No. 16-7070
CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

RONALD BERT SMITH,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

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

BRIEF IN OPPOSITION TO SMITH'S PETITION FOR WRIT OF CERTIORARI

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EXECUTION SCHEDULED FOR DECEMBER 8, 2016

QUESTIONS PRESENTED

(Rephrased)

I. Should this Court deny Smith's petition for writ of certiorari where he failed to properly present his claims to the state courts in a manner in which his claims could be addressed, resulting in several procedural obstacles that prevent a review of his claims?

II. Should this Court deny Smith's petition for a writ of certiorari where his appeals are exhausted and *Ring v. Arizona* does not apply retroactively?

III. Should this Court deny Smith's petition for a writ of certiorari in which he alleges that his sentence violates the Sixth and Eighth Amendments where the jury unanimously found the existence of an aggravating circumstance necessary to impose the death penalty and where this Court has upheld the constitutionality of Alabama's capital sentencing system?

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INTRODUCTION

Smith's certiorari petition is chock full of reasons exposing that this case is an extremely poor vehicle for review, any one of which is sufficient for this Court to deny certiorari. To begin, Smith's petition presents an unusually large number of procedural problems that prevent this Court from reaching the questions presented. These procedural hurdles include the following: (1) that Smith seeks certiorari review of claims presented through an improper legal vehicle in state court, (2) that Smith's claims are procedurally defaulted, and (3) that Smith delayed in raising his current Sixth Amendment claim, and never raised his Eighth Amendment claim in state or federal court, until a few weeks before his execution in an improper request for a petition for an original habeas corpus in state court.

Even more problematic, Smith's case is a particularly bad vehicle with which to address his claims under *Hurst v. Florida* because that case has no retroactive application to Smith, whose direct appeal concluded in 2000. Moreover, even if this Court could address Smith's petition, his sentence is constitutional; *Hurst* is not implicated because the jury made the critical findings necessary to impose a death sentence by virtue of the jury's unanimous finding that Smith was guilty of capital murder during a robbery—a finding that established the existence of an aggravating circumstances for sentencing purposes. Thus, for a host of reasons, the petition should be denied.

STATEMENT OF THE CASE

This case arises out of the Alabama Supreme Court's denial of Ronald Bert Smith's November 14, 2016, petition for an original writ of habeas corpus. In his petition for discretionary review by way of extraordinary writ, Smith sought to resurrect state and federal review of his time-barred *Ring v. Arizona* claim, based on the application of *Ring* in *Hurst v. Florida,* 136 S. Ct. 616, 620–21 (2016).

A. The facts of Smith's crime

Knowledge of the facts of Smith's crime is unnecessary to reach the appropriate disposition of this matter, but the State hopes that having the facts will assist the Court with properly weighing the merits of Smith's request for a stay.

There is no doubt that Smith committed this murder or that it was extraordinarily brutal. Even Smith admitted to the district court during habeas proceedings, "No one ever doubted that Ron Smith was guilty of some degree of homicide . . . . His presence at the scene was documented by video, he made statements about his role in the crime to acquaintances, and he confessed after arrest." Petition for a Writ of Habeas Corpus at 84, Smith v. Campbell, 5:05-cv-01547 (M.D. Ala. July 19, 2005), Doc. 1. The state judge who sentenced Smith to death—Lynnwood Smith, whom President Clinton later appointed to the federal district bench—summarized the facts of Smith's crime in a detailed sentencing order, from which this synopsis is derived.

During the early morning hours of November 8, 1994, Smith and two associates robbed a convenience store, killing clerk Casey Wilson. Smith's role was significant, and as the trial court noted, his attitude about the killing was unusually depraved. Smith appears to have spearheaded the effort to rob the store, and he was the one who started the robbery and killed the victim. The store's surveillance tape showed Smith entering the store at 3:24 AM and pretending to buy a soft drink while his associates remained outside. He then pulled a semi-automatic pistol from his waistband and told Wilson to open the register. When Wilson could not comply, Smith forced him into the restroom. For the next nineteen seconds, Smith pistol-whipped Wilson about the head and body and shot him in his left arm. Afterwards, Smith returned to the cash register and unsuccessfully attempted to open it. He also tried without success to open the store's safe, which was located directly beneath the cash register. Apparently frustrated, Smith returned to the bathroom and fatally shot Wilson in the head.

