No. 23A402
CAPITAL CASE

In the
Supreme Court of the United States

CASEY A. MCWHORTER,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari to the
Alabama Supreme Court

OPPOSITION TO APPLICATION FOR A STAY OF EXECUTION PENDING PETITION FOR WRIT OF CERTIORARI

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EXECUTION SCHEDULED THURSDAY, NOVEMBER 16, 2023

CAPITAL CASE
QUESTIONS PRESENTED (RESTATED)

I. Should the Court deny McWhorter's application for a stay of his execution because (A) he did not request a stay below and presents no extraordinary circumstance for such failure, (B) he unreasonably and inexplicably delayed in bringing the instant claims, which he could have raised years if not decades ago, and (C) his petition was likely dismissed below on the basis of its several procedural defects and thus does not contain a federal question?

II. Is McWhorter entitled to a stay of execution when he cannot establish a substantial likelihood of success of the merits?

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INTRODUCTION

Thirty years ago, Casey McWhorter ambushed Edward Lee Williams in his home and shot the man eleven times, including once directly in the head after Williams fell to the floor. McWhorter was convicted and sentenced to death in 1994. After McWhorter exhausted his direct appeal and state and federal postconviction procedures, the State scheduled his execution for November 16, 2023.

Now, mere weeks before his sentence is set to be executed, McWhorter tries to manufacture delay by asking this Court for extraordinary relief. But there is no emergency. His petition is entirely composed of waived arguments about his 1994 jury venire and the lawfulness of his 1994 sentence—claims McWhorter could have raised *decades ago* at trial, on direct appeal, and/or on collateral review. Because he declined to raise those claims at the right time and in the right forum, instead waiting until the eleventh hour to file a time-barred successive habeas petition (directly in the Alabama Supreme Court), McWhorter is not entitled to the equitable remedy of a stay.

Even if McWhorter's original petition to the Alabama Supreme Court were proper at this late stage and had raised a federal question, his application to this Court should "not be entertained" because McWhorter failed to seek a stay in the court below. SUP. CT. R. 23.3. Respectfully, this Court should swiftly deny the application based on the balance of equities and McWhorter's failure to satisfy the "most extraordinary" burden of Supreme Court Rule 23.3.

McWhorter's claims are also meritless. The State may impose capital punishment on eighteen-year-old offenders tried as adults, and it makes no difference to the constitutional inquiry that such offenders could not serve on juries until age nineteen in Alabama. This Court is unlikely to grant McWhorter's petition for a writ of certiorari, and McWhorter has zero prospect of success on these claims.

Because McWhorter waited years (without explanation) to bring these new claims, lodged them in a procedurally barred habeas petition, neglected to seek a stay below, failed to identify a circuit split in his latest cert petition, and has no colorable constitutional claim, his application for a stay should be denied.

STATEMENT OF THE CASE

A. Statement of the Facts

McWhorter, Lee Williams, and two other friends conspired to rob and murder Lee's father, Edward Williams. *Ex parte McWhorter*, 781 So. 2d 330, 333 (Ala. 2000). McWhorter and his co-conspirators spent three weeks planning the murder and, around 3:00 p.m. on February 18, 1993, Lee and one of the other conspirators dropped off McWhorter and the fourth conspirator at Edward Williams's home. *Id.* Knowing that Williams would not be home for several hours, McWhorter and his friend passed the time finding the rifles they would use to kill Williams, creating makeshift silencers for those rifles, test-firing them into a mattress, and pillaging through the house for items to steal. *Id.* When Williams arrived home, McWhorter shot first. He and his co-conspirator shot Williams at least eleven times. *Id*. One of those shots came

as Williams was lying helpless on the floor, when McWhorter fired a shot directly into Williams's head "to assure that he was dead." *Id.*

After killing Williams, McWhorter methodically gathered items from the home, including retrieving Williams's wallet from his dead body, before driving away in Williams's pick-up truck. *Id*. The co-conspirators met at a pre-arranged spot in the woods, stripped the truck for parts, and divided the stolen items. *Id.* McWhorter's only concern was that Edward Williams did not have as much money on him as his son had promised.

