No. 18-9031, 18A-1120

CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL BRANDON SAMRA,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

On Petition for a Writ of Certiorari to the
Alabama Supreme Court

BRIEF IN RESPONSE TO ORIGINAL HABEAS PETITION AND TO THE MOTION FOR STAY OF EXECUTION

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CAPITAL CASE

QUESTIONS PRESENTED

(Restated)

I. Has Samra properly invoked the jurisdiction of this Court where there is not a final judgment rendered by the Alabama Supreme Court concerning his Eighth Amendment claim?

II. Should this Court grant relief on the claim in Samra's original habeas petition where the claim is unexhausted, procedurally defaulted, and without merit?

III. Should this Court deny Samra's cert petition where there is no conflict and no circuit split concerning his claim that the Constitution bars the execution of persons who were under twenty-one when their capital crime was committed?

IV. Are the equities against granting a stay where Samra waited until a little over two weeks before his scheduled execution to request a stay and where his claim could have been brought years before?

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STATEMENT OF JURISDICTION

Petitioner's contention that this Court has jurisdiction over this case pursuant to 28 U.S.C. §1257(a) is incorrect. Samra petitioned from an administrative order of the Alabama Supreme Court setting his date of execution, not from a "final judgment or decree rendered by the highest court of a State in which a decision could be had." 28 U.S.C. §1257(a). As explained further below, this Court does not have jurisdiction to consider this case because there is no underlying merits decision to review.

STATEMENT OF THE CASE

A. Statement of the Facts

On March 23, 1997, Michael Brandon Samra and his friend Mark Duke executed a plan to murder Duke's father, Randy Duke. Vol. 29 at 128.[1] In order to cover up the murder, the two also killed Randy Duke's girlfriend, Dedra Hunt, and her two daughters, six-year-old Chelisa Hunt and seven-year-old Chelsea Hunt. Vol. 29 at 133.

The murders stemmed from Randy Duke's refusal to allow his son to borrow his truck the day before. Vol. 29 at 130. Following a planning session with two other codefendants, David Collum and Michael Ellison, Duke and Samra obtained two pistols and returned to Randy Duke's house. Vol. 29 at 130–32. Killing everyone at the house was part of the plan. Vol. 29 at 133. Duke shot his father in the head, killing him. Vol. 29 at 128. Samra intended to kill Dedra Hunt and shot her in the face, but she managed to flee upstairs with her daughters. Vol. 29 at 128–29, 135. Hunt and Chelisa sought shelter in an upstairs bathroom, while Chelsea

1. Volume numbers refer to the record filed in the federal habeas proceedings, Samra v. Jones, 2:07-cv-01962-LSC-HGD (N.D. Ala.).

hid under a bed. Vol. 29 at 128–29. The two men pursued them, and Duke shot and killed Hunt after kicking in the bathroom door. Vol. 29 at 128.

Out of bullets, Duke retrieved two kitchen knives to finish the quadruple homicide. Vol. 29 at 130. First, he killed six-year-old Chelisa, who was hiding behind a shower curtain, cutting her throat. Vol. 29 at 128. The two men then went after seven-year-old Chelsea, who was still hiding under a bed. Vol. 29 at 133. After she fought back, Duke held her down and told Samra to kill her. Vol. 29 at 129, 133. Chelsea begged for mercy. Vol. 29 at 133. Instead of listening to her pleas, Samra slit her throat, and she drowned in her own blood. Vol. 29 at 134.

The killing done, Samra and Duke emptied drawers and displaced items in the home to make it appear that the house had been burglarized. Vol. 29 at 136. But the police quickly zeroed in on the two men. After being questioned by the police, Samra admitted to his part in the crime. Vol. 29 at 127–28.

B. Trial and direct appeal

Samra was charged with the capital offense of murdering two or more persons by one act or pursuant to one scheme or course of conduct, in violation of section 13A-5-40(a)(10) of the Code of Alabama (1975).

Samra v. State, 771 So. 2d 1108, 1111 (Ala. Crim. App. 1999). On March 16, 1998, a jury found Samra guilty as charged. Vo1. 14 at 7. Following the presentation of evidence, closing arguments, and instructions from the trial court, the jury unanimously recommended that Samra be sentenced to death. Vol. 14 at 113.

