No. 08-7621

IN THE SUPREME COURT OF THE UNITED STATES

JOE HARRIS SULLIVAN, Petitioner,

v.

STATE OF FLORIDA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BRYAN A. STEVENSON
Counsel of Record
AARYN M. URELL
ALICIA A. D'ADDARIO
BENJAMIN W. MAXYMUK
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803

Counsel for Petitioner

March 30, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES AND STATUTES

MISCELLANEOUS

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Mr. Sullivan presented an argument in state court that, under Roper v. Simmons, 543 U.S. 551 (2005), the Eighth Amendment requires the State to engage in a distinct constitutional analysis before imposing an extreme sentence on a thirteen-year-old child. The Florida courts discussed Mr. Sullivan's federal constitutional argument and rejected it. *Based on this determination of federal law*, the courts dismissed Mr. Sullivan's claim under a state procedural bar. Because the state-court judgment depends on resolution of a "right . . . claimed under the Constitution . . . [of] the United States," 28 U.S.C. § 1257(a), jurisdiction is proper in this Court. Id.[1]

STATEMENT OF THE CASE

The State's brief in opposition does not dispute any of the operative facts affecting Mr. Sullivan's constitutional claim, including that: (1) Joe Sullivan was thirteen when the underlying crime was committed; (2) the crime was a non-homicide; and (3) only two people

[1]The State appears to argue, to the contrary, that this Court lacks jurisdiction over Mr. Sullivan's petition because the state court based its ruling on an independent and adequate state ground. The State cannot help but acknowledge, however, that the state-court ruling is based on a threshold consideration of the federal constitutional questions presented below and in the instant Petition. (See Resp't's Br. Opp'n 9.) This Court repeatedly has held that where application of a state procedural bar "rests, as a threshold matter, on a determination of federal law," the state-law bar provides no obstacle to this Court's review. Ohio v. Reiner, 532 U.S. 17, 20 (2001) (per curiam).

in the United States have been sentenced to die in prison for a non-homicide offense committed at the age of thirteen. (Pet. Cert. 2, 26–28.) Nor does the State dispute that thirteen-year-olds have constitutionally significant psychosocial and neurological differences from older teens and adults, (id. at 29–32), or that the law treats thirteen-year-olds differently from older teens and adults. (Id. at 21–23).

A. Joe Sullivan's Juvenile History.

The State mischaracterizes Joe's juvenile history,[2] apparently to suggest that his death-in-prison sentence is less troubling. A review of the record, however, actually supports the opposite conclusion. Joe was thirteen years old when this crime took place. He had no encounters with the juvenile justice system until his family disintegrated into what state officials described as "abuse and chaos." (Presentence Investigation Report, Dec. 12, 1989, at 7.) During this period Joe lived in ten different residences in three years. (Id.) He began spending time on the streets, where he picked up twelve misdemeanors, mostly trespassing, stealing a bike, or property crimes committed with his older brother and older teens. (Predisposition Report, Dec. 11, 1989, at 1–3.) These misdemeanors make up the bulk of his

---

[2]It is worth noting that these adjudications of delinquency are *not* criminal convictions. See Fla. Stat. Ann. § 985.565 ("Adjudication of delinquency shall not be deemed a conviction . . . ."). As such, Florida was not required to afford Joe all the procedural safeguards that attend a criminal trial. See McKeiver v. Pennsylvania, 403 U.S. 528, 541 (1971) (plurality opinion) (no right to jury trial in juvenile adjudication because not entitled to all constitutional protections afforded in criminal prosecution); In re Gault, 387 U.S. 1, 30 (1967) ("We do not mean to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing."). This Court previously has noted that such informality can lead to less reliable determinations of guilt because the goal of the juvenile justice system is treatment rather than punishment. See Gault, 387 U.S. at 18–24, 44–45 (describing problems in the juvenile justice system's informal adjudication system).

juvenile history. (Guideline Scoresheet, Dec. 12, 1989, at 1.)

