Georgia Law Review

Volume 51 | Number 2 Article 9

2017

An Aggravating Adolescence: An Analysis of Juvenile Convictions as Statutory Aggravators in Capital Cases

Lesley A. O'Neill
University of Georgia School of Law

AN AGGRAVATING ADOLESCENCE: AN ANALYSIS OF JUVENILE CONVICTIONS AS STATUTORY AGGRAVATORS IN CAPITAL CASES

TABLE OF CONTENTS

I. INTRODUCTION

In 2005, the Supreme Court held that it was a violation of the Eighth and Fourteenth Amendments to sentence an individual to death for a crime committed as a juvenile.[1] In its reasoning, the Court looked to the " 'evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual" and found that our society evolved to the point where we no longer can condone a punishment of death for those who commit crimes when they are under eighteen years old.[2] The Court determined that "[b]ecause the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force," and that "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence."[3] In general,

> [a] legislature may specify aggravating factors to be considered in the penalty phase of a capital trial in the statutory definition of the crime or in a separate sentencing factor, or in both, provided that it permits the factfinder to consider the individual characteristics of the defendant and the crime.[4]

In arriving at its determination, the Court in *Roper* relied heavily on scientific evidence that major psychological and physiological differences exist between adults and juveniles that demonstrate juveniles cannot be held culpable for their offenses in the same way as adult offenders. This precludes classifying juvenile offenders among the "worst of the worst."[5] The Court determined that three general differences between juveniles under eighteen and adults demonstrate the lack of culpability of juveniles: an absence of maturity and responsibility; a susceptibility to outside influences and peer pressure; and a lack of

---

[1] Roper v. Simmons, 543 U.S. 551, 578 (2005).

[2] *Id.* at 561 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion)).

[3] *Id.* at 568.

[4] 24 C.J.S. *Criminal Procedure and Rights of Accused* § 2348 (2016) (footnotes omitted).

[5] *See Roper*, 543 U.S. at 569–70 (describing the scientific and sociological studies that support this conclusion).

solidified character combined with transitory personalities.[6] According to the Court, "[t]hese differences render suspect any conclusion that a juvenile falls among the worst offenders. . . . Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."[7] The Court determined that due to a juvenile's "susceptibility . . . to immature and irresponsible behavior . . . 'their irresponsible conduct is not as morally reprehensible as that of an adult.' "[8]

Antonio Melton, a black eighteen-year-old, had just turned eighteen twenty-five days earlier when he shot and killed the owner of a jewelry store during an armed robbery.[9] When he was seventeen he previously had committed first-degree felony murder of a taxicab driver during an armed robbery.[10] While he was sentenced to two consecutive life imprisonment sentences for the offense committed when he was seventeen, in the trial for the crime committed when he was eighteen a jury voted by a margin of eight-to-four for a sentence of death.[11] In sentencing Mr. Melton to death, "the trial court found that two aggravating circumstances existed: '(1) Melton was previously convicted of a violent felony . . . and (2) Melton committed the homicide for financial gain.' "[12] Since the second aggravating factor is insufficient on its own to support a death sentence, the death sentence was essentially reached due to Mr. Melton's prior conviction committed when he was seventeen.[13] Due to the weight given to prior violent

---

[6] *See id.* (describing the three general differences in detail).

[7] *Id.* at 570.

[8] *Id.* (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (plurality opinion)).

[9] Melton v. Sec'y, Fla. Dep't of Corrs., 778 F.3d 1234, 1235 (11th Cir. 2015); Brief for Appellant at 117, Melton v. State, 949 So. 2d 994 (2007) (Nos. SC04-1689, 91-373-CFB), 2005 WL 2211489.

[10] Melton v. State, 949 So. 2d 994, 1000 (Fla. 2006).

[11] *Id.*; *Melton*, 778 F.3d at 1238 (Martin, C.J., dissenting).

[12] *Melton*, 778 F.3d at 1238 (Martin, C.J., dissenting) (quoting Melton v. State, 638 So. 2d 927, 929 (Fla. 1994) (per curiam)).

[13] The Florida Supreme Court has held that the pecuniary-gain aggravating factor, the only other aggravator in this case, is not sufficient by itself to support a death sentence. *See, e.g.*, Williams v. State, 707 So. 2d 683, 684, 686 (Fla. 1998) (per curiam); Sinclair v. State, 657 So. 2d 1138, 1140 n.1, 1142–43 (Fla. 1995) (holding pecuniary-gain aggravating

felonies as an aggravator, the state's use of his murder conviction committed while under the age of eighteen was the most likely reason he was sentenced to death.[14]

This Note will examine the use of and reliance on previous juvenile convictions of defendants as statutory aggravators in capital cases, such as Mr. Melton's case, and address the question of whether this use of a statutory aggravator is constitutional. It will conclude that based on the Court's reliance in *Roper* on the factors that point to juveniles possessing a diminished moral culpability combined with the application of "non-weighing" statutory schemes in jurisdictions like Georgia that can elevate a crime into a capital offense based on a sole aggravator, the use of such aggravators is unconstitutional.

