No. 08-7621

IN THE
SUPREME COURT OF THE UNITED STATES

JOE HARRIS SULLIVAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the
District Court of Appeal, First District of Florida

RESPONDENT'S BRIEF IN OPPOSITION

Respectfully Submitted,

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QUESTION PRESENTED

DID THE FLORIDA COURTS VIOLATE THE CONSTITUTION WHEN THEY APPLIED FLORIDA'S REGULARLY ENFORCED POST CONVICTION RULES AND DISMISSED SULLIVAN'S POST CONVICTION MOTION AS UNTIMELY?

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OPINION BELOW

Petitioner, Joe Sullivan, seeks review of the decision of the District Court of Appeal, First District of Florida, affirming without opinion the denial of his state post conviction motion found at Sullivan v. State, 987 So.2d 83 (Fla. 1st DCA 2008).

JURISDICTION

Petitioner is seeking jurisdiction pursuant to 28 U.S.C. § 1257 of a per curiam affirmed decision of the District Court of Appeal, First District of Florida. In order to obtain review under 28 U.S.C. §1257, petitioner must show that the Florida Appellate Court was presented with and ruled upon the question raised in his

petition. However, the issue petitioner desires addressed was not ruled upon by the state court which dismissed his untimely state motion on state procedural grounds.

In interpreting its jurisdiction under § 1257, this Court has repeatedly rejected attempts to go beyond what was addressed by the state court. This Court has stated:

> With "very rare exceptions," Yee v. Escondido, 503 U.S. 519, 533, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992), we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review. See Heath v. Alabama, 474 U.S. 82, 87, 88 L. Ed. 2d 387, 106 S. Ct. 433 (1985); Illinois v. Gates, 462 U.S. 213, 217-219, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983); McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434, 84 L. Ed. 849, 60 S. Ct. 670 (1940).

Adams v. Robertson, 520 U.S. 83, 86 (U.S. 1997); See also Campbell v. Louisiana, 523 U.S. 392, 402 (U.S. 1998). Because the state court dismissed the post conviction motion as untimely, it cannot be said that the Eighth Amendment claim that petitioner presents here has been properly presented and was ruled upon below. Therefore, this Court should deny review.

CONSTITUTIONAL PROVISION

Respondent accepts as accurate petitioner's statement regarding the constitutional provision petitioner desires this Court to review.

STATEMENT OF THE CASE AND FACTS

Joe Sullivan, a young recidivist, was arrested in 1989 and charged with two counts of sexual battery, two counts of burglary of a dwelling and one count of grand theft. An Escambia County grand jury indicted Sullivan for these offenses, thereby removing him from the state's juvenile system.[1] (R Vol III 256)

The facts of the case are straightforward. Sullivan and two other youths, Gulley and McCants, broke into an elderly woman's home. During this first burglary, the victim was not home. The testimony from Gulley was that during this burglary McCants took jewelry and coins.

Later the same day, Sullivan and Gulley returned to the home. On this occasion, a car was in the driveway. Gulley went to the front door and asked the elderly woman who answered the door about doing yard work. She declined the offer. Gulley testified that he ran from the scene when he observed the neighbor watching him.

The trial evidence showed that while Gulley was distracting the victim, Sullivan went to the other door and began to enter the home. The victim testified

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[1] Florida law mandates that a juvenile who is indicted for a felony punishable by life is to be treated as an adult. See § 39.02(c) Fla. Stat. (1987), currently § 985.56 Fla. Stat.(2008)

that she tried to prevent the entry. She testified that her assailant forced his way in and threw a black slip over her head. She testified that her assailant several times threatened to kill her but also stated that if she couldn't identify him he might not have to kill her. Sullivan took her to her bedroom removed her clothes, beat her, and raped her vaginally and orally. The victim testified she did as instructed by the assailant and did not try to look at him, thus she could not visually identify her assailant. However, after Sullivan said the "might not have to kill her" phrase, she testified that "there is a tone in the voice which makes me know its that person". (R Vol I 67-97, 88)

From the rape, the victim sustained bruising, a laceration to the vulva, and a vaginal tear which required surgery to repair. (R Vol I 81, 104-110)

Additionally, a neighbor, who had seen juveniles around the area earlier in the day, testified that when she saw the youth on the porch she tried calling the victim. When the victim did not answer her phone and the witness observed the tall youth still on the victim's porch, she called the police. The witness, Ms. Sobota, testified that after the police arrived she saw a different, shorter youth leave the house running, from the police. (R Vol I 49-57)

