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

PETITION FOR WRIT OF CERTIORARI

Christine A. Freeman, Executive Director
Leslie S. Smith
John Anthony Palombi*
Keisha S. Hough
Natalie C.R. Olmstead
Federal Defenders, Middle District of Alabama
817 S. Court Street
Montgomery, Alabama 36104
Telephone: 334.834.2099
Facsimile: 334.834.0353
Email: john_palombi@fd.org

**Counsel of Record*

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CAPITAL CASE – EXECUTION DATE SET
DECEMBER 8, 2016

QUESTIONS PRESENTED

No jury ever sentenced Ronald Bert Smith to death. The jury in his case rendered a verdict of life without parole after reviewing all the evidence in aggravation and mitigation. The trial court made its own contrary findings of fact and imposed a death sentence in the face of the jury's verdict. The Alabama Supreme Court ignored this Court's ruling in *Hurst v. Florida*[1] and refused to vacate Mr. Smith's death sentence and impose the jury's verdict of life without parole. This ruling leads to the following questions:

I. Does Alabama's capital sentencing system, which allows a judge to override a jury's findings and verdict for life and impose a death sentence violate the Sixth Amendment?

II. Does this Court's opinion in *Hurst* apply retroactively to invalidate death sentences where a jury voted to impose a sentence of life without parole and a judge overrode that verdict?

III. Does Alabama's capital sentencing system, which allows a judge to override a jury's findings and verdict for life and impose a death sentence violate the Eighth Amendment?

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[1] 136 S. Ct. 616 (2016).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

State Cases

State Statutes

Other

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Ronald Bert Smith, respectfully requests that this Court grant his writ of *certiorari* to review the judgment of the Alabama Supreme Court, which concluded that this Court's opinion in *Hurst v. Florida*[2] does not render unconstitutional a death sentence imposed by a judge based on his own fact finding when a jury has made contrary findings of fact and rendered a verdict for life.

OPINIONS BELOW

The opinion of the Alabama Supreme Court denying Mr. Smith's writ of habeas corpus is unreported and is included in Petitioner's Appendix.[3]

JURISDICTION

The judgment of the Alabama Supreme Court was filed on November 23, 2016. The Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

The Eighth Amendment to the United States Constitution provides in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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[2] 136 S. Ct. 616 (2016).

[3] Pet. App. 1a.

RELEVANT STATUTORY PROVISIONS

Alabama Code §§ 13A-5-46(e)(1-2) provide:

(e) After deliberation, the jury shall return an advisory verdict as follows:

(1) If the jury determines that no aggravating circumstances as defined in Section 13A-5-49 exist, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole;

(2) If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exist but do not outweigh the mitigating circumstances, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole;

Alabama Code §§ 13A-5-47(d) and (e) provide:

(d) Based upon the evidence presented at trial, the evidence presented during the sentencing hearing, and the presentence investigation report and any evidence submitted in connection with it, the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in Section 13A-5-49, each mitigating circumstance enumerated in Section 13A-5-51, and any additional mitigating circumstances offered pursuant to Section 13A-5-52. The trial court shall also enter written findings of facts summarizing the crime and the defendant's participation in it.

(e) In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such verdict has been waived pursuant to Section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

STATEMENT OF THE CASE

Ronald Bert Smith was tried and convicted of the robbery and murder of Casey Wilson, a convenience store clerk, during an alcohol-fueled episode.[4] In the sentencing phase of the trial, the jury heard evidence in aggravation and mitigation. The jury heard evidence that Mr. Smith was an Eagle Scout and a member of the National Honor Society who, by all accounts was a quiet easy-going young man.[5] They also heard that after going to college, Mr. Smith struggled with alcoholism.[6] The jury heard all this evidence, and after doing so, rendered a verdict of life without parole.[7] The trial court heard this same evidence and overrode the jury's verdict and sentenced Mr. Smith to death,[8] concluding:

> Without question, the attributes or features that make up and distinguish Smith's formative years stand in stark contrast to his adult conduct, and to this crime. They also diverge from the background of cold-blooded killers: typically products of poverty, a broken home, physical or sexual abuse, and social deprivation. Smith comes from an intact, middle-class family. Yet, those characteristics cut two ways. They are concurrently mitigating *and* aggravating. Smith's background exposed him to virtually all of the values that are central to an ordered society; the awards of his youth opened avenues that pointed to a successful career based upon honest effort. But, Smith spurned society's road signs and took the way that led him to where he is today. He chose to wallow in the gutter; he was not born into it.[9]

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[4] *Smith v. State*, 756 So. 2d 892, 904 (Ala. Crim. App. 1997).

[5] Pet. App. 17a.

[6] *Id.*

[7] *Smith*, 756 So. 2d at 904. The jury's vote was 7-5 in favor of life. *Id.*

[8] Pet App. 17a. (italics in original).

[9] *Id.*

Mr. Smith's direct appeal against his conviction was rejected, as was his state post-conviction challenge to his conviction.[10] Mr. Smith never received habeas corpus review of the state court rulings because his post-conviction counsel failed to properly file a motion to proceed *in forma pauperis*.[11] The district court concluded that he was not entitled to equitable tolling of the habeas corpus statute of limitations, despite the fact that his local counsel gave up his license and eventually committed suicide due to his drug addictions, and his out of state counsel never actually wrote a pleading on his behalf. The Court of Appeals for the Eleventh Circuit affirmed that ruling.[12]

After this Court issued its opinion in *Hurst*, Mr. Smith filed a writ of habeas corpus in the Alabama Supreme Court, arguing that his death sentence should be vacated and that the court should impose the jury's verdict of life without parole. The State argued that the petition should be dismissed because it was not properly brought, or, in the alternative, denied because *Hurst* did not invalidate Alabama's statute and did not apply retroactively to invalidate Mr. Smith's death sentence. The Alabama Supreme Court chose the latter course and denied the writ, without opinion, over one dissent.[13]

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[10] *Ex parte Smith*, 756 So. 2d 957 (Ala. 2000).

[11] *Ex parte Smith*, 946 So.2d 545 (Table) (Ala. 2005).

[12] *Smith v. Comm'r*, 703 F.3d 1266 (11th Cir. 2012).

[13] Pet. App. 1a.

Alabama's capital punishment statute, like Florida's previous statute, establishes a trifurcated capital trial consisting of a guilt phase trial before the jury,[14] a jury penalty phase,[15] and finally, a sentencing hearing before the judge only.[16] During the jury penalty phase, the State must establish at least one of the eight statutory aggravating circumstances[17] beyond a reasonable doubt.[18]

The defendant may then offer any mitigating circumstance before the jury, and the State can attempt to disprove such mitigating circumstances by a preponderance of the evidence.[19] If the jury finds no aggravating circumstance, it must recommend a sentence of life imprisonment.[20] If the jury unanimously finds the existence of an aggravating circumstance beyond a reasonable doubt, the jury then weighs the aggravating and mitigating circumstances.[21] If at least ten members of the jury find that the aggravating circumstances outweigh the mitigating circumstances, the jury verdict is for

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[14] *See* Ala. Code § 13A-5-40(a).

[15] *See* Ala. Code §§ 13A-5-45(a) & 13A-5-46(a).

[16] *See* Ala. Code § 13A-5-47(c).

[17] Ala. Code § 13A-5-49.

[18] Ala. Code §§ 13A-5-45(e) & (f).

[19] Ala. Code § 13A-5-45(g).

[20] Ala. Code § 13A-5-46(e)(1).

[21] Ala. Code § 13A-5-46(e)(2-3).

death.[22] If between seven and nine members of the jury vote for death, there is no verdict.[23] If the majority of jurors find that the mitigators outweigh the aggravators, the jury verdict is for life.[24] The jury is not required to note its findings of fact or specify which aggravating or mitigating circumstances, if any, it has found.

Mr. Smith was found guilty of one count of capital murder, specifically, murder committed during a robbery in the first degree.[25] The State presented two aggravating factors, that the murder was committed during a robbery, and that the murder was "especially heinous, atrocious, or cruel."[26] Mr. Smith presented one statutory mitigating factor, that he had no prior criminal history, and 16 non-statutory mitigating factors.[27] The jury, after

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[22] Ala. Code § 13A-5-46(f).

[23] *Id.*

[24] *Id.*

[25] *Smith v. State*, 756 So. 2d 892, 945 (Ala. Crim. App. 1997).

[26] *Id.*

[27] *Id.* at 945-46 ("The trial court found one statutory mitigating circumstance: (1) the appellant had no significant prior criminal history, § 13A–5–51(1), Ala. Code 1975. The trial court found 16 nonstatutory mitigating circumstances: (1) prior to November 8, 1994, the appellant had no history of assaultive behavior; (2) after his arrest, the appellant did not show any tendencies of violence towards others; (3) with the exception of the events on November 8, 1994, the appellant had always been a quiet, polite individual; (4) the appellant did not resist arrest; (5) the appellant voluntarily confessed after being advised of his right to remain silent and without asking for assistance of counsel; (6) upon his arrest, the appellant cooperated with law enforcement officials; (7) the crime was out of character for the appellant; (8) the appellant had adapted well to life in custody; (9) the appellant had become a "model prisoner"; (10) while in custody, the appellant had made improvements in his mental and emotional problems; (11) while in custody, the appellant had helped other inmates; (12) the appellant had made improvements with the help of his religious faith; (13) while in prison, the appellant would be able to make a contribution to society by helping

hearing all the evidence, returned a verdict for life, by a vote of seven to five.[28]

By rendering a verdict in favor of life, the jury found that the aggravating circumstances did not outweigh the mitigating circumstances proven by Mr. Smith. The trial court, substituting its own fact finding for that of the jury, concluded that the mitigating circumstances proven by Mr. Smith did not outweigh the aggravating circumstances found by the jury.[29] The powers vested in the sentencing judge by Alabama's capital sentencing scheme — to both make additional findings of fact necessary to impose punishment and substitute its own findings of fact for that of the jury — violate *Hurst.*

Mr. Smith presented the Alabama Supreme Court with a direct challenge to the judicial override portion of Alabama's capital punishment statute. Yet, instead of treating this issue with the seriousness it deserves, the Alabama Supreme Court denied his writ, without opinion, less than four hours after the State filed a brief in response to the writ. Nothing in Alabama's capital sentencing statute immunizes judicial override from the

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other inmates; (14) the appellant had served in the United States military; (15) the appellant had maintained a good work record; and (16) the appellant had a son.").

[28] *Id.* at 949.

[29] *Id.* at 957 ("Therefore, following careful and deliberate consideration of all circumstances, this Court is convinced beyond a reasonable doubt that the aggravating circumstances substantially outweigh the mitigating circumstances and jury verdict.").

post-*Hurst* constitutional scrutiny which has invalidated similar statutes in Delaware and Florida.[30]

REASONS FOR GRANTING THE WRIT

I. The Alabama Supreme Court has ignored this Court's decision in *Hurst* by upholding Alabama's capital sentencing system, which permits a judge to override a jury's verdict for life and impose a death sentence.

