No. _____

In the Supreme Court of the United States

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

On Petition for Writ of Certiorari to the Alabama Supreme Court

CAPITAL CASE
PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner seeks this Court's review of the Alabama Supreme Court's denial of Petitioner's habeas petition, which presents important issues concerning Alabama's denial of constitutional rights based on age. Alabama deems 18-year-olds to be juveniles and excludes them from jury service, yet it permits them to be sentenced to death. This anomaly in the law led to the unconstitutional result of Petitioner being sentenced to death as a juvenile by a jury that was not made up of his peers.

The Court should therefore grant cert on the following questions:

1. Does Alabama's exclusion of 18-year-olds from jury service, coupled with its permitting them to be tried as adults, deny 18-year-old defendants their right to have a jury drawn by a fair cross-section of the community?

2. Does Alabama deny 18-year-olds equal protection of the law because it bars 18-year-olds from state jury service?

3. Does the capital sentence of a defendant whom the state classifies as a minor violate the Eighth Amendment's ban on cruel and unusual punishment?

LIST OF PARTIES

The parties involved are listed in the caption.

STATEMENT OF RELATED PROCEEDINGS

McWhorter v. State, No. CC-93-77A (Ala. Cir. Ct.) (issuing sentencing order on May 14, 1993).

McWhorter v. State, No. CR-93-1448 (Ala. Crim. App.) (affirming conviction and sentence on Aug. 27, 1999, as reported at 781 So.2d 257; later denying rehearing in unreported decision on Dec. 3, 1999).

Ex Parte McWhorter, No. 1990427 (Ala.) (affirming conviction and sentence on Aug. 11, 2000, as reported at 781 So.2d 330; later denying rehearing in unreported decision on Oct. 27, 2000).

McWhorter v. Alabama, No. 00-8327 (U.S.) (denying certiorari for the direct appeal of McWhorter's conviction and sentence on April 16, 2001, as reported at 532 U.S. 976).

McWhorter v. State, No. CC-93-77.60 (Ala. Cir. Ct.) (issuing final order denying McWhorter's petition under Alabama Rule of Criminal Procedure Rule 32 in unreported decision on March 29, 2010).

McWhorter v. State, No. CR-09-1129 (Ala. Crim. App.) (affirming denial of Rule 32 petition on Sept. 30, 2011, as reported at 142 So.3d 1195; later denying rehearing in unreported decision on Feb. 10, 2012).

McWhorter v. State, No. 1110609 (Ala.) (denying certiorari regarding denial of Rule 32 petition in unreported decision on Nov. 22, 2013).

McWhorter v. Comm'r, Alabama Dep't of Corr., No. 4:13-cv-2150-RDP (N.D. Ala.) (denying petition for writ of habeas corpus on Jan. 22, 2019, as reported at 2019 WL 277385).

McWhorter v. Comm'r, Alabama Dep't of Corr., No. 19-11535 (11th Cir.) (affirming denial of habeas petition on issues certified for appeal on Aug. 18, 2020, as reported at 824 F. App'x 773; later denying petition for rehearing in unreported decision on Oct. 20, 2020).

McWhorter v. Dunn, 141 S. Ct. 2757 (2021) (denying petition for certiorari).

Ex Parte McWhorter, No. SC-2023-0656 (Ala.) (dismissing petition for writ of habeas corpus on October 13, 2023).

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McWhorter invoked the Alabama Supreme Court's original jurisdiction over writs of habeas corpus and filed his petition on September 12, 2023. The Alabama Supreme Court dismissed McWhorter's writ on October 13, 2023.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). Petitioner filed an original writ of habeas corpus to the Alabama Supreme Court pursuant to that court's original jurisdiction over such writs, raising claims under the Sixth, Eighth, and Fourteenth Amendments. On October 13, 2023, the Alabama Supreme Court issued a summary order dismissing McWhorter's petition for habeas corpus. Because the Alabama Supreme Court did not indicate the grounds for its decision, McWhorter is entitled to the presumption that the Alabama Supreme Court dismissed his petition on the merits. *Harrington v. Richter*, 562 U.S. 86, 99 (2011) (citing *Harris v. Reed,* 489 U.S. 255, 265 (1989)).

