

No.

IN THE
SUPREME COURT OF THE UNITED STATES

RONALD BERT SMITH,
Petitioner,

v.

ALABAMA,
Respondent.

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

APPLICATION FOR STAY OF EXECUTION
SCHEDULED FOR DECEMBER 8, 2016

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December 2, 2016

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

Petitioner, Ronald Bert Smith, respectfully requests a stay of his execution, which is scheduled for December 8, 2016 at 6:00 p.m. CST.

Petitioner asks this court to stay his execution in order to permit this Court to consider his Petition for Writ of Certiorari to the Alabama Supreme Court. Mr. Smith filed his Petition for Writ of Certiorari concurrently with this Application for Stay of Execution. Pursuant to Supreme Court Rules 23.1, 23.2, and under the authority of 28 U.S.C. § 2101(f), the stay may lawfully be granted.

In the accompanying Petition for Writ of Certiorari, Mr. Smith asks this Court to review a decision of the Alabama Supreme Court refusing to grant him relief from his unconstitutional sentence despite this Court's decision in *Hurst v. Florida*,¹ which held that an inmate may only be sentenced to death if a jury finds all of the facts necessary to impose a death sentence. Mr. Smith was not sentenced to death by a jury. His jury rendered a verdict of life without parole, and the trial court overrode that verdict and sentenced Mr. Smith to death, based on a finding that was contrary to the jury's findings. Mr. Smith's constitutional claim will become moot if he is executed as scheduled pursuant to an illegal sentence.²

¹ 136 S. Ct. 616 (2016).

² See *Wainwright v. Booker*, 473 U.S. 935, 936 (1985) (Mem.) (Powell, J. concurring).

Principles of equity favor staying Mr. Smith's execution. He has made no "last-minute attempt to manipulate the judicial process."³ Mr. Smith filed a writ of habeas corpus with the Alabama Supreme Court on November 14, 2016. The State did not file a response until November 22, 2016, and the Alabama Supreme Court denied the writ four hours after the State responded, despite the significant issues presented by the case. Mr. Smith filed for a stay of execution in the Alabama Supreme Court on Wednesday, November 23, 2016. It was denied on Monday, November 28, 2016, without a response from the State.

This Court should grant a stay if Mr. Smith shows that there is a reasonable probability that four members of the Court will consider the issue sufficiently meritorious to grant certiorari.⁴ If that threshold is met, then the stay should be granted if, upon granting *certiorari* and resolving the constitutional issues presented, five Justices are likely to conclude that the case was erroneously decided below.⁵

Mr. Smith meets those standards. Mr. Smith's *certiorari* petition is meritorious and raises an important federal issue that a state court of last resort decided in conflict with an opinion of this Court: is Alabama's death-sentencing scheme unconstitutional because it allows a judge to sentence an inmate to death after a jury made contrary factual findings and rendered a verdict for life? This

³ *Nelson v. Campbell*, 541 U.S. 637, 649 (2004) (quoting *Gomez v. U.S. Dist. Court for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992)).

⁴ *See, e.g., Multimedia Holdings Corp. v. Cir. Ct. of Fla.*, 544 U.S. 1301 (2005) (Kennedy, J.).

⁵ *See, e.g., Barefoot v. Estelle*, 463 U.S. 880, 895-96 (1983).

Court has already remanded four cases to the Alabama Court of Criminal Appeals after *Hurst*.⁶ Members of this Court questioned the continued constitutionality of Alabama's capital sentencing statute in orders related to Christopher Brooks' petition for certiorari.⁷ Therefore, there is a reasonable probability that this Court would grant *certiorari* in Mr. Smith's case.

Mr. Smith also meets the second part of the standard, namely whether five members of the Court would rule in his favor. In *Hurst*, after evaluating the constitutionality of Florida's virtually identical death penalty sentencing scheme, eight members of this Court concluded that Florida's scheme was unconstitutional. It is more than reasonably probable that this Court would rule that Alabama's sentencing scheme that allows a jury verdict for life to be overridden by a judge would be unconstitutional.

This Court's decision in *Hurst* impliedly invalidates Alabama's death sentencing scheme, and with it, Mr. Smith's sentence. The Alabama Supreme Court failed to recognize both of those points, and denied his motion for relief. Given the constitutional error in that conclusion, five Justices of this Court are likely to conclude that the case was erroneously decided below.

While the harm to Mr. Smith would be great if a stay is not granted, the State will suffer no harm. There can be no harm to the State in delaying an

⁶ *Johnson v. Alabama*, 15-7091 (Order filed May 2, 2016); *Wimbley v. Alabama*, 15-7939 (Order filed May 31, 2016); *Kirksey v. Alabama*, 15-7912 (Order filed June 6, 2016); *Russell v. Alabama*, 15-9918 (Order filed October 3, 2016). None of these cases involved judicial override of a jury's life verdict.

⁷ 136 S.Ct. 708 (Mem.) (2016).

execution to allow the constitutionality of Alabama's death sentencing scheme and the validity of Alabama death sentences to be resolved before this Court. Alabama can have no interest in carrying out illegal sentences.

Finally, staying Mr. Smith's execution would be in the interest of the public. All citizens have an interest in ensuring that the Constitution is upheld.⁸ The public interest is even greater where, as here, the ultimate punishment of death is being carried out.⁹

This Court's decision in *Hurst* invalidates Alabama's death sentencing scheme. The Alabama Supreme Court refused to recognize the validity of *Hurst*, both as it applies generally to Alabama and specifically to Mr. Smith. This Court should stay Mr. Smith's execution.

Respectfully submitted,



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Executed on December 2, 2016

⁸ See *Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979).

⁹ *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976).