Part II of this Note will revisit the history surrounding the Supreme Court's decision in *Roper*, briefly touch on how the science around juvenile brain development has evolved to bolster the Court's reasoning, and respond to subsequent criticism of the Court's reliance on this science. In addition, it will discuss the difference between "weighing" and "non-weighing" jurisdictions in applying statutory aggravators to reach a death sentence, and how this can contribute to the unconstitutional use of a prior juvenile felony conviction. It will also explore how the review of habeas claims in federal courts has changed since the enactment of the Anti-Terrorism Effective Death Penalty Act (AEDPA) and how those charges affect the evaluation of constitutional issues during the appeals process of cases such as Mr. Melton's. A brief discussion reviewing the decisions of the few appellate courts that have faced this issue will reveal why either their analysis frames the question incorrectly, leading to an incorrect conclusion, or the AEDPA impedes meaningful review of this issue.

---

factor, even when combined and merged with murder-during-robbery aggravating factor, was insufficient to support death sentence where defendant had some mitigation).

[14] *See Melton*, 778 F.3d at 1240 (Martin, C.J., dissenting) (arguing that "the state's reliance on the murder he committed while a juvenile was arguably the weightiest reason he was sentenced to death"); *see also* Silvia v. State, 60 So. 3d 959, 974 (Fla. 2011) ("[T]he prior violent felony aggravator is considered one of the weightiest aggravators."); Wong v. Belmontes, 558 U.S. 15, 26 (2009) (per curiam) (recognizing that a capital petitioner's participation in a prior murder is "the worst kind" of aggravating evidence).

Part III will apply the analytical framework of *Roper* to cases like Mr. Melton's and will determine that, based on the Court's analysis in *Roper*, the use of this aggravator is unconstitutional. This analysis will determine that due to the AEDPA, most of these claims have been procedurally barred by the time circuit courts are ruling on them, not allowing for an effective review of both the merits of the underlying legal issues and the potential constitutional implications. Lastly, this analysis will argue that the use of juvenile convictions as statutory aggravators has led to the institutionalization of the very fear that Justice Kennedy spoke of in *Roper*, namely that evidence of juveniles' diminished capacities will be used as evidence of aggravation and the inability for rehabilitation, rather than mitigation and the ability for redemption.

II. BACKGROUND

A. THE ENVIRONMENT LEADING TO *ROPER* AND THE SCIENCE BEHIND DIMINISHED JUVENILE MORAL CULPABILITY

Due to a nationwide increase in violent crime from the late 1980s to the early 1990s, states adopted "get tough" policies and pushed to prosecute larger numbers of youths as adults.[15] This push deemphasized rehabilitation and concern for the best interest of the youths while upholding assertions of public safety, punishment, and accountability among juveniles accused of crimes.[16] Today, nearly 200,000 youths are tried as adults each year in various states because the jurisdiction of their juvenile courts ends at fifteen or sixteen years old, rather than seventeen.[17] While most states have judicial waiver statutes, prosecutors rather than judges often determine the adult status of youths based on

---

[15] Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 966 (1995).

[16] *See id.* at 970–73 (recounting the changes in juvenile punishment measures over the past decade).

[17] *See, e.g.*, Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281, 282–83, 286 (1991) (highlighting the growing trend of younger juveniles being transferred to adult criminal courts).

age and offense.[18] All of this has translated to a high number of youths who have faced the criminal justice system as adults.[19] While the Court had struck down some capital sentences for juveniles prior to the ruling in *Roper*, it declined to extend a categorical ban to youths under eighteen convicted of murder until 2005.[20] In addition, studies have shown that when it comes to the criminal justice system, minority children are treated substantially different than their white counterparts who have committed similar offenses.[21] Despite comprising just 16% of the national youth population,[22] African Americans make up 56% of all youths serving life without parole sentences, and 47% of all juvenile life sentences.[23] Minority youths are more likely to be prosecuted as adults, and, once convicted, receive significantly harsher sentences than white youths prosecuted as adults.[24]

When *Roper* imposed a categorical ban on death sentences for all juveniles under the age of eighteen, there were dissenters and critics; the main criticisms were against the imposition of a bright-

---

[18] *See* AMNESTY INT'L & HUM. RTS. WATCH, THE REST OF THEIR LIVES 19 nn.28, 30 (2005), http://www.amnestyusa.org/sites/default/files/pdfs/therestoftheirlives.pdf (noting the amount of child offenders that had been transferred from juvenile to state court).

[19] *See* Bishop & Frazier, *supra* note 17, at 282–83 (evidencing the number of youths who have been tried in adult courts).