The trial court found this murder particularly disturbing and described the act as "an execution-style slaying." Smith killed Wilson after having already beaten him "into helpless submission" because Smith wanted to "avoid later identification." Wilson was "on his knees, bruised, bleeding from the beating Smith inflicted," and "begg[ing] for his life, for his newborn son." From other testimony, the trial court assessed that Smith actually "enjoy[ed]" Wilson's suffering. For example, one of

Smith's associates testified that "Smith bragged that 'you should hear the sound a body makes when the last breath goes out of it.'" Smith even "'smiled, and kind of laughed' when describing how Wilson had 'pleaded for his life' before he killed him." Moreover, although Smith removed the store's surveillance tape, he "did not destroy" it, evidencing, in the court's view, that "he kept it as a 'trophy.'" *See Smith v. State*, 756 So. 2d 892, 946–57 (Ala. Crim. App. 1997) (reprinting sentencing order as appendix).

B. The proceedings below

The Alabama courts affirmed Smith's conviction and sentence over sixteen years ago. *Smith*, 756 So. 2d 892, *aff'd*, *Ex parte Smith*, 756 So. 2d 957 (Ala. 2000). His sentence became final when this Court denied his petition for writ of certiorari on October 2, 2000. *Smith v. State*, 531 U.S. 830 (2000).

The final obstacle to Smith's execution—the federal collateral attack of his conviction and sentence—dissipated when this Court, on November 4, 2013, denied certiorari review of the Eleventh Circuit's affirmance of the denial of habeas corpus relief. *Smith v. Thomas*, 134 S. Ct. 513 (2013) (mem.). There is no dispute that Smith did *nothing* to attack his conviction or sentence after this Court denied certiorari

review until the filing of his November 14, 2016, original petition for writ of habeas corpus in the Alabama Supreme Court.[1]

Smith seeks certiorari review of the Alabama Supreme Court's denial of this petition, and he further asks this Court to stay his execution, which is scheduled to occur later this week. Smith's original habeas corpus petition appears to have been motivated by the issuance of an execution warrant in September, scheduling the execution of his death sentence for December 8, 2016. This warrant was the result of the State of Alabama's February 26, 2016, motion to set an execution date, pursuant to the rules of the Alabama Supreme Court governing such procedures. Ala. R. App. P. 8(d). Smith filed both an opposition and surreply to the State's motion, whereupon the Alabama Supreme Court issued the execution warrant on September 14, 2016.

The record is clear that Smith did nothing in response to the Alabama Supreme Court's September order. On October 13, nearly one month later, the State contacted Smith's lawyers to inform them that their failure to act in the face of Smith's impending execution would be asserted as a ground for denying equitable relief if Smith did not act promptly to assert any claims he might bring. (App. A.) The State

1. Smith opposed the State's motion to set an execution date, but proceedings under Rule 8(d) have no bearing on the validity of an inmate's conviction or sentence. *See* Ala. R. Crim. App. 32.4. Asking the Alabama Supreme Court to delay the administrative task of issuing an execution warrant is not the same as challenging a conviction and sentence by way of a recognized post-conviction procedure.

warned Smith against attempting "to thrust a weighty legal decision upon a court with little or no time for proper consideration of the issues presented." (*Id.* at 2.) Smith still did nothing.

Finally, more than one month after the State's letter (and only twenty-four days before his execution date), Smith filed his original petition for writ of habeas corpus in the Alabama Supreme Court on November 14, seeking discretionary review. On November 22, the State responded to Smith's petition, pointing out that the Alabama Supreme Court "does not issue original writs of habeas corpus unless the Circuit Court has refused to entertain a petition for writ of habeas corpus there." *Maddox v. State*, 171 So. 2d 112, 112 (Ala. 1965). Smith's petition was denied the same day without opinion. *Ex parte Smith*, No. 1971580 (Ala. Nov. 22, 2016).

Despite his impending execution date and the State's October 13 correspondence warning Smith not to inexcusably delay seeking equitable relief, Smith elected to wait an additional ten days to seek review in this Court. Finally, on the afternoon of December 2, Smith filed his petition for certiorari review of the Alabama Supreme Court's denial of his state court writ. Thus, Smith brought his petition before this Court six days prior to his scheduled execution, knowing that the weekend (which began only five hours later) would prevent a timely response from reaching this Court so as to enable a consideration of the issues well in advance of his execution date.