RELEVANT CONSTITUTIONAL 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.

INTRODUCTION

Alabama treats 18-years-olds as juveniles. In particular, an 18-year-old cannot serve on a state jury. A criminal defendant can, however, can be sentenced to death for actions that he took as an 18-year-old. That is precisely what happened here: In 1994, Petitioner Casey McWhorter was sentenced to death for a crime he committed when he was just three months past his 18th birthday. 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 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, and it deprives all 18-year-olds of their right to serve on juries. And if 18-year-olds are juveniles, as Alabama law has deemed, then they should not be eligible for the death penalty.

McWhorter's capital sentence violated his rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution. The Alabama Supreme Court erred in dismissing McWhorter's petition for habeas corpus. This Court should grant certiorari on McWhorter's petition to address important constitutional questions about the rights of 18-years-olds.

STATEMENT OF THE CASE

On February 18, 1993, McWhorter and a co-defendant robbed the home of Edward Lee Williams and killed Williams when he came home during the robbery. *See McWhorter v. Dunn*, No. 4:13-CV-02150-RDP, 2019 WL 277385, at *3 (N.D. Ala. Jan. 22, 2019), *aff'd sub nom. McWhorter v. Comm'r, Ala. Dep't of Corr.*, 824 F. App'x 773 (11th Cir. 2020).

McWhorter was just three months past his 18th birthday at the time of the crime. His co-defendants were 15 and 16. The third co-defendant, who was not present at the robbery but helped plan it, was

Williams' son. After the crime, McWhorter attempted to commit suicide and was hospitalized; he confessed when questioned by police at the hospital. *Id*. at *3, *65, *70 n.44.

McWhorter was arrested the next day and was appointed counsel. Jury selection began on March 14, 1994, and on March 22 the jury rendered its guilty verdict. After a short penalty phase hearing, which also took place on March 22, the jury began deliberations on the appropriate sentence. After a few hours of deliberations, the jury stated that it could not reach a verdict. The Court gave a modified "*Allen* charge" explaining to the jurors the significant costs that their inability to reach a verdict would impose. Shortly thereafter, the jury recommended a death sentence by a 10-2 vote, the statutory minimum for death. The trial court followed the recommendation and sentenced McWhorter to death. *See McWhorter v. Comm'r*, 824 F. App'x at 776. In doing so, the trial court weighed one statutory aggravating circumstance (that the capital offense occurred during a robbery) and two statutory mitigating circumstances (that McWhorter lacked a significant prior criminal history and was 18 years old at the time of the crime). *McWhorter v. Dunn*, 2019 WL 277385, at *10-11.

McWhorter appealed his conviction to the Court of Criminal Appeals, which affirmed the conviction, as did the Alabama Supreme Court. The United States Supreme Court then denied McWhorter's petition for writ of *certiorari*. *See McWhorter v. State*, 781 So. 2d 257 (Ala. Crim. App. 1999); *Ex parte McWhorter,* 781 So. 2d 330 (Ala. 2001); *McWhorter v. Alabama*, 532 U.S. 976 (2001) (denying certiorari); *McWhorter v.*

State, No. CR-09-1129, 2011 WL 4511231 (Ala. Crim. App. Sept. 30, 2011).

McWhorter filed a petition pursuant to Alabama Rule of Criminal Procedure 32 on April 11, 2002, and an amended petition on February 8, 2005. After pre-trial motions led to dismissal of certain claims in the Amended Petition, *see* Order of October 19, 2006, a hearing (hereinafter, the "Rule 32 Hearing") was held on the remaining claims on August 26-28, 2009. Among other claims, McWhorter argued that: (1) he was denied an impartial jury because, in voir dire, a juror deliberately lied about having been related to the victim of a crime; (2) trial counsel was ineffective for failing to investigate and present mitigation evidence during the penalty phase; and (3) the State failed to disclose exculpatory evidence indicating that McWhorter's co-defendant admitted to firing the shot that killed Williams. *See generally, McWhorter v. Dunn*, No. 4:13-CV-02150-RDP, 2019 WL 277385 (N.D. Ala. Jan. 22, 2019).

