No. 18-9033, 18A-1121

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL BRANDON SAMRA,
Petitioner
- vs -
STATE OF ALABAMA,
Respondent

On Petition For Writ of Certiorari to the Alabama Supreme Court

---

REPLY FOR PETITIONER

THIS IS A CAPITAL CASE: MR. SAMRA IS SCHEDULED TO BE EXECUTED ON MAY 16, 2019

STEVEN R. SEARS
655 Main Street
P.O. Box 4
Montevallo, AL 35115
(205) 665-1211
montevallo@charter.net

N. JOHN MAGRISSO (*pro bono*)
Attorney-At-Law
525 Florida St., Ste. 310
Baton Rouge, LA 70801
(225) 338-0235
magrissolaw@gmail.com

ALAN M. FREEDMAN
Counsel of Record
CHRISTOPHER KOPACZ
Midwest Center for Justice, Ltd.
P.O. Box 6528
Evanston, IL 60204
(847) 492-1563
fbpc@aol.com

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

REPLY FOR PETITIONER

A. This Court has jurisdiction to rule on the final judgment on the merits from the Alabama Supreme Court.

Initially, the State argues that Samra has not properly invoked the jurisdiction of this Court. (BIO at 11) The State claims that Samra is unable to identify any final judgment by the Alabama Supreme Court for this Court to review. As Samra argued in the petition for a writ of certiorari, however, the Eighth Amendment claim at issue here was litigated in the Alabama Supreme Court by both parties during proceedings on the State's motion to set an execution date and Samra's request for a stay of execution based on the Eighth Amendment claim. (Pet. Cert. at 6-7) Although the State invokes procedural default, the Alabama Supreme Court never articulated any procedural grounds for rejecting Samra's claim. (Pet. Cert. Appx. A) In the absence of any state court opinion expressly rejecting Samra's claim on procedural grounds, the Alabama Supreme Court's execution order serves as a final judgment on the merits of Samra's Eighth Amendment claim. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1194 (2018); *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).

Furthermore, the State's filings in the Alabama state court make clear that the Alabama Supreme Court rejected Samra's Eighth Amendment claim on its merits. In a motion opposing Samra's motion to stay state post-conviction proceedings in the trial court pending this Court's resolution of Samra's claims, the State relied on state case law holding that the Alabama Supreme Court "is the *final* arbiter of Alabama law, with ultimate authority to oversee and rule upon the

decisions of the lower State courts." (St. Resp. Mtn. at 2) (quoting *Ex parte Sandifer*, 925 So. 2d 290, 295 (Ala. Crim. App. 2005) (quoting *Ex parte James*, 836 So. 2d 813 (Ala. 2002)) (emphasis in *James*)). As the "final arbiter," the Alabama Supreme Court "determined that now is the appropriate time to set Samra's execution." (St. Resp. Mtn. at 2)

Given that the Alabama Supreme Court is the final arbiter of this claim and has rejected it, any attempt by Samra to raise this claim in Alabama's lower courts would be futile. *See Douglas v. Alabama*, 380 U.S. 415, 422-23 (1965) (finding "[n]o legitimate state interest would have been served by requiring repetition of a patently futile objection, already thrice rejected"); *Estelle v. Smith*, 451 U.S. 454, 468 n.12 (1981) (affirming finding that defendant's failure to raise a claim was not a bar to relief in part, because of "the alleged futility of objecting" based on prior directly adverse decisions of the highest state appellate court at the time of the trial).

Similarly, in this case, it would be a meaningless task to require Samra to raise this claim in the Alabama courts, where the state's high court has rejected the claim and prevented Samra from litigating it through state post-conviction proceedings. The lack of a remedy in state court or federal habeas corpus proceedings in the District Court, along with the recently-evolving standards of decency that underlie Samra's Eighth Amendment claim, create the type of exceptional circumstances that justify this Court's exercise of its authority to issue an original writ of habeas corpus. *See* S. Ct. R. 20.1; *Felker v. Turpin*, 518 U.S. 651,

660-62 (1996).