REASONS FOR DENYING THE PETITION

I. Certiorari must be denied because Smith's petition suffers from multiple major procedural problems.

A. Smith failed to properly present his claims to the state courts.

Petitioner Ronald Bert Smith seeks this Court's certiorari review of the denial of an original state court petition for writ of certiorari, a form of relief that was unavailable to Smith as a matter of state law. Section 12-2-7(3) of the Code of Alabama (1975), upon which Smith's original petition relied, applies only to original writs of habeas corpus "as are necessary to give to [the Alabama Supreme Court] a general superintendence and control of courts of inferior jurisdiction." Thus, in Alabama, it is well-settled that "the writ of habeas corpus may issue from [the Alabama Supreme Court] only when necessary in the exercise of the 'general superintendence and control of inferior jurisdictions' with which it is clothed by the Constitution." *Ex parte Lee,* 155 So. 2d 296, 297 (Ala. 1963) (quoting *Ex parte Winnagle*, 115 So. 2d 261, 262 (Ala. 1959)). In fact, the Alabama Supreme Court, "in the absence of unusual circumstances[,] will not entertain an original petition for writ of habeas corpus." *Id*.

It is for this reason that the Alabama Supreme Court "does not issue original writs of habeas corpus unless the [trial court] has refused to entertain a petition for writ of habeas corpus there." *Maddox*, 171 So. 2d at 112. Here, Smith did not seek a petition for writ of habeas corpus in a circuit court, and he does not contend any

differently in his petition for certiorari. Accordingly, because the state court determination rested on an independent and adequate state law ground, this case does not fall within this Court's jurisdiction.

B. Smith's claims are procedurally defaulted.

Even if this Court indulged Smith's argument that federal jurisdiction exists over a determination made by the Alabama Supreme Court to deny a petition for discretionary review by way of extraordinary writ, wholly governed by state law, certiorari review would properly be denied due to the principles of federalism and comity underlying the Anti-terrorism and Effective Death Penalty Act of 1996. In his state post-conviction (Rule 32) proceedings, Smith asserted a claim invoking *Ring v. Arizona*, 536 U.S. 584 (2002). The circuit court denied relief on Smith's *Ring* claim, holding, among other things, that *Ring* was not retroactive. Smith challenged this ruling on appeal, and the Alabama Court of Criminal Appeals affirmed the circuit court's finding that *Ring* was not retroactive—a finding that this Court made in *Schriro v. Summerlin*, 542 U.S. 348 (2004). *See Smith v. State*, CR-02-1691(Ala. Crim. App. App. 22, 2005).

It was Timothy Hurst's reliance on *Ring* that formed the basis of this Court's grant of certiorari and holding in *Hurst v. Florida,* 136 S. Ct. 616, 620–21 (2016). Thus, Smith's purported petition for an original writ of habeas corpus in the Alabama Supreme Court was, in reality, a successive Rule 32 petition seeking a second review

of his *Ring* claim. Such a review was procedurally barred under the plain terms of the state law governing the original petition for writ of habeas corpus and post-conviction collateral attacks. Rule 32.4 of the Alabama Rules of Criminal Procedure, for example, provides that a "proceeding under this rule displaces all post-trial remedies except post-trial motions under Rule 24 and appeal." That rule also specifies that "[*a*]*ny other post-conviction petition* seeking relief from a conviction or sentence shall be treated as a proceeding under this Rule." *Id.* (emphasis added). In addition, Rule 32.2(b) provides:

> If a petitioner has previously filed a petition that challenges any judgment, all subsequent petitions by that petitioner challenging any judgment arising out of that same trial or guilty-plea proceeding shall be treated as successive petitions under this rule. *The court shall not grant relief on a successive petition on the same or similar grounds on behalf of the same petitioner*.

(Emphasis added.)

Finally, Smith's Eighth Amendment claim is likewise procedurally barred from review. Smith failed to raise an Eighth Amendment jury sentencing claim at any point during his direct appeal or during his Rule 32 proceedings. Rules 32.2(a)(3) and (5) of the Alabama Rules of Criminal Procedure provide that any claim "[w]hich could have been but was not raised" at trial or appeal is procedurally barred from review. Thus, even apart from Smith's improper presentation of his Eighth Amendment claim to the state courts by way of a petition for original writ of habeas corpus, his claim was procedurally defaulted. The fact that Smith's petition

involves claims that are procedurally defaulted in state court provides another reason this Court cannot reach the questions presented.