Joe's only serious prior offense occurred when he was twelve. (Predisposition Report, at 2.) He and his older brother broke into a house, and, when they unexpectedly were set upon by a dog, Joe hit the dog in the head, accidentally killing it. (Id.) This incident alone accounted for nearly two-thirds of the criminal history points assessed at sentencing. (Guideline Scoresheet, at 1.) The assault referred to by the State actually was a misdemeanor that caused no injury. (Predisposition Report, at 1.)

Joe's adjustment under juvenile supervision "initially was great for the first few months." (Id. at 4.) The juvenile probation officer who prepared the predisposition report attributed Joe's behavior to the fact that "he is easily influenced and associates with the wrong crowd." (Id.) She noted that "[i]t is apparent that Joe is a very immature naive person who is a follower rather than a leader," and that he had the potential to "be a positive and productive individual." (Id.)

B. Joe Sullivan's Unreliable Trial and Conviction.

In its brief in opposition, the State suggests that the case against Joe Sullivan was compelling and the adjudication of guilt reliable. (See Resp't's Br. Opp'n 3–6.) The record belies this characterization.

Joe was tried by a six-person jury in a one-day proceeding; opening statements began sometime after 9 a.m., and the jury returned its verdict at 4:55 p.m. (See Trial Tr. 30, 250.) During trial, the prosecutor and witnesses made repeated, unnecessary reference to the race

of both the accused (African American) and the victim (white), (R. 6, 19; see, e.g., Trial Tr. 44, 47, 64, 165, 171), and a witness repeatedly referred to the perpetrator of the assault as a "colored boy" or "a dark colored boy." (Trial Tr. 76, 97.) The biological evidence that had been collected was not presented at trial and was destroyed before it could be subjected to DNA testing. (R. 6, 18–19.) Joe's appointed counsel—who was later suspended from practice in Florida and never reinstated[3]—spent limited time on the case. (Mot. Att'y's Fee, filed Dec. 13, 1989.)

There was no dispute that Joe had participated, along with two older teens—Nathan McCants, seventeen at the time, and Michael Gulley, fifteen at the time[4]—in a burglary of the victim's unoccupied home on the morning of May 4, 1989. Joe admitted as much at trial. (Trial Tr. 192–94.) Nor was there a dispute that, later in the day, someone returned to the victim's home and sexually assaulted her. The victim, however, was blindfolded during the entire attack, (Trial Tr. 97), and could not identify her attacker. The central question at trial, therefore, was whether the State could prove that Joe Sullivan was that attacker.

Within minutes of the assault, Gulley and McCants were apprehended nearby,

---

[3]See Fla. Bar v. Plant, 698 So. 2d 1226 (table) (Fla. 1997) (inactive status); Fla. Bar v. Plant, 699 So. 2d 1376 (table) (Fla. 1997) (public reprimand); Fla. Bar, In re Plant, 728 So. 2d 205 (table) (Fla. 1998) (reinstatement denied); Fla. Bar v. Plant, 848 So. 2d 1156 (table) (Fla. 2003) (suspended); see also Florida Bar Online, http://www.floridabar.org/ (click "Find a Member" and search last name: Plant, first name: Mack).

[4]Co-defendants' ages are based on information from the Florida Department of Corrections web site, available at http://www.dc.state.fl.us/InmateReleases.

together.[5] (Trial Tr. 48–49, 142.) When arrested, McCants was in possession of jewelry belonging to the victim. (Trial Tr. 124.) Gulley's pretrial deposition revealed that he had an extensive criminal history involving at least one sexual offense.[6] (Dep. of Michael Gulley, Nov. 2, 1989, at 38–41.) Nevertheless, the State proceeded to trial on a theory that it was Gulley and Joe Sullivan who returned to the victim's house for a second time, and that Joe committed the sexual assault.

