Nos. 16-7070

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

MOTION FOR RECONSIDERATION OF DENIAL OF APPLICATION FOR A STAY

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PRELIMINARY STATEMENT

The Court released an order earlier today from which it appears that four, Justices favor review of Mr. Smith's petition for writ of certiorari, but he did not receive five votes to stay of Mr. Smith's impending execution. Because the Court's inconsistent practices respecting 5-4 stay denials in capital cases clash with the appearance and reality both of equal justice under law and of sound judicial decision-making, Mr. Smith asks this Court to reconsider the Court's denial of his application for a stay of execution.

MOTION FOR RECONSIDERATION

It is unclear whether, as happened in *Arthur v. Dunn*,[1] this Court has returned to the practice of staying executions when four Justices would grant certiorari but there are not five votes for a stay of execution. The order denying Mr. Smith a stay of execution contains no notation that four Justices would grant certiorari in his case, but that provides little illumination because the Court has followed inconsistent practices with respect to the circulation of stay applications and certiorari petitions in capital cases in which both documents arrive here contemporaneously.[2] Regardless of the technicalities of the Rule of Four, the Court should not permit executions in the face of four dissents. Where capital cases arrive here by certiorari, the Members of the Court should have as much time for consideration as they would in any other case.

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[1] No. 16-602.

[2] Eric M. Freedman, *Idea: No Execution if Four Justices Object*, 43 Hofstra L. Rev. 639, 645 (2015); *See also id.* at 655-56 & 655 n. 67 (providing recent examples and calling on Court to explain "the seemingly disparate treatment of identically-situated litigants).

A. The Public Interest Requires This Court to Clarify the Relationship Between the Rule of Four and This Court's Stay Practice in Capital Cases.

The Rule of Four, which is over 80 years old, first came to public attention when a number of Justices -- in an effort to get Congress to increase this Court's discretionary jurisdiction and decrease its mandatory jurisdiction -- testified as to their painstaking procedures in reviewing discretionary petitions, "in order to demonstrate that the discretionary docket was being processed in a responsible, nonarbitrary way."[3] As of the time Justice Stevens wrote, twenty to thirty percent of the cases on this Court's docket were placed there as a result of the Rule,[4] which "increases the likelihood that an unpopular litigant, or an unpopular issue, will be heard in the country's court of last resort."[5]

Whether this tilt be desirable or no, all certiorari petitioners, public and private parties in civil and criminal cases of every kind, are entitled to the benefits of it -- except certiorari petitioners like Mr. Smith, a capital prisoner whose execution the state has scheduled for a time before this Court's schedule will permit it to reach the merits. Such a petitioner, unlike any other, must not only persuade four Justices that the case is worthy of certiorari review, but obtain the vote of a fifth Justice for a stay of execution if his success in obtaining review is to have any practical significance.

In other words, every litigant in the country gets the benefit of the Rule of Four, except those whose claims should have the highest call on the judicial

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[3] John Paul Stevens, *The Life Span of Judge-Made Rule*, 58 N.Y.U. L. Rev. 1, 10-12 (1983).

[4] *Id.* at 17.

[5] *Id.* at 21.

conscience. As has been repeatedly documented, the claims presented on federal habeas corpus by capital prisoners are overwhelmingly more likely to be meritorious than those of non-capital prisoners. The most recent statistics show that capital prisoners' federal habeas corpus petitions succeed approximately 47% of the time, compared to 3.2% for non-capital ones.[6] This vastly higher likelihood of constitutional error in Death Row cases casts the gravest doubt on the appropriateness of procedures of this Court that tend to differentially reduce the likelihood that they will be reviewed.

For that reason, there was general approval among the profession for the proposal of the Judicial Conference committee headed by retired Justice Powell that stays of execution be automatic through the conclusion of one full round of federal habeas corpus proceedings. *See* Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 Am. U. L. Rev. 1, 10-11 (1990) (reprinting American Bar Association policy in favor of proposal); Association of the Bar of the City of New York, *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 Rec. Assoc. Bar City N.Y. 848, 855 (1989) (supporting proposal). Justices Stevens and Ginsburg are on record as endorsing this proposal, *see Emmett v. Kelly*, No. 06-11622 (Oct. 1, 2007) (statement of Stevens, J. respecting denial of certiorari).

Perhaps mindful of these considerations, the Court at one time had a practice

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[6] *See* 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 27 n. 27(6th ed. 2011) (reviewing studies).

of staying executions in capital cases in which four Justices would grant certiorari, a practice that it abandoned in 1990.[7] In subsequent years, there has been no clarification from this Court. There has, rather, been a confusing pattern of results[8] that have led commentators to look for patterns that may exist,[9] or may not,[10]

B. Regardless of the technicalities of the Rule of Four, the Court should not permit executions in the face of four dissents

Even if it is true that the current Court will grant a stay once four Justices are ready to commit to a grant of certiorari, this is solution is unresponsive to the bulk of the problem either as an institutional or an individual matter.