C. Smith's claims are untimely.

Even looking beyond *Ring*'s lack of retroactivity, Smith forfeited federal review of his *Ring* claim by waiting too long to assert his claims, in violation of the AEDPA statute of limitation. *See Smith v. Comm'r, Ala. Dep't of Corr.*, 703 F.3d 1266, 1267–68 (11th Cir. 2012), *cert. denied*, 134 S. Ct. 513 (2013).[2] Smith's loss of federal review was a direct result of Congress's desire to advance the finality of criminal convictions through employment of "a tight time line, a one-year limitation period[.]" *Mayle v. Felix*, 545 U.S. 644, 662 (2005) (citing *Rhines v. Weber*, 544 U.S. 269, 276 (2005)). This limitations period is directly linked to AEDPA's "finality" and "federalism" concerns. *Id*. at 663 (citing *Williams v. Taylor*, 529 U.S. 420, 436 (2000)). It is these concerns that make Smith's case highly inappropriate for certiorari review or a stay of execution.

2. Considering the fact that Smith forfeited federal review of his state court sentence and conviction because of the AEDPA statute of limitation, it is jaw-dropping that Smith engaged in dilatory tactics in presenting this claim to the Alabama Supreme Court and this Court, knowing that principles of equity would be involved if additional time were needed to consider his claims. To the extent that Smith ignored the State's plain warning not to attempt to "to thrust a weighty legal decision upon a court with little or no time for proper consideration of the issues presented" (App. A at 2), his prior litigation history makes his delay unreasonable, warranting a finding that his conduct weighs heavily against equity for purposes of his request for a stay.

Moreover, in his federal habeas petition, Smith's *Ring* claim morphed into an equal protection claim, based on his argument that "the override is standardless in Alabama," which promotes an "inconsistent application of the ultimate sanction." Doc. 1 at 82. Thus, adding to the procedural obstacles previously mentioned, Smith abandoned his procedurally defaulted Sixth Amendment *Ring* claim raised in his state post-conviction petition for a Fourteenth Amendment equal protection claim raised in his untimely federal habeas petition.

Further, as noted above, Smith failed to raise an Eighth Amendment jury sentencing claim at any point during his state and federal post-conviction proceedings. There is no way for Smith to escape the procedural morass that confines this Court from having jurisdiction over his belatedly-raised claim.

As Smith lost review of his *Ring* claim in federal court due to the AEDPA statute of limitation, this Court cannot review his current claim without completely undercutting Congress's intent to promote finality through employment of "a tight time line, a one-year limitation period[.]" *Mayle*, 545 U.S. at 662.[3] To consider Smith's claim under the procedural posture of this case would eliminate the concept of federalism in the federal review of state court convictions. After all, if an inmate

3. As noted in the statement of the case, Smith conceded in his habeas petition that no one doubted he committed this homicide. Thus, this Court cannot turn to "actual innocence" as a basis to evade Congressional intent, as happened in *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013).

can claim to have raised a federal constitutional issue in state court by simply filing a last-minute request for discretionary review through petition for an extraordinary writ, AEDPA means nothing.

Under AEDPA, this Court cannot consider a constitutional claim raised for the first time in a state court petition for discretionary review. Since 1989, preceding AEDPA, this Court has held that "the submission of a new claim to a State's highest court on discretionary review" does not constitute fair presentation. *Castille v. Peoples*, 489 U.S. 346, 351 (1989). Here, Smith's presentation of his federal claim to the Alabama Supreme Court through a mechanism that will not be granted "absent unusual circumstances," *Lee,* 155 So. 2d at 297, and where "the Circuit Court [must first] refuse[] to entertain a petition for writ of habeas corpus," *Maddox*, 171 So. 2d at 112, did not constitute a fair presentation. Again, consideration of the merits of Smith's claim would implicitly unravel the past thirty years of habeas corpus practice.

It is undisputed that Smith did not first go to the circuit court to pursue his claim. Allowing him to resurrect his forfeited federal habeas claim because he had his request for discretionary review by way of extraordinary writ to the Alabama Supreme Court denied would do nothing to further this Court's "pragmatic recognition that 'federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in

their review." *Castille*, 489 U.S. at 349 (quoting *Rose v. Lundy*, 455 U.S. 509, 518 (1982)). In fact, it would accomplish the opposite. This Court cannot consider the federal claims Smith offers without turning its back on the federalism principles ingrained in AEDPA.

Respectfully, there is no legally reasonable, rational argument that this Court has jurisdiction over Smith's claim. The survivors of Smith's victim expect justice on December 8, 2016.