Officer Cutler, one of the first officers to arrive, testified that she stationed herself by the corner of the house. She testified she heard a neighbor yell and Cutler observed a young black male run from the front of the house. She testified he paused briefly and she saw his face. Officer Cutler identified Sullivan as the one who she saw running from the house, at the time of the rape offense. (R Vol I 111-

121)

Gulley also testified, that later that same day, he and McCants were at his home when the police came to talk to him. After the police discovered McCants had some of the missing items, they told the police what happened. Gulley further testified that while they were at the detention center, Sullivan told him that he had beaten and raped the woman. (R Vol I 157-173)

Police investigation revealed Sullivan's palm print was on a plaque found on the bed after the second incident. (R Vol I 175-186) Based on this evidence, the jury convicted Sullivan of a lesser included offense of count one and count five and as charged as to the remainder of the indictment.

On December 12, 1989, the trial court held a sentencing hearing. Mr. Sullivan chose not to speak regarding the punishment, however counsel made an argument in his behalf. The state pointed out that because of Sullivan's prior record, he scored 846 points, far exceeding the 583 points needed under the sentencing guidelines to impose a life sentence. The state during its argument highlighted two of Sullivan's prior offenses described in the presentence/predispositional report. One of these offenses, was a prior burglary where during the course of the burglary Sullivan killed a dog. The other involved an assault on his counselor at Lakeview. (R Vol III 266-273) The presentence/predispositional reports indicated Sullivan had been found guilty of seventeen criminal offenses in the prior two years including several serious felonies. The report also indicated that he had been previously committed to juvenile programs and described his adjustment as poor. The report reflected that, while at one

commitment facility, he was charged with two new law violations because he assaulted other clients. The reports recommended that adult sanctions be imposed. The trial court found that an adult sentence was appropriate and sentenced him to life in prison on the sexual batteries and imposed 30 year sentences on the burglaries. As to count five, Sullivan was sentenced to time served. (R Vol III 270-272) The state noticed an error as to the sentence on the burglaries and two days later the thirty year sentences were reduced to 15 years. (R Vol III 276-277) Sullivan filed an appeal of his conviction. After a complete review of the record, counsel filed an Anders[2] brief. Although given an opportunity, Sullivan did not file a pro-se brief.

In 1992, Mr. Sullivan filed a rule 3.850 state post conviction motion challenging his conviction. The first motion was dismissed and petitioner was allowed to refill another post conviction motion. The refilled motion was denied in 1996. (R 2007Rule 3.850 p 43) and Sullivan did not appeal.

Finally, on June 25, 2005, petitioner filed a state post conviction motion asserting that under Florida Law he was entitled to bring another post conviction motion because Roper v. Simmons, 543 U.S. 551 (2005), created a new constitutional right which applied to his case. The state trial court issued a written order in which the court first reviewed Florida's law on untimely and successive petitions and then evaluated whether Mr Sullivan qualified under any of Florida's exceptions to timeliness. The court determined that Sullivan did not qualify for any exception and

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[2] Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967)

dismissed the post conviction motion as untimely. (R 2007Rule 3.850 p 43) Sullivan appealed this decision to the District Court of Appeal, First District of Florida which affirmed the lower court without a written opinion. Sullivan v. State, 987 So.2d 83 (Fla. 1st DCA 2008)[3].

From this decision, which affirmed the dismissal of his state post conviction motion as untimely, petitioner filed this certiorari petition.

[3] Sullivan did not seek review of this decision in Florida Supreme Court because the court does not have jurisdiction to review per curiam affirmed decisions of the District Courts of Appeal.

REASONS FOR DENYING THE WRIT

DID THE FLORIDA COURTS VIOLATE THE CONSTITUTION WHEN THEY APPLIED FLORIDA'S REGULARLY ENFORCED POST CONVICTION RULES AND DISMISSED SULLIVAN'S POST CONVICTION MOTION AS UNTIMELY?

In this petition for writ of certiorari, Sullivan contends that this Court should grant review of the decision of the District Court of Appeal, First District of Florida, which upheld the trial court's dismissal of petitioner's untimely and procedurally barred post conviction motion. Petitioner asserts that the decision of the Florida appellate court should be reviewed because the petitioner's sentence violates the Eighth Amendment.

Given the procedural posture of this case, petitioner's request is extraordinary. What Sullivan is asking this court to do is to treat his petition as if this Court was conducting a direct review of his conviction. However, this is not a direct review case, but a case involving review of the denial of a procedurally barred, state post conviction motion. Petitioner has not identified any post conviction case in which this Court has conducted a direct review. Thus, this Court should deny petitioner's certiorari request.