This Court granted, vacated, and remanded four cases to the Alabama Court of Criminal Appeals for reconsideration in light of *Hurst*.[31] That court has ordered briefing in all of those cases, and briefs have been filed, but no decision has been rendered. Meanwhile, the Alabama Supreme Court, in a separate case that was decided on direct appeal, determined that Alabama's capital sentencing statute is constitutional even under this Court's holding in *Hurst*.[32]

In *Bohannon*, the Alabama Supreme Court concluded that none of this Court's precedents require that a jury impose a capital sentence.[33] The court

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[30] The Florida Supreme Court, in discussing how Alabama has treated the issue, stated "we note that the Alabama Supreme Court in *Bohannon* did not discuss its statute's constitutionality under its own state constitution and did not mention the Alabama cases remanded by the United States Supreme Court in light of *Hurst v. Florida*." *Hurst v. State*, No. SC12-1947, 2016 WL 6036978, at *38 n. 26 (Fla. Oct. 14, 2016)

[31] *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.

[32] *In re Bohannon*, 2016 WL 5817692 (Ala. Sept. 30, 2016). This Court's most recent remand order (in *Russell*) was issued three days after *Bohannon* was decided.

[33] "Furthermore, nothing in our review of *Apprendi*, *Ring*, and *Hurst* leads us to conclude that in *Hurst* the United States Supreme Court held that the Sixth Amendment requires that a jury impose a capital sentence. *Apprendi* expressly stated that trial courts may 'exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute.' 530 U.S. at 481,

further held that *Hurst*'s conclusion that a death sentence may not be based on a jury's recommendation did not invalidate Alabama's capital sentencing statute even though it allows just that.[34] The Alabama Supreme Court disagreed with the argument that Alabama's statute is unconstitutional because the judge makes fact findings independent of the jury's[35] and did not find that this Court's overruling of *Spaziano v. Florida*[36] and *Hildwin v. Florida*,[37] the bases of upholding the statute in the past, had any effect on Alabama's statute after *Hurst*.[38]

This Court has recognized that Alabama's capital sentencing statute is similar to the Florida statute struck down in *Hurst*.[39] Alabama itself, in an amicus brief filed in *Hurst*, recognized that a decision in favor of Hurst could invalidate Alabama's statute and call into question numerous death sentences.[40] Yet, the Alabama courts steadfastly refuse to acknowledge what Florida courts and Delaware courts have acknowledged: that a death

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120 S.Ct. 2348. *Hurst* does not disturb this holding." *In re Bohannon v. State*, No. 1150640, 2016 WL 5817692, at *6 (Ala. Sept. 30, 2016).

[34] "Therefore, the making of a sentencing recommendation by the jury and the judge's use of the jury's recommendation to determine the appropriate sentence does not conflict with Hurst." *In re Bohannon v. State*, No. 1150640, 2016 WL 5817692, at *7 (Ala. Sept. 30, 2016).

[35] *In re Bohannon v. State*, No. 1150640, 2016 WL 5817692, at *5 (Ala. Sept. 30, 2016).

[36] 468 U.S. 447 (1984).

[37] 490 U.S. 638 (1989).

[38] *In re Bohannon v. State*, No. 1150640, 2016 WL 5817692, at *6 (Ala. Sept. 30, 2016).

[39] *Harris v. Alabama*, 513 U.S. 504, 508 (1995) ("Alabama's capital sentencing scheme is much like that of Florida.").

[40] Brief of Amici Curiae Alabama and Montana at 9, *Hurst v. Florida*, 136 S. Ct. 616 (2016) (No. 14-7505) ("Moreover, Florida and Alabama have relied on this Court's decisions in *Spaziano* and *Harris* to sentence hundreds of murderers in the intervening decades.").

sentencing scheme which allows the judge instead of a jury to find any fact necessary to sentence someone to death is unconstitutional.

In Mr. Smith's case, not only did the judge find a fact that was required to sentence Mr. Smith to death, but he also did so in the face of a contrary fact-finding from the jury. This Court's opinion in *Hurst* applies to Alabama's capital sentencing scheme and requires Mr. Smith's death sentence to be invalidated.

The rule in *Hurst* is clear: "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough."[41] Here, the jury *did not even recommend death.* The jury's verdict was for life. That means that either the jury did not find the aggravators proven beyond a reasonable doubt or it did not find that the aggravators outweighed the mitigators. Both findings must be made in order to impose a death sentence in Alabama. Because the jury, by its verdict, did not find those two facts, Mr. Smith's sentence is invalid.

While Florida and Delaware have addressed the infirmities in their capital sentencing systems after *Hurst*, Alabama has refused.[42] The Alabama Supreme Court has declined to follow this Court's opinion in *Hurst*, despite the fact that Alabama's statute is similar to Florida's. Certiorari is

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[41] *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016).

[42] *See* Appellee's Brief, *Lee v. Alabama*, 2016 WL 6773670 * 11 (Ala. Crim. App., Oct. 14, 2016) ("The fact that Lee's jury recommended life without parole on a split verdict is immaterial, as a judge may override a jury's advisory verdict in a capital case."[52] Thus, *Ex parte Bohannon* forecloses relief on this issue.").

proper because the Alabama Supreme Court has decided this important federal question in a way that conflicts with this Court's opinion in *Hurst.*

II. This case presents the perfect vehicle for this Court to resolve the issue of whether *Hurst* applies retroactively to invalidate death sentences imposed through judicial override of a jury verdict for life.

Mr. Smith argued to the Alabama Supreme Court that this Court's opinion in *Hurst* applied retroactively to invalidate his death sentence. The Alabama Supreme Court denied his writ. This Court should take this case to determine the important question of whether *Hurst* applies retroactively to invalidate death sentences imposed by judicial override of a jury verdict for life.

This case presents the Court with its first opportunity to resolve the issue of *Hurst*'s retroactive application to a death sentence imposed by a judge when a jury has rendered a verdict for life. The issue was raised squarely to the Alabama Supreme Court, and it rejected Mr. Smith's argument on the merits. This issue affects not only a significant percentage of the death row population in Alabama, but also a sizeable number of death-sentenced inmates in Florida. Because this case raises an issue of national importance, certiorari is appropriate.

Under *Teague v. Lane*,[43] a new constitutional rule of criminal procedure generally does not apply to convictions that were final when the

[43] 489 U.S. 288 (1989).

new rule was announced. However, there are two categories of rules that are not subject to *Teague*'s general bar.

First, courts must give retroactive effect to new substantive rules of constitutional law. Substantive rules are "rules forbidding criminal punishment of certain primary conduct," and "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."[44] While *Teague* calls substantive rules an exception to the bar on retroactive application of procedural rules, substantive rules "are more accurately characterized as . . . not subject to the bar."[45] Second, courts must give retroactive effect to new "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[46]

Mr. Smith's case implicates both *Teague* exceptions. It is a watershed rule of criminal procedure because it holds, for the first time, that death sentences can only be imposed by a jury. It is also substantive as to Mr. Smith because it bars the imposition of a death sentence on anyone for whom the jury did not decide that punishment.[47]

A. *Hurst* is a watershed rule of criminal procedure.

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[44] *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989); *see also Teague*, *supra*, at 307.

[45] *Schriro v. Summerlin*, 542 U.S. 348, 352 n.4 (2004).

[46] *Id.* at 352; *see also Teague*, 489 U.S. at 312–313.

[47] *See supra.*

Hurst constitutes a "watershed rule[] of criminal procedure" and applying it to Mr. Smith's case is not prohibited by *Teague*'s general bar against applying new rules retroactively.[48] To fall under *Teague*'s exception for watershed rules, a procedural ruling must "implicate the fundamental fairness of the trial" and "significantly improve . . . pre-existing fact-finding procedures."[49] *Hurst* satisfies this exception.

In *Hurst*, the Supreme Court invalidated Florida's death penalty sentencing scheme, one that is "much like" Alabama's,[50] because it required the judge alone to find the existence of an aggravating circumstance.[51] The Court stated unequivocally: "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough."[52] This ruling goes beyond the Court's ruling in *Ring*.

In *Ring*, the Supreme Court concluded that Arizona's capital sentencing scheme was unconstitutional because the jury had no role in the sentencing process and a defendant could not be sentenced to death unless a judge found at least one aggravating circumstance.[53] The Court held that

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[48] *See Teague*, 489 U.S. at 311.

[49] *Id.* at 312-13.

[50] *Harris v. Alabama*, 513 U.S. 504, 508 (1995).

[51] *Hurst*, 136 S. Ct. at 624.

[52] *Id.* at 619.

[53] *Ring*, 542 U.S. at 592–593.

"'the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict.'"[54] *Ring* did not hold that systems like Alabama's and Florida's (which were in existence at the time) were unconstitutional because a jury only recommended a sentence.

Hurst's conclusion that a jury recommendation is insufficient to impose a death sentence is based on the Sixth Amendment's guarantee of a right to a jury trial.[55] This right is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure."[56]

Hurst invalidated Florida's death penalty sentencing scheme. That scheme had been upheld in two previous Supreme Court cases.[57] Those two decisions formed the basis for upholding Alabama's death sentencing scheme.[58] *Hurst* specifically overruled *Hildwin* and *Spaziano*.[59] This indicates that Alabama's system is equally infirm.[60] The watershed nature of the *Hurst*

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[54] *Id.* at 604 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000) (alterations omitted)).

[55] *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) ("The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.").

[56] *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

[57] *See Hildwin v. Florida*, 490 U.S. 638 (1989); *Spaziano v. Florida*, 468 U.S. 447 (1984).

[58] *See Harris v. Alabama*, 513 U.S. 504 (1995).

[59] *Hurst*, 136 S. Ct. at 623.

[60] *See Brooks v. Alabama*, No. 15-7786 (Jan. 21, 2016) (Sotomayor, J., concurring in denial of certiorari).

ruling is evident from the direct repudiation of cases that were 30 years old, and the implied repudiation of *Harris*, which was based on those cases.

It has long been recognized that juries generally are more accurate fact finders than judges, particularly when it comes to the imposition of the death penalty.[61] That Alabama's capital sentencing scheme implicates the fundamental fairness of the trial is all the more stark because this life-and-death decision is being made by judges facing intense electoral pressure.[62]

Further, Alabama's capital sentencing scheme — particularly with

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[61] *See, e.g., Ring*, 536 U.S. at 618 (Breyer, J., concurring) ("[T]he danger of unwarranted imposition of the [death] penalty cannot be avoided unless the decision to impose the death penalty is made by a jury rather than by a single government official." (internal quotations and citation omitted)); *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) ("The Court has said that 'one of the most important functions any jury can perform in making . . . a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system.'" (citation omitted)). Stephen Gillers, *Deciding Who Dies*, 129 U. Pa. L. Rev. 1, 60-69 (1980) ("The jury is substantially more likely than the judge to reliably reflect community feelings on the need for a retributive response to the offender and the offense.").

