

No. 16A-450
CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

◆
THOMAS D. ARTHUR,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

◆
On Petition for a Writ of Certiorari to the
Alabama Supreme Court

OPPOSITION TO ARTHUR'S MOTION FOR STAY OF EXECUTION

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November 3, 2016

EXECUTION SCHEDULED FOR NOVEMBER 3, 2016

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INTRODUCTION

Movant Thomas Arthur seeks a stay of his November 3, 2016, execution based on a decision of the Alabama Supreme Court that rested solely on state procedural and equitable grounds. The fact that Arthur challenges a straightforward application of Rule 8(d) of the Alabama Rules of Appellate Procedure, wholly independent of federal constitutional considerations, removes this case from the scope of this Court's certiorari review. *See* 28 U.S.C. § 1257(a) (2016) (permitting certiorari review of judgment by the highest court of a State "where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution"). Because a stay pending disposition of a petition for writ of certiorari should be granted only where there are "substantial grounds upon which relief might be granted," Arthur is not entitled to relief. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983).

REASONS FOR DENYING THE STAY

Arthur seeks certiorari review of a decision of the Alabama Supreme Court refusing to reconsider the question of whether the appropriate time had arrived for the execution of his sentence of death. Arthur's appearance before the Alabama Supreme Court, as indicated by his motion for a stay, was pursuant to Rule 8(d) of the Alabama Rules of Appellate Procedure, which governs the *issuance* of execution warrants. Although Arthur cited this Court's decision in *Hurst v. Florida*, 136 S. Ct.

616 (2016), in support of his motion, the Alabama Supreme Court did not reach the merits of that claim.

Hurst was announced on January 12, 2016. Despite the fact that the Alabama Supreme Court had previously issued execution warrants pertaining to Arthur on six occasions, Arthur did nothing to challenge his sentence pursuant to *Hurst* prior to filing his motion for a stay in the Alabama Supreme Court on November 1, 2016, just two days prior to his execution. This filing occurred forty-eight days after the Alabama Supreme Court issued the seventh execution warrant pertaining to Arthur.

As the State noted in its state court response, Arthur had no standing under Rule 8(d) of the Alabama Rules of Appellate Procedure to raise a constitutional claim in the Alabama Supreme Court in the first instance, as that Court is governed by strict discretionary review and extraordinary application rules. *See* Ala. R. App. P. 21 and 39; *see also Ex parte Williams*, 795 So. 2d 785, 787 n.1 (Ala. 2001) (recognizing that certiorari review is at the discretion of the Alabama Supreme Court, even in cases where a sentence of death was imposed); *cf. Smith v. Jones*, 256 F.3d 1135 (11th Cir. 2001) (recognizing the Alabama Supreme Court’s certiorari review is discretionary). There is no provision in Rule 8(d) for the Alabama Supreme Court to grant relief from a conviction or sentence, as administrative action is predicated “upon disposition of the appeal or other review.” *Id.* Because Rule 8(d)(1) is administrative in nature and is operable only “upon disposition of the appeal or

other review,” Arthur could not vindicate his *Hurst* claim by presenting it directly to the Alabama Supreme Court pursuant to Rule 8(d).¹

Under Alabama law, all post-trial remedies seeking relief from a conviction or sentence are governed through the procedures contained in Rule 32 of the Alabama Rules of Criminal Procedure. Ala. R. Crim. P. 32.4. Assuming *arguendo* that Arthur could seek an original writ of habeas corpus in the Alabama Supreme Court, such relief would be governed by Rule 21 of the Alabama Rules of Appellate Procedure, which Arthur did not cite to the state court as a basis for his request. Further, Arthur did not even purport to present his claim as a “petition,” as required by Rule 21(c). Arthur did not comply with Alabama law pertaining to the very limited circumstances in which a sentence or conviction may be collaterally attacked, a fact that *a fortiori* prevents any argument that the Alabama Supreme Court reached the merits of his *Hurst* claim.

For reasons of federalism and comity, this Court should decline to exercise its certiorari jurisdiction because the state court judgment rests upon on an independent and adequate state law ground *See, e.g., Berry v. Mississippi*, 552 U.S. 1007, 128 S. Ct. 528 (mem.) (2007); *Wilson v. Loew’s Inc.*, 355 U.S. 597, 78 S. Ct. 526 (1958); *see also Beard v. Kindler*, 558 U.S. 53, 130 S. Ct. 612 (2009); *Coleman v. Thompson*,

1. Arthur conceded this point in a filing on November 2, 2016, in the Circuit Court of Jefferson County, Alabama. He requested permission to file a successive post-conviction petition in that court because the Alabama Supreme Court did not discuss the merits of his *Hurst* claim, as he did not have any pending *Hurst* claim in any court.

501 U.S. 722, 111 S. Ct. 2546 (1991). As Rule 8(d) could not provide a legal vehicle for Arthur to challenge his sentence under *Hurst*, Arthur has not presented the merits of his *Hurst* claim in the appropriate form to provide Alabama's judiciary a merits review. Moreover, assuming purely *arguendo* that the Alabama Supreme Court's Rule 8(d) determination were appealable to this Court, Arthur still would not fairly be entitled to relief because of undue delay. Arthur first raised a *Hurst* claim on August 11 in response to the State's request that his execution date be set. The Alabama Supreme Court issued its order on September 14. Why, if that court's state law determination is appealable to this Court, did Arthur not appeal at that time instead of waiting to the day of his execution?

The current execution warrant in this case represents the seventh occasion the Alabama Supreme Court has had to order the execution of Arthur's lawful sentence. The prior six execution dates were stayed based on Arthur's long-term manipulation of the federal and state courts through civil litigation and successive collateral attacks. In the most notable case, Arthur received a reprieve based on the presentation of perjured testimony. *Arthur v. State*, 71 So. 3d 733 (Ala. Crim. App. 2010). Arthur also filed three 42 U.S.C. § 1983 complaints prior to filing the Rule 8(d) motion underlying this proceeding. It is clear that, had he so desired, Arthur could have brought his *Hurst* claim to the Alabama courts in proper form and using proper procedure, had he acted with promptness in January (or, perhaps, even

August or September). Because he did not, this Court should protect the State's enforcement of its criminal rules and procedures. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006) ("A court considering a stay must apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such time as to allow consideration of the merits without requiring entry of a stay.'") (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)).

Finally, the State of Alabama asserted the state law doctrine of invited error as to Arthur's *Hurst* claim. At trial, Arthur specifically asked the circuit court and his sentencing jury for a sentence of death. *See, e.g., Arthur v. Thomas*, 739 F.3d 611, 615 (11th Cir. 2014); *Arthur v. State*, 711 So.2d 1031, 1089 (Ala. Crim. App. 1996). Both the jury and judge obliged Arthur's request. Having asked for his current sentence, Arthur cannot now claim error. *See Ex parte Deardorff*, 6 So. 3d 1235, 1241–42 (Ala. 2008) (recognizing that a criminal defendant cannot by his own voluntary conduct invite error and then seek to profit thereby). Again, application of the state law doctrine of invited error is an adequate and independent state law ground for the Alabama Supreme Court's refusal to stay Arthur's execution under Rule 8(d) of the Alabama Rules of Appellate Procedure.

CONCLUSION

Wherefore, for the foregoing reasons, Respondents respectfully request this Court deny Arthur's request for a stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 3, 2016, I filed this opposition to motion for stay via electronic mail with the clerk of the court and will also send by U.S. mail, first class postage pre-paid. In addition, I e-mailed an electronic copy of the opposition to the following persons:

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