

No.

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

**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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APPLICATION FOR A STAY OF EXECUTION

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

Applicant Casey McWhorter respectfully requests a stay of his execution by lethal injection pending the Court's disposition of his Petition for Writ of Certiorari seeking review of the decision of the Alabama Supreme Court (October 13, 2023), and any further proceedings in this Court. The execution is scheduled to take place between November 16, 2023, 12:00 am CT and November 17, 2023 6:00 am CT. If this Court is unable to resolve this application by November 16, 2023, it should grant a temporary stay while it considers this application.

OPINION BELOW

The judgment for which review is sought is attached as Exhibit A.

JURISDICTION

McWhorter has concurrently filed a petition for a writ of certiorari with this Application. This Court has jurisdiction to enter a stay under 28 U.S.C. § 2101(f), 28 U.S.C. § 1651, and Supreme Court Rule 23.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

U.S. Constitution, Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with

the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Constitution, Eighth Amendment:

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

U.S. Constitution, Fourteenth Amendment, Section 1:

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.

Ala. Code § 26-1-1(a):

Any person in this state, at the arrival at the age of 19 years, shall be relieved of his or her disabilities of minority and thereafter shall have the same legal rights and abilities as persons over 21 years of age. No law of this state shall discriminate for or against any person between and including the ages of 19 and 21 years solely on the basis of age.

REASONS FOR GRANTING THE STAY

McWhorter seeks a stay of his execution pending this Court's decision on his petition for certiorari. The Governor of Alabama has authorized McWhorter's execution to take place within a thirty-hour period beginning November 16, 2023 at

12:00 am CT and ending November 17, 2023 at 6:00 am CT. Without a stay, he may be executed while his petition for certiorari remains pending before this Court.

The framework guiding the Court's discretion to grant a stay is as follows:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Thus, a stay should be granted when necessary to “give non-frivolous claims of constitutional error the careful attention that they deserve” and when a court cannot “resolve the merits [of a claim] before the scheduled date of execution ... to permit due consideration of the merits.” *Barefoot v. Estelle*, 463 U.S. 880, 888-89 (1983).

Where an applicant seeks a stay pending the Court's ruling on a petition for certiorari, he or she need show only a “reasonable probability” that this Court will grant certiorari and a “fair prospect” that the decision below will be reversed.

Maryland v. King, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers).

McWhorter's pending petition raises substantial violations of his rights under the Sixth, Eighth, and Fourteenth Amendments and therefore easily surpasses the threshold for a stay. For the reasons set forth below, the Court should grant McWhorter's application and stay McWhorter's execution date pending a decision on his petition.

I. There is a reasonable probability that this Court will grant certiorari and a fair prospect that McWhorter will succeed on the merits

It is reasonably likely that this Court will grant certiorari on McWhorter's petition because his petition seeks redress for an anomaly of state law that violates his rights under the Sixth, Eighth, and Fourteenth Amendments. Alabama law sets the age of majority at 19 years old, not 18 years. Ala. Code § 26-1-1. An 18-year-old is thus a minor. 18-year-olds cannot serve on state juries because of their legal status. They can, however, be sentenced to death for a capital offense, even though Alabama law otherwise treats them as juveniles.

In 1994, McWhorter was sentenced to death for a crime he committed just three months past his 18th birthday. In other words, he received a capital sentence even though he was a juvenile. When McWhorter was tried, the venire for his jury excluded 18-year-olds, since jurors must be at least 19 in Alabama. The jury recommended death by a vote of 10-2, the bare statutory minimum.

Alabama's treatment of 18-year-olds is not just arbitrary but unconstitutional. If 18-year-olds are competent to be tried as adults and subject to capital punishment, there is no rational reason for them to be excluded from state jury service. By systematically excluding 18-year-olds from jury venires, Alabama deprives criminal defendants of their right under the U.S. Constitution to a jury drawn from a fair cross-section of the community. Alabama also deprives 18-year-olds of their right to serve on juries. But if 18-year-olds are juveniles, as Alabama law has deemed, then they should not be eligible for the death penalty for crimes committed as juveniles.