Once the co-conspirators separated, McWhorter hid his "take" from the robbery. Another co-conspirator almost immediately went to the police and reported the crime. The day after the murder, police found McWhorter; he confessed and was arrested. *Id.*

B. Proceedings and Disposition Below

McWhorter was indicted for capital murder in May 1993.[1] The trial began on March 13, 1994, with voir dire, which lasted four days. R. 58–59. The guilt phase of the trial began on March 17, 1994, and continued for five days. R. 59–61. After a day of deliberations, McWhorter was convicted of capital murder for an intentional killing during a robbery. R. 1758. The penalty phase of trial followed, and the jury recommended a sentence of death by a vote of 10–2. R. 1852. The trial judge subsequently accepted the jury's recommendation and sentenced McWhorter to

1. Record citation are as follows:
   C. Clerk's record on direct appeal
   R. Transcript on direct appeal
   C32. Rule 32 (state postconviction) record

death. C. 384–95. The judge focused on the premeditated and calculated nature of McWhorter's crime and his lack of remorse. *Id.*

McWhorter appealed his conviction and sentence, and the Alabama Court of Criminal Appeals affirmed, *McWhorter v. State*, 781 So. 2d 257 (Ala. Crim. App. 1999), as did the Alabama Supreme Court, *Ex parte McWhorter*, 781 So. 2d 330 (Ala. 2000). This Court denied certiorari. *McWhorter v. Alabama*, 532 U.S. 976 (2001) (mem.). Thereafter, McWhorter sought collateral relief in state court under Rule 32 of Alabama Rules of Criminal Procedure. After an evidentiary hearing on McWhorter's impartial-jury and ineffective-assistance-of-counsel claims, the trial court denied McWhorter's petition and McWhorter appealed to the Alabama Court of Criminal Appeals. *McWhorter v. State*, 142 So. 3d 1195, 1202–03 (Ala. Crim. App. 2011). The Alabama Court of Criminal Appeals affirmed the denial of state postconviction relief. *Id.* at 1264. Although McWhorter sought discretionary certiorari review in the Alabama Supreme Court, his petition was denied. *Id.* at 1195.

McWhorter then sought habeas corpus relief through a petition filed in the United States District Court for the Northern District of Alabama. *McWhorter v. Dunn*, No. 4:13-cv-02150, 2019 WL 277385 (N.D. Ala. Jan. 22, 2019). The district court denied the petition and declined to issue a certificate of appealability, *id.* at *90, but the Eleventh Circuit granted a certificate of appealability on two issues: whether McWhorter's constitutional right to an impartial jury was violated because of a biased juror and whether trial counsel conducted an inadequate penalty-phase mitigation investigation. The Eleventh Circuit ultimately affirmed in an unpublished opinion,

McWhorter v. Comm'r, Ala. Dep't of Corr., 824 F. App'x 773 (11th Cir. 2020), and this Court denied certiorari, *McWhorter v. Dunn*, 141 S. Ct. 2757 (June 14, 2021) (mem).

On August 9, 2023, the State sought authorization from the Alabama Supreme Court to execute McWhorter's sentence. On September 6, 2023, McWhorter responded by filing a motion to strike the State's request and an original petition for writ of habeas corpus in the Alabama Supreme Court. On October 13, 2023, the Alabama Supreme Court authorized the State to carry out McWhorter's sentence in accordance with that Court's procedures, denied McWhorter's motion to strike, and dismissed McWhorter's original habeas petition. McWhorter did not seek a stay of any Alabama Supreme Court order but filed his petition for writ of certiorari and the instant stay application in this Court on November 1, 2023.