II. Certiorari should be denied because *Hurst* is not retroactive.

In addition to the procedural problems noted above, Smith presents a particularly bad case for certiorari because *Hurst* has no retroactive application to his case. For this reason, if for no other, Smith's petition should be denied.

The only way in which this Court can construct a rule's retroactivity is through a holding. *Tyler v. Cain*, 533 U.S. 656, 663 (2001) ("We thus conclude that a new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive."). This Court made no such holding in *Hurst*. Even if that case did apply to Alabama law (which it does not), *Hurst* clearly would have no application to Smith, whose direct appeal, let alone his collateral review, was completed long ago.

The conclusion that *Hurst* is inapplicable to Smith's case is strengthened even further given the fact that *Ring* itself—the decision on which *Hurst* is based—is not

retroactive. *See Summerlin*, 542 U.S. 348. *Hurst* changes nothing for Smith. A jury made Smith eligible for the death penalty based on its guilt-phase verdict, his sentence is final, and his appeals are complete. His sentence is due to be carried out and his request for a stay must be denied.

Even if this Court were inclined to readdress the non-retroactive nature of *Ring* and *Hurst*, this again would be the wrong case to do so because resolving such a question would be grossly premature. While Smith suggests that his case presents the Court with "its first opportunity" to resolve the issue of *Hurst*'s retroactive application, Pet. 11, he fails to cite any decision in which the lower courts have even addressed this issue, much less a disagreement amongst the courts of appeal or the states' highest courts. It would serve no purpose to grant cert to address a question that Smith has not even shown has presented a problem in the lower courts that needs to be addressed.

Finally, Smith argues in a convoluted fashion that *Hurst* is a substantive rule, and therefore retroactive, based on this Court's decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), despite arguing earlier in his petition that *Hurst* was a watershed procedural rule. Pet. 11-18. Inconsistencies aside, this argument is fundamentally flawed. The retroactivity issue in *Montgomery* is absent in *Hurst*. This Court held in *Montgomery* that the rule announced in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), was a substantive rule retroactively applicable to cases on

collateral review. 136 S. Ct. at 736. But unlike *Miller*, *Hurst* presents no question as to its non-retroactivity. As noted above, this Court has already held that *Ring*, the case on which *Hurst* is based, is not substantive. *Summerlin*, 542 U.S. at 353. It makes no sense for Smith to argue that *Hurst*, which merely applied *Ring* to Florida's capital-sentencing statutes, 136 S. Ct at 621–22, is a substantive rule where *Ring* is not. Therefore, there is no reason for this Court to postpone Smith's lawful execution and grant certiorari on a question about retroactivity that has been answered for many years.

III. Certiorari should be denied because Smith's claims are meritless.

A. Smith's sentence is constitutional and perfectly consistent with *Ring* and *Hurst*.

It is difficult to ascertain how Smith contends that Alabama's capital sentencing system violates the Sixth Amendment or what part of *Hurst* supports his position, but it appears that the essence of his argument is that the Sixth Amendment requires jury sentencing. Pet. 8. In regard to his sentence, he argues that the Sixth Amendment was violated because he was sentenced to death even though the jury recommended a life sentence. But nothing in this Court's decisions in *Ring* or *Hurst* support Smith's position. Indeed, Smith's argument demonstrates that he misunderstands *Hurst*, the Sixth Amendment, and the way that Alabama's capital-sentencing statute works.

1. *Hurst* requires only that the jury find the existence of aggravating factors that make a defendant eligible for the death penalty.

This Court has clearly distinguished two separate determinations to be made in capital sentencing: "the eligibility decision and the selection decision." *Tuilaepa v. California*, 512 U.S. 967, 971 (1994). "To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment." *Id*. (citing *Coker v. Georgia*, 433 U.S. 584 (1977)). That includes a finding of an "'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase." *Id.* at 972. But the Court has recognized "a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence." *Id*. That question involves whether the aggravating factors outweigh any mitigating factors.

In *Ring*, 536 U.S. 584 (2002), this Court applied the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to death penalty cases. The Court held that although a judge can make the "selection decision," the jury must find the existence of any fact that makes the defendant "eligible" for the death penalty by increasing the range of punishment to include the imposition of the death penalty. Thus, Arizona's death penalty statute violated the Sixth Amendment right to a jury trial "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 585.