The Rule 32 Court denied the remaining claims in an Order dated March 29, 2010. *See* Final Order Denying McWhorter's Amended Rule 32 Petition, No. CC-93-77-60. On September 30, 2011, the Alabama Court of Criminal Appeals affirmed denial of McWhorter's Rule 32 petition. McWhorter filed an Application for Rehearing pursuant to Alabama Rule of Appellate Procedure 40 on November 14, 2011. On February 20, 2012, the Application for Rehearing was denied. McWhorter filed a petition for writ of certiorari to the Alabama Supreme Court on March 9, 2012. The Alabama Supreme Court denied

McWhorter's writ for certiorari and affirmed the judgment on November 22, 2013.

On November 25, 2013, McWhorter filed a federal petition for habeas corpus asserting claims of constitutional error, including claims of biased jury and ineffective assistance of counsel. On January 22, 2019, the United States District Court for the Northern District of Alabama denied McWhorter's habeas petition. *See McWhorter v. Dunn*, No. 4:13-CV-02150-RDP, 2019 WL 277385 (N.D. Ala. Jan. 22, 2019).

On October 11, 2019, McWhorter appealed to the Eleventh Circuit. On August 18, 2020, the United States Court of Appeals for the Eleventh Circuit upheld the District Court's denial of McWhorter's habeas petition. *McWhorter v. Comm'r, Ala. Dep't of Corr.*, 824 F. App'x 773 (11th Cir. 2020).

The U.S. Supreme Court denied McWhorter's petition for writ of certiorari on June 24, 2021. *See McWhorter v. Dunn*, 141 S. Ct. 2757 (2021).

On August 9, 2023, the Alabama Attorney General filed a motion with the Alabama Supreme Court seeking an order authorizing McWhorter's execution.

On September 6, 2023, McWhorter filed a motion to strike the Alabama Attorney General's motion and an opposition to the motion. On September 12, 2023, McWhorter filed an original petition for writ of habeas corpus with the Alabama Supreme Court.

On October 13, 2023, the Alabama Supreme Court issued three separate orders. It granted the

Alabama Attorney General's motion seeking an order authorizing McWhorter's execution. It denied McWhorter's motion to strike the aforementioned order. And it dismissed McWhorter's petition for writ of habeas corpus.

On October 18, 2023, Alabama Governor Kay Ivey sent a letter to Alabama Department of Corrections Commissioner John Q. Hamm, authorizing McWhorter's execution to take place between 12:00 am on Thursday, November 16, 2023 and 6:00 am Friday, November 17, 2023.

REASONS FOR GRANTING THE PETITION

This Court's review is necessary to end Alabama's denial of equal protection of the law to 18-year-olds. Alabama's arbitrary treatment of 18-year-olds deprives them of constitutional protections and rights. Alabama law treats 18-year-olds as minors and excludes them from jury service in any state proceeding. Ala. Code § 26-1-1. But at the same time it treats them as adults eligible for capital punishment and thus ineligible for the protections that the Eighth Amendment provides to juveniles. Alabama has not advanced any important state interest to justify this irrational treatment of 18-year-olds as minors in one constitutional context but adults in another. This Court should therefore grant certiorari to resolve and clarify the constitutional status of 18-year-olds in Alabama.

I. Alabama's Exclusion of 18-Year-Olds From Jury Service While It Allows Them To Be Tried As Adults Violates The Sixth Amendment's Requirement That A Jury Be Drawn From A Fair Cross-Section Of The Community

This Court should grant certiorari to resolve whether Alabama's practice of trying 18-year-olds as adults while systematically excluding them from jury service violates criminal defendants' right to have a jury drawn from a fair section of the community.