[20] *See* Eddings v. Oklahoma, 455 U.S. 104, 116–17 (1982) (reversing a sixteen-year-old's death sentence for failing to consider youthfulness as a mitigating factor); Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (plurality opinion concluding that fifteen-year-old offenders could not be held culpable in capital cases); Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (rejecting a categorical ban on the death penalty for sixteen or seventeen-year-old youths convicted of murder).

[21] *See* Ashley Nellis & Ryan S. King, *No Exit: The Expanding Use of Life Sentences in America*, 19 (2009), http://www.sentencingproject.org/publications/no-exit-the-expanding-use-of-life-sentences-in-america/ ("Racial disparity in juvenile life sentences is quite severe in many states.").

[22] Joshua Rovner, *Racial Disparities in Youth Commitments and Arrests*, 1 (2016), http://www.sentencingproject.org/publications/racial-disparities-in-youth-commitments-and-arrests/.

[23] *Id.* at 21 tbl.8, 23 tbl.9.

[24] *See* Nat'l Council on Crime & Delinquency, *And Justice for Some: Differential Treatment of Youth of Color in the Justice System* 37 (2007), http://www.nccdglobal.org/sites/default/files/publication_pdf/justice-for-some.pdf (revealing the disproportionate representation of African American youths in the juvenile system). *See generally* Howard N. Snyder & Melissa Sickmund, U.S. DEP'T OF JUSTICE OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *Juvenile Offenders and Victims: 2006 National Report* (2006), https://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf (providing statistics by race on involvement of youths in the criminal justice system).

line rule, as opposed to allowing juries to continue to weigh the "mitigating factor of age."[25] Yet Justice Kennedy argued for the majority that "the differences between juvenile and adult offenders are too marked and well understood" and that an "unacceptable likelihood exists that the brutality . . . of any particular crime would overpower mitigating arguments based on youth . . . even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."[26] In fact, it is illustrative that the prosecutor in *Roper* actually argued the defendant's age was aggravating rather than mitigating, and that *Roper*'s harshest critics today rely on the combination of *Roper*'s diminished capacity with youth argument to argue for harsher punishments of juveniles, offering evidence that Justice Kennedy had correctly intuited how the jury might misuse the evidence of youth.[27] Justice Scalia's dissent disparaged the social science research that the majority relied on, and criticism has since been lobbied at the decision for its reliance on outdated science and selective *amici*.[28]

---

[25] Kevin W. Saunders, *The Role of Science in the Supreme Court's Limitations on Juvenile Punishment*, 46 TEX. TECH L. REV. 339, 354–55 (2013) (highlighting the scientific community's amicus briefs filed in *Roper* detailing the adolescent brain science behind the diminished culpability theory, and noting the Justices sharp disagreement over drawing the line at eighteen).

[26] Roper v. Simmons, 543 U.S. 551, 572–73 (2005).

[27] "Defense counsel in *Roper* reminded the jurors that juveniles of [the defendant]'s age cannot drink, serve on juries, or even see certain movies, because 'the legislatures have wisely decided that individuals of a certain age aren't responsible enough.' " In rebuttal, the prosecutor responded with: "Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit." *Roper*, 543 U.S. at 558. *See also* Mitchel Brim, *A Sneak Preview Into How the Court Took Away a State's Right to Execute Sixteen and Seventeen Year Old Juveniles: The Threat of Execution Will No Longer Save an Innocent Victim's Life*, 82 DENV. U. L. REV. 739, 739, 753 (2005) (opening his article with a recitation of a horrific crime committed by the juvenile and calling it a "grave injustice" that he cannot face the ultimate punishment of death); Moin A. Yahya, *Deterring* Roper*'s Juveniles: Using a Law and Economics Approach to Show that the Logic of* Roper *Implies that Juveniles Require the Death Penalty More Than Adults*, 111 PENN ST. L. REV. 53, 106 (2006) (arguing that if *Roper*'s logic is correct that juveniles are more reckless, "then harsher punishments are needed to control them").

[28] *Roper*, 543 U.S. at 617–18 (Scalia, J., dissenting); *see also* Deborah W. Denno, *The Scientific Shortcomings of* Roper v. Simmons, 3 OHIO ST. J. CRIM. L. 379, 396 (2006) (arguing that despite *Roper* reaching the correct result, "the Court's use of social science research was . . . limited and flawed"); Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 108 (2009) (stating that in

However, despite the criticisms leveled at the Court for its foundational use (or lack thereof) of adolescent brain science, nearly all scholars, scientists, and advocates delving into the field are in agreement with the basic premises behind the science.[29] In addition, the science that the Court relied on in *Roper* has evolved even further to provide a foundation for why juveniles possess a diminished moral culpability for their crimes, thus precluding the use of the most serious punishment for juvenile offenders.[30] Furthermore, as the science continues to evolve the courts are taking notice and questioning how the development of the adolescent brain should affect criminal justice policies such as sentencing.[31] The adolescent (generally defined as spanning from eleven to nineteen years old) brain undergoes massive synaptic pruning in these formative years, resulting in substantial loss of grey matter; the degree of change varies, but development is particularly marked in the prefrontal cortex, or the area of the brain involved in emotional and impulse control.[32] In addition,

---

Roper the "influence of neuroscience was unclear" and that "[t]he Court drew most of its language from prior decisions, none of which had relied on brain science, and remarked that 'any parent knows' that teenagers are immature").