In light of *Ring*, a trial judge cannot make a finding of "any fact on which the legislature conditions an in-crease in their maximum punishment." *Id*. at 589. Only a jury can.

But *Ring* does not require that a jury weigh the aggravating and mitigating circumstances and pronounce sentence. As Justice Scalia explained in his concurrence in *Ring*, "[w]hat today's decision says is that the jury must find the existence of the fact that an aggravating factor existed." 536 U.S. at 612 (Scalia, J., concurring). "Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase." *Id*. at 612–13 (Scalia, J., concurring). Once the jury finds any facts that establish a range of punishment that includes the death penalty, the judge can evaluate any evidence in order to determine the appropriate sentence within that statutory range.

Hurst did not add anything of substance to *Ring*. In *Hurst*, the State of Florida prosecuted a defendant for first-degree murder, which carried a maximum sentence of life without parole unless the specific findings were made during the sentencing phase. *Hurst*, 136 S. Ct. at 620. Florida did not ask a jury to find the existence of any aggravating circumstance at the guilt phase. *Id*. At the sentencing phase, the jury also did not find the existence of any particular aggravating circumstance. The jury

merely returned a non-unanimous advisory sentencing recommendation of seven to five in favor of death. *Id*. Because the jury found no aggravating factor at the guilt or sentencing phase, the judge should have imposed a life without parole sentence. Instead, the judge found an aggravating circumstance herself and imposed a death sentence, making both the eligibility and selection determinations. *Id*. Applying *Ring*, the Court held the resulting death sentence unconstitutional because "the judge alone [found] the existence of an aggravating circumstance" that expanded the range of punishment to include the death penalty. *Id*. at 624.

2. The jury found the aggravating factor that made Smith eligible for the death penalty at the guilt phase.

In contrast to *Hurst*, in this case the jury found all that it needed to find to allow the judge to sentence Smith to death. The jury found Smith guilty of capital murder "because the murder was committed during the course of a robbery. § 13A–5–40(a)(2), Ala. Code 1975." *Smith v. State*, 796 So. 2d 892, 945 (Ala. Crim. App. 1997). Thus, by virtue of the jury's unanimous guilt-phase verdict, the aggravating circumstance under Section 13A-5-49(4) of the Code of Alabama was necessarily proven beyond a reasonable doubt for purposes of Smith 's sentencing determination. *See* Ala. Code § 13A-5-45(e) (1975). In fact, the trial court specifically found in its sentencing order that the jury's "verdict finding defendant guilty of capital murder as charged in the indictment established this aggravating

circumstance [section 13A-5-49(4)] beyond a reasonable doubt." *Smith*, 796 So. 2d at 950.

What happened in Smith's case is perfectly consistent with *Ring* and *Hurst*. Following Justice Scalia's explanation in his concurrence in *Ring*, Alabama has chosen the second and most "logical" option—to secure a jury determination of aggravating circumstances at the guilt phase. Alabama law 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) (1975). The elements of capital murder in Alabama track aggravating circumstances. For example, one way the State can convict a person of capital murder is to show that the murder occurred "during a robbery in the first degree or an attempt thereof committed by the defendant." *Id*. § 13A-5-40 (a)(2). This same showing is also an aggravating factor for the purposes of sentencing. *See id*. § 13A-5-49(4) ("The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, . . . robbery[.]").

Thus, in Alabama and in Smith's case, the jury made "the critical findings necessary to impose the death penalty." *Hurst*, 136 S. Ct. at 622. Unlike in *Hurst*, the State is relying on a unanimous jury finding at the guilt phase to satisfy *Ring*, not an advisory sentencing recommendation. *Id*. (rejecting Florida's argument that the

jury's non-unanimous and non-specific advisory sentencing recommendation was a fact-finding that satisfied *Ring*). This jury finding is an aggravating factor that made Smith eligible for a death sentence. Thus, Smith's Sixth Amendment claim is meritless.

B. The Eighth Amendment does not require judicial sentencing in capital cases.

Smith also invokes the Eighth Amendment in support of his argument that the Constitution requires jury sentencing. He argues that *Hurst* "calls into question the continued constitutionality of Alabama's statute against an Eighth Amendment challenge, particularly in a situation where the jury voted for life and the judge overrode the verdict." Pet. 18. Contrary to Smith's view, this Court held in *Harris v. Alabama*, 513 U.S. 504 (1995), that Alabama's capital sentencing scheme was consistent with the Eighth Amendment. The *Harris* Court explained that "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence." *Id*. at 515. This Court need not grant certiorari to reconsider that case for several reasons.