But if the State is correct that the Alabama Supreme Court's decision is not a final judgment on the merits, then it has virtually conceded that an original writ of habeas corpus is the only appropriate vehicle for Samra's Eighth Amendment claim. In that case, this Court should grant Samra's petition for an original writ of habeas corpus, filed simultaneous to the present petition for a writ of certiorari.

B. Standards of decency have evolved to merit the categorical prohibition of executing offenders under the age of 21.

The "standards of decency" that govern the question of death penalty eligibility, *see Roper v. Simmons*, 543 U.S. 551, 560-61 (2005), have evolved to the point where our Constitution can no longer permit the execution of offenders who were under 21 at the time of their crime.

The State argues that Samra's Eighth Amendment claim is meritless, citing several cases that have rejected this claim. (BIO at 21-30) But those cases have eschewed any meaningful evaluation of the recent neuroscientific studies showing that the brains of young adults are similar to the brains of juvenile. Instead of analyzing the post-*Roper* changes in science, laws, and society, the cases reflexively fall back on the bright-line rule announced in *Roper* and decline to depart from *Roper*'s holding. *See, e.g., Thompson v. State*, 153 So. 3d 84, 178 (Ala. Crim. App. 2012) ("*Roper* establishes a bright-line rule based on the chronological age of the defendant, and this Court will not depart from *Roper* . . ."); *Otte v. State*, 96 N.E.3d 1288, 1292 (Oh. App. 2017) (finding "no authority exists at the present time," to support the defendant's claim the he was ineligible for the death penalty because he

was 19 years old at the time of the offense (citing *In re Phillips*, 2017 WL 4541664, *3 (6th Cir. July 20, 2017)). Accordingly, those cases provide no substantive support for the State's contention that the Eighth Amendment permits the execution of 18-to-21-year-olds.

The State also offers no reasoned basis to reject the conclusion of the Kentucky trial court finding that the death penalty is an unconstitutional punishment for crimes committed by individuals under 21 years of age. *Commonwealth v. Efrain Diaz*, 15 CR 584-001 (Fayette Cir. Ct. Order Sept. 6, 2017) (transfer granted, 2017-SC-000536) (Cert. Pet. Appx. R). The court's conclusion followed an evidentiary hearing at which it heard expert testimony on recent neuroscientific research indicating that people in their late teens and early 20's are less mature and more likely to rehabilitate than older adults. *Diaz* order at 6-10. The court also examined the national consensus and found a consistent direction of change in the states against the execution of defendants aged 18 to 21. *Id.* at 4-5. Applying the same type of analysis as this Court did in *Roper*, the Kentucky trial court logically concluded that under the Eighth Amendment, the age for which the death penalty is permissible must be increased to 21. *Id.* at 11. Contrary to the State's suggestion, the bare fact that the trial court's order is on appeal to the Kentucky Supreme Court case is not a principled basis to reject the trial court's sound reasoning.

The State also ignores cases and persuasive authorities that have accepted the argument that the line drawn in *Roper* is no longer supported by science or

society's treatment of young people. The State does not even acknowledge the legal scholars who have concluded that the "scientific, societal and legal justifications" for the 18-year cutoff "have eroded" in the 14 years since *Roper* was decided. Blume, et al., *Death by Numbers: Why Evolving Standards Compel Extending Roper's Categorical Ban Against Executing Juveniles From 18 to 21*, TEXAS L. REV. at p. 31 (forthcoming 2019). Nor does the State recognize that the American Bar Association has called for a ban on executing offenders under the age of 21. American Bar Association Report 111 (adopted Feb. 5, 2018).