REASONS FOR DENYING THE STAY

McWhorter's application suffers from a variety of procedural defects, and his cert petition has no probability of success. First, McWhorter never requested a stay from the Alabama Supreme Court before seeking that relief here. SUP. CT. R. 23.3. Second, McWhorter's undue delay in asserting his latest challenge warrants denial of a stay on equitable grounds. Third, the federal claim presented in McWhorter's certiorari petition is not properly before the Court for review. Finally, McWhorter has failed to establish a likelihood of success on the merits because he has identified no circuit split and there is no constitutional right against capital punishment for eighteen-year-olds even when a State makes nineteen the minimum age for jury service.

I. McWhorter Did Not Request a Stay in the Court Below.

Rule 23 of this Court's Rules provides, in part, "[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof." SUP. CT. R. 23.3; *Dolman v. United States*, 439 U.S. 1395, 1397–98 (1978) (Rehnquist, J., as Circuit Justice) ("Our Rule 27 provides that applications for a stay here will not normally be entertained unless application for a stay has first been made to a judge of the court rendering the decision sought to be reviewed."); *Bateman v. Arizona*, 329 U.S. 1302, 1304 (1976) ("In all cases, the fact weighs heavily 'that the lower court refused to stay its order pending appeal.'") (quoting *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers)). Here, McWhorter did not seek a stay in the Alabama Supreme Court before or after it dismissed his original habeas application.

McWhorter's application for a stay does not acknowledge Rule 23's requirement to seek relief in the lower court, much less offer an explanation as to why his last-minute filing meets the definition of "the most extraordinary circumstances." SUP. CT. R. 23.3. Because McWhorter did not request a stay in the lower court and he has not set forth extraordinary circumstances to justify his omission, this Court should deny McWhorter's stay application.

II. McWhorter's Undue Delay Warrants Denial of a Stay.

This Court recognizes 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." *Hill v. McDonough*, 547 U.S. 573, 584

(2006) (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004) (requiring district courts to consider whether an inmate unnecessarily delayed in bringing the claim before granting a stay "[g]iven the State's significant interest in enforcing its criminal judgments")). When determining whether to "grant a stay of execution, [this Court] must consider whether [the petitioner's] challenge 'could have been brought earlier' or otherwise reflects a prisoner's 'attempt at manipulation.'" *Nance v. Ward*, 142 S. Ct. 2214, 2225 (2022). In this case, there is no question that McWhorter could have brought his claim long ago, and he offers no excuse for his extreme delay.

McWhorter says that his death sentence is unconstitutional because he was eighteen when he murdered Williams, yet he could not have served on a jury at that time because Alabama requires that jurors be nineteen years old. His attempt to raise this claim for the first time after the conclusion of direct appeal, state postconviction, and federal habeas review is indefensible (and McWhorter offers no defense). Not only did he wait until the end of federal habeas proceedings, McWhorter let more than *two years* elapse after this Court's denial of certiorari review before filing a new habeas petition directly with the Alabama Supreme Court, and even then only after the State sought authorization to execute his sentence.

The proper time for McWhorter to challenge the composition of his jury venire was in 1994 before the trial had begun. *See, e.g.*, *Ross v. State*, 581 So. 2d 495, 496 (Ala. 1991); *Smith v. State*, 364 So. 2d 1, 11 (Ala. Crim. App. 1978) ("Here there was no attempt to prove that the 'youth' constituted a distinct and identifiable group within the community."); *Burks v. State*, 600 So. 2d 374, 384 (Ala. Crim. App. 1991).

In fact, the trial court heard motions on juror selection at a pretrial hearing on March 11, 1994. *See McWhorter*, 781 So. 2d at 298. At that time, McWhorter knew that he was eighteen when he murdered Williams and that the minimum age for jury service was nineteen. He could have raised the issue immediately. And because McWhorter was sentenced to death, he had another opportunity to present his claim for plain error review during his direct appeal. Instead, McWhorter waited until September 12, 2023—more than one month after the State moved on August 9 for authorization to execute his sentence—to present this claim.[2]

Similarly, the proper time for McWhorter to challenge his death sentence on the ground that he was eighteen when he murdered Williams was either in the penalty phase of his 1994 trial or soon after this Court decided *Roper v. Simmons*, 543 U.S. 551 (2005). McWhorter's stay application acknowledges *Roper* and argues he should now "receive[] the benefit of his juvenile status." Stay App. at 6. But this Court's decision in *Roper* was published on March 1, 2005. McWhorter waited over *eighteen years* to challenge his sentence based on his expansive reading of that decision.

