IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1337

RICHARD HENYARD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY, STATE OF FLORIDA

REPLY BRIEF OF THE APPELLANT

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ARGUMENT

MR. HENYARD'S SENTENCE OF DEATH VIOLATES THE UNITED STATES AND FLORIDA CONSTITUTIONAL REQUIREMENT OF DUE PROCESS AND PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT IN LIGHT OF *ROPER v. SIMMONS*

In support of the lower court=s summary denial of any relief, the Appellee refers to the Aunequivocal language@ of Roper v. Simmons, *infra,* which limits the constitutional bar on executions to those under the age of eighteen, and at page fourteen the Appellee asserts that Athe holding@ in *Simmons* is not applicable to this case.

The claim Henyard makes here is not that the absolute bar based on the chronological age of a defendant at the time of the offense should be expanded to those older than eighteen. Rather, the claim is based on the interplay between the articulation of the Eighth Amendment=s prohibition of cruel and unusual punishments in *Roper v. Simmons*, this Court=s decision in Urbin and other Florida authority, and the fact that *Roper v. Simmons* automatically changed Florida=s capital sentencing law.

Art. 1 ' 17, Fla. Const. prohibits cruel and unusual punishments. This section, as amended in 2002, provides that it shall be construed in Aconformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.@ This Court has since done so by applying the bar articulated in *Roper*

v. Simmons. E.g. *Lecroy v. State*, Case No.: SC05-136, Order dated August 17, 2005, setting aside a death sentence where the defendant was under eighteen at the time of the offense.[1]

The only authority cited by the Appellee, other than Henyard=s earlier cases, *Urbin*, and *Roper v. Simmons* itself, is a federal habeas corpus case, *Moreno v. Dretke*, 362 F. Supp. 2d 773 (W.D. Tex. 2005). Moreno added a supplemental claim based on *Roper v. Simmons* shortly after that decision was issued, but Moreno=s claim differed from the one presented here. Moreno was eighteen when he committed murder, but he argued that because he was seventeen when he conceived of the plan to murder the victim, the absolute bar on the execution of juveniles established in *Roper v. Simmons* should apply to him. As the court stated:

> In his supplemental claim, Petitioner argues that although he committed the murder when he was age eighteen, the *mens*

[1]In originally upholding LeCroy=s death sentence, this Court observed that the AFlorida Legislature's decision that age should be a statutory mitigating factor . . . indicates that the legislature intended that youth and its potential characteristics be considered as a factor by the jury and the sentencing judge in determining whether a youthful defendant should be subject to the death penalty. It does not suggest an intention to draw an arbitrary bright line between those who are eighteen years of age and those, such as here, who are seventeen years of age.@ *LeCroy v. State*, 533 So.2d 750 (Fla. 1988).

> *rea* to commit the murder was formed when he was seventeen years of age. Petitioner argues that Roper's prohibition on the execution of juvenile offenders should apply to him as well.

Moreno v. Dretke, *supra*, 811 (footnote omitted).[2] This, however, is not a claim that the offense somehow extended back to the time Henyard was under eighteen.

The Florida constitutional provision which requires conformity with Supreme Court Adecisions@ which Ainterpret@ the Eighth Amendment is broader than the restriction which applies in federal habeas review of state convictions. In *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), the Court concluded that the phrase Aclearly established Federal law@ contained in ' 2254(d)(1), Arefers to the holdings, as opposed to the dicta, of this Court's decisions,@ id., at 412, 120 S.Ct. 1495. The Aholding@ of a decision is limited to either the court's Adetermination of a matter of law pivotal to its decision@ or Aa principle drawn from such a decision.@

[2]In an unpublished opinion, the Texas Court of Appeals also summarily rejected a claim based on *Roper v. Simmons*, however that court also characterized the claim presented as a request to extend the absolute bar of Simmons to those between the ages of eighteen and 21, which is not the claim made here. *Young v. State*, 2005 WL 2374669 (Tex.Crim.App. Sep 28, 2005). Also, unlike Florida, Texas is a non-weighing state, in that its capital sentencing scheme does not direct appellate courts or juries to weigh aggravating factors against mitigating ones. *Cervantes Salazar v. Dretke*, 393 F.Supp.2d 451 (W.D. Tex. 2005).

Black's Law Dictionary (8th ed. 2004). AInterpretation@, on the other hand, is broadly defined as the Aprocess of determining what something . . . means@. *Id.* Black=s definition includes two quotations: "Interpretation, as applied to written law, is the art or process of discovering and expounding the intended signification of the language used, that is, the meaning which the authors of the law designed it to convey to others." Henry Campbell Black, Handbook on the Construction and Interpretation of the Laws 1 (1896). "There is more to interpretation in general than the discovery of the meaning attached by the author to his words. Even if, in a particular case, that meaning is discoverable with a high degree of certitude from external sources, the question whether it has been adequately expressed remains." Rupert Cross, Statutory Interpretation 149 (1976). Beyond the Aart@ of Adiscovering and expounding@ the authors= meaning, the *Court in Roper v. Simmons* specifically reaffirmed the necessity of referring to the "evolving standards of decency that mark the progress of a maturing society" in interpreting the Eighth Amendment prohibition of cruel and unusual punishment. Id. at 1190. This is NOT a request that the Court use a floor and ceiling analysis and establish a higher age bar than that established in *Roper v. Simmons*. Rather, those interpretations of the Eighth Amendment contained in *Roper v. Simmons* which do apply to Henyard, must be applied pursuant to the terms of the conformity clause of Art. 1 ' 17.