[62] *See* Equal Justice Initiative, *The Death Penalty in Alabama: Judge Override* 4, 8, 16 (July 2011), *available at* http://eji.org/files/Override_Report.pdf (last visited March 16, 2016) ("Because trial judges have almost unlimited discretion in capital sentencing, and because reviewing judges also are subject to reelection pressure, the override decision is perhaps the most vulnerable to political pressure."; "[R]ecent studies show that elections exert significant direct influence on decision-making in death penalty cases."; "[P]olitical pressure injects unfairness and arbitrariness into override decisions."; "The data suggests that override in Alabama is heavily influenced by arbitrary factors such as the timing of judicial elections . . . ."); Paul Brace & Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 Am. J. Pol. Sci. 360, 370 (2008) ("[E]lections and strong public opinion [in support of capital punishment] exert a notable and significant direct influence on judge decision making in [capital] cases . . . ."); Karin E. Garvey, *Eighth Amendment—the Constitutionality of the Alabama Capital Sentencing Scheme*, 86 J. Crim. L. & Criminology 1411, 1434-35 (1996) (observing the political pressure on elected judges to support the death penalty "simply increases the arbitrariness of the sentences imposed by Alabama judges"); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 759, 792-93 (1995) (observing "[t]he political liability facing judges who enforce the Bill of Rights in capital cases undermines the independence, integrity, and impartiality of the state judiciary," including in deciding whether to exercise judicial override in capital cases).

respect to life-to-death overrides — produces unreliable results. As Justice Sotomayor recently concluded after surveying the death sentences imposed under Alabama's capital sentencing scheme:

> There is no evidence that criminal activity is more heinous in Alabama than in other States, or that Alabama juries are particularly lenient in weighing aggravating and mitigating circumstances. The only answer that is supported by empirical evidence is one that, in my view, casts a cloud of illegitimacy over the criminal justice system: Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures. . . . By permitting a single trial judge's view to displace that of a jury representing a cross-section of the community, Alabama's sentencing scheme has led to curious and potentially arbitrary outcomes.[63]

As of late 2013, Alabama judges were responsible for 26 of the 27 instances since 2000 in which a judge in any state has overridden a jury's advisory sentencing verdict of life without parole.[64] It is apparent that Alabama is a "clear outlier" among states administering the death penalty — even among those few states that permitted judicial override.[65]

Teague holds that watershed rules of criminal procedure are to be applied retroactively to cases on collateral review. *Hurst* is such a case. It requires the jury to find all facts necessary to impose a death sentence and completely invalidates the judicial override portion of Alabama's death sentencing scheme as violative of the Sixth Amendment. This implicates

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[63] *Woodward v. Alabama*, 134 S. Ct. 405, 408-09 (2013) (Sotomayor, J., dissenting from denial of certiorari).

[64] *Id.* at 407.

[65] *Id.*

fundamental fairness and makes Alabama's system more accurate. Therefore, this Court should grant *certiorari* and hold that *Hurst* applies retroactively to people sentenced to death under Alabama's capital sentencing scheme.

B. *Hurst* is retroactive for individuals like Mr. Smith who received a life without the possibility of parole recommendation from the jury.

As discussed *infra*, new substantive rules of constitutional law apply retroactively to cases that are final when they are announced.[66] Substantive rules are "rules forbidding criminal punishment of certain primary conduct," and "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."[67] In Mr. Smith's case, the jury recommended a life sentence with a seven-to-five vote. Mr. Smith's trial judge overrode the jury's recommendation and sentenced him to death. The jury's verdict indicates that it did not find all facts necessary to impose a sentence of death, which *Hurst* ruled the Sixth Amendment requires.[68] Based on the life recommendation from the jury Mr. Smith is part of a "class of defendants" for whom the death penalty is prohibited – those defendants who did not receive a jury verdict for death.

In *Montgomery v. Louisiana*,[69] this Court considered whether its

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[66] A new constitutional rule that has both procedural and substantive characteristics call fall within this exception. *See Montgomery v. Lousiana*, 136 S. Ct. 718, 735-736 (2016).

[67] *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989); *see also Teague*, *supra*, at 307.

[68] *Hurst*, 136 S. Ct. at 619.

[69] 136 S. Ct. 718 (2016).

ruling in *Miller v. Alabama*[70] that juveniles convicted of homicide offenses could not automatically be sentenced to life without parole applied retroactively. In its ruling, the Court noted that when "a new rule bars States from proscribing certain conduct or from inflicting a certain punishment, '[i]n both cases, the Constitution itself deprives the State of the power to impose a certain penalty.'"[71]

Hurst deprives the State of the power to impose a death penalty when a jury renders a verdict for life. Therefore, for death-sentenced inmates who were sentenced to death by a judge in the face of a jury verdict for life, *Hurst* is substantive, and it must apply retroactively.

III. This Court should grant certiorari to clarify whether this Court's decision in *Harris v. Alabama*,[72] holding that Alabama's death sentencing statute does not violate the Eighth Amendment, is still valid law after *Hurst*.

Decades prior to *Hurst*, Alabama's death sentencing statute was upheld against an Eighth Amendment challenge in *Harris*. *Hurst* overruled the cases that provided the precedential support for finding Alabama's statute constitutional in *Harris*, and 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 that verdict.

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[70] 132 S. Ct. 2455 (2012).

[71] *Montgomery*, 136 S. Ct. at 729 (citation omitted).

[72] 513 U.S. 504 (1995).

Certiorari is needed to resolve the question of whether *Harris* is still good law and whether a capital sentencing statute that allows a judge to make the necessary findings to sentence someone to death, when the jury has voted for life, violates the Eighth Amendment. The Alabama Supreme Court has misread *Hurst* to conclude that it does not apply to Alabama's capital sentencing statute.[73] Twenty percent of Alabama's death row population is there despite a jury verdict for life. Granting certiorari in this case will provide clarity and reduce further confusion about the applicability of *Hurst* in Alabama and the continued viability of *Harris* in the face of *Hurst.*

A. *Hurst* explicitly overruled *Spaziano v. Florida*[74] and implicitly overruled *Harris*, both of which upheld judicially imposed death sentences against Eighth Amendment challenges.

This Court has previously considered whether allowing a judge to override a jury's recommendation of a life sentence violates the Eighth Amendment.[75] In both cases, the Court concluded there was no Eighth Amendment violation. However, the reasoning and precedent relied upon in *Spaziano* and *Harris* has drastically changed in the 21 years since *Harris* was decided.

In *Spaziano*, this Court held that a death sentence, imposed after a jury recommended a life sentence, complied with the Sixth and Eighth

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[73] See *supra*, the discussion of *In re Bohannon.*

[74] 468 U.S. 447 (1984).

[75] *See Spaziano v. Florida*, 468 U.S. 447 (1984); *Harris v. Alabama*, 513 U.S. 504 (1995).

Amendments to the United States Constitution. The Court first decided that the Sixth Amendment did not guarantee the right to have a jury determine the sentence in a capital case. The Court then used this decision to frame the Eighth Amendment result, ultimately holding:

> [i]n light of the fact that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.[76]

The Court was not "persuaded that placing the responsibility on a trial judge to impose the sentence in a capital case is so fundamentally at odds with contemporary standards of fairness and decency that [the state] must be required to alter its scheme and give final authority to the jury to make the life-or-death decision."[77]

In *Harris*, the Court, relying on *Spaziano*, held that because "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence," the Eighth Amendment does not require the state to prescribe the weight the judge should give to the sentencing verdict of an advisory jury.[78] Ultimately the Court found that allowing a judge to override a jury's

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[76] *Spaziano*, 468 U.S. at 464.

[77] *Id.* at 465.

[78] *Id.* at 515.

recommendation of life was not "fundamentally at odds with contemporary standards of fairness and decency."[79]

Justice Stevens dissented in *Harris*. He noted that in the vast majority of jurisdictions, a jury, not a judge, provides the sentence in a capital case. He asserted that "[c]ommunity participation is . . . critical in life-or-death sentencing decisions" because capital judges are not solely motivated by retribution (the only viable societal interest for imposing death).[80] He observed that "present-day capital judges may be 'too responsive' [to] a political climate in which judges who covet higher office – or who merely wish to remain judges – must constantly profess their fealty to the death penalty."[81] He emphasized the danger that capital judges "will bend to political pressures when pronouncing sentence in highly publicized capital cases."[82]

Justice Stevens found that conversely, a jury answers "only to their own consciences; they rarely have any concern about possible reprisals after their work is done . . . . A jury verdict expresses a collective judgment that we may fairly presume to reflect the considered view of the community."[83] He

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[79] *Id.* at 510 (internal quotations omitted).

[80] *Id.* at 519 (Stevens, J., dissenting).

[81] *Id.*

[82] *Id.*

[83] *Id.* at 518-519.

concluded that "[t]he most credible justification for the death penalty is its expression of the community's outrage. To permit the State to execute a [man] in spite of the community's considered judgment that [he] should not die is to sever the death penalty from its only legitimate mooring."[84]

It is now clear, 21 years after *Harris*, that Justice Stevens was right. Alabama's death penalty scheme is "fundamentally at odds with contemporary standards of fairness and decency."[85] Therefore, "Alabama's capital sentencing scheme [is] fundamentally unfair and results in cruel and unusual punishment."[86]

B. Imposing a death sentence when the jury has returned a verdict for life violates the Eighth Amendment because it is contrary to evolving standards of decency.

Eighth Amendment analysis has changed since *Harris* was decided. In *Atkins v. Virginia*,[87] this Court reiterated that the Eighth Amendment "'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society."[88] To the extent possible, objective factors should be used to determine the contemporary standards of decency[89].

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[84] *Id.* at 536.

[85] *Harris*, 513 U.S. at 510.

[86] *Id.* at 526 (Stevens, J., dissenting).

[87] 536 U.S. 304 (2002).

[88] *Atkins*, 536 U.S. at 311-312 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958)).

[89] *Id.* at 312.

However, "the objective evidence, though of great importance, [does] not 'wholly determine' the controversy, 'for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'"[90] The Court expressed that "the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'"[91]

The Court again conducted an analysis of evidence of contemporary values using legislative enactments in *Roper v. Simmons.*[92]

The *Roper* Court observed that 30 states prohibited the juvenile death penalty (12 that have abolished the death penalty and 18 that maintain the death penalty but prohibit the execution of juveniles).[93] "[E]ven in the 20 states without a formal prohibition on executing juveniles, the practice is infrequent. Since *Stanford*, six States have executed prisoners for crimes committed as juveniles. In the past 10 years, only three have done so."[94]

The Court concluded that

> the objective indicia of consensus in this case – the rejection of the juvenile death penalty in the majority of states; the infrequency of its use even where it remains on the books; and

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[90] *Atkins*, 536 U.S. at 312 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

[91] *Atkins*, 536 U.S. at 312 (quoting *Penry*, 492 U.S. at 331).

