

No. 20-_____

In the
Supreme Court of the United States

BRANDAN A. MACK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the
Florida First District Court of Appeal

PETITION FOR A WRIT OF CERTIORARI

LUKE NEWMAN
COUNSEL OF RECORD
LUKE NEWMAN, P.A.
908 THOMASVILLE ROAD
TALLAHASSEE, FL 32303
(850) 224-4444
LUKE@LUKENEWMANLAW.COM

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COUNSEL FOR PETITIONER

SUPREME COURT PRESS



(888) 958-5705



BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Where a state enacts long-term sex offender registration requirements which are enforced under threat of felony criminal offense, may the state subject a juvenile offender to such a registration scheme following conviction for possession of child pornography?

PARTIES TO THE PROCEEDINGS

Petitioner

- Brandan A. Mack

Respondent

- State of Florida

LIST OF PROCEEDINGS

First District Court of Appeal State of Florida
1D19-1383

Brandan A. Mack v. State of Florida

Date of Final Opinion: June 16, 2020

Circuit Court of the First Judicial Circuit in and for
Walton County, Florida

Case No. 2018-CF-000098

State of Florida v. Brandan A. Mack, Defendant.

Date of Final Order: March 20, 2019

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
LIST OF PROCEEDINGS	iii
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE PETITION.....	4
CONCLUSION.....	9

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS**OPINIONS AND ORDERS**

Opinion of the First District Court of Appeal State of Florida (June 16, 2020)	1a
Order Denying the Defendant's Motion to Correct Sentencing Error Pursuant to Rule 3.800(B)(1) (March 20, 2019)	2a
Order of Sex Offender Probation (Attachment 1) (February 19, 2019)	6a
Information (Attachment 2) (February 12, 2018)	17a
Statutory Provisions Involved.....	26a

TABLE OF AUTHORITIES

	Page
CASES	
<i>Atkins v. Virginia</i> ,	
536 U.S. 304, 122 S.Ct. 2242,	
153 L.Ed.2d 335 (2002)	7
<i>Eveland v. State</i> ,	
161 So.3d 481 (Fla. 2d DCA 2014)	6
<i>Jollie v. State</i> ,	
405 So.2d 418 (Fla. 1981)	1
<i>Owens v. State</i> ,	
94 So.3d 688 (Fla 4th DCA 2012)	6
<i>Robinson v. California</i> ,	
370 U.S. 660, 82 S.Ct. 1417,	
8 L.Ed.2d 758 (1962)	7
<i>Robinson v. State</i> ,	
6 So.3d 677 (Fla. 1st DCA 2009)	6
<i>Roper v. Simmons</i> ,	
543 U.S. 551, 125 S.Ct. 1183,	
161 L.Ed.2d 1 (2005)	7, 8, 9
<i>Smith v. Doe</i> ,	
538 U.S. 84, 123 S.Ct. 1140,	
155 L.Ed.2d 164 (2003)	4, 5
<i>Solem v. Helm</i> ,	
463 U.S. 277, 103 S.Ct. 3001,	
77 L.Ed.2d 637 (1983)	7
<i>Thompson v. Oklahoma</i> ,	
487 U.S. 815, 108 S.Ct. 2687,	
101 L.Ed.2d 702 (1988)	8

TABLE OF AUTHORITIES – Continued

	Page
<i>United States v. Juvenile Male</i> , 590 F.3d 924 (9th Cir. 2010), <i>cert. granted, judgment vacated</i> , 564 U.S. 932, 131 S.Ct. 2860, 180 L.Ed.2d 811 (2011)	4, 5, 9
<i>United States v. Ward</i> , 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980)	6
<i>Weems v. United States</i> , 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed.2d 793 (1910)	7
<i>Wells v. State</i> , 132 So.3d 1110 (Fla. 2014)	1

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VIII	2, 6, 7, 8
U.S. Const. amend. XIV.....	2, 6

STATUTES

28 U.S.C. § 1257(a)	1
F.S. § 827.071.....	2
F.S. § 827.071(5)(a)	3
F.S. § 943.0435.....	3, 5, 6
FLA § 847.0135.....	2



PETITION FOR A WRIT OF CERTIORARI

Petitioner, Brandon Mack, respectfully requests that a writ of certiorari issue to review the judgment of Florida First District Court of Appeal entered on June 16, 2020.



OPINIONS BELOW

The Petitioner appealed the trial court's order, dated March 20, 2019 (App.2a) denying his motion to correct an illegal sentence to Florida's First District Court of Appeal. The First District Court of Appeal entered its per curium affirmance of the trial court's order on June 16, 2020. (App.1a) The opinion below has not been published.



JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). This Petition is filed within 90 days of the entry of Florida's First District Court of Appeal's per curium affirmance. The First District Court of Appeal's per curium affirmance constitutes a "[f]inal judgment . . . or decree . . . rendered by the highest court of a State in which a decision could be had" under 28 U.S.C. § 1257(a). *See Jollie v. State*, 405 So.2d 418 (Fla. 1981); *see also Wells v. State*, 132 So.3d 1110 (Fla. 2014).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

- **U.S. Const. amend. VIII**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

- **U.S. Const. amend. XIV**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

- **FLA § 847.0135** (App.30a)

Computer pornography; prohibited computer usage; traveling to meet minor; penalties

- **FLA § 943.0436** (App.63a)

Duty of the court to uphold laws governing sexual predators and sexual offenders.

- **F.S. § 827.071** (App.26a)

Sexual performance by a child; penalties.

- **F.S. § 943.0435** (App.34a)
Sexual offenders required to register with the department; penalty.



STATEMENT OF THE CASE

The State of Florida charged the Petitioner as an adult with multiple counts of possession of child pornography under Florida Statutes Section 827.071(5)(a) and another related offense. He was 17-years-old at the time of the offenses. Following a no contest plea, the trial court entered an order designating him as a sexual offender under Florida Statutes Section 943.0435(1)(h). Pursuant to Florida Statutes Section 943.0435(11), barring a pardon or some form of post-conviction relief, the Petitioner will carry this designation for 25 years following the completion of his sentence. Even after 25 years, he will be eligible for removal of the designation only if he meets the very stringent requirements under Section 943.0435(11) (an unlikely outcome given the many criminal charges that may result from even minor deviations from the requirements of the sex offender statute). This minimum 25-year sex offender designation is mandatory under Section 943.035. Petitioner seeks a writ of Certiorari to review the constitutionality of this cruel and unusual form of punishment.



REASONS FOR GRANTING THE PETITION

If a life without parole sentencing statute for non-homicide juvenile offenders creates a categorically cruel and unusual punishment, what is to be said about a mandatory sex offender registration statute that subjects the juvenile offender caught in its web to a likely lifetime of imprisonment behind the virtual bars of shame, ostracism, and social stigma that is Florida's sex offender registration scheme?

The requirements of Florida's sex offender registration scheme are (1) irrevocable for a minimum of 25 years up to life, (2) substantially likely to cause severe psychological trauma, and (3) grossly disproportionate to the culpability of a 17-year-old child pornography possessing offender. This registration scheme is a punishment, and it is cruel and unusual when applied to juvenile offenders.

The United States Court of Appeals, Ninth Circuit, has concluded that a strikingly similar federal sex offender registration scheme was punitive when applied to juveniles. *United States v. Juvenile Male*, 590 F.3d 924 (9th Cir. 2010), *cert. granted, judgment vacated*, 564 U.S. 932, 131 S.Ct. 2860, 180 L.Ed.2d 811 (2011). To distinguish *Smith v. Doe*, 538 U.S. 84, 99, 123 S.Ct. 1140, 1150, 155 L.Ed.2d 164 (2003), the Ninth Circuit emphasized the “pervasive and severe new and additional disadvantages that result from the mandatory registration of former juvenile offenders and from the requirement that such former offenders report in person to law enforcement authorities every 90 days for 25 years.”

On certiorari review, this Court vacated the Ninth Circuit's judgment on the grounds of mootness. *United States v. Juvenile Male*, 564 U.S. 932, 933, 131 S.Ct. 2860, 2862, 180 L.Ed.2d 811 (2011). Because the Respondent in *Juvenile Male* had turned 21 during the pendency of the case, he was no longer subject to ongoing registration as a special condition of supervision (which was imposed as a condition of his sentence in juvenile court). Without an ongoing injury, this Court found that the Ninth Circuit lacked jurisdiction to consider the case on the merits. *Id.* Given the purely procedural nature of this Court's *Juvenile Male* ruling, it remains an open question whether sex offender registration is punitive when applied to juveniles.