By its terms Art. 1 ' 17 is to be applied retroactively. If it were applied retroactively so as to disadvantage Henyard, it might violate the Federal Constitutional

prohibition of ex post facto laws. However, for a law to be ex post facto it must be more onerous than the prior law. *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). Where the challenged provision does not add to the quantum of punishment, there is no ex post facto violation. *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977).

Moreover, the rule announced in *Roper v. Simmons* alters the class of persons eligible for the death penalty and therefore applies retroactively. Id., 125 S.Ct. at 1198. To the extent it could be argued that, because this claim is based on interpretations of the Eighth Amendment contained in *Roper v. Simmons* rather than solely on the actual age bar itself, and that therefore nonretroactivity rules should apply, Appellant would argue that the Florida Constitutional requirement of retroactive application trumps those rules.

The American Medical Association, the American Psychiatric Association, the American Society for Adolescent Psychiatry, the American Academy of Child & Adolescent Psychiatry, the American Academy of Psychiatry and the Law, the National Association of Social Workers, the Missouri Chapter of the National Association of Social Workers, and the National Mental Health Association filed an amicus brief in Roper v. Simmons. Of particular significance to this case is the discussion which focused on subjects older than seventeen years of age: AEven more groundbreaking . . . is the recent revelation, confirmed through brain imaging studies, that the brain's frontal lobes are still structurally immature well into late adolescence.

The prefrontal cortex (which, as noted above, is most associated with impulse control, risk assessment, and moral reasoning) is ›one of the last brain regions to mature.= This, in turn, means that ›response inhibition, emotional regulation, planning and organization . . . continue to develop between adolescence and young adulthood.= Citing extensive research, the Amici found that ›the region of the brain associated with impulse control, risk assessment, and moral reasoning is the last to form, and is not complete until late adolescence or beyond . . . . One of the last areas of the brain to reach full maturity . . . is the part associated with regulating behavior, stifling impulses, assessing risks, and moral reasoning.=@ Id. 16-20 (footnotes omitted).

The establishment of a nationwide bar on the execution of those who were under eighteen at the time of the offense obviously does not imply that being youthful but over the age of eighteen at the time of the offense is no longer a mitigating circumstance under Florida law. It also says nothing about how that mitigator should be applied under the Florida=s weighing system. *Roper v. Simmons* did, however, raise the age at which the bar takes effect beyond that which existed according to either state or federal law at the time of Henyard=s sentence and direct appeal. In *Urbin v. State*, 714 So.2d 411 (Fla. 1998), this Court held that the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier the age statutory mitigator becomes. Urbin was afforded relief from his death sentence based on statutory and nonstatutory mitigation related to age and maturity issues even though he was above the age of maturity at which execution was

constitutionally barred.

Appellee=s reference[3] to this language in *Urbin* as Adicta@ is apparently a suggestion that it be ignored. To the contrary, this Court reaffirmed the principle stated in Urbin in *Bell v. State*, 841 So.2d 329 (Fla. 2002) ([I]n *Urbin v. State*, 714 So.2d 411, 418 (Fla. 1998), we stated that Athe closer the defendant is to the age where the death penalty is constitutionally barred, the weightier [the age] statutory mitigator becomes.@). In *Mahn v. State*, 714 So.2d 391, 400-01 (Fla. 1998) the Court explained that where a defendant is not a minor, in order for age to be accorded significant weight, the defendant's age Amust be linked with some other characteristic of the defendant or the crime such as immaturity.@ 714 So.2d at 400. Thus, in *Mahn* the Court found that the trial court abused its discretion in refusing to consider Mahn's age of nineteen given Mahn's Aunrefuted, long-term substance abuse, chronic mental and emotional instability, and extreme passivity in the face of unremitting physical and mental abuse@ that Aprovided the essential link between his youthful age and immaturity.@ Id. *Morton v. State*, 789 So.2d 324 (Fla. 2001). Here, the trial court found that the defendant was acting under an extreme emotional disturbance and his capacity to conform his conduct to the requirements of law was impaired, but accorded these mental mitigators "very little weight." As for nonstatutory mitigating circumstances, the trial court found the following circumstances among others but

[3]AB at 14.

accorded them "little weight": (1) the defendant functions at the emotional level of a thirteen year old and is of low intelligence; (2) the defendant had an impoverished upbringing; (3) the defendant was born into a dysfunctional family. The requirements of *Mahn* were met.

CONCLUSION AND RELIEF SOUGHT

The evolving standards of decency in society prohibit the cruel and unusual execution of an individual who was the functional equivalent of a thirteen year old at the time of the offense. The lower court erred by failing to vacate the sentence of death in light of the *Simmons* and Urbin decisions, grant a new penalty phase at which the jury must be instructed that the death penalty is constitutionally prohibited for those defendants under the age of eighteen, or at the very least, conduct an evidentiary hearing and reevaluate the weight to be afforded to the statutory and non-statutory mitigators related to age and maturity.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of the Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record and the Defendant on January___, **2006.**

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of the Appellant, was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210.

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