No. 23A402 * CAPITAL CASE *****

IN THE

Supreme Court of the United States

CASEY McWHORTER

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for a Writ of Certiorari to Alabama Supreme Court

REPLY IN SUPPORT OF APPLICATION FOR A STAY OF EXECUTION TO THE HONORABLE CLARENCE THOMAS, CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Execution To Take Place Between November 16, 2023, 12:00 am CT and November 17, 2023 6:00 am CT

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The State opposes McWhorter's stay application by baselessly contesting his compliance with this Court's Rules, accusing him of manipulation and undue delay, and arguing that the Alabama Supreme Court's decision is not reviewable. Each of these arguments fail.

I. McWhorter's Stay Application Complies With Supreme Court Rule 23

McWhorter's stay application is not barred by Rule's 23 requirement to seek a stay from the court below. McWhorter sought relief equivalent to a stay from the Alabama Supreme Court. As the State is aware, on September 6, 2023, McWhorter moved to strike the State's motion seeking an order authorizing the execution. App. 9 (McWhorter Alabama Habeas Petition). While that motion was pending, he filed his habeas petition with the Alabama Supreme Court, which is the subject of his petition for certiorari to this Court. The Alabama Supreme Court denied both McWhorter's motion to strike and his original habeas petition on the same day, October 13, 2023. In light of the Alabama Supreme Court's denial of the motion to strike, seeking a stay from that court would have been redundant.

Furthermore, as the State concedes, the Rule provides that an applicant facing "the most extraordinary circumstances" is not required to seek a stay from the court below. McWhorter is facing execution; he most certainly is facing extraordinary circumstances.

McWhorter thus properly sought a stay from this Court pending review of his petition for certiorari.

II. There Has Been No Undue Delay

The State argues that McWhorter's petition for certiorari comes too late and is composed of entirely waived arguments. The State ignores, however, that McWhorter's petition here follows a petition invoking the Alabama Supreme Court's original jurisdiction over writs of habeas corpus. Ala. Code § 12-2-7(2) (granting the Alabama Supreme Court the authority to hear writs of habeas corpus when no other lower state court has jurisdiction). Thus, McWhorter's petition is not a successive petition nor an end-run around the postconviction process, as the State characterizes it. He legitimately invoked the Alabama Supreme Court's jurisdiction and then properly took an appeal of that order to this Court.

Nor could McWhorter have raised his jury and Eighth Amendment claims any earlier. First, while this Court decided *Roper* in 2005, the national consensus regarding eighteen-year-olds has recently shifted. As McWhorter noted in his petition to the Alabama Supreme Court, recent decisions in the Michigan and Washington Supreme Courts have recognized that eighteen-year-olds should not be subject to mandatory life without parole because such sentences constitute cruel punishment. App. 17 (citing *People v. Parks*, 987 N.W.2d 161 (Mich. 2022); *Matter of Monschke*, 482 P.3d 276 (Wash. 2021)). Both courts relied on the emerging scientific consensus that 18-year-old brains are more similar to juvenile brains than to those belonging to fully matured adults. *See, e.g.*, *Parks*, 987 N.W.2d at 175 (summarizing scientific literature); *Monschke*, 482 P.3d at 277 ("Modern social science, our precedent, and a long history of arbitrary line drawing have all shown that no clear line exists between childhood and adulthood."). Second, there is

growing recognition by federal courts that eighteen-year-olds cannot be denied constitutional rights based on their age. App. 14 (citing federal cases recognizing that constitutional rights vest before the age of 21 and that states may not deny such rights to 18-to-20 year olds).

It is implausible to suppose that after almost 30 years on death row, and given the well-known difficulties in obtaining stays at the 11th hour, McWhorter was holding back one last argument in his back pocket. McWhorter did no such thing and raised his arguments properly before the Alabama Supreme Court in an original habeas petition. Following the Alabama Supreme Court's dismissal of that petition, McWhorter's petition for certiorari is properly before this Court and there has been no undue delay barring this Court's grant of an application for a stay.

III. The Alabama Supreme Court's Order Is Reviewable

The Alabama Supreme Court dismissed McWhorter's claim without further explanation. First, dismissal does not imply that the decision was on the merits or based on a procedural defect. *See, e.g.*, Black's Law Dictionary ("The dismissal of an action, suit, motion, etc., is an order or judgment finally disposing of it by sending it out of court, though without a trial of the issues involved"). Second, absent any further indication from the Alabama Supreme Court – and there is none – the law clearly provides a presumption that the Alabama Supreme Court's decision was on the merits. *See Harrington v. Richter*, 562 U.S. 86, 99 (2011) ("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."); *Harris v. Reed*,

489 U.S. 255, 265 (1989) (presumption of a merits determination when it is unclear whether a decision appearing to rest on federal grounds was decided on another basis); *Borden v. Allen*, 646 F.3d 785, 813-14 (11th Cir. 2011) ("Because ambiguity often pervades state court opinions, the Supreme Court has devised a plain statement rule: 'in determining… whether we have jurisdiction to review a case that is alleged to rest on adequate and independent state grounds, we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon' such grounds.") (further citation omitted).

The State offers no credible reason to rebut this well-established presumption. While the State argues that McWhorter's original habeas petition was "likely" dismissed on procedural grounds, it can only guess. Indeed, the State ignores that its own motion to dismiss was not (as it represents) purely procedural but also argued equitable grounds. It is therefore impossible to assert, as the State does, that the Alabama Supreme Court's dismissal was not on substantive, federal, grounds. The Alabama Supreme Court surely knew how to say that its ruling was a procedural one, or that it was dismissing the petition on some other grounds. *See Borden* at 815 ("[T]he Alabama state courts appear fully capable of utilizing adequate and independent state procedural rules to avoid review of federal claims when they wish to do so."). It did not say anything. Under the law that is treated by this Court as a decision on the merits and therefore reviewable by this Court.

IV. The State Fails To Prove The Absence Of A Substantial Likelihood of Success on the Merits

The State argues that McWhorter's petition should be denied because he has not established a substantial likelihood of success on the merits. Response 14-16. In support of this argument, the State presents a fabrication of the facts that is unsupported by the record. The State claims that McWhorter's own petition to the Alabama Supreme Court "conceded that Alabama is not an outlier." Response 15. However, McWhorter argues the exact opposite. In his petition to the Alabama Supreme Court and to this Court, McWhorter stated and established that Alabama *is* "an outlier in systematically excluding 18-year-olds from jury service." App. 9 (Petition to the Alabama Supreme Court); Cert. Petition at 8 ("Alabama is an outlier in barring 18-year-olds from jury service."). And while states can define who can serve on a jury, the states' ability to do so must comport with the Constitution. McWhorter demonstrated in his petition to the Alabama Supreme Court and to this Court that Alabama's practice of excluding of 18-year-olds from jury service, while simultaneously holding them capable of being punished as adults, is irrational.

V. The State Concedes It Would Not Be Harmed By A Stay

The State does not even attempt to argue that it would be harmed by a brief stay. It therefore concedes that a stay pending this Court's review of McWhorter's petition would not pose any harm to its interests.

CONCLUSION

The Court should grant McWhorter's application for a stay of execution pending its consideration of his petition for certiorari.

Respectfully submitted,

Date: November 9, 2023

/s/ *Benjamin Rosenberg*

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