First, the Eighth Amendment provides a poor vehicle through which to determine whether there is a constitutional right to jury sentencing in capital cases. In *Coker v. Georgia*, 433 U.S. 584 (1977), *Roper v. Simmons*, 543 U.S. 551 (2005), and similar cases, the Supreme Court found that "capital punishment—though not unconstitutional per se—is categorically too harsh a penalty to apply to certain types

of crimes and certain classes of offenders." *Graham v. Florida*, 560 U.S. 48, 100 (2010) (Thomas, J., dissenting). As the Court explained in *Graham*, "[t]he classification" it uses under the Eighth Amendment "consists of two subsets, one considering the nature of the offense, the other considering the characteristics of the offender." *Id*. at 60. This framework does not fit Smith's challenge to judicial sentencing.

Smith does not fall within either of the subsets recognized by this Court's Eighth Amendment jurisprudence. He was convicted of capital murder, a crime for which the death penalty is constitutionally permissible. Consequently, a consideration of the nature of his offense is inapposite. And unlike age or mental status, a jury's nonbinding recommendation is not an objective "characteristic of the offender." Rather, the jury's recommendation reflects its subjective opinion regarding the appropriate sentence based on the limited evidence available to it. Thus, Smith's argument does not fall within the second classification of cases. To accept Smith's reasoning would therefore have uncertain effects in other areas of criminal and sentencing procedure, in which one or more states are an outlier.

Second, even if the Court were to survey "societal consensus" on the issue, nothing has changed since *Harris* to call that precedent into question. Although courts in Delaware and Florida have held similar schemes unconstitutional, that says nothing about societal consensus because those decisions contravene acts of state

legislatures. Moreover, there has been no consistent movement in the intervening years since *Harris*: Indiana, which allowed judicial sentencing in 1995, amended its capital punishment procedures in 2002 to place final sentencing authority in the jury, but in 2003 Delaware amended its capital punishment procedures to allow judicial sentencing. Del. Code Ann. tit. 11, § 4209.[4] If the societal consensus is "evolving" on this issue, the direction of that evolution is not yet clear.

Third, Alabama has relied on this Court's decision in *Harris* to sentence hundreds of murderers in the intervening decades. Some of those murderers have likely already been executed. Others are presently on death row. "[T]he States' settled expectations deserve our respect." *Ring*, 536 U.S. at 613 (Kennedy, J., concurring). The Court should hesitate before retesting the constitutionality of "reforms designed to reduce unfairness in sentencing." *Id*. (Kennedy, J., concurring). And it should decline to consider overruling precedents where "significant reliance interests are at stake that might justify adhering to their result." *Alleyne v. United States*, 133 S. Ct. 2151, 2166 (2013) (Sotomayor, J., concurring).

4. As noted above, the fact that the Delaware Supreme Court recently held that Delaware's capital sentencing scheme was unconstitutional based on that court's review of Delaware law, *see Rauf v. State*, 145 A.3d 430 (Del. 2016), does not change the fact that there has not been a shift in societal consensus or acts of state legislatures since *Harris*, particularly since the state court's decision contravened the act of a state legislature.

Fourth, and perhaps most important, Smith's Eighth Amendment claim is not the product of recent developments in caselaw or national consensus, but rather is simply a piece of the larger historical game played by death-row inmates to devise legal theories to thwart their sentences. Alabama's current death penalty statute was a remedial response to the problem of the arbitrariness of unfettered jury discretion that this Court identified in *Furman v. Georgia*, 408 U.S. 238 (1972). The Alabama Legislature's answer to the Court's concerns about arbitrariness was to place sentencing authority with a judge, instead of a jury. *See* Nathan A. Forrester, Judge Versus Jury: The Continuing Validity of Alabama's Capital Sentencing Regime After Ring v. Arizona, 54 ALA. L. REV. 1157, 1164–78 (2003). The Court upheld this system as constitutional in *Harris*.