[92] 543 U.S. 551 (2005).

[93] *Id.* at 564-566.

[94] *Id.* at 564-565.

> the consistency in the trend toward abolition of the practice – provide sufficient evidence that today our society views juveniles . . . as categorically less culpable than the average criminal.[95]

The Court conducted a similar analysis in *Kennedy v. Louisiana*,[96] holding that the Eighth Amendment forbids a sentence of death for the rape of a child. The Court observed that post-*Furman,* only six states reintroduced the death penalty for the rape of a child.[97] The Court noted that there was still a "divided opinion" but found it extremely significant that "in 45 jurisdictions [the] petitioner could not be executed for child rape of any kind. That number surpasses the 30 states in *Atkins* and *Roper* and the 42 states in *Enmund* that prohibited the death penalty under the circumstances those cases considered."[98]

C. There is a national consensus against judicial override of a jury's verdict for life.

There is no question that a national consensus on this topic exists. Every death penalty state other than Alabama requires a jury verdict for death and prohibits a judge from overriding a jury verdict for life.

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[95] *Id.* at 567 (internal quotations omitted).

[96] 554 U.S. 407 (2008).

[97] *Kennedy*, 554 U.S. at 423.

[98] *Id.* at 426.

At the time of *Harris,* 37 states authorized capital punishment.[99] In 33 of the 37 states, the jury participated in the sentencing decision.[100] "In 29 of those states, the jury's decision [was] final; in the other 4 – Alabama, Delaware, Florida, and Indiana – the judge [had] the power to override the jury's decision."[101]

Today, 34 states and the federal government have statutes that authorize capital punishment.[102] In 33 of the 34 states, the jury participates in the sentencing process.[103] Of those 33 states, Alabama is the only state that allows a judge to sentence a defendant to death when the jury has recommended a sentence of life. Indiana abolished judicial override in 2002.[104] Florida and Delaware abolished judicial override from life to death in 2016.[105]

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[99] *Harris v. Alabama*, 513 U.S. 504, 516 (1995) (Stevens, J., dissenting).

[100] *Id.*

[101] *Id.*

[102] *States with and without the Death Penalty*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Oct. 12, 2016).

[103] Montana, by statute, requires the judge sitting alone to find the aggravators. Mont. Code Ann. § 46-18-301 (2015). This statute is also of questionable constitutionality following *Hurst.*

[104] In Indiana, the judge is not allowed to override the sentencing decision of the jury; however, if the jury cannot reach a decision, the judge is authorized to sentence the defendant alone. Ind. Code Ann. § 35-50-2-9.

[105] The Florida legislature passed a law that mandates a life sentence unless at least 10 jurors recommend a sentence of death. FL ST §921.141. The Delaware Supreme Court held that Delaware's sentencing scheme violated the Sixth Amendment based on *Hurst. Rauf v. State,* No. 39, 2016, 2016 WL 4224252 (Del. Aug. 2, 2016).

Alabama is the only state that continues to allow judicial override in the face of *Hurst*. This weighs heavily in favor of this Court finding a national consensus against judicial override. The "'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'"[106] Nationwide, legislatures have been clear: contemporary standards of decency forbid a sentence of death when a jury renders a life verdict.

A punishment may be regarded as unusual if "tangible evidence of societal standards" leads to a determination that "there is a 'consensus against' a given sentencing practice."[107] Under this definition, there is no question that the practice of judicial override is unusual. This is especially clear when this practice is compared to the practices found unusual in *Atkins*, *Roper*, and *Kennedy*. The graph below shows the breakdown of the number of states that allowed/forbade the challenged practice that was found to be unusual compared to the number of states that allow/forbid judicial override.

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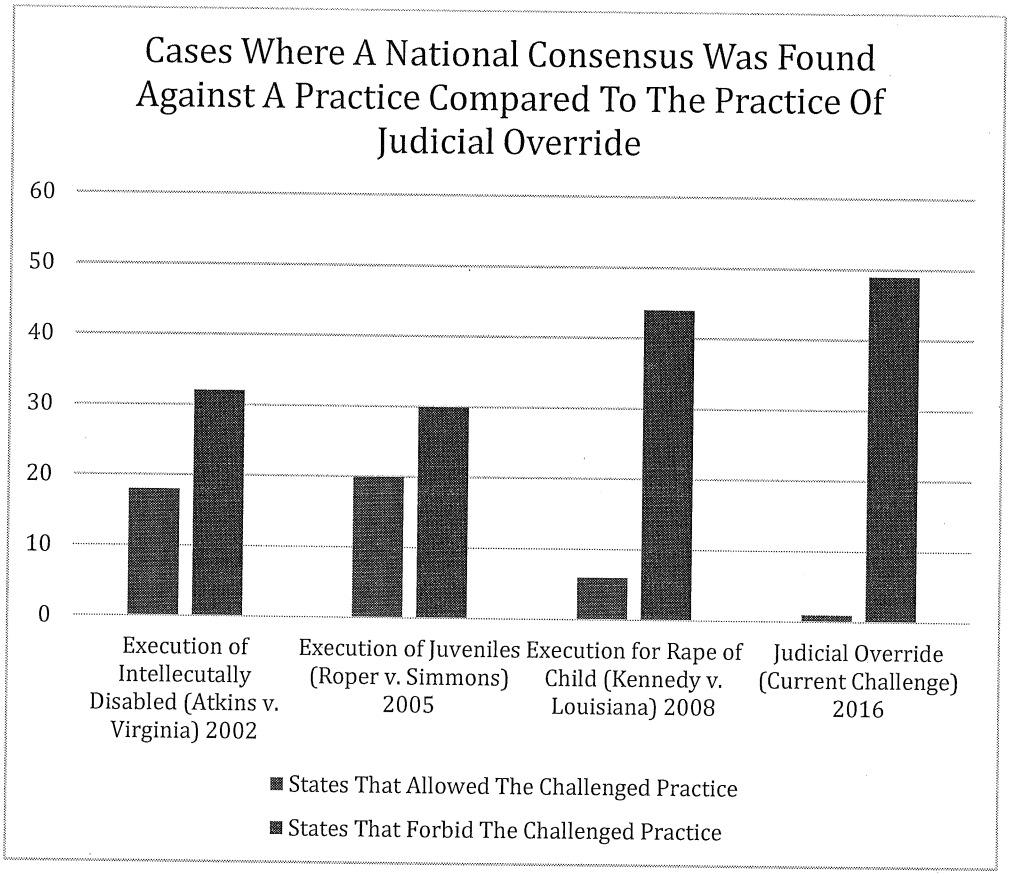
[106] *Atkins*, 536 U.S. at 312 (quoting *Penry*, 492 U.S. at 331).

[107] *Miller*, 132 S. Ct. at 2478 (Roberts, J., dissenting).



It is impossible to deny that a national consensus exists against judicial override. Unlike every other case where a consensus was found, there is not even a divided opinion: Alabama stands alone. "The practice . . . has become truly unusual, and . . . a national consensus has developed against it."[108]

The infrequent use of judicial override outside of Alabama and the direction of change of the legislative enactments also support the conclusion that a national consensus against judicial override exists. No state allows judicial override now that did not allow judicial override in 1995. Moreover,

[108] *Atkins*, 536 U.S. at 316.

even before its abolition in Indiana, Delaware, and Florida, judicial override was extremely rare in those states. In 2013, in a dissent from a denial of certiorari in *Woodward v. Alabama*,[109] Justice Sotomayor discussed the decline in the use of judicial override, noting that,

> [i]n the 1980's, there were 125 life-to-death overrides: 89 in Florida, 30 in Alabama, and 6 in Indiana. In the 1990's there were 74: 26 in Florida, 44 in Alabama, and 4 in Indiana. Since 2000, by contrast, there have been only 27 life-to-death overrides, 26 of which were by Alabama judges.[110]

It is indisputable that a national consensus exists against judicial override. Contemporary standards of decency do not allow a judge to sentence a defendant to death when a jury has recommended a life sentence.

D. The trial court's override of the jury's life verdict violates the Eighth Amendment.

For the second part of the Eighth Amendment analysis, this Court must determine whether, in its own judgment, the practice of judicial override violates the Eighth Amendment. In making this judgment, this Court should consider: whether the practice of judicial override contributes to the penological goals advanced by the death penalty; whether defendants a jury determined did not deserve to die are less culpable for the crime; whether the process of judicial override is non-arbitrary and reflects moderation and restraint of the application of capital punishment; and whether judicial override offends Eighth Amendment principles of dignity.

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[109] 134 S. Ct. 405 (2013).

[110] *Id.* at 407.

1. The practice of judicial override does not serve any legitimate penological goals.

"[C]apital punishment is excessive when . . . it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes."[111] Executing Mr. Smith, a person who a jury determined should live, does not further either of these goals.

> In considering whether retribution is served . . . [the court looks] to whether capital punishment 'has the potential . . . to allow the community as a whole . . . to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed."[112]

The jury is the voice of the community. The Supreme Court has said that "one of the most important functions any jury can perform in making a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system."[113] "In respect to retribution, jurors possess an important comparative advantage over judges. . . . [T]hey are more attuned to the community's moral sensibility . . . because they reflect more accurately the composition and experiences of the community as a whole."[114]

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[111] *Kennedy*, 554 U.S. at 441.

[112] *Id.* at 442 (quoting *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007)).

[113] *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (internal quotations and citations omitted).

[114] *Ring v. Arizona*, 536 U.S. 584, 615-616 (2002) (Breyer, J., concurring) (internal quotations and citations omitted).

When a judge sentences a defendant to death after a jury returns a recommendation of life, the judge severs the link to the community. Without this connection, the case for retribution falls apart. The community never made a determination that "the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed."[115] In fact, the community made the opposite determination. When a jury determines the appropriate sentence is life, retribution is not advanced by sentencing the person to death. This is why "the danger of unwarranted imposition of the [death] penalty cannot be avoided unless the decision to impose death is made by a jury rather than by a single government official."[116]

Moreover, like *Kennedy*, there is a "special risk of wrongful execution" in judicial override cases.[117] Jury studies reflect that residual doubt often motivates a juror to vote for a life sentence.[118] This suggests that override cases "are more likely to involve weaker evidence and wrongful convictions when compared to other death penalty cases. Not surprisingly, in Alabama, override cases account for less than a quarter of death sentences but half of death row exonerations."[119] This increased risk of wrongful conviction further diminishes any retributive purpose.

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[115] *Kennedy*, 554 U.S. at 442 (internal quotations omitted).