In *Doe*, this Court held that, when distinguishing a punitive statute from a non-punitive civil regulatory scheme, the first inquiry is whether the legislature meant to impose punishment or enact a regulatory scheme. *Id.* at 92. If the intent behind a sex offender registration program "was to enact a regulatory scheme that is civil and nonpunitive," any reviewing court should the "examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the legislature's] intention to deem it civil." *Id.* (internal quotation marks and citations omitted). This Court further held that "[b]ecause we ordinarily defer to the legislature's stated intent, only the clearest of proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* (internal quotation marks and citations omitted). Florida's sex offender registration scheme, codified as Section 943.0435, Florida Statutes, presents to this Court with the clearest proof

that it is, in both purpose, and in effect, a punitive statute. Whether a statutory scheme is civil or criminal is a question of statutory construction. *United States v. Ward*, 448 U.S. 242, 248-49, 100 S.Ct. 2636, 2641, 65 L.Ed.2d 742 (1980).

Florida Statutes Section 943.0435(12) contains language evincing a legislative suggestion that the designation of a person as a sexual offender is not a sentence or a punishment, but is simply the status of an offender that is the result of a conviction for having committed certain crimes. However, Section 943.0435 (12) lists eight various felony offenses, which makes it clear that this statute is designed to be, and functions as, a form of punishment. The State's use of Section 943.0435 is illustrative. The State of Florida has used Section 943.0435 to prosecute homeless defendants who could not afford the regular renewal of drivers' licenses or identification cards. *See e.g. Eveland v. State*, 161 So.3d 481 (Fla. 2d DCA 2014). Florida has also prosecuted at least one homeless defendant who was sleeping at a homeless shelter. *See e.g. Robinson v. State*, 6 So.3d 677 (Fla. 1st DCA 2009). The State of Florida has prosecuted registrants who could not obtain new identification cards based on a failure to provide sufficient address documentation. *See e.g. Owens v. State*, 94 So.3d 688 (Fla 4th DCA 2012). The documented history of zealous prosecution as well as the pervasive criminal offenses found within the statute itself preclude any argument that Section 943.0435 is some benign civil registration scheme. The statute is a byzantine and esoteric morass which the State of Florida regularly uses to impose lengthy prison sentences on registered sex offenders.

As applied to juveniles who commit possessory child pornography offenses, the requirements of Florida's sex offender registration statute constitute cruel and unusual punishment. The Eighth Amendment is incorporated against the states through the due process clause of the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 666, 82 S.Ct. 1417, 1420, 8 L.Ed.2d 758 (1962).

As this Court explained in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. This right flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Id.* at 311 (quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 549, 54 L.Ed.2d 793 (1910)). By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all people. The Amendment prohibits "not only barbaric punishments, but also sentences that are disproportionate to the crime committed." *Solem v. Helm*, 463 U.S. 277, 284, 103 S.Ct. 3001, 3006, 77 L.Ed.2d 637 (1983).

Applying decades (and possibly a lifetime) of sex offender restrictions and registration requirements upon a 17-year-old boy who possessed child pornography is the very definition of cruel and unusual punishment. Beginning with *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), this Court emphasized the differences between juveniles and adults in the areas of psychosocial and brain development. This Court in *Roper* invoked social science research to support its finding that juveniles are not as culpable as adults and thus cannot be class-

ified as “among the worst offenders.” 543 U.S. at 569–570. This Court has also recognized that juveniles are prone to “impetuous and ill-considered actions and decisions.” *Id.* at 569. State laws recognize the immaturity and irresponsibility of juveniles by prohibiting persons younger than 18 from voting, serving on juries, or marrying without parental consent. Secondly, juveniles are more likely to be negatively influenced by external pressures, including peer pressure, because they possess “less control, or less experience with control, over their own environment.” *Id.* These characteristics cause juveniles to be more prone to “immature and irresponsible behavior.” *Id.* at 570. Thus, juveniles’ “irresponsible conduct is not as morally reprehensible as that of an adult.” *Id.* at 561. (*quoting Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S.Ct. 2687, 2698, 101 L.Ed.2d 702 (1988)). Under this reasoning, juveniles are entitled to forgiveness. *Roper*, 543 U.S. at 569.



CONCLUSION

Mack presents this argument on the basis of the reasoning found in *Roper*, and that opinion's analysis of the Eighth Amendment to the United States Constitution. This Court should grant the present Petition to resolve the conflict between Florida's First District Court of Appeal in the present case and the Ninth Circuit's opinion in *Juvenile Male*.

Respectfully submitted,

LUKE NEWMAN
COUNSEL OF RECORD
LUKE NEWMAN, P.A.
908 THOMASVILLE ROAD
TALLAHASSEE, FL 32303
(850) 224-4444
LUKE@LUKENEWMANLAW.COM

COUNSEL FOR PETITIONER

SEPTEMBER 14, 2020