The trial court agreed. While the court found that the defense had shown two statutory and seven non-statutory mitigating factors, Vol. 3 at 116–17, they were outweighed by the existence of a single aggravating circumstance: that the capital offense was especially heinous, atrocious, and cruel when compared to other capital offenses. In supporting that finding, the trial court stated:

> Evidence showed at trial that the victims in this case were killed in a very cruel and heinous manner. The minor children's throats were actually cut and according to testimony of the medical examiner, they drowned in their own blood. The photographs and other demonstrative evidence in this case leads to one and only one conclusion, that the manner in which the victims were killed was much more heinous and atrocious and cruel than would be necessary in any killing.
>
> This case stands out as particularly heinous, atrocious and cruel when it is considered that at least one victim, according to the admission of Defendant, begged not to be killed. All of the victims died very painful and brutal deaths. The victims apparently struggled for life and breath and that

> very struggle caused one or more of the victims to drown in their own blood.

Vol. 3 at 118.

The Alabama Court of Criminal Appeals affirmed Samra's capital murder conviction and death sentence. *Samra v. State*, 771 So. 2d 1108 (Ala. Crim. App. 1999). The court noted that "[t]he sentencing order shows that the trial court weighed the aggravating and mitigating circumstances and correctly sentenced [Samra] to death." *Id.* at 1121. The Alabama Supreme Court affirmed as well, holding in part:

> We have found no error in either the guilt phase of the trial or the sentencing phase of the trial that adversely affected the defendant's rights. Furthermore, we conclude that the trial court's findings concerning the aggravating and mitigating circumstances were supported by the evidence and that the death sentence was proper under the circumstances.

Ex parte Samra, 771 So. 2d 1122, 1122 (Ala. 2000) (citing ALA. CODE §§ 13A-5-53(a), (b) (1975)). Samra then filed a petition for writ of certiorari in this Court, which was denied. *Samra v. Alabama*, 531 U.S. 933 (2000).

C. Samra's first Rule 32 proceeding

Having failed to obtain relief on direct appeal, Samra filed a Rule 32 petition for postconviction relief in the Shelby County Circuit Court on October 1, 2001, Vol. 32 at C. 1–25, eventually filing three amendments. After an evidentiary hearing, the court denied relief in 2005. Vols. 36–37 at C. 755–831.

The Court of Criminal Appeals affirmed the circuit court's judgment in an unpublished memorandum opinion. Vol. 49, Tab #R-82. The Alabama Supreme Court denied Samra's petition for writ of certiorari. Vol. 49, Tab #R-83.

D. Samra's successive Rule 32 proceeding

On September 25, 2007, Samra filed a successive Rule 32 petition for postconviction relief in the Shelby County Circuit Court. He filed this petition while his appeal from the denial of his first Rule 32 petition was pending in the Court of Criminal Appeals, awaiting a ruling on his application for rehearing.

In his successive petition, Samra raised two claims. Vol. 44 at C. 5–13. First, Samra argued that his death sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment because

his juvenile codefendant was resentenced to life without parole under *Roper v. Simmons*, 543 U.S. 551 (2005). *Id.* Second, Samra contended that his sentence was excessive and disproportionate under section 13A-5-53(b)(3) of the Code of Alabama because his codefendant was resentenced to life without parole. *Id.*

After oral argument, *see* Vol. 44 at C. 103–20, the circuit court denied Samra's successive petition. Vol. 44 at C. 72–73. On August 29, 2008, the Court of Criminal Appeals issued an order directing the circuit court to set aside that order and hold the case in abeyance until a certificate of judgment issued concerning Samra's pending appeal from his first Rule 32 petition. Vol. 45 at C. 257. Once the first matter was final, the State moved the circuit court to summarily dismiss Samra's successive petition. Vol. 45 at C. 330–57. After considering briefs from the parties, the circuit court granted the State's motion. Vol. 46 at C. 426–27.

The Court of Criminal Appeals affirmed the circuit court's ruling in an unpublished memorandum opinion. Vol. 49, Tab #R-87. The Alabama Supreme Court denied Samra's petition for writ of certiorari. Vol. 49, Tab #R-88.

E. Federal habeas litigation

On October 26, 2007, Samra filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Alabama, plus a motion to hold his habeas petition in abeyance to allow him to exhaust one claim in the state courts. Docs. 1, 3.[2] The court granted that motion. Doc. 9. Once the stay was lifted, Samra filed an amended petition on February 21, 2014, Doc. 31, which the State answered. Docs. 33–36.

The district court issued a final order denying Samra's amended habeas petition on September 5, 2014, and denying his certificate of appealability on October 27, 2014. Docs. 53, 60. While the Eleventh Circuit Court of Appeals granted a certificate of appealability on two issues, that court affirmed the judgment of the district court. *Samra v. Warden, Donaldson Corr. Facility*, 626 F. App'x 227 (11th Cir. Sept. 8, 2015). Once again, this Court denied certiorari review. *Samra v. Price*, 136 S. Ct. 1668 (2016) (mem.).