[116] *Ring*, 536 U.S. at 618 (Breyer, J., concurring) (internal quotations omitted).

[117] See *Kennedy*, 554 U.S. at 443.

[118] Mulvaney and Chamblee, *Innocence and Override*, The Yale Law Journal Forum, http://www.yalelawjournal.org/forum/innocence-and-override (last visited Oct. 13, 2016).

[119] *Id.*

Executing a person a jury determined should live serves absolutely no deterrent purpose. "The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct."[120] The Supreme Court has found that deterrence is not diminished if a person who commits a capital crime "continue[s] to face the threat of execution."[121] Banning judicial override does not change this threat. A death sentence is still available for these crimes; however, the jury, not the judge must be the body to decide.

The process of judicial override does not "measurably further the goal[s] of deterrence" and retribution.[122] The sentence in this case therefore "is nothing more than the purposeless and needless imposition of pain and suffering."[123]

2. Demands of fairness and reliability in capital cases require jury sentencing.

It is unconstitutional for a death sentence to be applied in an arbitrary manner.[124] A sentence is non-arbitrary if the sentencing body had clear instructions to follow to ensure the sentencing verdict is fair and reliable.[125]

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[120] *Atkins*, 536 U.S. at 320.

[121] *Id.*

[122] *Id.*

[123] *Atkins*, 536 U.S. at 319.

[124] *See Gregg v. Georgia*, 428 U.S. 153 (1976).

[125] *Id.*

In capital cases in Alabama, a jury is instructed to weigh the mitigating and aggravating circumstances for each case. In this case, and other judicial override cases, the jury followed the instructions and determined the fair and reliable sentence was life without the possibility of parole. Despite this, judges arbitrarily overrode the juries' decisions and sentenced defendants to death. As a result, override death sentences, including Mr. Smith's, are unfair, unreliable, and unconstitutional.

The process of judicial override is unfair and therefore arbitrary. First, the procedure does not reflect "moderation or restraint in the application of capital punishment."[126] "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint."[127] Therefore, "the Eighth Amendment applies to it with special force."[128] The Eighth Amendment mandates that a death sentence can only be applied to a narrow class of offenders that have been determined to be the worst of the worst.[129]

The process of judicial override can never reflect the constitutional requirement that capital punishment must be used in moderation and with restraint. In every case where there was a judicial override from life to death,

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[126] *Kennedy*, 554 U.S. at 435.

[127] *Id.* at 420.

[128] *Roper*, 543 U.S. at 568.

[129] *Kennedy*, 554 U.S. at 446-447.

a jury determined that the defendant did not fall within the narrow class of offenders who deserved to die; yet the judge still sentenced each one of these defendants to death. These judges showed no restraint in overruling the juries' decisions. A judicial override expands the application of the death penalty and reverses the restraint a jury has determined is appropriate.

The unfairness of judicial override is further compounded by the fact that judges in Alabama are motivated by political pressure and that motivation improperly influences override decisions. In his *Harris* dissent, Justice Stevens observed that judges seeking reelection or higher office "will bend to political pressure when pronouncing sentence in highly publicized capital cases."[130] "In 2008, an election year, 30% of the death sentences imposed in Alabama were the result of judge override."[131] Justice Sotomayor has observed that judicial override has led to "curious and potentially arbitrary outcomes."[132] Judges have justified overrides with reasons that "do not seem to square with . . . Eighth Amendment jurisprudence."[133] For example, one judge sentenced a man with a 65 IQ to death, despite the fact that the jury unanimously recommended a life sentence, because "the sociological literature suggest Gypsies intentionally test low on standard IQ

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[130] *Harris*, 513 U.S. at 519 (Stevens, J., dissenting).

[131] *The Death Penalty in Alabama: Judge Override*, Equal Justice Initiative, July 2011, available at: http://eji.org/sites/default/files/death-penalty-in-alabama-judge-override.pdf.

[132] *Woodward*, 134 S. Ct. at 409.

[133] *Id.* at 409-410.

tests."[134] Here, Mr. Smith's sentencing judge overrode the jury's life verdict, finding that evidence the jury found mitigating was actually aggravating.

Judges are not well suited to make these life and death decisions. "Judges . . . are part of the State—and an increasingly bureaucratic part of it, at that."[135] Juries, on the other hand,

> answer only to their own consciences; they rarely have any concern about possible reprisals after their work is done. More importantly, they focus their attention on a particular case involving the fate of one fellow citizen, rather than on a generalized remedy for a global category of faceless violent criminals who, in the abstract, may appear unworthy of life. A jury verdict expresses a collective judgment that [the Court] may fairly presume to reflect the considered view of the community.[136]

Judicial override also renders the sentence unreliable. A sentence of death is only reliable when it "is an expression of society's moral outrage at particularly offensive conduct."[137] It is undisputed that a jury, not a judge, is best suited to represent society's view. "'[O]ne of the most important functions any jury can perform . . . is to maintain a link between contemporary community values and the penal system.'"[138] "Even in jurisdictions where judges are selected directly by the people, the jury

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[134] *Id.* (internal quotations omitted).

[135] *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring).

[136] *Harris*, 513 U.S. at 518-519 (Stevens, J., dissenting).

[137] *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

[138] *Id.* (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968)).

remains uniquely capable of determining whether, given the community's views, capital punishment is appropriate in the particular case."[139]

The connection between the community and the penal system was severed in this case when the judge overrode the jury's decision. Mr. Smith's death sentence is unreliable because it reflects, not the view of the community, but the view of a single state actor.

In the years since *Spaziano* and *Harris,* it has become extremely clear that fairness and reliability do in fact require a jury to make the decision to sentence a defendant to death. This provides strong support for this Court to determine, based on its own judgment, that the practice of judicial override violates the Eighth Amendment, and Mr. Smith's sentence must be vacated. Certiorari is appropriate because the Alabama Supreme Court does not recognize the application of *Hurst* to Alabama's capital sentencing statute and it is needed to clarify the continued viability of *Harris* post-*Hurst.*

CONCLUSION

For the forgoing reasons, Ronald Bert Smith's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Christine Freeman, Executive Director
John Anthony Palombi*
Assistant Federal Defender
Federal Defenders
Middle District of Alabama

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[139] *Ring*, 536 U.S. at 616 (Breyer, J., concurring).

817 S. Court Street
Montgomery, AL 36104
Telephone: 334.834.2099
Facsimile: 334.834.0353

*Counsel of Record

IN THE SUPREME COURT OF ALABAMA

November 22, 2016

1971580

Ex parte Ronald Bert Smith, Jr. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Ronald Bert Smith, Jr. v. State of Alabama) (Madison Criminal Appeals: CC-95-187; Criminal Appeals: 95-93).

ORDER

The Petition for Original Writ of Habeas Corpus filed by Ronald Bert Smith on November 14, 2016, having been submitted to this Court,

IT IS ORDERED that the Petition for Original Writ of Habeas Corpus is DENIED.

Stuart, Bolin, Parker, Main, Wise, and Bryan, JJ., concur.

Murdock, J., dissents.

I, Julia Jordan Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 22nd day of November, 2016.

Julia Jordan Weller

Clerk, Supreme Court of Alabama

cc:
D. Scott Mitchell
Bruce Edward Williams
Madison County Circuit Clerk's Office
U.S. Court of Appeals

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

STATE OF ALABAMA)
)
vs.) Criminal Case No. CC 95-187CLS
)
RONALD BERT SMITH, JR.,)
)
Defendant.)

SENTENCING ORDER

Ronald Bert Smith, Jr. was convicted of a capital offense: intentional murder committed during the course of a robbery in the first degree or an attempt thereof, as charged in the indictment. Therefore, as required by *Alabama Code* §13A-5-47(d) (1975), this Court enters the following findings of fact.

Summary of Crime and Defendant's Participation

During the early morning hours of Tuesday, November 8, 1994, Ronald Bert Smith, Jr., Jay Zuercher, and Chad Roundtree were riding in a pick-up truck owned by Smith, but then driven by Roundtree. Smith turned to Zuercher and asked: "Do you want to do it?"[1] — *"it"* meaning, to rob the Circle C convenience store at the intersection of Byrd Springs Road with South Memorial Parkway.[2] Zuercher replied, "Yes."[3] Smith directed Roundtree to the store, and they parked behind it.

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1 Testimony of Philip Chad Roundtree.

2 Following his arrest, defendant gave a tape recorded statement to Huntsville Police Department homicide investigator William E. Payne, Jr., which was introduced into evidence as State's Exhibit No. 2. Early in that statement Smith said: *"We'd been driving around and we decided that we were going to rob the Circle C on Byrd Spring Road. ..."*

3 Later in his taped confession, when asked by Investigator Payne to "give me the conversation" that led to the agreement to commit a robbery, Smith said: "There really wasn't much conversation." Even so, it is noted that, "[f]or five or six months in 1992, Smith was employed as a clerk/cashier at [this same] Circle C Convenience Store...." (Pre-Sentence Investigative Report, at page 6.) Consequently, Smith was familiar with the layout of the store.

Smith and Zuercher got out of the truck; Roundtree remained in the driver's seat. Smith said to Zuercher: "I'm going to 'pop' the guy. When you hear the shots, come in." Zuercher replied: "I've got your back," and proceeded to cover his head and face with a black T-shirt, "Ninja" fashion.[4]

Smith entered the store at 3:24:15 a.m.[5] He walked quickly to the drink coolers and removed a soft drink.[6] He then approached the counter area where Casey Wilson,[7] the lone clerk on duty at that time of night, was standing.

Smith placed the bottle on the counter. As Wilson began to enter the cost of the apparent purchase into the cash register, Smith pulled a Colt .45 caliber semi-automatic pistol[8] from the waistband of his pants and:

> told the clerk to open up the register * * * to give me the money, but for some reason the register malfunctioned, so I was going to put him in the bathroom and try myself.

Later in his tape recorded statement, Smith reiterated the incident as follows:

> Then, I pulled the gun out and I said, 'open the register.' ... He tried; he didn't really say anything. ... He couldn't do it. So I started backing him up, and I said, you know, I was giving him this, and I said, "get back, get back."

At 3:24:51 a.m., Smith forced Wilson at gun point into the restroom at the rear of the store. They were in the restroom area for nineteen seconds, during

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4 Testimony of Philip Chad Roundtree.

5 The precise statements of time which follow were logged by a digital clock, electronically transposed upon a videotape of the incident (State's Exhibit No. 8) recorded by four television security cameras located in different areas of the convenience store. The separate views afforded by each camera were done on a so-called "split screen."

