No. 15-7091
CAPITAL CASE

In the
Supreme Court of the United States

BART JOHNSON,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

On Petition for a Writ of Certiorari to the
Alabama Court of Criminal Appeals

BRIEF IN OPPOSITION TO PETITION FOR REHEARING

LUTHER STRANGE
Alabama Attorney General

Andrew Brasher
Alabama Solicitor General

Lauren A. Simpson
Assistant Attorney General
*Counsel of Record

OFFICE OF ALA. ATT'Y GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
lsimpson@ago.state.al.us

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT 1

REASONS THE PETITION SHOULD BE DENIED 3

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Ex parte McNabb,
887 So. 2d 998 (Ala. 2004) 6

Ex parte Waldrop,
859 So. 2d 1181 (Ala. 2002) 3

Fletcher v. Florida,
No. 15-6075 (cert. denied Jan. 25, 2016) (rehearing denied March 7, 2016) 4

Hurst v. Florida,
136 S. Ct. 616 (2016) 3

Neder v. United States,
527 U.S. 1 (1999) 7

Ring v. Arizona,
536 U.S. 584 (2002) 3

Shanklin v. Alabama,
No. 15-953 (cert. denied March 21, 2016) 3

Smith v. Florida,
No. 15-6430 (cert. denied Jan. 25, 2016) (rehearing denied March 21, 2016) 4

White v. Texas,
310 U.S. 530 (1940) 4

Statutes

Ala. Code § 13A-5-40 2

Ala. Code § 13A-5-45 6

Ala. Code § 13A-5-49 .... 2, 6

Other Authorities

Steve Bousquet, *Gov. Rick Scott signs new Florida death penalty law as legal challenges mount*, Miami Herald (March 7, 2016) 3

STATEMENT

Bart Wayne Johnson murdered an on-duty police officer, Officer Phillip Davis, on the side of the interstate. C. 32–33. The murder was captured on video, which was introduced at trial as State's Exhibit 1.

At 11:50 p.m. on December 3, 2009, Officer Davis pulled over Bart Johnson for driving 76 miles per hour in a construction zone. St. Exh. 1; R. 1538–39. After Johnson pulled over to the shoulder of the road, Officer Davis walked to the driver's window and requested his license and registration. St. Exh. 1. Officer Davis then went back to his patrol car to write a speeding ticket. St. Exh. 1.

While Officer Davis was in his car writing the ticket, his patrol car's camera continued to film Johnson. St. Exh. 1. Filmed through the rear window of his car, the video shows Johnson reach his hand up and turn off the interior lights of the car one at a time. St. Exh. 1. After Johnson turned off the lights, he raised the automatic sunshade in the car's rear window. St. Exh. 1. The sunshade effectively blacks out the rear window so that it is impossible to see what the driver is doing. St. Exh. 1.

Officer Davis walked back to Johnson's car and returned his license and registration. St. Exh. 1. Johnson then said, "I've been on the road for like four hours, man. My brother's a cop. I totally understand that you're just doing your job." St. Exh. 1. Officer Davis responded, "Have your brother call me and I'll tell him how you acted and then we'll see how that works out, okay?" St. Exh. 1.

Officer Davis then bent down slightly, leaned towards the driver's window,

held out a clipboard with the citation on it, and said, "I need your signature at the bottom." St. Exh. 1. Immediately thereafter, Johnson raised a pistol and shot Officer Davis in the face at point blank range. St. Exh. 1. Officer Davis collapsed. St. Exh. 1. His head hit the side of the car and he fell backward, coming to rest in the right-hand lane of the interstate. St. Exh. 1. Johnson sped off, and Officer Davis never moved again. St. Exh. 1.

A jury convicted Johnson of capital murder and recommended that he be sentenced to death. The jury convicted Johnson of capital murder in the guilt phase of trial by finding that (1) Officer Davis was an on-duty police officer at the time of the murder; and (2) Johnson fired the fatal shot from inside a vehicle. Ala. Code § 13A-5-40(a)(5), (18). In the sentencing phase of trial, the jury considered two aggravating circumstances: (1) that the crime was committed to avoid or prevent a lawful arrest, and (2) that the crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. Ala. Code § 13A-5-49(5), (7). The judge charged the jury at sentencing that they could vote to recommend the death penalty only if they *unanimously* found the existence of an aggravating circumstance. The judge gave this unanimity charge at least four times. R. 2212:15–25; 2214:1; 2217:3–10; 2212:15–25, 2214:1; 2227:22–25; 2228:1–2; 2238:19–25; 2239:1–4. The jury unanimously found that at least one aggravating circumstance existed and voted ten to two in favor of sentencing Johnson to death.