2. Document numbers refer to filings in Samra v. Jones, 2:07-cv-01962-LSC-HGD (N.D. Ala.).

F. Samra's second successive Rule 32 proceeding

On March 20, 2019, the State of Alabama, pursuant to Rule 8(d)(1) of the Alabama Rules of Criminal Procedure, moved the Alabama Supreme Court to set an execution date for Samra. On March 26, Samra filed a second successive Rule 32 petition in the Circuit Court of Shelby County, arguing that it is cruel and unusual under the Eighth Amendment to execute offenders who were under twenty-one at the time of their crimes. The circuit court dismissed this petition on April 10 because it was filed under the incorrect case number, because Samra failed to file a paper copy of the petition, and because Samra failed to pay the filing fee or file a request to proceed in forma pauperis.

The next day, April 11, the Alabama Supreme Court set Samra's execution for May 16. Samra then waited until April 29, a little over two weeks before his scheduled execution, to refile his second successive Rule 32 petition in the circuit court. The State filed its answer and motion to summarily dismiss the petition on May 2, and the circuit court dismissed the petition and found it procedurally barred on May 3.

REASONS FOR DENYING THE WRIT AND/OR ORIGINAL HABEAS PETITION

Samra's cert petition should be dismissed or denied for multiple reasons. First, the petition should be dismissed for want of jurisdiction. Samra's appeals have long been final. He could have, but did not, raise and exhaust his present claims in state court. Instead, Samra's petition is an improper attempt to invoke the jurisdiction of this Court based solely upon an objection filed to the Alabama Supreme Court's administrative order setting the date for his execution. This Court does not have jurisdiction to hear Samra's claim pursuant to 28 U.S.C. §1257(a).

Second, Samra's original habeas petition should be denied because his Eighth Amendment claim is unexhausted. He has not given the state courts a full and fair opportunity to decide his claim, as there has not been a complete round of the state's established appellate process. While the trial court summarily dismissed Samra's claim on procedural grounds, neither the Alabama Court of Criminal Appeals nor the Alabama Supreme Court has reviewed the claim.

Third, Samra's procedural defaults preclude this Court from reviewing his claim. Under Alabama law, Samra's claim was doubly

barred because it was one that could not be raised in a successive petition collaterally attacking his sentence, and his claim was raised after the applicable statute of limitations had run. ALA. R. CRIM P. 32.2(b), (c).

Finally, Samra's petitions should be denied because Samra fails to establish "compelling reasons" for granting certiorari, SUP. CT. R. 10, much less the "extraordinary circumstances" meriting this Court's "sparingly exercised" power to issue "an extraordinary writ." SUP. CT. R. 20(1). Samra's claim has not been heard by any federal court or state court of last resort, and Samra has shown no conflict between any decision of any state court of last resort, any decision of a federal court of appeals, or any decision of this Court. SUP. CT. R. 10. For the reasons set forth below, Samra's petitions are without merit and should be denied.

I. SAMRA HAS NOT PROPERLY INVOKED THE JURISDICTION OF THIS COURT.

Samra contends that this Court has jurisdiction pursuant to 28 U.S.C. §1257(a), which provides for jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had[.]" *Id.* But Samra cannot identify any final judgment by the Alabama Supreme Court for the simple fact that there is none. Instead,

he tries to spin straw into gold, pointing this Court to the State's motion for an administrative order setting the date for his execution and the Alabama Supreme Court's issuance of that order. (Cert. Pet. 6–7.) Samra's objection to that motion was no substitute for a properly filed state-court action. Indeed, this Court has held that certiorari review is not proper where a petitioner failed to "carry their burden of showing that the claim they raise here was properly presented to the Alabama Supreme Court[.]" *Adams v. Robertson*, 520 U.S. 83, 90 (1997).

Alabama law provides a process for raising constitutional claims through Rule 32 of the Alabama Rules of Criminal Procedure. "Rule 32.4 provides that Rule 32 petitions are the procedure by which a petitioner seeks relief from his conviction or sentence." *Wallace v. State*, 959 So. 2d 1161, 1164 (Ala. Crim. App. 2006). "A proceeding under this rule **displaces all post-trial remedies**[.]" ALA. R. CRIM. P. 32.4 (emphasis added). Claims brought under Rule 32 are subject to a number of procedural requirements, including a limitations period and a bar on most successive petitions. Alabama law does not make any provision for raising substantive constitutional claims in an objection to the issuance of an administrative order. Nor, indeed, does Alabama law provide any

means for directly raising any claim, constitutional or otherwise, in an original pleading in the Alabama Supreme Court. In short, Samra's March 26, 2019, objection to the State's motion to set an execution date was not a properly filed Rule 32 petition. Consequently, no "decision" on Samra's constitutional claim "could be had" through his objection. 28 U.S.C. §1257(a).