The actual evidence purporting to identify Joe as the perpetrator of the sexual assault, however, was quite tenuous: (1) self-serving stories of McCants and Gulley (who both received juvenile sentences for their roles in the crimes, (R. 6, 18)), including Gulley's claim that Joe confessed the rape to him in a detention facility before trial, (see Trial Tr. 168); (2) evidence of a match between Joe's left palm-print and a latent print lifted from a plaque in the victim's bedroom, which at best established Joe's admitted presence in the bedroom at an earlier time, (Trial Tr. 186); (3) a tainted identification by a police officer,[7] which at best established Joe's presence outside the house; and (4) an in-court voice identification by the victim, proposed and conducted for the first time by the State on the day of trial, (Trial Tr.

---

[5]Joe Sullivan, by contrast, was not apprehended on the day of the crime, but was picked up the next day, after Gulley and McCants implicated him. (See Trial Tr. 47, 120.)

[6]The record does not reflect McCants's prior criminal history. Defense counsel failed to impeach Gulley or McCants with prior juvenile adjudications at trial. Cf. Davis v. Alaska, 415 U.S. 308, 319 (1974) (defendant has constitutional right to confront State witness with prior juvenile adjudications).

[7]On the day of the assault, the officer got a "glimpse," (Trial Tr. 118), of an African-American youth fleeing the victim's house. The next day, the officer observed Joe while he was at the police station being interrogated as a suspect in the sexual assault. (Trial Tr. 120.) Under these suggestive circumstances, the officer identified Joe as the fleeing youth. (Id.)

37).

The victim, who previously had been unable to identify her attacker, was allowed to identify Joe as the attacker at trial based on a highly suggestive and unreliable voice-identification procedure. (Trial Tr. 84–91.) A dry run of this procedure outside of the presence of the jury revealed the unreliable nature of the identification.[8] Nonetheless, the witness was allowed to repeat the identification, in a more polished and confident form, in front of the jury.[9] (Trial Tr. 90-91.)

After Joe's conviction, counsel filed no written pleadings, and his oral presentation at sentencing does not exceed twelve lines of transcript. (Trial Tr. 267.)

---

[8]The following excerpt from the proffer outside of the presence of the jury demonstrates the unreliability of the procedure. After Joe was forced to repeat the words used by the attacker, the witness testified:

The Witness:	It sounds – there's a tone in your voice that's just like that, only **you said it very loud to me that time** in a belligerent way.
[Prosecutor]:	I don't want to argue about it. Are you able to say that's the voice of the person?
The Witness:	There's a tone in that voice that makes me know its that person.
[Prosecutor]:	So you are saying the person who just spoke to you is the person that said that to you that day?
The Witness:	**It sounds like the voice.**
[Prosecutor]:	All right.
The Witness:	It's been six months. **It's hard, but it does sound similar.** But it's said in a different way. See, the tone – it was said to me very belligerent in a loud voice.

(Trial Tr. 87-88 (emphasis supplied); see also Trial Tr. 91 ("A: He has a deep voice, and there's a tone in it like the – like as well as I remember. Q: Does it sound like the voice? A: It could very easily be.").)

[9]Defense counsel objected, but only on the clearly nonmeritorious ground that the Fifth Amendment barred the compelled production of a voice exemplar—not on the clearly *meritorious* ground that the identification procedure was unduly suggestive, unreliable, and highly prejudicial. (See Trial Tr. 37, 84–85.)

C. The State's Argument That a Sixth-Grader Must File a Pro Se Brief to Preserve Constitutional Issues Highlights the Need for Constitutional Protection of a 13-Year-Old Facing Death in Prison.

Despite the various trial errors and infirmities described above—by no means an exhaustive listing—Joe's appointed appellate defender, inexplicably, filed an Anders brief,[10] and the Florida First District Court of Appeal, inexplicably, accepted it. (See Pet. Cert. 6 & n.8.)

The State suggests that the absence of any appellate review in this case is acceptable because Joe was "given an opportunity . . . [to] file a pro se brief." (Resp't's Br. Opp'n 6.) Joe Sullivan was thirteen when he was arrested. He had completed sixth grade but read at only a first-grade level. (Presentence Investigation Report, Dec. 12, 1989, at 5, 7). He was fourteen when the State suggests he should have filed a pro se brief to preserve the issues presented here.