REASONS THE PETITION SHOULD BE DENIED

Johnson's sentence is consistent with the Sixth Amendment. The Sixth Amendment requires a jury to find "any fact on which the legislature conditions an increase in their maximum punishment." *Ring v. Arizona*, 536 U.S. 584, 589 (2002). As relevant here, a capital murderer can be sentenced to death in Alabama only upon a finding of at least one aggravating circumstance. *See Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002). The trial court instructed Johnson's jury that it must unanimously find an aggravating factor or it could not recommend the death penalty. The jury followed those instructions, unanimously found one or more aggravating factors, and recommended the death penalty by a vote of ten to two.

Although Alabama's and Florida's capital sentencing statutes are superficially similar, the unusual facts that led to *Hurst v. Florida*, 136 S. Ct. 616 (2016), could not happen in Alabama.[1] Unlike the Florida law addressed in *Hurst*, Alabama law requires a jury to unanimously find the existence of an aggravating circumstance—at either the guilt phase or the sentencing phase—before a defendant can be sentenced to death. And that is precisely what happened here. In comparable cases, the Court has declined to grant plenary review or GVR in light of *Hurst*. *See Shanklin v. Alabama*, No. 15-953 (cert. denied March 21, 2016); *Fletcher v. Florida*, No. 15-6075 (cert. denied Jan. 25, 2016) (rehearing denied

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[1] In fact, it appears that Florida's solution to *Hurst* was to more closely follow the "sentencing system used in one other state, Alabama." Steve Bousquet, *Gov. Rick Scott signs new Florida death penalty law as legal challenges mount*, Miami Herald (March 7, 2016) *available at* http://www.miamiherald.com/news/politics-government/state-politics/article64556467.html.

March 7, 2016); *Smith v. Florida*, No. 15-6430 (cert. denied Jan. 25, 2016) (rehearing denied March 21, 2016).

Johnson's petition for rehearing should be denied for at least four reasons.

First, Johnson's petition for rehearing is based on a ground that he did not raise in his petition for certiorari. The petition for rehearing requests that the Court reconsider denying Johnson's petition for certiorari because of the Court's Sixth Amendment decision in *Hurst*. But Johnson's petition for certiorari did not raise a Sixth Amendment issue. Instead, his petition for certiorari raised a single claim about pre-trial publicity: "did it violate the Due Process Clause to refuse to change the venue of the trial from a community that was exposed to extensive and prejudicial media coverage of the case?" Pet. for Cert. at i. In effect, Johnson's petition for rehearing is a completely new and different petition for certiorari. The Court should not grant a petition for rehearing on an issue that was not fairly presented in the original petition for certiorari. *But see White v. Texas*, 310 U.S. 530 (1940).

Second, the jury at Johnson's sentencing unanimously determined that an aggravating circumstance existed, which is all that *Ring* and *Hurst* require. Johnson erroneously argues that the judge "instructed the jury that it could recommend death even if it did not find the existence of an aggravating circumstance." Pet. for Rehearing at 4. There is no citation for this sentence. And, in fact, the judge did precisely the opposite. The judge instructed the jury at least four times that, if it did not unanimously determine the existence of an aggravating

circumstance, it could not even consider recommending a death sentence: "[B]efore you can even consider recommending the defendant's punishment be death in a particular case, each and every one of you must be convinced beyond a reasonable doubt based upon the evidence that an aggravating circumstance exists in that case." R. 2212:15–25, 2214:1. "All twelve of you must be convinced beyond a reasonable doubt that an aggravating circumstance exists in order for any of you to consider that aggravating circumstance in determining what the sentence should be." R. 2217:3–10. "There must be a unanimous agreement on the existence of a particular aggravating circumstance in a particular case before it can be considered by any juror in that particular case." R. 2217:22–25; 2218:1. After the jury began deliberating, the judge answered specific questions about his prior instructions and reiterated the unanimity requirement:

> JUROR ALLEN: If you should have two [aggravating circumstances], does that have to be unanimous?
>
> THE COURT: Any time you have an aggravating circumstance, an aggravating circumstance, it must be unanimous and it must be beyond a reasonable doubt.
>
> * * *
>
> As I stated to you, the burden of proof is on the State of Alabama to convince each of you beyond a reasonable doubt the existence of any aggravating circumstance considered by you in determining what punishment will be recommended in each case. This means that before you can even consider recommending the defendant's punishment be death in a particular case, each and every one of you must be convinced beyond a reasonable doubt, based upon the evidence, that an aggravating circumstance exists in that case.

R. 2227:22–25; 2228:1–2; 2238:19–25; 2239:1–4.

Johnson's petition for rehearing rests on the erroneous fiction that the judge did not give a unanimity instruction. But the judge gave that instruction at least four times. These jury instructions ensured that the jury unanimously found at least one aggravating circumstance before it ultimately recommended the death penalty. *See Ex parte McNabb*, 887 So. 2d 998 (Ala. 2004) (holding that similar jury instructions satisfy the Sixth Amendment).

Third, in addition to the jury's unanimous finding at sentencing, the jury's *guilt-phase verdict* established that it found the aggravating circumstance that the crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. Ala. Code § 13A-5-49(7). As part of its unanimous guilt-phase verdict, the jury determined that Johnson intentionally killed an on-duty police officer when it convicted him of capital murder under Alabama Code Section 13A-5-40(a)(5). Unlike the Florida law at issue in *Hurst*, Alabama law expressly provides that "any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing." Ala. Code § 13A-5-45(e). The Alabama courts have not addressed the interplay between a guilt-phase finding that the defendant killed an on-duty police officer and a sentencing-phase finding that the defendant disrupted or hindered law enforcement. But it is obvious that the first finding "establishes" that the second finding "was proven beyond a reasonable doubt." If a defendant kills an on-duty police officer, he is necessarily disrupting or hindering law enforcement.

Fourth, if there were any *Hurst/Ring* error in this case, it would be harmless beyond a reasonable doubt. *See Neder v. United States*, 527 U.S. 1, 18–19 (1999) (failure to submit an element of an offense to a jury may be harmless). Johnson was caught on video murdering an on-duty police officer at a traffic stop, which prevented the police officer from giving Johnson a speeding ticket. The only issue at trial was whether Johnson committed the murder because of a mental disease or defect. The jury unanimously rejected that defense at the guilt-phase, finding instead that Johnson intentionally murdered the police officer. The video and the jury's guilt-phase verdict clearly establish the relevant aggravating factors, and Johnson did not meaningfully argue otherwise at trial.

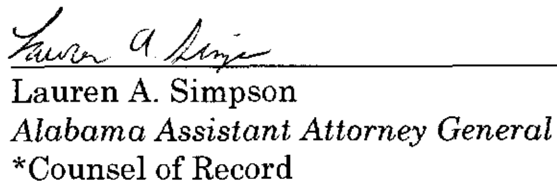
CONCLUSION

The Court should deny the petition for rehearing.

Respectfully submitted,

LUTHER STRANGE
Alabama Attorney General

Andrew Brasher
Alabama Solicitor General



Lauren A. Simpson
Alabama Assistant Attorney General
*Counsel of Record

OFFICE OF ALA. ATT'Y GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
lsimpson@ago.state.al.us

CERTIFICATE OF SERVICE

I, Lauren A. Simpson, do hereby declare that on this date, March 25, 2016, I have served a copy of the enclosed BRIEF IN OPPOSITION on each party to the above proceeding or that party's counsel, and on every other person required to be served, by electronic mail properly addressed as follows:

Randall S. Susskind
Benjamin H. Schaefer
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
rsusskind@eji.org
bschaefer@eji.org

I declare under penalty of perjury that the foregoing is true and correct.

Lauren A. Simpson
Alabama Assistant Attorney General

Andrew L. Brasher
Alabama Solicitor General

OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Montgomery, Alabama 36130
Tel: (334) 242-7300
Fax: (334) 242-4891
lsimpson@ago.state.al.us

March 25, 2016