Alabama is an outlier in barring 18-year-olds from jury service. The overwhelming practice in the United States is to allow 18-year-olds to serve on juries – and this was so when Casey McWhorter was tried in 1994. *See* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L. Rev. 203, 211 (1995) (noting Mississippi and Missouri as states excluding jurors between 18 and 21).[1] Indeed, when McWhorter stood trial, the minimum age for federal jury service had long been lowered to 18 years of age. *See* Pub. L. 92-269, § 1, Apr. 6, 1972, 86 Stat. 117. If McWhorter had been tried for a federal crime, 18-year-olds would have been part of the jury pool under federal statute, but because he was convicted of a state crime, this critical group of jurors was excluded from the venire.

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[1] A bill was proposed this year to lower the age of majority in Mississippi from 21 to 18. *See* 2023 MS S.B. 2643 (Jan. 16, 2023).

Under the U.S. Constitution, criminal defendants have the right to have their juries selected from a representative cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522 (1975). While the *Taylor* line of cases first ensured representative jury pools with respect to race and gender, it has also ensured representation with respect to age. In 1976 the Alabama Court of Criminal Appeals found that the exclusion of citizens over the age of 65 denied a defendant's right to a jury drawn from "a cross section of the community without purposeful exclusion." *Williams v. State*, 342 So. 2d 1325, 1327 (Ala. Crim. App. 1976), *aff'd*, 342 So. 2d 1328 (Ala. 1977); *see also Beckley v. State*, 342 So.2d 1330 (Ala. Crim. App. 1976) (finding exclusion of potential jurors over the age of 65 unconstitutional).

Alabama's systematic exclusion of 18-year-olds from jury service, while at the same time trying them and punishing them as adults, violates the Sixth and Fourteenth Amendments of the U.S. Constitution. To establish a prima facie violation of the fair cross-section requirement, the defendant must show: "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the [lack of] representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this [lack of representation] is due to systematic exclusion of the group in the jury-selection process." *Duren v. Missouri,* 439 U.S. 357, 364 (1979).

Here, 18-year-olds are a distinctive class because they are treated as juveniles with respect to

many aspects of Alabama law but can be tried as adults and are eligible for capital punishment. Essentially, Alabama says that 18-year-olds are competent enough to be put to death for their crimes, but not competent enough to serve on a jury that would provide a capital sentencing recommendation. The *per se* exclusion of 18-year-olds is not fair and reasonable in relation to their presence in the community, and because their exclusion is a function of Alabama statute, it is systematic.

The harm arising from the exclusion of 18-year-olds from McWhorter's jury venire is not merely academic. During the penalty phase, McWhorter's trial counsel called only four character witnesses, two of whom barely knew McWhorter. *See McWhorter v. Comm'r, Ala. Dep't of Corr.*, 824 F. App'x 773, 776 (11th Cir. 2020). Even on trial counsel's paltry and ineffective presentation, the jury initially could not agree on a sentence and ultimately went on to have two jurors vote against capital punishment. *McWhorter v. Comm'r, Alabama Dep't of Corr.*, 824 F. App'x 773, 776 (11th Cir. 2020). That vote was the bare minimum permitted for a death recommendation; a change of one death juror to life would have resulted in a hung penalty phase jury. Had someone in the jury been 18 years old, he or she could have been an influential voice against the imposition of the death penalty, particularly because that individual could have understood the unique position of 18-year-olds being treated as minors under Alabama law but as adults for purposes of capital punishment.

McWhorter therefore asks this Court to grant certiorari and find McWhorter was denied his right to a jury selected from a fair cross-section of the community due to the exclusion of 18-year-olds from his jury pool.

II. Alabama's Exclusion of 18-Year-Olds From State Jury Service Violates Their Rights Under The Fourteenth Amendment

"Many of the rights and responsibilities of citizenship fall upon the shoulders of 18-year-olds." *Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 3:22-CV-410, 2023 WL 3355339, at *13 (E.D. Va. May 10, 2023) (noting 18-year-olds gain the right to vote, become eligible for federal jury service, and lose the Eighth Amendment's shield from the death penalty). Indeed, numerous constitutional rights are extended to 18-year-olds and states cannot deny these rights based on age. As the federal district court in in the Eastern District of Virginia recently wrote:

> It is firmly established that the rights enshrined in the First, Fourth, Fifth, Eight, and Fourteenth Amendments vest before the age of 21. *See Firearms Policy Coal. Inc. v. McCraw*, ——623 F.Supp.3d ———, ———740, No. 4:21-CV-1245-P, 2022 WL 3656996 at *4-5 (N.D. Tx. Aug. 25, 2022) (finding that the Second Amendment includes 18-to-20-year-olds because the First, Fourth, Fifth, Eight, and Fourteenth Amendments apply to all Americans regardless of age) (citing to

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (free exercise); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731, (1969) (free speech); *New Jersey v. T.L.O.*, 469 U.S. 325, 334, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) (Fourth Amendment); *Fisher v. Univ. of Tex.*, 579 U.S. 365, 136 S.Ct. 2198, 195 L.Ed.2d 511 (2016) (equal protection); *Goss v. Lopez*, 419 U.S. 565, 574, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) (due process); *Kent v. Dulles*, 357 U.S. 116, 120, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958) (travel); *Roper v. Simmons*, 543 U.S. 551, 574, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (Eighth Amendment); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (equal educational opportunities)); *see also Worth v. Harrington*, ——F.Supp.3d ——, ——, No. 21-cv-1348, 2023 WL 2745673, at *7 (D. Minn. March 31, 2023) ("Although one can find certain limitations upon the rights of young people secured by both the First and Fourth Amendments, neither has been interpreted to exclude 18-to-20-year-olds from their protections"); *Carey v. Pop. Servs.*

> *Internat'l.*, 431 U.S. 678, 692 n.14, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977).

Fraser, No. 3:22-CV-410, 2023 WL 3355339, at *13 (finding that the Second Amendment's protections apply to 18-to-20-year-olds).

But an 18-year-old in Alabama cannot access the full range of constitutional rights that would otherwise be available to him. By setting the age of majority as 19 but still making 18-year-olds eligible for capital punishment, the Alabama legislature has carved up the bundle of rights that are normally bestowed on 18-year-olds and left them only with the burdens. Alabama cannot do so – particularly where the right denied involves a fundamental aspect of citizenship enshrined in the Constitution.

By excluding 18-year-olds from jury service in state proceedings, Alabama denies them a fundamental right of citizenship only because of their age. "Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019). This Court has long recognized that "equal opportunity to participate in the fair administration of justice is fundamental to our democratic system." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 145 (1994); *see also Powers v. Ohio*¸ 499 U.S. 400, 407 (1991) ("with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.").

The significance of the jury as an institution has been recognized from the Founding. Alexander

Hamilton, The Federalist No. 83, (1788) ("The friends and the adversaries of the plan of the [Constitutional] convention, if they agree in nothing else, concur at least in the value they set upon trial by jury[.]"). Jury service, like voting, is a fundamental aspect of citizenship. Barbara Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It Anyway?*, 92 Col. L. Rev. 725, 746 (1992) (citing *Carter v. Jury Commission*, 396 U.S. 320 (1970)).

Historically, these two rights have been inextricably linked and regarded as twin pillars of democracy. The Federal Farmer, *Letters from the Federal Farmer (IV)* (1987) ("The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature, are those fortunate inventions which have procured for them, in this country, their true proportion of influence, and the wisest and most fit means of protecting themselves in the community."); Alexis de Tocqueville, *Democracy in America Vol. 1 Chapter 16: Causes Mitigating Tyranny in the United States – Part 2* (1835) (jury service and universal suffrage "are two instruments of equal power"); Akhil Reed Amar, *The Bill of Rights* (1998) (identifying voting and serving on a jury, along with holding public office and the right to bear arms, as "political rights"); *see also* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L. Rev. 203, 244-46 (1995).