As this Court has explained, "[u]nder [§1257] and its predecessors, this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim "was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (citing *Adams,* 520 U.S. at 86); *Illinois v. Gates,* 462 U.S. 213, 218 (1983). This Court has long declined to review cases where the "petitioner[] fail[ed] to utilize the proper channel of review." *Hammerstein v. Superior Court of Cal.*, 341 U.S. 491, 492 (1951). In such cases, this Court has held that "we have no jurisdiction to review the proceedings[.]" *Id.*

Though Samra did file a Rule 32 postconviction action in state court raising his present constitutional claim *after* his objection to the State's

motion to set an execution date, that action was not properly filed, as the circuit court noted in dismissing it. *See* April 10, 2019, Order, attached hereto as Exhibit A. Samra failed to either pay a filing fee or to complete an application for in forma pauperis status. *Id.* It is axiomatic that there cannot be an appeal with a "final judgment" in a case that has never been properly filed. Consequently, the dismissal of Samra's untimely second successive Rule 32 petition does not in any way warrant this Court's jurisdiction. 28 U.S.C. §1257(a).

The State notes that Samra refiled his second successive Rule 32 petition on April 29, 2019. While that action was dismissed as procedurally barred on May 3, that circuit court decision is, self-evidently, not a "final judgment rendered by the highest court of a State." 28 U.S.C. §1257(a). Moreover, as shown in detail below, Samra's failures to comply with Alabama's independent and adequate procedural rules would operate as a procedural default to his attempt to seek habeas review.

Because Samra has not cited any final decision that would warrant the exercise of this Court's jurisdiction pursuant to 28 U.S.C. §1257(a), this Court should dismiss the petition for want of jurisdiction.

II. THIS COURT SHOULD DECLINE TO GRANT RELIEF ON SAMRA'S ORIGINAL HABEAS PETITION WHERE HIS EIGHTH AMENDMENT CLAIM IS UNEXHAUSTED, PROCEDURALLY DEFAULTED, AND WITHOUT MERIT.

A. Samra's claim in the original habeas petition is not exhausted.

This Court should decline to grant relief on Samra's Eighth Amendment claim because the claim has not been exhausted in the state courts. A habeas petitioner is required to first present his federal claim to the state courts and to exhaust all of the procedures available in the state-court system before seeking relief in federal court. 28 U.S.C. § 2254(b)(1); *Medellin v. Dretke*, 544 U.S. 660, 666 (2005) (holding that a petitioner "can seek federal habeas relief only on claims that have been exhausted in state court"); *O'Sullivan v. Boerckel,* 526 U.S. 838, 842–45 (1999) (a petitioner must give the state courts a full and fair opportunity to decide any federal constitutional claims presented in the federal habeas petition, which includes giving the "state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate process"). As this Court has explained, "[t]he role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and

limited. Federal courts are not forums in which to relitigate state trials." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983).

Samra has not exhausted his Eighth Amendment claim in the Alabama appellate courts. While he did refile his second successive Rule 32 petition in the circuit court on April 29, the circuit court entered a final judgment on May 3, and the Alabama appellate courts have not had an opportunity to consider the claim. Because the Alabama appellate courts have not had "one full opportunity" to resolve the constitutional issue, Samra's claim is unexhausted, and therefore, this Court should refuse to consider the claim.

B. Samra's claim in his original habeas petition is also procedurally defaulted.

This Court should also decline to review the Eighth Amendment claim in the original habeas petition because the claim is procedurally defaulted. In 1977, this Court established the doctrine of procedural default in *Wainwright v. Sykes*, 433 U.S. 72 (1977). This Court explained the procedural default doctrine in *Woodford v. Ngo*, 548 U.S. 81, 92–93 (2006), as follows:

> In habeas, state-court remedies are described as having been "exhausted" when they are no longer available, regardless of

> the reason for their unavailability. *See Gray v. Netherland,* 518 U.S. 152, 161 (1996). Thus, if state-court remedies are no longer available because the prisoner failed to comply with the deadline for seeking state-court review or for taking an appeal, those remedies are technically exhausted, *ibid*., but exhaustion in this sense does not automatically entitle the habeas petitioner to litigate his or her claims in federal court. Instead, if the petitioner procedurally defaulted those claims, the prisoner generally is barred from asserting those claims in a federal habeas proceeding. *Id.* at 162; *Coleman, supra,* at 744–51.