6 State's Exhibit No. 9: a bottle of "Mountain Dew."

7 Mr. Wilson was a 26 year old white male whose date of birth was December 18, 1967.

8 State's Exhibit No. 4.

which Smith pistol-whipped Wilson about the head and body,[9] and shot him in the left arm.[10] In Smith's words:

> He made a move at me, you know, [and] I pulled the trigger on the gun cause I was scared. * * * * *[But, the gun] didn't fire.*[11] * * * * *He reached out to grab me so I hit him with it.* * * * * And then he fell in the bathroom. I tried to get the door shut and I was, you know, real scared, and he started reaching for me, *so I pulled the trigger again, and this time it went off.*[12]

At 3:25:02 a.m. (while Smith and Wilson still were in the restroom area) the videotape showed Zuercher entering the store, holding a gun in his right hand.[13]

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9 Police investigators found blood splatters near the toilet in the restroom that were consistent with such a beating. Dr. Joseph Embry, a forensic pathologist for the State of Alabama who performed the autopsy of Casey Wilson, identified nine non-gunshot wounds to the body, which he attributed to a pistol-whipping of the victim prior to death, none of which was severe enough to kill, or to render the victim unconscious.

10 This Court believes Casey Wilson sustained the gunshot wound to his left arm during this time, and, that the killing shot was fired nearly two minutes later: see the text at note 15, *infra*. The testimony of Chad Roundtree indicated the sequence of shots to be: "Pop ... pop, pop, pop," with only a short interval between the first and subsequent shots. However, circumstantial forensic evidence tended to show a different sequence. First is the blood splatters near the toilet noted in the preceding footnote. State forensic experts also testified that blood stains on the wall, inside the restroom, to the left of the door, and approximately eighteen to twenty-four inches above the floor, were consistent with blood *compression,* as opposed to blood *smear* stains. Such stains would be produced by the victim if he were in a kneeling position, leaning against the wall. In addition, the pattern of blood stains on the victim's pants, the large pool of blood by the door, and blood splatter patterns on the floor near the door all indicate the victim was in a kneeling position by the restroom door, *after* he had been shot in the left arm. Dr. Embry testified that the wound to the left arm would cause tremendous bleeding, a fact which is consistent with the pool of blood near the door. Moreover, the victim vomited on the floor of the bathroom; Dr. Embry testified that a person cannot vomit after death; therefore, the victim lived for a period of time *after* being assaulted by Smith. In addition, the videotape showed Smith standing in the doorway after placing Wilson in the restroom. Smith's right arm appeared to move in a motion similar to that of firing a gun; and, after a brief movement that cannot clearly be seen because Smith stepped partially inside the restroom, Smith again made a similar movement.

For the foregoing reasons, this Court adopts the opinion of Dr. Joseph Embry, who believed the victim was shot in the left arm while standing, fell against the wall, then crumpled into a kneeling or crouching position by the door ("I think the pattern of blood staining on his trousers would indicate that"), and then collapsed onto the floor, where the last two shots were inflicted.

11 The first time Smith attempted to fire the gun, the shell did not discharge. After Smith shucked the misfired cartridge and rammed another shell into the chamber of the semi-automatic pistol, the gun fired. Investigators found the unfired .45 caliber bullet which was ejected when Smith re-set the gun: State's Exhibit No. 17.

12 State's Exhibit No. 2: defendant's tape recorded statement (emphasis added).

13 Zuercher's entry at this time is circumstantially consistent with Smith having fired his pistol at least once, because, when the two of them got out of the pick-up truck, Zuercher had told Smith: "he was actually going to be looking out; he said *I'll either come in if there's a shot,* or I'll just wait for you, you know, he was watching outside. ..." State's Exhibit No. 2 (defendant's tape recorded statement)(emphasis supplied); *see also,* the testimony of Philip Chad Roundtree noted in text, *supra* at note 4.

At 3:25:10 a.m., Smith returned to the cash register; during the next thirty-four seconds, he tried to gain access by punching various keys.[14] He was not successful, and looked under the counter where the safe was located. He appeared to manipulate the safe's combination lock.

At 3:25:42 a.m., Smith returned to the restroom at the rear of the store. It is the opinion of this Court that, although not clearly in view, Smith fired the killing shot into Casey Wilson's head during the next thirteen-second interval.[15] The videotape shows Smith, after stepping out of the restroom, retrieving spent shell casings from the floor.

At 3:26:38 a.m., Zuercher reached toward a display rack near the cash register and grasped an object (apparently a pack of cigarettes) which he placed in his pants' pocket.

At 3:26:45 a.m., Smith and Zuercher ran out of the store. Before leaving the parking lot, however, one of them remembered the store had security cameras which probably had recorded the incident.[16] Smith *twice* ran back into and out of the store: ultimately returning to a storage room where the videocassette recorder was locked in a metal cabinet.

At 3:31:31 a.m., the surveillance tape went blank. Smith had used Zuercher's .9 mm Baretta semi-automatic pistol to blast open the lock. He ripped the recorder

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14 Smith was asked by HPD homicide investigator Bill Payne whether he tried to open the register, and Smith replied: "Oh yes. ... I pushed the, I can't really, I don't know what the button was, but there was like a say total button or a cash button." State's Exhibit No. 2. When police investigators entered the store, they found an "ERROR" message displayed on the cash register's digital screen, and there was an audible alarm.

15 See note 10, *supra*.

16 State's Exhibit No. 2 (defendant's tape recorded statement).

from the cabinet and left the store for the final time. The three accomplices drove to Roundtree's apartment, where Smith removed the tape from the recorder.[17]

At 3:59 a.m., a uniformed police officer arrived at the store in response to a customer's telephone call that no clerk was present. Finding the restroom door closed, the officer pushed it open and discovered Casey Wilson lying on the floor in pools of blood. He checked for a pulse, but detected none and secured the scene until homicide investigators arrived.

Almost one month passed before investigators developed their first lead. On December 1, 1994, Monique Ferguson informed police that Smith had bragged to her of killing the clerk at the Circle C store. Smith repeated his boast to Ferguson's boyfriend (now husband), Owen Ickes.[18] Both agreed to assist police. They were given a tape recorder, instructed to find Smith, and catch him talking about the murder. During the early morning hours of December 2nd, Ferguson (who concealed the recorder in her purse) and Ickes (who wore a police "body wire") engaged Smith and Nick Mullins in a conversation on Hobbs Island Road near the Tennessee River. During that encounter, Smith confirmed the substance of his prior statements: *e.g.*, Ferguson attempted to purchase Smith's .45 caliber pistol, but he refused to sell it, saying "it is *The* gun." The tape was delivered to police.[19]

Owen Ickes later assisted police in obtaining fired shell casings from (and eventually purchasing) the .9 mm Baretta semi-automatic pistol owned by Jay

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17 The videotape (**State's Exhibit No. 8**) ultimately was found by police in the seat springs of Smith's pick-up truck, pursuant to a "consent to search" form signed by Smith (State's Exhibit No. 6).

18 Owen Ickes testified that defendant said, "Yeah, I killed the guy at Circle C" in a manner "like he was bragging about it."

19 State's Exhibit No. 3.

Zuercher.[20] Ballistic tests confirmed that gun had been used to shoot open the lock on the metal cabinet protecting the store's surveillance recorder.

On December 6, 1994, following directives from police, Owen Ickes persuaded Ronald Smith to accompany him to a shooting range for target practice with the .45 caliber pistol. They left Smith's apartment in Ickes' truck. En route, Ickes stopped at a convenience store and went inside, leaving Smith in the truck alone. Smith was quickly surrounded by police and arrested. After being advised of his *Miranda* rights, Smith gave a taped confession.[21]

The jury found Ronald Bert Smith, Jr. guilty of intentionally killing Casey Wilson with a pistol during a robbery in the first degree or an attempt thereof, in violation of *Alabama Code* § 13A-5-40(a)(2).

The Second Stage Sentencing Hearing

Following a recess, this Court conducted a sentencing hearing before the same twelve jurors,[22] who returned a majority verdict recommending, by a vote of 7 to 5, a sentence of life imprisonment without parole.[23]

The Third Stage Sentencing Hearing

Following preparation of a written pre-sentence investigative report,[24] this Court conducted a non-jury sentencing hearing for the purposes of receiving evidence on any portion of the report which was the subject of factual dispute,

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20 State's Exhibit No. 1.

21 State's Exhibit No. 2, *op. cit.* note 2.

22 ALA. CODE 1995 §§ 13A-5-43(d), 13A-5-45(a), 13A-5-46(b).

23 ALA. CODE 1995 § 13A-5-46(f).

24 ALA. CODE 1995 § 13A-5-47(b).

receiving non-cumulative evidence, and, hearing arguments concerning the existence or nonexistence of aggravating and mitigating circumstances and the proper sentence to be imposed in the case.[25]

Based upon the evidence presented at trial, the evidence presented during the second and third stage sentencing hearings, and the pre-sentence investigative report, this Court now proceeds to "enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in Section 13A-5-49, each mitigating circumstance enumerated in Section 13A-5-51, and any additional mitigating circumstances offered pursuant to Section 13A-5-52."[26]

Aggravating Circumstances

Only two of the eight aggravating circumstances listed in section 13A-5-49 were asserted by the State:

§ 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...."

The verdict finding defendant guilty of capital murder as charged in the indictment established this aggravating circumstance beyond a reasonable doubt.[27]

§ 13A-5-49(8) — "The capital offense was especially heinous, atrocious or cruel compared to other capital offenses."

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25 ALA. CODE 1995 §§ 13A-5-47(b), -47(c). *See also,* Joseph A. Colquitt, *Sentencing in Capital Cases,* Chapter 5 at 15-16 of a book in progress (June 1, 1995 draft distributed by the Administrative Office of Courts during the 1995 annual meeting of the Alabama Circuit Judges Association).

26 ALA. CODE 1995 § 13A-5-47(d).

27 ALA. CODE 1995 §§ 13A-5-45(c), 13A-5-50. *See also,* Joseph A. Colquitt, *Sentencing in Capital Cases, op. cit.* note 25, at 22-23:

> ... Alabama allows "doubling," *i.e.,* using the same facts to establish both the required "aggravating component" of the capital crime and the required "aggravating circumstance" to support a death sentence. Thus, a jury verdict of guilty in the guilt phase of a capital trial may establish the presence of an aggravating circumstance in the second-stage sentencing hearing without the need for further evidence. *For example, a conviction for murder during a robbery in the first degree ... establishes beyond a reasonable doubt the aggravating circumstance that the capital offense was committed while the defendant was engaged in a robbery....* [Emphasis added; citations and footnotes omitted.]

Our appellate courts have defined the key words of this statute as follows:

> ... heinous means extremely wicked or shockingly evil; ... atrocious means outrageously wicked and vile; and, ... cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies — the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Johnson v. State, 399 So.2d 859, 869 (Ala.Crim.App. 1979), *aff'd in part and rev'd in part,* 399 So.2d 873 (Ala. 1981). Applying those definitions to the evidence herein, this Court finds this aggravating circumstance to have been proven beyond a reasonable doubt.