[29] *See, e.g.*, Maroney, *supra* note 28, at 111 (arguing that the basic "diminished culpability" theory "has been endorsed to some degree—and often completely—by virtually every scholar, advocate, and defender now seeking to expand the influence of neuroscience within juvenile justice").

[30] *See, e.g.*, The Royal Society, *Brain Waves Module 2: Neuroscience: Implications for Education and Lifelong Learning* (Feb. 2011), at 5–6, http://www.interacademies.net/File.aspx?id=25096 (explaining neuroplasticity and how during adolescence the areas of the brain undergoing significant changes are those involved in self-awareness, internal control, and perspective taking); Sarah-Jayne Blakemore, *The Developing Social Brain: Implications for Education*, 65:6 Neuron 744–47 (Mar. 25, 2010), http://www.sciencedirect.com/science/article/pii/S089662731000173X (outlining the research regarding cognitive development in adolescents and concluding that adolescence is a key time for the development of regions of the brain involved in social cognition and self-awareness); Catherine Sebastian et al., *Social Brain Development and the Affective Consequences of Ostracism in Adolescence*, 72 BRAIN & COGNITION 134–45 (2010) (discussing the formative periods in adolescent brain development when peers become influential in shaping social behavior).

[31] *See* Carl Zimmer, *You're an Adult. Your Brain, Not so Much*, N.Y. TIMES (Dec. 21, 2016), http://nyti.ms/2hTUDRG (detailing the findings of a Harvard neuroscientist who often speaks to audiences of judges interested in how the brain develops and how that affects legal questions such as how old someone has to be to be sentenced to death and noting that "[c]ourts, too, may need to take into account the powerful influence of emotions, even on people in their early 20s").

[32] The Royal Society, *supra* note 30, at 5–6; Sebastian et al., *supra* note 30, at 134–35.

some social capabilities, such as the ability to recognize emotions in others and the ability to understand another person's point of view, are temporarily compromised or still undergoing significant development into late adolescence.[33] Studies have also suggested that adolescents are still developing the ability to deal with social and emotional distress, making them less able to cope with peer rejection and social exclusion.[34] Science has also sought to provide answers as to why excitement and stress can cause youths to make riskier decisions than adults.[35] All of this indicates that the research into the development of the juvenile brain and the findings of the lack of some fully-developed significant cognitive measures that adults possess, such as the ability to withstand peer influence, make rational decisions, and empathize with others, lends further scientific support and credibility to the Court's holding that juveniles should be categorically excluded from the imposition of a death sentence.

B. THE USE OF STATUTORY AGGRAVATORS IN CAPITAL CASES IN "WEIGHING" VS. "NON-WEIGHING" JURISDICTIONS

A defendant in a capital case cannot be sentenced to death unless a jury of his peers first finds him guilty of the offense and, second, finds at least one aggravating factor in the penalty phase.[36] States approach the application of statutory aggravators differently. For example, while both Florida and Georgia use previous felony convictions as statutory aggravators, states differ in how they instruct juries to consider aggravating evidence.[37]

---

[33] Blakemore, *supra* note 30, at 744–47.

[34] *See, e.g.*, Sebastian et al., *supra* note 30, at 134–45; *see also supra* note 30 and accompanying text.

[35] *See, e.g.*, Bernd Figner et al., *Affective and Deliberative Processes in Risky Choice: Age Differences in Risk Taking in the Columbia Card Task*, 35 J. EXPERIMENTAL PSYCHOL. 709, 726–28 (2009) (reporting that the emotional limbic system influences adolescents more heavily, which in turn leads to riskier decisions made under stress).

[36] *Capital Punishment*, 43 GEO. L.J. ANN. REV. CRIM. PROC. 857, 865 (2014).

[37] *Compare* O.C.G.A. § 17-10-30(b)(2) (2016), FLA. STAT. § 921.141(6)(a) (2016) (stating as an aggravator that the offense was committed by a person with a prior record of conviction for a capital felony), *and* O.C.G.A. § 17-10-31(a) (2016) ("Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of **at least one** statutory aggravating circumstance. . . ." (emphasis added)), *with* FLA. STAT. § 921.141(2) (2016)

Florida is known as a "weighing" state, which requires the jury to weigh the aggravating factors against the mitigating evidence. Georgia is a "non-weighing" state, where the jury finding of at least one aggravating circumstance can lead to the death penalty.[38] Not only is this fact important at trial, since a jury in Georgia could hypothetically reach a death sentence based on a single aggravating factor, but also it becomes even more important on appeal. Even if the reviewing court concluded that an invalid aggravating circumstance existed, as long as the jury found at least one valid aggravating circumstance, the case will not necessarily be remanded, since one aggravator is all the statute requires. Therefore, hypothetically, under the statute as it is currently written, a defendant in Georgia could be sentenced to death solely on the existence of a previous felony conviction—including a juvenile one.