Indeed, the suggestion that the State's failure to provide reliable trial and sentencing proceedings can be cured by providing a mentally challenged sixth-grader the "opportunity" to file a pro se brief only underscores the State of Florida's general failure to acknowledge the basis for Mr. Sullivan's petition—that the developmental and practical gulf separating thirteen- and fourteen-year-old children from older teens and adults requires a distinct constitutional analysis before imposition of a sentence of life imprisonment without parole.

---

[10]See Anders v. California, 386 U.S. 738 (1967). It should be noted that, at the time, as now, Florida law allowed appellate courts to review unpreserved trial errors for plain error. See Fla. Stat. Ann. § 90.104(3) (West 1989).

ARGUMENT

Joe Sullivan was sentenced to life imprisonment without possibility of parole for a non-homicide offense committed at age thirteen. Petitioner contends that the Eighth Amendment establishes that, for children, age has a distinct constitutional meaning for certain serious sentences and consequently some sentences may be unconstitutional when imposed on a young child even though the same sentence may be permissible for an older teen or an adult. Petitioner argues here and argued below that Roper v. Simmons, 543 U.S. 551 (2005), makes this clear, and he argued that the Eighth Amendment requires an inquiry into the constitutionality of sentencing a thirteen-year-old child to die in prison. That inquiry compels the conclusion that Joe's youth at the time of the crime categorically shields him from being sentenced to die in prison. The Florida courts erroneously applied federal constitutional law when they rejected Joe's Eighth Amendment claim without even engaging in the required inquiry.

In his Petition, Mr. Sullivan explains that: (1) the federal constitutional claim presented to, and summarily rejected by, the Florida courts is of extraordinary importance; (2) the nature of the claim—unconstitutional imposition of a freakishly rare sentence—means that, by definition, this Court will have few opportunities to review it; (3) the purported state procedural bar does not preclude this Court's review, because the state-court decision was premised expressly on a threshold evaluation of the federal constitutional issue; and (4) the state courts failed to conduct a proper Eighth Amendment analysis and thus reached the

wrong conclusion. (See Pet. Cert. 9–11, 18.)

The State's brief in opposition fails to rebut these arguments. Therefore, for all the reasons stated in the Petition, as well as the reasons stated below, this Court should grant certiorari review in this case.

I. The State Concedes That the State-Court Judgment Rests on a Threshold Determination of Federal Constitutional Law.

In his Petition, Mr. Sullivan argues that no independent and adequate state-law ground precludes this Court's review, because the state-court decision was premised expressly on a threshold evaluation of the underlying federal constitutional claim. (See Pet. Cert. 10, 18.) The State's brief in opposition repeatedly references "state procedural grounds" and "timeliness rules" as the basis for the state-court judgment, (Resp't's Br. Opp'n 2, 10 n.4), but ultimately the State's own brief acknowledges that, in fact, the state procedural ruling is predicated on an analysis of the merits of Joe's Eighth Amendment claim. (Id. at 9 ("Based on this determination [of the federal constitutional claim], the court then dismissed the post conviction motion because it was procedurally barred.").)

The purported state procedural ground of decision is that Mr. Sullivan's motion for postconviction relief was time-barred. As the brief in opposition itself recites, however, Florida's applicable statute of limitations contains exceptions, one of which "allows a court to hear an untimely motion when: 'the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.'" (Id. (quoting Fla. R. Crim. P. 3.850(b)(2)).) Mr. Sullivan argued to the Florida courts that

the federal Eighth Amendment right he asserted was established by Roper v. Simmons, and that his Roper-based claim was timely filed following this Court's decision in Roper. The Respondent concedes that:

> The state court examined Roper, and how courts had interpreted Roper, and determined that Roper *did not establish the constitutional right asserted. Based on this determination*, the court dismissed the post conviction motion because it was procedurally barred.