(Citations edited.) Generally, if the last state court to examine a claim states clearly and explicitly that the claim is barred because the petitioner failed to follow state procedural rules, and that procedural bar provides an adequate and independent state ground for denying relief, then federal review of the claim also is precluded by federal procedural default principles. *See Cone v. Bell*, 556 U.S. 449, 465 (2009) ("When a petitioner fails to raise his federal claims in compliance with relevant state procedural rules, the state court's refusal to adjudicate the claim ordinarily qualifies as an independent and adequate state court for denying federal review."); *Coleman v. Thompson*, 501 U.S. 722, 731 (1991).

If a claim is procedurally defaulted, a petitioner can obtain review of the claim in federal court only by showing either (1) cause for the

procedural default and actual prejudice growing out of the violation of federal law or (2) a resulting fundamental miscarriage of justice if the federal court does not consider the claim. *Coleman*, 501 U.S. 722 (1991); *Smith v. Murray*, 477 U.S. 527, 537–38 (1986); *Engle v. Issac*, 456 U.S. 107 (1982); *Wainwright*, 433 U.S. 72 (1977). "'Cause and prejudice' is a conjunctive standard, both prongs of which must be satisfied by the appellant before this Court is free to ignore the procedural default and hear the merits of appellant's claim." *Douglas v. Wainwright*, 714 F.2d 1532, 1547 (11th Cir. 1983).[3]

Samra's claim is procedurally barred from review in the state courts for a myriad of reasons, as the circuit court acknowledged. First, the claim is barred from review by Alabama's statute-of-limitations procedural bar, found in Rule 32.2(c) of the Alabama Rules of Criminal Procedure. *See Cogman v. State*, 852 So. 2d 191, 193 (Ala. Crim. App. 2002) ("Because only nonjurisdictional claims for relief were contained in Cogman's first . . . petition, which was filed more than two years after the certificate of judgment was issued, those issues were precluded by Rule

3. The State has not set forth the law concerning cause and prejudice or a fundamental miscarriage of justice because Samra has not attempted to establish either to overcome the procedural default of his claim.

32.2(c), Ala. R. Crim. P."). The Alabama Supreme Court affirmed Samra's capital murder conviction and death sentence on March 3, 2000, and denied the application for rehearing on May 5, 2000. *Ex parte Samra*, 771 So. 2d 1122 (Ala. 2000). The certificate of judgment issued on May 23, 2000. Thus, Samra is raising this claim almost nineteen years after his conviction became final, well beyond Rule 32.2(c)'s statute of limitations. In addition, Samra does not, and cannot show that his claim is based on newly discovered evidence that was discovered within the last six months. In fact, Samra could have raised his Eighth Amendment claim in his first successive Rule 32 petition, which was filed after this Court decided *Roper v. Simmons*, 543 U.S. 551 (2005).

Samra's claim is also barred from review by Alabama's successive petition rule, found in Rule 32.2(b) of the Alabama Rules of Criminal Procedure. Samra's claim is barred from review by the successive-petition bar unless he can establish either (1) that the trial court was without jurisdiction to render a judgment or impose sentence on him, or (2) that the grounds could not have been ascertained through reasonable diligence when his first petition was filed and that a miscarriage of justice

would result if his claim is not entertained. His petition meets neither of those exceptions.

As an initial matter, "jurisdiction" is "[a] court's power to decide a case or issue a decree." *Ex parte Seymour*, 946 So. 2d 536, 538 (Ala. 2006) (quoting BLACK'S LAW DICTIONARY 867 (8th ed. 2004)). A circuit court possesses jurisdiction over capital offenses. *Id.* Further, Alabama's current death penalty statute, under which Samra was sentenced, has never been struck down by this Court. *Harris v. Alabama*, 513 U.S. 505 (1995). Thus, Samra cannot seriously maintain that death was not an available punishment to be imposed by a circuit court at the time he was sentenced.

