We need an explicit statute, we can't imply it by waiver provisions . . . the legislation

Please see Florida on 4B

Florida officials debate issue

Continued from Big Sun

we have is not enough."

Under state law, adult sanctions can be imposed depending on the seriousness of the crime, sophistication and maturity of the child, prior criminal record and certain other criteria. But the provision does not spell out whether those sanctions include capital punishment.

Nolas said the Legislature has had "ample time to set a cutoff age" since the U.S. Supreme Court ruled in 1988 that it's unconstitutional to impose death penalties on those under 16.

The reason the issue hasn't been addressed is because "in the general community, the sentiment is that we don't kill our kids," Nolas said. Of the 722 sentenced to Florida's death row since 1972, none who were under 16 were affirmed by the state Supreme Court.

"That's a telling example of what we're doing as a community . . .," Nolas said. "Prosecutors are not seeking to impose death on juveniles — it's not something we do and we should not do. That's why legislators say this is not an issue to put on the floor and debate."

Sawaya seemed to agree.

"The waiver provision doesn't address the issue as far as cruel and unusual punishment," the judge said.

If Sawaya sides with Cookston's attorneys, prosecutors will be barred from seeking anything but a 25-year minimum mandatory prison term.

"If it's unconstitutional, you've got no discretion . . . absolutely none, zero," Sawaya told Assistant State Attorney Jim Phillips.

Phillips answered: "What's clear today may not be clear tomorrow with the changing composition of the Supreme Court."

The teen-death-penalty issue may resurface again when Jacquie Bobo, 15, goes to trial later this year for the drug-related murder of a Texas woman.

The Tampa Tribune, Wednesday, May 27, 1992

Ruling blocks possible execution for teen

By LYNN PORTER
Tribune Staff Writer

OCALA — An accused teen-age murderer should not face the electric chair if convicted, a judge ruled Tuesday.

Circuit Judge Thomas D. Sawaya ruled that Timothy Cookston, who was 15 when he was accused of strangling a widow in January, should not be subject to the state's ultimate punishment.

An assistant state attorney, in a earlier hearing, argued that Florida law allows prosecutors to seek death-by-electrocution for anyone 14 years or older. Public defenders said a U.S. Supreme Court decision rules out that penalty.

The defense attorneys relied on the 1988 decision in which the high court ruled no one under 16 can be put to death for a capital offense. Writing for the court, Justice Sandra Day O'Connor said unless the state where the killing occurred has a minimum cutoff age, anyone under 16 cannot be executed for a capital offense.

In his order, Sawaya said the high court ruling "is valid constitutional precedent which this court cannot ignore or disregard."

"It specifically holds that imposition of the death penalty on children under the age of 16 is unconstitutional under the cruel and unusual punishment clause of the Eighth Amendment," he wrote.

Sawaya also wrote that while Florida law does contain a statutory scheme allowing children older than 14 to tried as an adult, it "may not be used to validate an unconstitutional sentence of death when it is clear that the Legislature never specifically addressed the issue of capital punishment on children under the age of 16 in this or any other statutory scheme."

Cookston, now 16, was indicted in February on charges of first-degree murder, armed robbery and burglary. He is accused of strangling a 72-year-old widow in her mobile home with an electric cord after asking to use her telephone. Cookston, who knew the widow, also is accused of stealing her purse, which contained more than $300. His trial has not begun.

If convicted, Cookston could face 25 years to life in prison. That sentence is not lenient by any standards, Assistant Public Defender Billy H. Nolas said.

"We 100 percent believe the judge was right," Nolas said "The state should not be seeking the death penalty in this case."

In the earlier hearing, Assistant State Attorney Jim Phillips argued that state law allows prosecutors to seek death for anyone 14 or older. He said that once a juvenile like Cookston was thrust into the adult arena through a first-degree murder indictment, he faces the same treatment an adult does.

Phillips cited a 1988 Florida Supreme Court decision that notes since 1951 the Legislature has allowed juveniles 14 and older to be tried as adults. Later, the Legislature deleted a cutoff mark of 16 for teen-agers accused of capital offenses, allowing virtually any child 14 and older to be executed, he argued.

Still, the Florida Supreme Court decision did not itself address a cutoff age. The Florida justices were dealing with a convict who was 17 at the time of the crime, and concurred in part with the U.S. Supreme Court decision.

Phillips could not be reached for comment, but has said earlier that if Sawaya ruled out the death penalty for Cookston, State Attorney Brad King would likely appeal.

Staff Writer Stephen Thompson contributed to this report.

BIG SUN
Ocala Star-Banner ★ Friday, May 29, 1992

State pondering appeal over teen death-penalty

OCALA — To appeal or not to appeal — that is the question that the Attorney General's Office will consider next week when its Capital Appellate Division reviews a 5th Judicial Circuit judge's order precluding the death penalty for an Ocala teen-ager charged with first-degree murder.

Timothy Brian Cookston was 15 last January when he allegedly strangled a 72-year-old Lindale widow. In an order filed May 26, Circuit Judge Thomas Sawaya ruled out the death penalty for Cookston, saying the U.S. Supreme Court has already ruled that capital punishment is unconstitutional for juveniles who were under 16 at the time of the crime.

Florida is one of eight states that has no set minimum age for the imposition of the death penalty.

State Attorney Brad King said that as of Thursday, the Attorney General's Office had "preliminarily" agreed to handle the appeal because of the case's "statewide import."