This was an execution-style slaying. Casey Wilson was pistol-whipped and beaten into helpless submission, but Smith nevertheless killed him to avoid later identification.

> Execution-type slayings evincing a cold, calculated design to kill, fall into the category of heinous, atrocious or cruel. ... We recognize that an instantaneous death caused by gunfire is not ordinarily a heinous killing. ... *However, when a defendant deliberately shoots a victim in the head in a calculated fashion to avoid later identification, after the victim has already been rendered helpless by gunshots to the chest,* such "extremely wicked or shockingly evil" actions may be characterized as especially heinous, atrocious, or cruel. ...

Bush v. State, 431 So.2d 555, 560-561 (Ala.Crim.App. 1982) (emphasis added) (citations omitted), *aff'd,* 431 So.2d 563 (Ala. 1983), *cert. denied,* 464 U.S. 865 (1983).

Casey Wilson, on his knees, bruised, bleeding from the beating Smith inflicted, begged for his life, for his newborn son.

> Ron hit the clerk and knocked him to his knees. And then he said the guy was holding up his hand telling him to "stop, I got a baby. Stop, I got a baby, six month old baby."[28]

Those pleas prove that Wilson feared for his life, that he was in "mental agony resulting from an awareness of sure and impending death." *Lawhorn v. State,* 581 So.2d 1159, 1175 n. 7 (Ala.Crim.App. 1990), *aff'd,* 581 So.2d 1179 (Ala. 1991), *cert. denied,* 502 U.S. 970 (1991).

> Evidence as to the fear experienced by the victim before death is a significant factor in determining the existence of the aggravating circumstance that the murder was heinous, atrocious, and cruel.

White v. State, 587 So.2d 1218, 1234 (Ala.Crim.App. 1990), *aff'd,* 587 So.2d 1236 (Ala. 1991), *cert. denied,* 502 U.S. 1076 (1992). Such evidence also establishes that the crime committed was "conscienceless or pitiless" and "unnecessarily torturous to the victim," both of which undergird this aggravating circumstance. *Lawhorn v. State,* 581 So.2d at 1174; *Ex parte Whisenhant,* 555 So.2d 235, 243-244 (Ala. 1989), *cert. denied,* 496 U.S. 943 (1990).

The evidence also establishes that Smith inflicted death "with utter indifference to, *or even enjoyment of,* the suffering of" Casey Wilson. *Johnson v. State,* 399 So.2d 859, 869 (Ala.Crim.App.) (cite omitted); *aff'd in part, rev'd in part,* 399 So.2d 873 (Ala. 1981). Chad Roundtree testified that when the three returned to his apartment following the incident, Smith bragged that "you should hear the sound a body makes when the last breath goes out of it." Smith, smiling, asked Roundtree if he wanted to watch the tape of the killing. (Roundtree ordered Smith to "get the Hell out of my apartment!," and then vomited.)

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28 Testimony of Josh Zimmerman during third stage sentencing hearing. (The newborn son of Sharon and Casey Wilson actually was six *weeks* old.)

Smith did not destroy the tape. In contrast, he threw the surveillance recorder into a trash dumpster and switched barrels in his gun to thwart ballistic identification. Thus, there is merit to the State's assertion he kept it as a "trophy."[29]

Nick Mullins, who altered the pistol, confirmed Smith bragged about the slaying: he "smiled, and kind of laughed" when describing how Wilson had "pleaded for his life" before he killed him.

§ 13A-5-51 Statutory Mitigating Circumstances

(1) **"The defendant has no significant history of prior criminal activity":**

Discussion: This mitigating circumstance was asserted and proven. Defendant's only previous criminal activity was a 1990 misdemeanor: illegal possession of alcohol by a minor, for which he forfeited a cash bond to the City of Huntsville.

(2) **"The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance":**

Discussion: This circumstance was neither asserted nor established by the evidence.

(3) **"The victim was a participant in the defendant's conduct or consented to it":**

Discussion: This circumstance was neither asserted nor established by the evidence.

(4) **"The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor":**

Discussion: This circumstance was neither asserted nor established by the evidence.

(5) **"The defendant acted under extreme duress or under the substantial domination of another person":**

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29 See note 17, *supra.*

Discussion: This circumstance was neither asserted nor established by the evidence.

(6) **"The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired":**

Discussion: Defendant contends his capacity to appreciate the criminality of his conduct was substantially impaired by his physical and mental states: *i.e.,* he had imbibed quantities of Tanqueray and beer during the afternoon and evening leading up to the crime, and, he was in a seething rage over Casey Wilson's alleged relationship with "Alexis."

Any alcohol consumption was voluntary and, even according to Smith's own testimony, did not negate a specific intent to kill.[30] Smith's actions immediately following the crime, in finding a way to remove the videocassette recorder from a locked cabinet, demonstrate a thought process that was able to perceive a problem and solve it. In flight from the crime, Smith demanded that Chad Roundtree, who was out of control from fear and panic, stop the truck and let him drive; Smith then drove far better than he. Roundtree said Smith's speech was not slurred, and he was very definite in his directions. Moreover, Smith gave no indication of mental distress or gross intoxication when, only a few hours later, he reported *"as scheduled"* to his job as cashier/clerk at the Discount Food Mart on Bailey Cove Road, and where ironically:

> he was one of several employees ... the manager spoke to about robbery procedures.... *Smith reportedly gave no indication as to what had transpired less than three hours earlier.* [Pre-sentence Investigative Report, at page 5 (emphasis added).]

At all times since that date, Smith has been able to clearly recall and relate the material events that occurred prior to, during, and after the commission of the

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30 *See, e.g.,* ALABAMA PATTERN JURY INSTRUCTIONS – CRIMINAL at 3-3 (Feb. 1, 1994 Rev.).

offense. Hence, there is no convincing evidence suggesting that alcohol affected Smith to any appreciable degree.

Smith denied going into the store for the purpose of robbery, saying police had suggested that motive during interrogation and he adopted the idea because it "sounded better" than the "true reason" for his crime.[31] Smith said he went there in a seething rage, specifically intending to kill Casey Wilson for having an affair with Smith's former lover: a nude dancer at the Fantasia nightclub whose stage name was "Alexis."[32] The weight to be accorded this contention (that Smith killed while under the influence of a seething rage of jealous anger) depends, in large part, upon the credibility of Smith's assertion that Wilson had a relationship with "Alexis." That proposition is refuted by these items of evidence:

- Smith was the only witness who put Wilson either with "Alexis" or in the Fantasia nightclub.
- The dates Smith claims to have seen Wilson with "Alexis" fell during the week following the birth of Wilson's son.[33] The paternal grandparents flew to Huntsville and spent October 1-6 with their son and daughter-in-law. Except for going directly to and from work, Wilson was with his wife, son, and parents the entire time, and there was no opportunity, much less rational reason, for him to be cavorting with another woman.
- Smith never mentioned jealousy as a motive for the killing to his accomplice, Chad Roundtree, or to his roommate, Josh Zimmerman.
- Smith never discussed such a relationship or purpose for the killing during several conversations with Monique Ferguson, who knew both Smith and "Alexis," and was familiar with the nightclub scene.
- Smith never hinted at such a nexus during his taped confession. In response to the question, "So, what made you decide to rob that place?," Smith said: "To tell you the truth, I don't know."[34]

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31 Smith explained he did not want his parents to know he had killed a man over a woman.

32 Her true name is Ursula Kristine Stehle.

33 Jack Ian Cooper Wilson, born to Sharon Cooper Wilson on September 29, 1994.

34 Just prior to that point in the taped confession, Payne asked Smith: "And how did y'all decide on what to rob? Had y'all ever been there before; *did you know the guy or whatever*?" Smith replied that he had worked at the store "a while back," and then added: "*we didn't know....*" The remainder of Smith's answer is as intriguing as it is inaudible.

- Smith never asserted such a basis for his actions to *anyone,* until a few days before trial.

These uncontroverted facts strongly suggest Smith's story was a last-minute fabrication, designed to reduce his culpability from capital murder to mere murder.

For all of the foregoing reasons, this Court rejects defendant's contention that the sixth statutory mitigating circumstance was established. *Thompson v. State,* 503 So.2d 871, 881 (Ala.Crim.App. 1986), *aff'd,* 503 So.2d 887 (Ala. 1987).

(7) **"The age of the defendant at the time of the crime":**

Discussion: Smith's date of birth is January 13, 1971. He thus was two months shy of his 24th birthday on the date of this crime. He graduated from high school with honors, five and a half years before. He had an Associate of Science Degree in general education from Calhoun Community College. He was employed, and enlisted in the United States Army Reserves. He had fathered a son, who was five months old at the time. For those reasons, age is rejected as a statutory mitigating circumstance. *See, e.g., Thompson v. State, supra; Bufford v. State,* 382 So.2d 1162, 1174 (Ala.Crim.App. 1980).[35]

Nonstatutory Mitigating Circumstances

Alabama Code section 13A-5-52 provides that a defendant is entitled to offer evidence of factors in mitigation other than those specifically listed in section 13A-5-51 above.

> These mitigating considerations, known generally as non-statutory mitigating circumstances, include every aspect of the character or record of the accused, or the circumstances surrounding the offense. Examples of non-statutory mitigating

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35 *Cf.,* Jackson v. State, 516 So.2d 726, 757 (Ala.Crim.App. 1985):

> As stated by ... Blackstone, "But the law, as it now stands, and has stood at least ever since the time of Edward the third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by strength of the delinquent's understanding and judgment." *Blackstone's Commentaries,* Vol. IV, p. 23 (reprint of first edition with supplement, 1966).

> circumstances include the nature of the defendant's family and societal relationships and responsibilities, no history of acts of violence, evidence of an impoverished, unstable, or traumatic childhood, good work, military, or prison habits or record, psychological problems, drug abuse, educational difficulties, cooperation with law enforcement, good character, expressions of remorse, or personal character adjustments during the defendant's incarceration.[36]

The following non-statutory mitigating circumstances were asserted by defense counsel during the second and third stage sentencing hearings.

(1) **Prior to November 8, 1994, defendant had no history of assaultive behavior.**

(2) **Since his arrest, defendant has shown no tendencies toward violence against others.**

(3) **With the exception of the events on November 8, 1994, defendant always had been a quiet, polite individual.**

Discussion: These three are discussed together, because they are cumulative: as defense counsel said during argument, "they go hand in hand."

All evidence indicates that, during his formative years, Smith *was* a quiet, polite, respectful, even gentle young man. There nevertheless was testimony about him fighting during the year before this crime: once assaulting another patron of the Fantasia nightclub, whom he perceived to be bothering "Alexis," and on another occasion with Alexis herself. In spite of that contradictory evidence, this Court finds these mitigating circumstances to have been substantially proven, and will give them appropriate weight.