Additionally, this Court should deny certiorari review because petitioner is seeking review of a question which was not properly presented to and ruled upon by the state court. In this case, to have his claim addressed by the state court on the merits, petitioner had to meet one of Florida's exceptions to its regularly enforced procedural bars. The state court ruled that petitioner did not meet Florida's

threshold requirements to be heard on the merits and dismissed the motion. Thus, the Eighth Amendment issue petitioner articulates in this petition, was not properly presented to or ruled on by the state court. What petitioner is asking this Court to do is to ignore its long standing precedent by refusing to review matters which were not ruled upon by the state tribunal.

After this Court's decision in Roper v. Simmons, 543 U.S. 551 (2005), Sullivan returned to state court and filed a untimely and successive post conviction motion. Such motions can be entertained by the Florida Courts only when certain conditions exist. One basis for entertaining such motions is set out in Rule 3.850(b)(2) Fla. R. Crim. P. and 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.

In his state motion, petitioner asserted that Roper, established a new constitutional right that juveniles could not be sentenced to life in prison. 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 then dismissed the post conviction motion because it was procedurally barred. Because the motion was dismissed as untimely the court never considered the Eighth Amendment claim on the merits. Petitioner's argument ignores the fact that his claim did not meet Florida's requirements for hearing out of time claims and ignores the fact that the state court did not rule on whether the sentence imposed violated

the Eighth Amendment.[4]

If the Court were to examine the case further, the starting point for determining whether to grant certiorari is United States Supreme Court Rule Ten, which provides that certiorari will be granted only for compelling reasons. The rule indicates that in establishing compelling reasons, conflict between Circuit Courts of Appeal or State Supreme Courts on the point of law in question is essential.

Petitioner's problem is that he has not and can not point to any conflict between decisions of this Court, the Circuit Courts of Appeal, or State Supreme Courts on this issue. Florida' exceptions to its timeliness rule mirrors the timeliness

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[4]Petitioner asserts that his case is unique because he otherwise cannot obtain review. Failure to meet the timeliness rules under state law or in accordance with federal habeas law, thus limiting review, does not make his situation unique. In fact, it makes it rather ordinary as the reporters are littered with cases where defendants who have failed to meet timeliness requirements have been denied relief. Moreover, avenues still remain to correct miscarriages of justice. The Court stated in Herrera v. Collins, 506 U.S. 390, 412 (1993), that clemency is "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."

Moreover, this Court rejected petitioner's uniqueness approach in Harmelin v. Michigan, 501 U.S. 957, 996 (U.S. 1991), where it stated:

> It is true that petitioner's sentence is unique in that it is the second most severe known to the law; but life imprisonment with possibility of parole is also unique in that it is the third most severe. And if petitioner's sentence forecloses some "flexible techniques" for later reducing his sentence, see Locket, supra, at 605 (Burger, C. J.) (plurality opinion), it does not foreclose all of them, since there remain the possibilities of retroactive legislative reduction and executive clemency. In some cases, moreover, there will be negligible difference between life without parole and other sentences of imprisonment -- for example, a life sentence with eligibility for parole after 20 years, or even a lengthy term sentence without eligibility for parole, given to a 65-year-old man. But even where the difference is the greatest, it cannot be compared with death. We have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further.

Harmelin, 501 U.S. at 996

exceptions in the Federal Habeas Statute. See 28 U.S.C.§ 2244(a)(1)(A) and 28 U.S.C.§ 2244(d)(1)(C). Several federal courts have interpreted how these provisions apply to individuals whom like Sullivan were juveniles when they received life sentences.

In Schane v. Cain, Case No. 07-1068, 2007 U.S. Dist. LEXIS 96538, *10–12 (W.D. La. Oct. 24, 2007), the district court stated:

> 28 U.S.C. §2244(d)(1)(C) - Newly recognized rights
>
> Petitioner, however, maintains that the limitations period should be reckoned as provided in §2244(d)(1)(C), from "... the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review ..." Thus, petitioner argues that the limitations period should be reckoned from March 1, 2005, the date the United States Supreme Court decided Roper v. Simmons, 543 U.S. 551, 125 S.C. 1183, 161 LED.2d 1 (2005).
>
> In order for petitioner to obtain the benefits of §2244(d)(1)(C), he must show that the constitutional right he asserts in this habeas corpus petition was newly recognized in Roper. In Roper, the newly recognized constitutional right was the abolition of the death penalty for minors, a claim not advanced by petitioner.
>
> Petitioner, although a minor at the time of the commission of the offense in question, was not sentenced to death and therefore the constitutional right recognized in Roper is clearly inapplicable. See In re Hill, 437 F.3d 1080, 1082 at fn. 1 (11th Cir. 2006); see also Culpepper v. McDonough, 2007 U.S. Dist. LEXIS 50866, 2007 WL 2050970 at *3 (M.D. Fla. 7/13/2007) ("Although Roper addresses a new and distinct constitutional right, the Roper decision is to be narrowly construed to include capital cases involving death sentences for minors. The constitutional claim in Roper sets a clear precedent by abolishing the execution of minors, but it does not particularly address the application of that constitutional claim to mandatory life sentences pertaining to minors."); Smith v. Howes, 2007 U.S. Dist. LEXIS 10061, 2007 WL 522697 at *2 (E.D. Mich. 2/14/2007) ("In Roper, the Supreme

> Court held that execution of individuals who were under 18 years of age at the time of their capital crimes violates the Eighth Amendment's prohibition against cruel and unusual punishment. Petitioner is not facing execution. Therefore ... Roper ... does not announce a constitutional right newly recognized by the Supreme Court which is relevant to Petitioner's case.").

Schane, 2007 U.S. Dist. LEXIS 96538, at 10-12

Likewise, in Sharikas v. Kelly, 2008 U.S. Dist. LEXIS 29153, 6-7 (E.D. Va. Apr. 7, 2008), the district court stated:

> Section 2244(d)(1)(C) delays the start of the limitations period, however, only for newly recognized constitutional rights that are retroactively applicable. In Roper, the Supreme Court held that the imposition of the death penalty upon individuals under 18 years of age at the time of their capital offense violates the Eighth Amendment's ban against cruel and unusual punishments. Roper, 543 U.S. at 568. Although Roper recognized a new constitutional right for juveniles sentenced to death prior to its issuance and that the ruling is retroactive on collateral review, by its very terms, Roper applies where an individual under the age of 18 is sentenced to death. In this case, petitioner was under 18 years of age at the time of his offenses, but was sentenced to terms of life imprisonment, not death. Accordingly, even if Roper were retroactively applicable, it did not announce a new constitutional right which is applicable to petitioner's case

Sharikas, 2008 U.S. Dist. LEXIS 29153, at 6-7 See also, Culpepper v. McDonough, 2007 WL 2050970, *4–5 (M.D. Fla. July 13, 2007); Smith v. Howes, Case No. 06cv10905, 2007 WL 522697, *2 (E.D. Mich. Feb. 14, 2007); Douma v. Workman, 2007 WL 2331883, *3 (N.D. Okla. 2007).

Thus, the federal courts, applying the equivalent timeliness exception, came to the exact same result as the state courts, finding the claims untimely. Thus, Sullivan has identified no conflict and no basis for this Honorable Court to exercise Certiorari

Jurisdiction in this case.[5]

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[5] In addition to the lack of conflict regarding the threshold procedural issue, Petitioner cannot establish conflict on the merits of whether the holding in Roper extends outside the death penalty context. Rather, the courts that have considered the applicability of Roper to a juvenile's term of life imprisonment have universally decided the issue *against* Petitioner's position. See United States v. Pete, 277 Fed. Appx. 730, 734 (9th Cir. 2008); United States v. Feemster, 483 F.3d 583, 588 (8th Cir. 2007), vacated on other grounds, 128 S. Ct. 880 (2008); United States v. Salahuddin, 509 F.3d 858 (7th Cir. 2007); United States v. Mavs, 466 F.3d 335, 339 (5th Cir. La. 2006), United States v. Wilks, 464 F.3d 1240, 1242 (11th Cir. Fla. 2006), Calderon v. Schribner, 2009 WL 89279, *4–6 (E.D. Cal. Jan. 12, 2009); Culpepper v. McDonough, 2007 WL 2050970, *4–5 (M.D. Fla. July 13, 2007); Douma v. Workman, 2007 WL 2331883, *3 (N.D. Okla. 2007); Pineda v. Leblanc, Case No. 07-3598, 2008 WL 294685, *3 (E.D. La. Jan. 31, 2008); Price v. Cain, Case No. 07-937, 2008 U.S. Dist. LEXIS 23474, *17–23 (W.D. La. March 4, 2008); Byrd v. Quarterman, Case No. 3:08cv1414b, 2008 WL 4427265, *2 (N.D. Tex. Sept. 26, 2008); Schane v. Cain, Case No. 07-1068, 2007 U.S. Dist. LEXIS 96538, *10–12 (W.D. La. Oct. 24, 2007); cf. Smith v. Howes, Case No. 06cv10905, 2007 WL 522697, *2 (E.D. Mich. Feb. 14, 2007) (finding *Roper* inapplicable to juvenile sentenced to thirty to sixty years in prison), Sharikas v. Kelly, 2008 U.S. Dist. LEXIS 29153 (E.D. Va. Apr. 7, 2008).