Regardless of whether McWhorter should have raised his claims at trial, when this Court decided *Roper*, or in the two years following the conclusion of federal

2. McWhorter's counsel, Benjamin Rosenberg, who was one of the attorneys representing McWhorter in the state habeas proceeding, has represented McWhorter since the appeal of McWhorter's original postconviction Rule 32 proceeding. Additionally, although he was not listed as representing McWhorter in the state habeas proceeding, Robert Newman with the Legal Aid Society has represented McWhorter since the filing of McWhorter's initial postconviction Rule 32 petition in 2002. C32 12.

habeas corpus review in 2021, McWhorter offers no excuse for his delay. Decades (or at least years) after his claims were available to him, he deployed them only after the State moved to execute his sentence. Consequently, his stay application reeks of manipulation—the kind of "'last-minute' claim relied on to forestall an execution" that this Court does "not for a moment countenance." *Nance*, 142 S. Ct. at 2225; *Hill*, 547 U.S. at 585 (federal courts "can and should protect the State from dilatory or speculative suits"); *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) ("Last-minute stays should be the extreme exception, not the norm, and 'the last-minute nature of an application' that 'could have been brought' earlier, or 'an applicant's attempt at manipulation,' 'may be grounds for denial of a stay.'") (quoting *Hill*, 547 U.S. at 584); *Gomez v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam) ("A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.").

McWhorter had years of orderly postconviction process resulting in a final judgment denying relief. His application seeks an end-run around that process, which would disturb both the finality of his conviction and the State's strong interests in carrying out its sentences. Such inexplicable delay is reason enough to deny relief. *See Woodward v. Hutchins*, 464 U.S. 377, 378–80 (1984) (Powell, J., concurring, joined by four Justices) (vacating stay of execution where claims in a successive petition could, and should, have been raised in a first petition for federal habeas corpus).

III. McWhorter's Federal Question is Not Reviewable Because the Alabama Supreme Court Did Not Rule on Merits.

McWhorter invites the Court to infer that the state court's decision was a ruling on the merits of his constitutional challenge to the imposition of the death penalty based on age. Stay App. at 5. He argues that he is entitled to such a presumption because the state court's decision was "silen[t] as to the reasoning behind its denial." *Id.* True, when "a federal claim has been presented to a state court and the state court has *denied* relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary," *Harrington v. Richter*, 562 U.S. 86, 99 (2011) (emphasis added). But McWhorter's state habeas petition was not denied. It was "DISMISSED" (Pet. App. at 1.) after the State filed a motion to dismiss based solely on Alabama law. *See Coleman v. Thompson*, 501 U.S. 722, 740 (1991).

To that end, the Alabama Supreme Court never ordered the State to answer McWhorter's original habeas petition. The lower court never received full briefing on the federal claim McWhorter tried to present. Rather, after the State moved to dismiss on purely procedural grounds under Alabama law (*see* Pet. App. 288–91), the state appellate court dismissed McWhorter's state habeas petition. Although the Alabama Supreme Court denied McWhorter's motion to strike the State's motion for authorization to execute McWhorter's sentence, the only order disposing of the State's motion to dismiss was the Alabama Supreme Court's order dismissing the petition.

As this Court has stated, the presumption of a merits ruling "may be overcome when there is reason to think some other explanation for the state court's decision is

more likely." *See Harrington*, 562 U.S. at 99–100 (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991)). In this case, it is more likely that McWhorter's original habeas petition addressed to the Alabama Supreme Court was dismissed on procedural grounds—as argued in the State's motion to dismiss. This is especially true where the federal claim was presented in a discretionary petition for extraordinary relief that, under the Alabama Supreme Court's own precedent, will not be entertained absent "unusual circumstances." *Ex parte Lee*, 155 So. 2d 296, 297 (Ala. 1963).