The record of Mr. Melton's case shows that the trial judge found two aggravating factors (the previous felony and the financial gain element) and also found two non-statutory mitigating factors, but assigned them little weight.[39] In addition, Florida is one of the few states that until very recently did not require a unanimous jury recommendation in death penalty cases—instead, requiring a minimum of seven votes.[40] However, in the wake of the recent Supreme Court decision of *Hurst v. Florida*, which declared a portion of Florida's statutory scheme unconstitutional (namely that the jury recommendation for death was only advisory to the judge's final determination), the Florida Supreme Court

("Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court . . . [t]he recommendation shall be based on a **weighing** of all of the following: a. Whether sufficient aggravating factors exist. b. Whether aggravating factors exist which **outweigh** the mitigating circumstances found to exist . . . ." (emphasis added)).

[38] *Capital Punishment*, *supra* note 36, at 870.

[39] *Melton*, 949 So. 2d at 1000 (noting that the mitigating factors in this case were: "(1) Melton exhibited good conduct while awaiting trial and (2) Melton had a difficult family background.").

[40] *See* Equal Justice Initiative, *Florida Supreme Court Declares New Death Penalty Statute Unconstitutional* (Oct. 17, 2016), http://eji.org/news/florida-supreme-court-declares-new-death-penalty-statute-unconstitutional. Until later in 2016, Alabama, Delaware, and Florida were the only states that allowed less than unanimous jury verdicts in the sentencing phase of capital cases. Delaware and Florida's statues have subsequently been struck down by the state supreme court.

subsequently ruled in *Perry v. State* that the rewritten statute (as cited in this Note) is unconstitutional, interpreting *Hurst* to require unanimity in all jury determinations; the statute has yet to be rewritten by the legislature.[41] Mr. Melton's case highlights that adding or striking one statutory aggravator can have huge implications. In his case, the only aggravator the judge could rely on to reach a death verdict was the juvenile conviction, and the recommendation was an 8–4 vote; one critical vote short of a recommendation for a life sentence instead of death under the previous statute.[42] While Mr. Melton will certainly challenge his sentence in light of the *Perry* ruling now requiring jury unanimity, his case highlights that even the existence of one unconstitutional aggravator has the potential to render the entirety of a death sentence unconstitutional.

C. THE AEDPA AND HABEAS REVIEW

The passage of the AEDPA in 1996 dramatically changed habeas corpus law in the United States.[43] Since the passage of the act, federal courts reviewing a petitioner's claim may not issue a writ based on its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly, but only if the state court applied the law in an objectively unreasonable manner.[44] This distinction creates a substantially higher threshold for obtaining relief than de novo review. Under this highly deferential standard of review, a state-court decision is not unreasonable if fair-minded jurists could disagree on its correctness.[45] This means that when it comes to an interpretation of existing Supreme Court precedent, unless the state courts apply the case unreasonably, the federal courts are

---

[41] Hurst v. Florida, 136 S. Ct. 616, 622, 624 (2016); Perry v. State, No. SC16-547, 2016 WL 6036982, at *8 (Fla. Oct. 14, 2016). FLA. STAT. 921.141(2) (2016).

[42] *Melton*, 949 So. 2d at 1000.

[43] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[44] 28 U.S.C. § 2254(d)(1) (2012).

[45] *See* Davis v. Ayala, 135 S. Ct. 2187, 2199 (2015) (stating that the petitioner "must show that the state court's decision to reject his claim 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.' " (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011))).

precluded from disagreeing with the state courts' interpretation. It is potentially reasonable to read *Roper* as not dictating that the use of juvenile convictions as statutory aggravators is unconstitutional, as the decision did not actually address this issue directly. However, in analyzing the Court's reasoning and justification for their decision in *Roper*, the correct legal interpretation should be that *Roper* does preclude the use of these, especially in a case like Mr. Melton's where the defendant was barely over eighteen and his youth conviction was the sole aggravating factor. Yet as the Supreme Court has pointed out, one of the key tenants of interpreting an AEDPA claim is that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law."[46] Commentators have recognized this problem when it comes to other protected classes of persons.[47] In addition, it has been pointed out that while the intent behind the enacting of the AEDPA was partly to shorten the length of time it takes to review a habeas case in its entirety, proponents of the bill expressly stated the importance of preserving and protecting the constitutional rights of the accused.[48] The AEDPA deference standard should not be construed at such a high standard that federal habeas courts are unable to conduct independent review of important constitutional claims.[49]

---

[46] Renico v. Lett, 559 U.S. 766, 773 (2010) (quoting Williams v. Taylor, 529 U.S. 362, 410 (2000)).