Voting rights and jury service are so linked that historically, the right to serve on a jury has typically expanded to additional groups of people in tandem with the broader recognition of voting rights. Underwood, 92 Col. L. Rev. at 746 ("eligibility for jury

service has historically been tied to eligibility for voting"). After the Nineteenth Amendment's recognition of women's right to vote, women gained the right to serve on juries in more states because the right to vote was a requirement for jury service. Hilary Weddell, *A Jury of Whose Peers? Eliminating Racial Discrimination in Jury Selection Procedures*, 92 Bos. J. L. Social Just. 453 (2013). Following the ratification of the Twenty-Sixth Amendment's minimum federal voting age of 18, Congress amended the federal Jury Selection and Service Act to lower the minimum age qualification from 21 to 18. 28 U.S.C. § 1865(b) (1972). Numerous other states have followed federal law in lowering the minimum age for jury service to 18 years of age. Yet Alabama persists in treating 18-year-olds as minors and denying them the right to serve on juries. This disparate treatment leads to the anomalous result that 18-year-olds in Alabama have the right to serve on a jury in federal proceedings, but do not have the same right in state courts.

This Court has protected a juror's right to serve on juries without being subjected to discrimination. *Batson v. Kentucky* and *J.E.B. v. Alabama* ensure a juror's right to serve on juries without being subject to race or gender discrimination. *See, e.g.*, *Burkette v. H.R. III, L.L.C.*, 410 F. Supp. 2d 1117, 1120 (M.D. Ala. 2006) (rejecting request to strike white juror to maintain racial balance of jury because doing so would violate that juror's right to serve on the jury solely because of his or her race). This Court should extend that protection to age discrimination as well. By denying 18-year-olds the right to serve on a state jury

even though they can be tried as adults, and even though they can vote Alabama irrationally discriminates against 18-year-olds and deprives them of their rights under the Fourteenth Amendment.

Alabama's denial of the jury service right to 18-year-olds cannot withstand rational basis scrutiny. Alabama has not advanced any rational reason for treating 18-year-olds as adults when it comes to capital punishment or voting but treating them as minors when it comes to jury service. If an 18-year-old is old enough to be sentenced to death for a criminal act, that 18-year-old should also be old enough to sit on a jury weighing a capital sentence.

This Court should therefore grant cert to resolve whether a state can deny a constitutional right to an individual based on age.

III. The Capital Sentence Of A Criminal Defendant Who Legally Was A Minor Constitutes Cruel and Unusual Punishment

Finally, this Court should grant cert to determine whether *Roper v. Simmons* bars capital punishment of an offender whose legal status was a minor at the time of the crime.

The defendant in *Roper* was similarly situated to McWhorter. At the time he committed the capital murder, Simmons was one year below the age of majority – he was 17. *Roper*, 543 U.S. at 555. Simmons stood trial at age 18 and was sentenced to death. *Id*. Though Simmons' first petition for a writ of habeas corpus was denied, he filed a new petition,

invoking the Missouri Supreme Court's jurisdiction over writs of habeas corpus, following the Supreme Court's decision in *Atkins v. Virginia*. *Id.* at 559. Here, while McWhorter was 18 years old at the time of the offense, he was one year below Alabama's age of majority and so faces the death penalty despite his status under state law as a minor.

Roper protects juveniles from the death penalty. *Id.* at 564 (basing decision on "the evidence of national consensus against the death penalty for juveniles."); *see also id.* (noting the Kentucky Governor's declaration in 2003 that "we ought not be executing people who, legally, were children."). Alabama has made the judgment that 18-year-olds are juveniles, a decision that is not out of step with *Roper*. *Id.* (expressly acknowledging "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18."). When McWhorter participated in the crime, he was a juvenile under Alabama law. McWhorter should therefore be eligible for protection under *Roper* and spared from the death penalty.

To deny McWhorter protection under *Roper* when he was a statutory juvenile just three months past his 18th birthday at the time of the crime is the epitome of cruel and unusual punishment. It is not simply that McWhorter finds himself on the wrong side of an arbitrary line. Though he admits and regrets his participation in Williams' murder, he cannot claim the same benefits of his youth that were afforded to his co-defendants—even though the Alabama legislature treats 18-year-olds as minors in numerous areas of the law. Alabama's statute

authorizing the capital punishment of 18-year-olds cannot be reconciled with Alabama's systematic treatment of 18-year-olds as minors and the dictates in *Roper*. This Court should grant certiorari and find that McWhorter's execution would violate his right to be free from cruel and unusual punishment under the U.S. Constitution.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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