Further, Alabama adheres to a substance-over-form reading of pleadings. *Ex parte Deramus,* 882 So. 2d 875, 876 (Ala. 2002) (noting that the "substance of a motion and not its style determines what kind of motion it is"). McWhorter's original petition for habeas corpus challenged the constitutionality of his sentence, so its substance was that of a Rule 32 postconviction petition despite being styled as a petition for habeas corpus. *Ex parte Powell*, 641 So. 2d 772, 775 (Ala. 1994) ("Rule 32 [of the Alabama Rules of Criminal Procedure] provides a procedure for securing the post-conviction relief from a conviction or sentence previously provided by either a writ of habeas corpus or a writ of error coram nobis."). As such, McWhorter's petition was subject to the procedural bars and limitation period under Rule 32—both of which were adequate state-law grounds for dismissal without reaching the merits.

First, McWhorter's claim was time barred from review. *See* ALA. R. CRIM. P. 32.2(c) (providing that courts "shall not entertain any petition" filed out of time). McWhorter's conviction and sentence became final on April 16, 2001, when this Court declined certiorari review of McWhorter's direct appeal. *McWhorter v. Alabama*, 532

U.S. 976 (2001) (mem). Alabama's limitations period for postconviction proceedings lapsed two[3] years later.

Second, given that McWhorter previously challenged his conviction and sentence under Rule 32, the Alabama Supreme Court was required to treat McWhorter's petition as a successive Rule 32 petition. *See* ALA. R. CRIM. P. 32.2(b). McWhorter made no attempt to present the Alabama Supreme Court with "good cause" for failing to present his federal constitutional claims "when the first petition was heard." *Id*. In fact, McWhorter's arguments would be procedurally barred even in a timely first state postconviction petition because his legal and factual theory could have been raised at trial or during his direct appeal. ALA. R. CRIM. P. 32.2(a)(3) and (5).

Third, even assuming McWhorter could have overcome these postconviction procedural rules, the state court filing was subject to dismissal because he failed to comply with the statutory procedure for other matters cognizable in habeas. "When a person is confined in the penitentiary, the petition for writ of habeas corpus must be addressed to the nearest circuit judge." *Ex parte Goodwin*, 214 So. 2d 415, 416 (Ala. 1968). Although the holding in *Ex parte Goodwin* was based on Section 6, Title 15 of the Code of Alabama, 1940, that legislative requirement was carried over into Alabama's current 1975 code. *See* ALA. CODE § 15-21-6(b) (1975). Accordingly,

3. *See Ex parte Gardener*, 898 So. 2d 690, 691–92 (Ala. 2004) (holding that, because the petitioner's triggering date occurred before Rule 32.2(c) was amended to impose a one-year limitation period for filing postconviction petitions, he had two years from his triggering date to file).

McWhorter's filing of an original petition was improper and was properly dismissed under Alabama Supreme Court precedent.

For any of these reasons, McWhorter's original writ of state habeas corpus was an inappropriate method for challenging the constitutionality of his sentence. *See Powell*, 641 So. 2d at 775; *Citizenship Trust v. Keddie-Hill*, 68 So. 3d 99, 105–06 (Ala. 2011) (citing ALA. R. CRIM. P. 32.4) (noting that the court treats any civil action attacking a criminal judgment "as we would any other Rule 32 proceeding"). It was for at least one of these reasons, articulated in the State's motion to dismiss, that the Alabama Supreme Court dismissed the petition. If there is any presumption that the Alabama Supreme Court denied McWhorter's substantive claims on the merits, it is amply rebutted by the procedural defects apparent from the face of McWhorter's filing and the plain meaning of Alabama's Rule 32.