[47] *See* Nathaniel Koslof, *Insurmountable Hill: How Undue AEDPA Deference has Undermined the* Atkins *Ban on Executing the Intellectually Disabled*, 54 B.C. L. REV. E. SUPP. 189, 190, 195–96 (2013) (arguing that the Eleventh Circuit's approach under the AEDPA has created an unduly deferential standard for federal review that undermines important constitutional protections, such as exempting the intellectually disabled from execution).

[48] *See* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 398 (1996) (discussing the Senate debate surrounding the AEDPA's passage, including Senator Orrin Hatch's statements that the AEDPA would limit frivolous appeals "while still preserving and protecting the constitutional rights of those who are accused").

[49] *See Davis*, 135 S. Ct. at 2198–99 (discussing the inability of federal courts to award habeas relief without overcoming the highly deferential AEDPA standard).

D. EXISTING CASE LAW

There are a few circuit and state supreme court cases that have been presented with this argument, and while none have ruled the way this Note proposes, many have not truly reached the merits of the claim due to either procedural bars or the AEDPA's highly deferential standard of review. For example, in *State v. Garcell*, the North Carolina Supreme Court determined that since the defendant did not object to the use of the statutory aggravator of his juvenile conviction at trial, their review was limited to plain error.[50] When they briefly reviewed the argument, they remarked that "[the defendant] is not being sentenced to death as an additional punishment for those [juvenile convictions]."[51] The Fifth Circuit reached a similar conclusion.[52] Mr. Melton's raising of this issue also did not garner a certificate of appealability from the Eleventh Circuit.[53] However, Judge Martin dissented, arguing that this is an issue of first impression before the court, as it has only previously been decided in the non-capital context.[54] In addition, at least one state supreme court has directed counsel to submit a post-oral argument brief directly addressing this question, recognizing that other courts have noted that this issue needs addressing.[55]

---

[50] 678 S.E.2d 618, 645 (N.C. 2009).

[51] *Id.*

[52] *See* Taylor v. Thaler, 397 F. App'x 104, 108 (5th Cir. 2010) ("Here, Taylor is not being punished again for his earlier crime but is instead being punished for a murder that he committed as an adult."). As noted above, the issue is not whether defendants are being punished doubly for a juvenile offense, but whether the reliance on the previous conviction to seek a punishment of death is necessarily unconstitutional.

[53] *Melton*, 778 F.3d at 1737.

[54] *Id.* at 1737–38. The Eleventh Circuit previously considered and rejected arguments that *Roper* prohibits consideration of juvenile convictions in the non-capital sentencing context. *See* United States v. Hoffman, 710 F.3d 1228, 1232 (11th Cir. 2013) (finding that a mandatory-life-sentence enhancement predicated on juvenile convictions did not violate the Eighth Amendment and *Roper*); United States v. Wilks, 464 F.3d 1240, 1243 (11th Cir. 2006) (holding that *Roper* does not preclude the use of juvenile convictions as predicate convictions for sentences under the Armed Criminal Career Act, 18 U.S.C. § 924(e)). Judge Martin, however, rightly relies on the "death is different" argument to highlight that these arguments in the capital context provide an issue of first impression for the court. *Melton*, 778 F.3d at 1242.

[55] *See, e.g.*, Appellant's Post-Oral Argument Brief on *Roper v. Simmons* Questions People v. Salazar (No. S077524), 2016 WL 1540424 (Cal. 2016).

III. ANALYSIS

A. *ROPER* LOGICALLY EXTENDS TO PRECLUDE THE USE OF JUVENILE CONVICTIONS AS STATUTORY AGGRAVATORS

One of the fundamental aspects of the *Roper* decision, and in fact all of the Court's death penalty jurisprudence during this period, is that the Eighth Amendment affords capital defendants heightened protection because "death is different."[56] The protections that are imposed are ones "that the Constitution nowhere else provides."[57] Some of these protections that the Court has mandated are a prohibition on mandatory death sentences for certain crimes, a ban on death sentences for non-homicide crimes (i.e., aggravated rape), and the categorical protection of certain protected classes of individuals, with one such class being juveniles.[58] One way to envision statutory aggravators is as a doorway; once a defendant commits a certain act, whether it is committed during the commission of the crime for which they are on trial or is a previous felony conviction, the door has been opened to the possibility of death. It necessarily follows that if the Supreme Court has outlawed the death penalty for a certain type of act (say, a rape not resulting in death) or a certain category of persons (e.g., juveniles), this keeps the door locked, unless other factors exist to open it. This categorical distinction is especially important in death penalty jurisprudence, and explains why a prior crime committed by an adult can render a defendant death-eligible, but a crime committed as a juvenile should not. If a prior murder committed as an adult was not eligible for death originally, it was due to factors related to the crime, not a categorical ban on the death eligibility of the offender. On the other hand, a juvenile murderer can never be death-eligible due to factors inherent in the nature of the offender, as the reasoning in

---

[56] Harmelin v. Michigan, 501 U.S. 957, 994 (1991).