(4) **Prior to November 8, 1994, defendant had never fired a gun at anyone.**

Discussion: Smith made this assertion during the third stage sentencing hearing. (It should be contrasted with his pre-arrest boasts of being a Mafia hit man discussed *infra,* at pages 16-17.) Such conduct is expected, and is not entitled to consideration in mitigation.

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[36] Joseph A. Colquitt, *Sentencing in Capital Cases, op. cit.* note 25, at 24-25.

(5) **Defendant did not resist arrest.**

Discussion: When police approached the truck in which Smith was apprehended, he was observed by Investigator Payne to move his hand toward the .45 cal. pistol on the seat beside him. Payne warned Smith that, if he did not immediately put his hands on the dash where they could be seen, Payne would "blow his brains out." Smith complied, and did not thereafter struggle with arresting officers. For that reason, this mitigating circumstance was substantially proven, but will not be given great weight.

(6) **Defendant voluntarily confessed after being warned of his right to remain silent, without asking for the assistance of counsel.**

Discussion: This was established: Smith's statement (State's Exhibit 2) was more descriptive and forthcoming than Chad Roundtree's (State's Exhibit 7). It will be given consideration in mitigation.

(7) **Upon his arrest, defendant cooperated with law enforcement officials.**

Discussion: This was true, but it is cumulative with the foregoing circumstances. To the extent this assertion may be considered separate from (5) and (6), it is not given substantial weight: "the fact that [defendant] behaved well during the investigation and trial is to be expected and ... is not necessarily a proper factor to consider as a mitigating circumstance." *Morrison v. State,* 500 So.2d 36, 51 (Ala.Crim.App. 1985), *aff'd,* 500 So.2d 57 (Ala. 1986), *cert. denied,* 481 U.S. 1007 (1987) (decided under former § 13-11-7).

(8) **The offenses were committed while defendant was under the influence of alcohol.**

Discussion: Smith's consumption of alcohol has been fully discussed above, in relation to the sixth statutory mitigating circumstance: *supra* at pages 11-12. For

the reasons stated there, influence of alcohol as a non-statutory mitigating circumstance is rejected as not proven.

(9) **The crimes committed were out of character for defendant.**

Discussion: This statement is accurate, if one focuses only upon the years prior to Smith's graduation from high school. Smith's family regularly attended a United Methodist Church, where he was active in the Youth Fellowship. He was a Boy Scout, and attained the rank of Eagle at age 15. He joined the Order of DeMolay, and several adult leaders say he was "a very trustworthy, easy-going young man" who "rarely would lose his temper," and who generally was well-liked and respected. Family friends and neighbors maintain he was quiet, polite, and respectful. He graduated from one of the best schools in the public system with honors: a member of the National Honor Society his Junior and Senior years; awarded an "Advanced Diploma" at graduation; and offered (but refused) a three-year Naval ROTC scholarship to Auburn University.

The weight of the foregoing complex of mental and ethical traits marking Smith's formative years is lessened when one looks at the five and a half year period between his graduation from high school and the date of this crime. Once Smith left the shelter of his parents' home for the unrestricted life of a college freshman, the path of his life took a very different turn. He began to drink heavily, skipped classes, and withdrew from college before the end of the first year. He returned home, but apparently not with the contrite humility of one who had squandered both educational opportunities and his parents' financial resources. He quarreled rebelliously, eventually was "kicked out" of the household, and began to wander with other young men who were as lost as he. In a perverted effort to gain respect, Smith became a swaggering, "loud, mouth-runner," boasting of being a "hit man and

collections person" for the "Dixie Mafia": "He said he collected on gambling debts."[37] He fathered one child out of wedlock, and sank deeper into undisciplined, irresponsible conduct: drinking, and regularly "hanging out" at the Fantasia nude-dancing nightclub.

Without question, the attributes or features that make up and distinguish Smith's formative years stand in stark contrast to his adult conduct, and to this crime. They also diverge from the background of cold-blooded killers: typically products of poverty, a broken home, physical or sexual abuse, and social deprivation. Smith comes from an intact, middle-class family.[38] Yet, those characteristics cut two ways. They are concurrently mitigating *and* aggravating. Smith's background exposed him to virtually all of the values that are central to an ordered society; the awards of his youth opened avenues that pointed to a successful career based upon honest effort. But, Smith spurned society's road signs and took the way that led him to where he is today. He chose to wallow in the gutter; he was not born into it.

Therefore, while this Court accepts this non-statutory mitigating circumstance as having been substantially proven, the weight to be accorded it must be affected by all that has been said above.

(10) Defendant has adapted well to life in custody.

(11) Defendant has become a "model prisoner."

(12) While in custody, defendant has made improvements in his mental and emotional problems.

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37 Testimony of Josh Zimmerman.

38 Defendant's father made a first career in the United States Army. He retired in 1986, and since then has worked as a contract specialist for NASA's Marshall Space Flight Center. His mother has been employed as a Registered Nurse for over 30 years. The couple have been married only to each other for 26 years. They had just one biological child – the defendant – but adopted two other children: Cassie Elizabeth Smith, age 22, a senior at Auburn University; and Bryan Paul Smith, age 20, on active duty with the U.S. Army, stationed at Fort Bragg, North Carolina. The State's Attorney said of them in closing argument, "they obviously attempted to raise up a child in the way he should go, in the hope that in his adult life he would not depart therefrom."

(13) While in custody, defendant has helped other inmates.

(14) Defendant has made improvements with the help of his religious faith.

(15) In prison, defendant would be capable of helping other inmates, and thereby of making a contribution to society.

Discussion: These non-statutory circumstances asserted by defense counsel are considered together, because they are cumulative. Based upon the testimony of Madison County Deputy Sheriff Terrence Petty during the second-stage sentencing hearing, and, the testimony of Patsy Wilson and defendant during the third-stage hearing, this Court finds all to have been proven. These six — together with those mitigating circumstances discussed in (1)–(3), (5)–(7) above — all indicate Smith could be integrated into long-term prison life without significant difficulty, and with reasonable expectations that he would function well in a penal institution.

(16) Defendant is "treatable" in a prison setting.

Discussion: This is cumulative, but is rejected as a separate mitigating circumstance. "In capital sentencing decisions, ... rehabilitation plays no role...." *Harris v. Alabama,* ___ U.S. ___, 115 S.Ct. 1031, 1038 (1995) (Stevens, J., dissenting).

(17) Defendant is remorseful.

Discussion: Smith's swaggering and boasting after this murder, his demeanor when questioned by Investigator Payne,[39] and his testimony refute this contention. It is rejected as a mitigating circumstance. *See, Ex parte Harrell,* 470 So.2d 1309, 1318 (Ala.), *cert. denied,* 474 U.S. 935 (1985).

(18) Defendant has made attempts to determine why he committed this offense in an effort to help himself and to prevent any further acts of violence by himself.

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[39] Investigator Payne testified that Smith "was" cooperative during interrogation, but that he "never" exhibited sorrow or remorse.

Discussion: There is not a great deal of evidence to support this assertion and, in any event, it is cumulative. Hence, it is due little, if any weight.

In addition to the non-statutory mitigating circumstances asserted by defense counsel, this Court notes the following circumstances which are suggested by the evidence or pre-sentence investigative report.

(19) **Defendant served in the United States military.**

Discussion: Smith joined the United States Army Reserves in 1990. His awards are noted in the pre-sentence investigative report, at page 6. In a letter to this Court, Smith's Platoon Sergeant described him as "nothing but a model soldier" who "was always uplifting to his platoon in times of hard and stressful training."

(20) **Defendant had a good work record.**

Discussion: In all jobs held after leaving the University of Alabama in Tuscaloosa (see pages 5-6 of the pre-sentence investigative report), Smith was considered by supervisors to be a good, dependable, caring, helpful, and cooperative employee.

(21) **Defendant has a child.**

Discussion: Defendant is the father of Jonathan David Smith, born to Tracie Lee Ann Taylor on June 22, 1994. Prior to his arrest, Smith paid weekly child support without court order. Any weight that might be accorded this circumstance, however, is offset by the fact that Smith showed no mercy in response to Casey Wilson's pleas for his own son.

Weighing Aggravating and Mitigating Circumstances

In summary, this Court has found that two aggravating circumstances were established by the evidence, beyond a reasonable doubt. Those have been compared to and weighed against: one statutory mitigating circumstance; sixteen non-statutory mitigating circumstances; and, the advisory verdict of the jury recommending that defendant be sentenced to life without parole. Each aggravating and mitigating circumstance is discussed at length in the previous pages and will not be reiterated here, except to add that, in the judgment of this Court, none of the mitigating circumstances, individually or collectively, are entitled to great weight, especially when considered in relation to the nature of this crime. The jury recommendation, by a majority vote of 7 jurors for life and 5 jurors for death, that defendant be sentenced to life imprisonment without eligibility for parole has been given a weight commensurate with the jury's vote division.

Therefore, following careful and deliberate consideration of all circumstances, this Court is convinced beyond a reasonable doubt that the aggravating circumstances substantially outweigh the mitigating circumstances and jury verdict.

The savage brutality of this killing is shocking. Defendant's acts demonstrate a pitiless indifference to Casey Wilson's fear, pain and suffering, and pleas for life. The most chilling and heinous aspect of this crime is that defendant, unquestionably, enjoyed and reveled in his vile acts.

The United States Supreme Court has recognized that "certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Gregg v. Georgia,* 428 U.S. 153, 184 (1976). This is such a crime. In the judgment of this Court, the only penalty which adequately reflects the

gravity of the offense, promotes respect for the law, and provides just punishment for the defendant is death.

ORDER OF SENTENCE

Accordingly, it is ORDERED, ADJUDGED, and DECREED that defendant, Ronald Bert Smith, Jr., be, and he hereby is, sentenced to death by electrocution as punishment for the capital offense of which he has been adjudged guilty. The date, place, and time of such execution shall be determined hereinafter by the Supreme Court of Alabama in accordance with Rule 8(d)(1) of the *Alabama Rules of Appellate Procedure.*

In accordance with the provisions of *Alabama Code* §§ 12-22-150, 13A-5-55, it is entered of record that defendant appeals from said judgment of conviction and the sentence of death hereby imposed.

It is further ORDERED that execution of sentence be stayed, pending said appeal.

Finally, this Court shall, by separate order, appoint new counsel to represent defendant on such appeal (who shall be different from defendant's trial counsel, in order that all issues, including the effectiveness of trial counsel, may be raised on such appeal) and provide a free transcript of all proceedings herein.

DONE and ORDERED this 6th day of October, 1995.

Lynwood Smith
Circuit Judge

Distribution:

Col. Kenneth T. Taylor, Deputy District Attorney
Karen Kimbrell Hall, Assistant District Attorney
Richard Kempaner, Attorney for Defendant
Jackie D. Ferguson, Attorney for Defendant
Ronald Bert Smith, Jr., Defendant
Sheriff of Madison County