

CAPITAL CASE

No. 17-5592

**IN THE
SUPREME COURT OF THE UNITED STATES**

DONALD MIDDLEBROOKS,

Petitioner

vs.

TONY MAYS, Acting Warden,

Respondent

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

PETITION FOR REHEARING

* Paul R. Bottei
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In *Hidalgo v. Arizona*, U.S. No. 17-251, this Court is being asked to reconsider the constitutionality of the death penalty in Arizona and in general, as Hidalgo maintains that the death sentence is arbitrary and irrational, and constitutes cruel and unusual punishment. *See* Pet. for Cert. in *Hidalgo v. Arizona*, O.T. 2017, No. 17-251, pp. 8-9, 10-16, 21-34. On December 6, 2017, this Court just called for the record to examine those issues more closely.

In his petition for writ of certiorari, Donald Middlebrooks has maintained that he has suffered the very violation of the Eighth Amendment that Hidalgo maintains infects the entire system. Relying on *Booth v. Maryland*, 482 U.S. 496 (1987), Middlebrooks has asserted that his death sentence is arbitrary, capricious, and cruel and unusual under the Eighth Amendment, because it was based on pointed prosecutorial argument that death should be imposed, as that was the request of the victim's mother. As this Court has made clear in *Booth* and its progeny (*e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 830 n.2 (1991)), the admission of such evidence violates the Eighth Amendment because it "creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *Booth*, 482 U.S. at 503.

Thus, while Hidalgo maintains that the death sentence in general violates the Eighth Amendment because it is imposed in an "arbitrary" and "irrational" manner (Pet. for Cert. in *Hidalgo v. Arizona*, O.T. 2017, No. 17-251, pp. 8-9), Donald Middlebrooks' case presents a specific proven instance of the arbitrary and irrational infliction of the death sentence. While Hidalgo further maintains that the death penalty is cruel and unusual because, in part, it is imposed based upon "caprice" (*Id.*, p. 28), Middlebrooks has provided this Court a specific instance of such caprice that violates the Eighth Amendment in his case.

Accordingly, should this Court grant certiorari in *Hidalgo* to consider whether the

death sentence is arbitrary or capricious, or cruel and unusual, this Court should hold this petition for rehearing pending the disposition of *Hidalgo*. Were this Court to grant certiorari to determine whether the death penalty violates the Eighth Amendment, *a fortiori*, Donald Middlebrooks may be entitled to relief as well, where he has established a specific Eighth Amendment violation in this case. The principles this Court would enunciate and apply in *Hidalgo* would necessarily inform the ultimate determination whether Middlebrooks should be accorded relief.

This Court, therefore, should hold this petition for rehearing pending the final disposition of *Hidalgo*. If this Court grants certiorari in *Hidalgo*, this Court should hold this petition for rehearing, and then after any decision in *Hidalgo*, this Court should grant this petition for rehearing, vacate its prior order denying certiorari, grant Donald Middlebrooks' petition for writ of certiorari, and then vacate and remand for further consideration in light of *Hidalgo*. Should Hidalgo be able to secure relief where he has been convicted of multiple homicides with multiple aggravating circumstances, *a fortiori*, Donald Middlebrooks would be entitled to relief where he has received the death sentence for a single homicide with a single aggravating circumstance, resulting from a clear *Booth* violation.

CONCLUSION

This Court should hold this petition for rehearing pending the final disposition of *Hidalgo*. Should this Court grant certiorari in *Hidalgo*, it should hold this petition for rehearing, and following any decision in *Hidalgo*, the Court should grant rehearing, vacate its prior order denying certiorari, grant Donald Middlebrooks' petition for writ of certiorari, and then vacate and remand for further consideration in light of *Hidalgo*.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for rehearing was served upon counsel for Respondent, Jennifer Smith, 425 Fifth Avenue North, Nashville, Tennessee 37243, this 29th day of December, 2017.



Paul R. Bottei

CERTIFICATE

I certify that this petition for rehearing complies with United States Supreme Court Rule 44.2, is restricted to grounds specified by that rule, and is presented in good faith and not for delay.



Paul R. Bottei