Second, Samra has fallen far short of showing that his argument could not have been ascertained through reasonable diligence when his first successive petition was filed and that a miscarriage of justice would result if his claim were not entertained. There is no reason that Samra could not have made this argument when he filed his successive petition after *Roper* was decided. Nor can Samra argue that the failure to entertain his claim will result in a miscarriage of justice. As set forth above, the evidence against Samra is overwhelming. Not only did he

assist Mark Duke in planning this crime, but he was also an active, willing participant in the crime. Thus, his Eighth Amendment claim is procedurally defaulted.

C. Samra is not entitled to relief on his claim.

Samra is not entitled to relief on his claim that his death sentence violates the Eighth Amendment because he was under twenty-one when he committed the brutal murders in this case. He asks this Court to extend the holding in *Roper* to include defendants who were under twenty-one when they committed their crimes. Only one court, a trial court in Kentucky, has extended *Roper* in this manner, and that case is on appeal in the Kentucky Supreme Court. As set forth below, a survey of case law shows that every appellate court that has been invited to extend *Roper* has declined to do so. *See infra* pp. 24–29. In fact, there has not been any indication from this Court that it will so extend its holding in *Roper*. As the Court explained:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. . . . The age of 18 is the point

> where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

Roper, 543 U.S. at 574. Samra admits that he was nineteen when he committed the murders in the instant case. Therefore, he is not entitled to relief on his claim.

Moreover, this Court's grant of certiorari in *Mathena v. Malvo* and the Kentucky trial court's order do not entitle Samra to relief. The alleged question concerning the scope of *Miller* and *Montgomery* in *Malvo* does not require this Court to hold Samra's case in abeyance. Those cases deal with youthful offenders who are eighteen or younger. As with *Roper*, those cases have no application to Samra because he was nineteen when he committed the murders in this case. Moreover, it goes without saying that a single Kentucky trial court's decision—one that is still being appealed—does not entitle Samra to an original habeas petition in this Court, especially where the claim is unexhausted and procedurally defaulted.

III. THIS COURT SHOULD DECLINE TO REVIEW SAMRA'S SPLITLESS AND CONFLICT-FREE CLAIM ALLEGING THAT THE CONSTITUTION BARS THE EXECUTION OF PERSONS WHO WERE UNDER THE AGE OF TWENTY-ONE WHEN THEY COMMITTED THEIR CRIMES.

As shown above, Samra has failed to establish this Court's jurisdiction because there is no § 1257 "final judgment" for this Court to review. As such, this petition is an extraordinarily bad vehicle for Samra's claim. But even considering Samra's argument on the merits, he has failed to establish any ground for granting certiorari review as there is no split and his claim is meritless.

A. Samra's claim does not present a federal question.

Samra is requesting that this Court grant cert to review his Eighth Amendment claim. However, what Samra is really doing is asking this Court to engage in fact-bound correction of a state trial court's application of state law. Samra attempted to raise this claim for the first time in his second successive Rule 32 petition. The State argued that this claim was barred from review by Rule 32.2(c)'s statute of limitations and by Rule 32.2(b)'s successive petition rule, and the circuit court correctly found the claim "procedurally barred" from its review. The Rule 32 statute of

limitations and successive petition bar are strictly matters of state law. A state court may apply its own procedural bars and may defeat a claim based on that independent state law. This Court should deny cert on this claim because it was decided under an independent and adequate state law rule, and therefore, Samra's claim does not present a federal question pursuant to 28 U.S.C. § 1257(a).

B. Samra's petition presents no split, as appellate courts have uniformly refused to extend *Roper*.

Since Samra's petition does not point this Court to any reviewable "final judgment," it follows that he has also failed to show that any Alabama court "has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." SUP. CT. R. 10. Indeed, Samra does not cite **any** "decision of another state court of last resort or of a United States court of appeals" that supports his position. Instead, he relies on a single pretrial ruling by one out of ninety-five Kentucky trial court judges. Order, Commonwealth v. Diaz, 15 CR 584-001 (Fayette Cir. Ct. Sept. 6, 2017). In that case, Judge Ernesto Scorsone issued a pretrial ruling preventing the prosecution from seeking the death penalty for

Efrain Diaz, who was seven months past his eighteenth birthday when he and two accomplices allegedly murdered a University of Kentucky student during a robbery.[4] That decision, which is currently on interlocutory appeal in the Kentucky Supreme Court, would not be a sufficient basis to warrant certiorari review even if Samra had been able to properly invoke this Court's jurisdiction.

Many courts of appeals have considered arguments for extending *Roper* to individuals over the age of eighteen, but each has refused to do so. This uniform agreement among state courts of last resorts and federal courts of appeals demonstrates why this issue does not merit this Court's review.