And the State fails to admit that other courts have acknowledged, in contexts outside the death penalty, that the scientific research and logical underpinnings of the recent Eighth Amendment juvenile jurisprudence are indeed applicable to those over 18. *See Cruz v. United States*, 2018 WL 1541898, *25 (D. Conn. March 29, 2018) (holding that the scientific evidence and societal evidence of national consensus found in *Miller v. Alabama*, 567 U.S. 460 (2012), applied to an 18-year-old and precludes a mandatory sentence of life without parole); *People v. House*, 72 N.E.3d 357, 388 (Ill. App. Ct. 2015) (vacating a 19-year-old offender's sentence of natural life based on *Miller* principles, while noting that "the designation that after age 18 an individual is a mature adult appears to be somewhat arbitrary"), *judgment vacated and remanded for reconsideration*, 111 N.E.3d 940 (Ill. 2018).

C. The equities favor this Court's intervention.

The State faults Samra for not raising his Eighth Amendment claim sooner. (BIO at 30-31) Yet this is a claim that, by definition, could not be successful until society's standards have evolved to a point in which a particular punishment is no

longer acceptable. The 14 years since *Roper* was decided is an adequate time period for a new national consensus to have emerged against the execution of youthful offenders up to the age of 21. Indeed, it took the same amount of time for this Court to explicitly reverse its precedent in finding a national consensus had emerged against the execution of juvenile offenders. *See Roper*, 543 U.S. at 555; *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989). Once the evolving standards of decency have been interpreted to categorically exclude a class of persons from the death penalty, it is not too late to bring such a claim under the Eighth Amendment. *See Penry v. Lynaugh*, 492 U.S. 302, 330 (1989) (retroactivity doctrine applies to new rules "prohibiting a certain category of punishment for a class of defendants because of their status or offense"), abrogated on other grounds by *Atkins v. Virginia*, 536 U.S. 304 (2002); *Montgomery v. Alabama*, 136 S. Ct. 718, 732-37 (2016) (finding *Miller v. Alabama*, 567 U.S. 460 (2012), retroactive); *In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011) (stating that *Miller* and *Atkins* have been given retroactive effect).

This Court's decision in *Roper* came too late for 22 juvenile offenders, who were executed by states in the years before that case was decided.[1] And before this Court ruled that "mentally retarded" persons could not be executed, states had executed 44 offenders with mental retardation.[2] Society's norms and laws have

---

[1] Death Penalty Information Center, https://deathpenaltyinfo.org/views-executions?exec_name_1=&sex=All&sex_1=All&federal=All&foreigner=All&juvenile=y&volunteer=All (last visited May 5, 2019).

[2] Death Penalty Information Center, https://deathpenaltyinfo.org/list-defendants-mental-retardation-executed-united-states?did=1858 (last visited May 5, 2019); *Atkins v. Virgina*, 536 U.S. 304 (2002) (holding that the Eighth Amendment bars death sentence against those with mental retardation). In a further sign of society's

progressed greatly in the decade and a half since *Roper* was decided, and this Court should intervene now to prevent the continued executions of persons for whom the death penalty is a constitutionally disproportionate punishment. This Court should grant certiorari to decide the important issue of whether society's evolving standards of decency no longer permit the execution of 19-year-old Samra and other offenders who were under 21 years old at the time of their crime.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, this Court should grant a stay of execution pending this Court's decision on the petition for certiorari and pending this Court's decision in *Mathena v. Malvo*.

Respectfully submitted,

/s/ Alan M. Freedman

ALAN M. FREEDMAN
Counsel of Record
CHRISTOPHER KOPACZ
Midwest Center for Justice, Ltd.
P.O. Box 6528
Evanston, IL 60204
(847) 492-1563
fbpc@aol.com

STEVEN R. SEARS
655 Main Street
P.O. Box 4
Montevallo, AL 35115
(205) 665-1211
montevallo@charter.net

N. JOHN MAGRISSO (*pro bono*)
Attorney-At-Law
525 Florida St., Ste. 310
Baton Rouge, LA 70801
(225) 338-0235
magrissolaw@gmail.com

May 7, 2019

---

evolving standards of decency, this Court's use of the term "mental retardation" has quickly become obsolete in favor of the term "intellectually disabled." *See Hall v. Florida*, 572 U.S. 701, 704 (2014).