State court decisions are in accord. See Connell v. State, Case No. CR-06-0668, 2008 Ala. Crim. App. LEXIS 108, *10 (Ala. Crim. App. May 30, 2008); People v. Metzger, Case No. B198096, 2008 Cal. App. Unpub. LEXIS 10492, *27–28 (Cal. Ct. App. Dec. 29, 2008); People v. Diaz, Case No. F052637, 2008 Cal. App. Unpub. LEXIS 10351, *13–17 (Cal. Ct. App. Dec. 22, 2008); People v. Demirdjan, 50 Cal. Rptr. 3d 184, 186–87 (Cal. App. Ct. 2006); State v. Allen, 958 A.2d 1214, 1233–36 (Conn. 2008); Wallace v. State, 956 A.2d 630, 638–41 (Del. 2008); Culpepper v. State, 971 So. 2d 259, 260–61 (Fla. 2d DCA 2008); People v. Griffin, 857 N.E.2d 889, 899 (Ill. App. Ct. 2006); Sims v. Commonwealth, 233 S.W.3d 731, 732–33 (Ky. Ct. App. 2007); Gussler v. Commonwealth, 236 S.W.3d 22, 23–24 (Ky. Ct. App. 2007); Van Pao Thao v. State, Case No. A07-2137, 2008 Minn. App. Unpub. LEXIS 1271, *11 n.3 (Minn. Ct. App., Sept. 16 2008); In re Welfare of L.F.G.-L., Case No. A07-366, 2007 Minn. App. Unpub. LEXIS 1089, *9–10 (Minn. Ct. App. Nov. 6, 2007); State v. Medina, 622 S.E.2d 176, 182 (N.C. Ct. App. 2005); State v. Warren, 887 N.E.2d 1145, 1149 (Ohio 2008); State v. Bunch, Case No. 06-MA-106, 2007 Ohio 7211, 2007 Ohio App. LEXIS 6314, **11–12 (Ohio Ct. App. Dec. 21, 2007); Thomas v. State, Case No. 14-06-00066-CR, 2007 Tex. App. LEXIS 6212, *15–19 (Tex. App. Aug. 7, 2007), cert. denied, 2008 U.S. LEXIS 6542 (Oct. 6, 2008); State v. Rideout, 933 A.2d 706, 718-19 (Vt. 2007); see also Cobos v. Dennison, 825 N.Y.S.2d 332 (N.Y. Sup. Ct., App. Div. 2006); State v. Averv, 649 S.E.2d 102, 108 (S.C. Ct. App. 2007); Gurerro v. State, Case No. 13-05-00709-CR, 2008 Tex. App. LEXIS 1837, *4–8 (Tex. Crim. App. March 13, 2008); Wills v. State, Case No.

Thus, Petitioner has failed to present any compelling reason for this Court to grant certiorari. The Florida Court determined that Sullivan failed to meet its established basis for having an untimely post conviction motion heard. Other federal and state courts are in accord. Therefore, Respondent urges this Court to deny certiorari.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny petitioner's request for certiorari review.

Respectfully Submitted,

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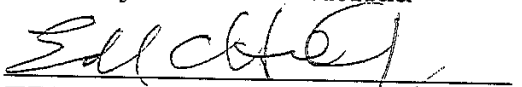

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06-04-00172-CR, 2005 Tex. App. LEXIS 7113, *7–8 (Tex. App. Aug. 31, 2005); State v. Ocak, Case No. 56006-9-I, 2006 Wash. App. LEXIS 1126, *2 (Wash. Ct. App. June 12, 2006).

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RESPONDENT'S PROOF OF SERVICE

Comes now Respondent, by and through counsel, and hereby certifies that pursuant to United States Supreme Court Rule 29, a true and correct copy of Respondent's Brief In Opposition was mailed, postage prepaid on this 20th day of March, 2008, to opposing counsel , as designated below:

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