The Florida courts have repeatedly rejected attempts to extend *Roper*. Not long after this Court's decision in *Roper*, attempts to extend it began. In *Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006), the Florida Supreme Court rejected a claim that *Roper* should be extended based on a defendant's "mental and emotional" age. Most recently, the Florida Supreme Court again declined to extend *Roper* to persons eighteen or

4. Mark Barber, *Attorneys Ready to Schedule Trial In April Shooting Death of UK Student*, WKYT (Dec. 4, 2015, 12:50 PM), https://bit.ly/2WgPKp3.

older, noting that *Roper* propounded a bright-line rule based on **chronological** age and concluding that "we reaffirm our adherence to *Roper*." *Foster v. State*, 258 So. 3d 1248, 1254 (Fla. 2018), *reh'g denied*, No. SC18-860, 2019 WL 76862 (Fla. Jan. 2, 2019).

Notably, while Samra relied on a Kentucky trial court's pretrial order, the Kentucky Supreme Court has declined to extend *Roper* beyond the bounds set by this Court. In *Bowling v. Commonwealth*, 224 S.W.3d 577, 583 (Ky. 2006), *as modified on denial of reh'g* (Ky. June 21, 2007), the Kentucky Supreme Court rejected a "mental age" claim because "the plain language of *Roper* compels the conclusion that its prohibition is limited to 'the execution of an offender for any crime committed before his 18th birthday . . . .' [*Roper*, 543 U.S. at 588] (O'Connor, J. dissenting)."

Following *Bowling,* both the Oklahoma and Alabama Courts of Criminal Appeals rejected attempts to extend *Roper* to eighteen-year-olds who committed capital murder. In *Mitchell v. State*, 235 P.3d 640, 659 (Okla. Crim. App. 2010), the Oklahoma Court of Criminal Appeals held that this Court "has drawn a bright line at eighteen (18) years of age for death eligibility and we therefore reject Appellant's argument that

being two weeks beyond his eighteenth birthday at the time of the murder exempts him from capital punishment." Similarly, in 2012, the Alabama Court of Criminal Appeals hewed to *Roper*'s line, rejecting its application to an eighteen-year-old and holding, "*Roper* establishes a bright-line rule based on the chronological age of the defendant, and this Court will not depart from *Roper* to consider Thompson's "mental age." *Thompson v. State*, 153 So. 3d 84, 178 (Ala. Crim. App. 2012), *as modified on denial of reh'g* (Ala. Crim. App. Dec. 7, 2012).

More recently, the Ohio Eighth District Court of Appeals was presented with a claim based on a Kentucky circuit court order that was materially identical to the one Samra cites here. The Ohio court rejected the defendant's claim, noting that "the United States Sixth Circuit recently observed that 'no authority exists at the present time,' to support the argument that the defendant in that case, Ronald Phillips, was ineligible for the Ohio death penalty because he was 19 years old at the time he committed the capital offense." *Otte v. State*, 96 N.E.3d 1288, 1292 (Oh. App. 2017).

Nor is it only State appellate courts that have rejected attempts to extend *Roper*. In 2015, the Eleventh Circuit also declined to extend *Roper*

beyond its "bright line" rule, affirming the denial of habeas relief to a petitioner who was over nineteen when he committed murder:

> In *Roper,* the United States Supreme Court Case drew a bright line—age 18. The Court squarely held that executing a defendant for committing a crime before age 18 is always unconstitutional, no matter how mature the defendant. A reasonable application of *Roper* is that the bright line works the other way, too—executing an individual for committing a crime after age 18 is not, just because of age, unconstitutional.

Barwick v. Sec'y, Fla. Dep't of Corr., 794 F.3d 1239, 1258 (11th Cir. 2015).

In 2017, the Sixth Circuit echoed this decision in *In re Phillips*, No. 17-3729, 2017 WL 4541664 (6th Cir. July 20, 2017), rejecting an application to file a successive § 2254 petition seeking an extension of *Roper* to a person who was nineteen when he committed capital murder. That court noted that the petitioner, like Samra, cited no authority for his claim. But the Sixth Circuit went further, holding that "more importantly, no authority exists at the present time supporting his central argument, that he is ineligible for the death penalty due to his age at the time of the offense." *Id.* at *3. The Sixth Circuit was correct in 2017, and nothing has changed since. Samra has pointed to no valid authority to support his petition, much less shown that any circuit split

or other ground for granting review pursuant to Rule 10 exists. This Court should deny Samra's petition.