Under such circumstances, there is no federal question presented for this Court's review. "This Court will not take up a question of federal law presented in a case 'if the decision of [the state] court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment.'" *Lee v. Kemma*, 534 U.S. 362, 375 (2002) (quoting *Coleman*, 501 U.S. at 729). The Court observes this practice both in the habeas context as well as in its exercise of certiorari review in the direct appeal context. *Lee*, 534 U.S. at 375.

It is essential to this Court's jurisdiction under 28 U.S.C. § 1257(a) that a substantial federal question have been properly raised in state court. McWhorter's claim—that the exclusion of eighteen-year-olds from his jury somehow violated the

Constitution—was not properly raised in the state courts, nor has McWhorter made any attempt to show that his claim was properly raised in state court. *See Adams v. Robertson*, 520 U.S. 83, 86–87 (1997) (dismissing writ as improvidently granted where petitioner failed to show that the federal question was properly presented in state court); *see also* SUP. CT. R. 14(g)(i) (stating that petitioner must "show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari"); *see, e.g.*, *Burks*, 600 So. 2d at 384 (holding that challenge to underrepresentation of eighteen-year-olds in grand jury, raised after arraignment and plea, "was untimely and preserved nothing for review," and that "there is absolutely nothing in the record before this Court to support this allegation"). Accordingly, the Court should deny McWhorter's stay application because the associated petition for writ of certiorari fails to furnish this Court with a reviewable federal question in compliance with Rule 14(g).

IV. McWhorter Has Not Established a Substantial Likelihood of Success on the Merits.

McWhorter's petition for writ of certiorari challenges the constitutionality of his death sentence based on his age at the time he murdered Edward Williams and Alabama's minimum age for service on a jury. But his petition offers this Court no compelling reason to exercise its certiorari jurisdiction. There is no circuit split identified and no written decision below for this Court to analyze. Any decision the Court would reach in this case would be the product of a "strawman" of this Court's own creation. Even McWhorter concedes that speculation would be the only way to attribute federal grounds to the lower court's dismissal. Pet. at 1. Such a procedural

posture does not present a worthwhile vehicle for this Court to review and resolve any constitutional questions.

McWhorter asserts that a stay is warranted to allow the Court time to address his constitutional challenge to his death sentence. His petition, however, presents a conflated jumble of Sixth, Eighth, and Fourteenth Amendment cases that he never presents in a harmonious fashion. Below, his belated and barred petition to the Alabama Supreme Court blatantly conceded that Alabama is not an outlier and that his position lacks support in existing precedent. *See, e.g.*, Pet. App. at 9–10 & n.2 (citing examples of other States that exclude eighteen-year-olds from jury service); *id.* at 13–14 & n.5 (acknowledging that "other cases have declined to find 'the young' as a cognizable category for the fair cross-section requirement," which would require this Court to "extend" its precedents). Moreover, this Court has noted that "claims of exclusion of the young from juries have met with little success in the federal courts," *Hamling v. United States*, 418 U.S. 87, 137 (1974) (collecting cases), and it is well-settled that the States retain the right to confine the selection of jurors to "citizens [and] to persons meeting specified qualifications of age and educational attainment." *Carter v. Jury Comm'n of Greene Cnty.*, 396 U.S. 320, 332–33 (1970). Indeed, McWhorter's petition fails to set forth a strong reason to link (constitutionally) the minimum age for jury service to eligibility for the death penalty, while also ignoring the fact that all fifty states provide a mechanism for exposing sixteen- and seventeen-year-olds to felony sentencing as an adult.

McWhorter has not shown that he has a colorable constitutional claim, let alone a likelihood of success on the merits. His claim was not properly presented to the lower court, and it arrives decades late. So, while there are compelling reasons to deny the abusive petition, there are certainly no compelling reasons to grant it. On this basis, the equities weigh heavily against granting the requested stay.

CONCLUSION

For the foregoing reasons, this Court should deny McWhorter's application for stay of execution.

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