[57] *Id.*

[58] *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 421 (2008) (outlawing the imposition of the death penalty for a crime that did not result in death); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (ruling that executing mentally retarded inmates violates the Eighth Amendment); Enmund v. Florida, 458 U.S. 782, 797 (1982) (banning felony murder where the defendant did not kill, attempt to kill, or intend to kill).

Roper explains. This distinguishes a crime committed by a defendant as a juvenile versus as an adult for death-eligibility purposes.

The few circuit courts that have briefly touched on the merits of Mr. Melton's argument, that *Roper* precludes the use of a juvenile conviction as a statutory aggravator, simply dismiss *Roper* as not mandating that a juvenile's slate be wiped clean when they turn eighteen.[59] However, this is not the correct argument to address this issue. It is not whether *Roper* wipes a juvenile's slate clean once they turn eighteen, but whether the reliance on a crime that was committed during a period the Supreme Court has already ruled a person "death ineligible," such as when they are a juvenile, is sufficient to elevate what might otherwise be a non-capital crime into a capital one. In other words, if a defendant committed a crime when they were under eighteen and in a state of "diminished culpability" according to the Court, should this conviction be enough to elevate a later crime into one this defendant can be sentenced to death for, when if not for the juvenile crime, the defendant would at most face life in prison? Since the Court's reasoning in *Roper* was so heavily based on the "diminished capacity of juveniles" argument, it does not logically follow that a crime committed during this period of diminished capacity to make rational, well-reasoned decisions should be the factor allowing the state to elevate what would not otherwise be a capital crime to a capital offense. While many decisions have been made in cases with multiple statutory aggravating factors, meaning the juvenile conviction is not the sole factor used to reach a death sentence, Mr. Melton's case illustrates that his situation where it is the sole reason is hardly just a hypothetical one.[60]

---

[59] *See, e.g.*, Taylor v Thaler, 397 F. App'x 104, 108 (5th Cir. 2010) ("We conclude that Taylor's claim most fail because *Roper* does not clearly establish that he is ineligible for the death penalty.").

[60] Judge Martin's dissent in *Melton* points to another case that raises this issue where the claim had also been procedurally defaulted. *Sec'y, Fla. Dep't Corrs.*, 778 F.3d at 1242 (Martin C.J., dissenting). *See also* Barwick v. State, 88 So. 3d 85, 106 (Fla. 2011).

B. THE AEDPA IMPEDES IMPORTANT CONSTITUTIONAL REVIEW OF THESE ISSUES

Imagining that the AEDPA did not dictate such a highly deferential standard of review to the state courts, and instead the Eleventh Circuit was faced with Mr. Melton's claim de novo, one can envision how the result may have been different. De novo review allows the appellate courts to consider the questions of law as if for the first time, allowing no deference to the lower court's opinion on the law; this affords the appellate court the latitude to decide if the lower court applied the law correctly.[61] While the Eleventh Circuit may still have decided against Mr. Melton, his substantive legal questions would at least be heard. In applying a *Roper* analysis to his case, since he was seventeen when he committed his first offense, he clearly falls within the Supreme Court's categorical ban on death-eligibility, possessing a "diminished capacity" and a lessened ability to make rational decisions and choices. Mr. Melton also argued that his "mental and emotional age" at the time of his second crime still displayed all the factors of youth that the *Roper* court considered.[62] While the Supreme Court did recognize that drawing the line at eighteen years of age is subject to the objections raised against categorical rules, taken in totality Mr. Melton's case falls squarely within the scope of the class of persons the Supreme Court considered death-ineligible. In addition, while the Supreme Court argued that jury discretion in imposing the death penalty should be limited in order to prevent arbitrariness, that discretion should not be limited to disallow the consideration of factors that the Supreme Court has used to narrow the class of death-eligible defendants.[63]

---

[61] *See* West, *Habeas Corpus: Issues and Findings of Fact; Historical Facts; Credibility*, ALR DIGEST 767 (2016) ("If a state court has failed to adjudicate a claim 'on the merits,' the [AEDPA] does not apply and federal habeas courts apply the pre-AEDPA standard of review, reviewing both questions of law and mixed questions of law and fact *de novo*.").

[62] *Melton*, 778 F.3d at 1241 (Martin, C.J., dissenting).

[63] Gregg v. Georgia, 428 U.S. 153, 189 (1976).