C. Samra's petition is meritless.

Finally, to the extent that Samra relies on a supposed national consensus against imposing capital punishment on persons who were under the age of twenty-one when they committed capital murder, his claim is meritless. There is no such consensus, which is made most obvious by Samra's failure to point to **a single state** that has specifically eliminated the death penalty for defendants who are between the ages of eighteen and twenty-one when they murder their victims. (*See* Cert. Pet. 10–11.) By contrast, in *Atkins*, this Court observed that since its decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), "the large number of States prohibiting the execution of mentally retarded persons" demonstrated the "national consensus" against executing "mentally retarded offenders." *Atkins v. Virginia*, 536 U.S. 304, 315–16 (2002). In the present case, of the thirty states that retain the death penalty, the number that have passed statutes specifically barring the execution of persons who committed murder between the ages of eighteen and twenty-one stands at **zero**. Samra attempts to obscure this fact by making the misleading

allegation that "a majority of states, 30, would not permit the execution of a youthful offender." (Cert. Pet. 10–11.)

Simply put, Samra's allegation does not withstand scrutiny. His "national consensus" and "clear and growing trend" are made up out of whole cloth. Rather than citing to any instance in which any state has adopted his position, Samra points to two red herrings: 1) states with a temporary moratorium on **executions**[5] and 2) states where executions are rare. What Samra ignores is that **all** of the states that fall in these categories still retain the death penalty as a sentencing option for persons who committed capital murder between the ages of eighteen and twenty-one. At bottom, Samra has failed to show a "clear and growing trend" because there is none.

5. Samra's reliance on California is particularly wrong-headed. Despite a unilateral move by the governor to impose a moratorium on executions, the death sentence remains available under the law for persons over the age of eighteen, and all current death sentences remain unaltered. California Executive Order No. N-09-19, https://bit.ly/2vD0e6u (last visited May 2, 2019). Moreover, California prosecutors continue to seek the death penalty for persons over eighteen but under twenty-one. *E.g.*, Meagan Flynn, *A Suspected Serial Killer Called The 'Hollywood Ripper' Is on Trial. Ashton Kutcher Is a Witness*, WASHINGTON POST (May 3, 2019), https://bit.ly/2UYZJ0D; Rebecca Plevin, Jorge L. Ortiz, and Joel Shannon, *Prosecutors Seek Life Without Parole or Death Penalty For Teen Accused in San Diego Synagogue Attac*k, USA TODAY (Apr. 30, 2019, 5:09 PM), https://bit.ly/2DNWqUk, (accessed on May 2, 2019).

IV. THE EQUITIES ARE AGAINST A STAY OF EXECUTION.

"Both the state and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Thus, "[a] court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id.* (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)). Federal courts "can and should protect the State from dilatory or speculative suits." *Id.* at 585.

Samra has failed to show that he is entitled to a last-minute stay of his execution. Samra has filed a certiorari petition, an original habeas petition, and two motions for stays of execution. But his underlying claim is unexhausted, barred on multiple State procedural grounds, and meritless.

Moreover, Samra waited until after the State moved the Alabama Supreme Court to set his execution date to file his time-barred, successive petition in state court. When that case was dismissed as improperly filed, he waited another nineteen days before re-filing the same petition. Then, he waited until a little over two weeks before his scheduled execution to

file his cert petition and unexhausted, procedurally defaulted original habeas petition in this Court. Samra was dilatory in bringing his claim—a claim that could have been made any time after this Court decided *Roper*. As the equities in this case weigh heavily against Samra, this Court should refuse to stay his execution.

CONCLUSION

The State respectfully requests that this Court deny Samra's petition for writ of certiorari, his original habeas petition, and his motions for stays of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of May 2019, I served a copy of the foregoing on the attorneys for the Petitioner by electronic mail, addressed as follows:

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EXHIBIT A

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CIRCUIT COURT OF
SHELBY COUNTY, ALABAMA
MARY HARRIS, CLERK

IN THE CIRCUIT COURT OF SHELBY COUNTY

STATE OF ALABAMA	)	
	)	
V.	)	Case No.: CC-1997-000384.00
	)	
SAMRA MICHAEL BRANDON/Z635	)	
Defendant.	)	

ORDER

The Petition for a Second Successor Rule 32 Petition for Post-Conviction Relief in a Capital Case e-filed on March 26, 2019, is hereby dismissed for being improperly filed. Defendant must pay filing fee or file for In Forma Pauperis. In addition, the Petition must be properly filed in .62 and paper filed with the Clerk of Court.

DONE this 10th day of April, 2019.

Corey B. Moore

COREY B. MOORE, CIRCUIT JUDGE