There are good reasons that society usually expects judges, not juries, to impose sentence. A juror's sentencing decision is likely to be the only decision about criminal punishment he or she will ever make, and it will come at the end of an emotionally draining trial, which will often be the first and only such trial a juror will have seen. Jury sentencing can lead to anomalous and unjust results. On the other hand, a judge has experience with sentencing, knows how similar defendants have been treated, and is unlikely to allow emotions to affect a decision. Indeed, Smith's case presents just such a situation: the judge's experience resulted in an appropriate sentencing determination where the "savage brutality" of the

"execution-style slaying" was "shocking" and Smith's actions demonstrated "a pitiless indifference to Casey Wilson's fear, pain and suffering, and pleas for life." *Smith*, 756 So. 2d at 950, 957. Indeed, as the trial court found the "most chilling and heinous aspect of this crime is that defendant, unquestionably, enjoyed and reveled in his vile acts." *Id*. at 957.

Now Smith (and other inmates like him) has come full circle and argues for a return to full jury sentencing, apparently ignoring, for now, the problem of arbitrariness that *Furman* sought to address. Smith cannot advocate for a return to the situation that caused the constitutional problem in *Furman* while asserting that the solution to *Furman* is now unconstitutional.

Finally, Smith attempts to make much of this Court's discussion in *Hurst* concerning *Spaziano v. Florida*, 468 U.S. 447 (1984), which held that Florida's judicial sentencing scheme complied with the Eighth Amendment. He contends that *Hurst* "explicitly overruled" *Spaziano*, thus calling into question the continued validity of *Harris*. Pet. 19. But *Hurst* did not overrule *Spaziano* in its entirety. Instead, the Court held: "The decisions [in *Spaziano* and *Hildwin*] are overruled *to the extent* they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." *Hurst*, 136 S. Ct. at 624 (emphasis added). Once again, Smith's attempt to overextend *Hurst* is without merit.

CONCLUSION

Wherefore, for the foregoing reasons, Respondents respectfully request that this Court deny Smith's petition for writ of certiorari.

Respectfully submitted,

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Attorney General

Andrew Brasher
Solicitor General
BY—

s/ Thomas R. Govan, Jr.
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CERTIFICATE OF SERVICE

I certify that on December 6, 2016, I filed this brief in opposition via electronic mail with the clerk of the court and in addition, I e-mailed an electronic copy of the brief to the following persons:

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Appendix A

STATE OF ALABAMA
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October 13, 2016

John A. Palombi, Esq.
Federal Defenders Office
Middle District of Alabama
817 S. Court Street
Montgomery, Alabama 36104
VIA HAND DELIVERY AND ELECTRONIC MAIL

Re: *Ronald Bert Smith*, Execution Scheduled for December 8, 2016

Dear John:

I wanted to take this opportunity to make you aware of the State of Alabama's position pertaining to your above-referenced client's upcoming execution date. Respectfully, the State-defendants place you on notice of their intent to aver that you have waited too long to begin any efforts you may undertake in the future to seek equitable relief.

In April, Judge Watkins entered a scheduling order that would permit a limited period of thirty (30) days of fact discovery limited to claims and information contained in Smith's complaint differing from the original complaints in the "Midazolam Litigation" if our motions to dismiss were denied. (Doc. 153 at 3.) The State-defendants would then have twenty-one (21) days in which to seek summary judgment, with your client receiving seven (7) additional days to respond in opposition. (*Id.*) Under this timeline, if the judge denied our motions to dismiss today, your response in opposition to summary judgment would not be due until December 10, 2016, two days after your client's execution.

By this letter, Defendants are placing your client on notice of their intent to argue that your failure to seek equitable relief in a timely manner warrants denial of any such relief you may request in the future. As you know, a strong equitable presumption against the grant of a stay exists where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Your client has been aware of his impending execution since September 14, twenty-nine (29) days ago. Under the facts as they presently exist, the State-defendants will either prevail through the grant of their motion to dismiss or your client will be unable to complete discovery and litigate summary judgment prior to this execution date.

Now that it is obvious that you cannot obtain a merits ruling in your client's favor before his execution date, every day Mr. Smith chooses to sit on his hands and refrain from seeking equitable relief is an inexcusable delay. Should Mr. Smith attempt to seek last-minute equitable

relief from state or federal courts to avoid imposition of his lawful sentence, State-defendants intend to inform the courts of this correspondence for their consideration in the balancing of the equities in the light of his delay.

Obviously, neither of us knows how any court will balance the equities in a specific case. Here, however, it is my belief that the longer your client chooses to be content with the status quo, the more culpable he will appear should he attempt to thrust a weighty legal decision upon a court with little or no time for proper consideration of the issues presented.

Sincerely,

James R. Houts
Assistant Attorney General

xc: File