Since McWhorter’s sentence in 1994, the nation’s consensus on the death penalty has evolved substantially. In 2003, this Court decided *Roper v. Simmons*, abolishing the death penalty for minors under 18 years old. There is emerging research showing that there is nothing magic about turning 18 when it comes to brain science – 18 year olds continue to develop and mature. Thus, the question of whether a defendant who was newly 18 at the time of the capital offense – and who has the legal status of a minor under state law – can be put to death consistent with the Eighth Amendment is ripe for this Court’s decision. Nor has the Court clarified whether age discrimination is consistent with the Sixth and Fourteenth Amendment rights concerning jury service.

McWhorter raised these issues by filing a petition for writ of habeas corpus with the Alabama Supreme Court pursuant to its original jurisdiction over such writs. His petition sought redress for violations of his right to a jury drawn from a fair cross-section of the community (Sixth Amendment) and the right to be free from cruel and unusual punishment (Eighth Amendment). His petition to the Alabama Supreme Court also argued that Alabama’s exclusion of 18-year-olds from state jury service denied them equal protection under the law (Fourteenth Amendment).

But on October 13, 2023, the Alabama Supreme Court issued a summary order dismissing the petition without explaining any of its reasoning. In light of the Alabama Supreme Court’s silence as to the reasoning behind its denial, McWhorter is entitled to the presumption that it was denied on the merits. *Harrington v. Richter*, 562 U.S. 86, 99 (2011) (citing *Harris v. Reed*, 489 U.S. 255, 265 (1989)).

The issues that McWhorter raised cry out for decision, particularly in light of his pending execution. Clarity is sorely needed as to when a state can deem a class of individuals to be juveniles but deny them fundamental constitutional protections that would otherwise be afforded to them. McWhorter should either have received the benefit of his juvenile status and been deemed a juvenile ineligible for the death penalty following this Court's decision in *Roper*, or else received the benefit of the Sixth Amendment's fair cross-section requirements and had a jury drawn from a pool with 18-year-olds. As it stands, however, in 1994 he got neither the benefit of his juvenile status nor protection from the Sixth Amendment. Alabama cannot have it both ways.

Because McWhorter's petition raises an important issue as to state and federal authority with respect to fundamental constitutional rights, it is reasonably likely that this Court will grant certiorari.

II. McWhorter will be irreparably injured pending this Court's decision on the petition without a stay of his execution

McWhorter is scheduled to be executed in less than a month. Without a stay of his execution, this Court will not have an adequate opportunity to consider and rule on his petition for certiorari. Absent a stay, McWhorter will be executed and thus irreparably injured. *See Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Mem.) (Powell, J., concurring) (a prisoner facing execution will suffer irreparable injury if the stay is not granted).

III. The state will not be substantially injured by the stay, and the public interest favors the stay

A brief stay of execution pending the Court's consideration of McWhorter's petition serves both the State's and public's interest in ensuring that criminal defendants are not sentenced to death in violation of their rights and needlessly executed. Further, given that Alabama did not take immediate action to schedule McWhorter's execution following this Court's denial of review of McWhorter's federal habeas petition (indeed, it waited 21 months), the State cannot credibly argue that it would be substantially injured by a brief stay that allows this Court to rule on McWhorter's petition.

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 1, 2023

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EXHIBIT A



IN THE SUPREME COURT OF ALABAMA

October 13, 2023

SC-2023-0656

Ex parte Casey A. McWhorter. PETITION FOR WRIT OF HABEAS CORPUS: CRIMINAL (In re: Casey A. McWhorter v. State of Alabama) (Marshall Circuit Court: CC-93-077A; Criminal Appeals: CR-09-1129).

ORDER

The Petition for Writ of Habeas Corpus filed by Casey A. McWhorter on September 12, 2023, having been fully considered,

IT IS ORDERED that the Petition is DISMISSED.

Parker, C.J., and Shaw, Bryan, Sellers, Mendheim, Stewart, Mitchell, and Cook, JJ., concur.

Wise, JJ., recuses.

Witness my hand and seal this 13th day of October, 2023.

Megan B. Rhodeseck

Clerk of Court,
Supreme Court of Alabama

FILED
October 13, 2023
Clerk of Court
Supreme Court of Alabama