C. JUVENILES ARE DIFFERENT

In addition, while speaking to the differences between juveniles and adults and demonstrating that the former cannot reliably be classified among the worst offenders, Justice Kennedy spoke of an "unacceptable likelihood" that the brutality of a crime would overpower mitigating arguments based on youth and vulnerability.[64] For instance, in Mr. Melton's case, he was convicted of first-degree felony murder at age seventeen for shooting a taxicab driver. While the trial record is unavailable in this case, one can imagine that in 1993, more than a decade before *Roper* was decided, Mr. Melton was most likely not afforded the same analysis later applied by the Court of how his age may have contributed to poor decision making; in fact, his young age may have been an argument that he was a morally depraved individual.[65] As noted above, a high number of youths today face prosecution in the criminal justice system as adults, and an even more unsettling number of minority defendants face prosecutions as adults.[66] There are also additional factors adding to the ultimate arbitrary application of the death penalty; white youths are statistically less likely to be sentenced as adults, meaning they will lack the prerequisite statutory aggravator that a similarly situated minority youth offender may have been subjected to, and might otherwise be ineligible for the death penalty where the minority youth offender is.[67] Racial disparities have frequently been observed in capital cases, and the troubling history of minority youth being disproportionally sentenced as adults is yet another factor contributing to this problem.[68]

In addition, the arc of the Supreme Court's jurisprudence both in *Roper* and the years after trends towards urging a "children are

---

[64] Roper v. Simmons, 543 U.S. 551, 573 (2005).

[65] *See id.* ("In some cases a defendant's youth may even be counted against him.").

[66] Feld, *supra* note 15, at 975–77.

[67] *See, e.g.*, Robin Walker Sterling, *"Children are Different": Implicit Bias, Rehabilitation, and the "New" Juvenile Jurisprudence*, 46 LOY. L.A. L. REV. 1019, 1025–26 (2013) (arguing that throughout U.S. history youths of color have been subjected to disproportionate treatment in the criminal justice system, which continues to be perpetuated today through implicit racial biases in sentencing).

[68] *Id.* at 1029.

different" analysis. The normative force of *Roper* sent a powerful message about redemption; the facts of the *Roper* case were extremely grisly and portrayed an unapologetic defendant.[69] The Court's holding seemed to send a message that no child "is so far beyond redemption that the state can completely renounce the rehabilitative ideal and 'extinguish [the child's] life and his potential to attain a mature understanding of his own humanity.' "[70] Since the Court seemed to think that children are ultimately redeemable, the logic that the court would then allow a crime committed as a juvenile to serve as the one aggravator that proves to a jury that the defendant is no longer worth attempting to rehabilitate or redeem does not seem to follow.

In *Roper* the Court imposed a categorical, bright-line distinction between juveniles with diminished capacities and adults who can be held to a higher culpability standard at age eighteen.[71] While there were many critics of this, bright-line rules often serve judicial interests of promoting predictability, efficiency and reliability. Similarly, while the Court has determined that there must be some jury discretion afforded to deciding what mitigating or aggravating factors did or did not exist in each case,[72] as already discussed, many states use statutory aggravating factors to determine when capital punishment is available. Due to the lack of meaningful review as a result of the AEDPA, and the potential for cases like Mr. Melton's that exhibit all of the logic and reasoning behind *Roper*'s preclusion of a death sentence, a bright-line, categorical ban on using juvenile felony convictions as statutory aggravators in capital cases would best serve the judicial interests of fairness, predictability, and efficiency.

IV. CONCLUSION

The Supreme Court first recognized a categorical distinction for children in *Roper*, and has continued to maintain this distinction

---

[69] The defendant in *Roper*, Christopher Simmons, broke into the victim's home, duct-taped and bound her hands and feet and threw her into a river. He bragged that he could "get away with" the murder because he was a minor. 543 U.S. at 556–57.

[70] Sterling, *supra* note 67, at 1029.

[71] *Roper*, 543 U.S. at 572–73.

[72] *Id.* at 572.

in later decisions.[73] The Court has signaled its belief that "the practice of simply superimposing adult criminal protections and jurisprudence on proceedings for children accused of crimes is inappropriate."[74] Therefore, a logical extension of the Court's decision is to preclude the use of juvenile convictions to reach a death sentence for a crime later committed as an adult. Delving into the Supreme Court's reasoning in *Roper* and its progeny, juveniles simply cannot be held to the same culpability level as adults, and while turning eighteen should not wipe a defendant's slate clean, a crime committed when a juvenile brain does not possess the same capabilities and capacities as its adult counterparts should not be allowed to elevate a non-capital crime to a capital one.

Lesley Alexandra O'Neill

---

[73] *See* Graham v. Florida, 560 U.S. 48, 62 (2010) (holding that the Eighth Amendment prohibits imposition of life without parole sentences on juvenile offenders who did not commit homicide).

[74] Sterling, *supra* note 67, at 1035.