(Resp't's Br. Opp'n 9 (emphasis added).) Since the application of the procedural bar depended squarely upon the Florida courts' examination and interpretation of the substantive constitutional holding of Roper and a determination that Roper "did not establish" the right claimed by Mr. Sullivan, this procedural ruling was not an adequate and *independent* state-law ground of decision. Ake v. Oklahoma, 470 U.S. 68, 75 (1985) ("[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded.").

Simply put, Joe contended in state court that he was entitled to have the distinct analysis laid out in Roper applied to his case. The state courts disagreed with Joe as to the scope and application of Eighth Amendment law, and they denied relief. This Court can and should take jurisdiction to correct the state courts' erroneous judgment and interpretation of federal constitutional law.

None of the cases cited in the State's brief in opposition changes this conclusion. Each engages in the same threshold, cursory analysis of federal law as Florida did here, and

none involves a sentence of life without parole imposed on a thirteen-year-old for a non-homicide. The fact that a handful of district courts have made errors similar to Florida's does not obviate the necessity for this Court's review.

II. This Case Presents Compelling Grounds for a Grant of Certiorari.

The second contention in the State's brief in opposition is that this Court should decline jurisdiction because the decision of the Florida courts does not conflict with decisions of the United States courts of appeal, state courts of last resort, or this Court on the underlying constitutional issue. (Resp't's Br. Opp'n 10.) This point treats the illustrations of potentially certiorari-worthy cases in subparagraphs (a) and (b) of this Court's Rule 10 as the full measure of the Court's certiorari discretion, in disregard of the plain terms of the Rule. See Sup. Ct. R. 10(c) (listing, as reason for granting certiorari review, that "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court"); see also Sup. Ct. R. 10 ("The following [subparagraphs], although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers . . . .").

Moreover, in forty-six states there are no reported cases of thirteen-year-old children being sentenced to death in prison. In the great majority of states, such a sentence is not permitted by law. There are only two identifiable instances, both in Florida, where a thirteen-year-old child had been sentenced to life without parole for a non-homicide. Condemning a thirteen-year-old child to life imprisonment with no chance of parole for a non-homicide

is precisely the kind of exceptionally rare and extreme sentence that requires review by this Court to assess whether the Eighth Amendment's cruel-and-unusual prohibition applies.

Florida's third point is a variant of its second point. It is that the lower courts "have universally decided the issue [of Roper's implications for the constitutionality of sentencing children to die in prison with no possibility of parole] *against* Petitioner's position." (Resp't's Br. Opp'n 13 n. 5.) But it is precisely because the lower courts appear to be locked into a narrow and mechanistic reading of Roper, ignoring its rationale and its logical implications for even the most severe and unforgiving sentence short of immediate death, that this Court's consideration of the proper scope of Roper's Eighth Amendment reasoning is warranted.

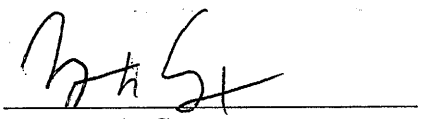
No case has addressed the constitutionality of sentencing a thirteen-year-old child to die in prison for a non-homicide offense. The fact that the State cannot cite to a single similar case highlights the extreme rarity of Joe's sentence.

In sum, although it cites a laundry list of inapposite cases, the State does not, and cannot, argue that the underlying question—whether the Eighth and Fourteenth Amendments prohibit imposition of a life-without-parole sentence on a thirteen-year-old for a non-homicide—is unworthy of this Court's attention.

CONCLUSION

For the foregoing reasons, Petitioner prays that the Court grant a writ of certiorari to the District Court of Appeal of Florida for the First District and declare that his rights were violated.

Respectfully submitted,



BRYAN A. STEVENSON
Counsel of Record
AARYN M. URELL
ALICIA A. D'ADDARIO
BENJAMIN W. MAXYMUK
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803

Counsel for Petitioner

March 30, 2009