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[7] *See Straight v. Wainwright*, 476 U.S. 1132, 1133 n. 2 (1986) ("[T]he court has ordinarily stayed executions where four Members have voted to grant certiorari"); *compare, e.g., Darden v. Wainwright*, 473 U.S. 928 (1985) (following this practice) *with Hamilton v. Texas*, 497 U.S. 1016 (1990) *and Herrera v. Collins*, 502 U.S. 1085 (1992) (not following it). In the immediate wake of the Court's action in these two cases, Hamilton was executed, *see Hamilton v. Texas*, 498 U.S. 908 (1990), while Herrera, who obtained a subsequent stay in state court, see *Ex parte* Herrera, 828 S.W.2d 8, 9 (Tex. Crim. App. 1992) (en banc), survived to receive review on the merits, *Herrera v. Texas*, 506 U.S. 390 (1993).

[8] Clarence Edward Hill was executed on September 20, 2006 following this Court's 5-4 stay denial that day in *Hill v. McDonough*, 548 U.S. 940, 127 S.Ct. 34, *cert. den'd* 549 U.S. 987, 127 S.Ct. 465 (Oct. 16, 2006); *see* Ron Word, *Killer Who Argued Lethal Injection Cruelty is Executed; Supreme Court Votes 5-4 Against Another Stay*, Houston Chronicle, Sept. 21, 2006, at A4, while Christopher Scott Emmett, who was denied a stay by a 5-4 vote in this Court on June 13, 2007 received one from the Governor of Virginia, which enabled the Court to consider his certiorari petition in ordinary course. *See* note 7, supra. He was therefore alive to receive the benefit of this Court's issuance of a stay in *Emmett v. Johnson*, 552 U.S. 987(Stay granted Oct. 17, 2007) (No. 07-A304).

[9] *See* Tom Goldstein, Supreme Court Stays, http://www.scotusblog.com/wp/2007/10/ (Posted Oct. 13, 2007) (suggesting that practice has changed since the early 1990's and Court will now issue stay where four Justices are ready to grant certiorari, but not where they only wish time for further consideration).

[10] *See* Eugene Gressman, Kenneth S. Geller, Stephen M. Shapiro, Timothy S. Bishop, and Edward A. Hartnett, Supreme Court Practice 932 (10th ed. 2013); Adam Liptak, *Execution Case Highlights the Power of One Vote*, N.Y. Times, Jan. 25, 2015, at A13 (commenting on case of Charles Warner, who was denied a stay of execution by 5-4 vote, *see Warner v. Gross*, 135 S. Ct. 824 (2015) eight days before certiorari was granted in case in which he had been lead plaintiff, *see Glossip v. Gross*, 190 L. Ed. 2d 929 (2015)); Adam Liptak, *4 Votes Get a Man to Court. 4 Votes Let Him Die First*, N.Y. Times, Oct. 8, 2007, at A13 (discussing Court's 5-4 stay denial of August 23, 2007, in *Williams v. Allen*, 551 U.S. 1183 (2007), a case which raised lethal injection challenges that the Court agreed on September 25, 2007, to review in *Baze v. Rees*, 551 U.S. 1192, 1192-93 (2007)).

From the individual perspective, not only are capital petitioners entitled to at least the degree of thoughtful consideration of their certiorari petitions as other litigants but the present injustice does not even fall impartially on every capital inmate. It affects exclusively capital inmates like Mr. Smith who have a near-term execution date. This is precisely the sort of arbitrary factor that should be anathema when life is at stake.

The best publicly-available information is that four votes are sufficient to "hold" a case in which certiorari is being sought until the Court disposes of a pending case that it has already agreed to review.[11]

The justification for a sub-majority rule is that it is difficult to predict in advance the contours of recent decisions from the Court. That justification applies with at least as much force in capital cases under warrant as any others.[12] This case vividly illustrates the problem. Smith's stay application is premised on this Court's decision in *Hurst v. Florida*.[13] There are at least three other cases from Alabama pending before this Court with various issues related to *Hurst*'s applicability to Alabama's capital sentencing statute.[14] One of those cases is to be conferenced the day after Mr. Smith's scheduled execution.[15]

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[11] *See* Mark Tushnet, *"The King of France With Forty Thousand Men": Felker v. Turpin and the Supreme Court's Deliberative Processes*, 1996 Sup. Ct. Rev. 163, 181.

[12] *See When A Tie Vote Means Death,* N.Y. Times, Jan. 18, 1988, http://www.nytimes.com/1988/01/18/opinion/when-a-tie-vote-means-death.html (editorially condemning an "anomaly in the Court's rules" that denies the benefit of holds to prisoners under warrant).

[13] 136 S.Ct. 616 (2016).

[14] *Arthur v. Alabama*, 16-595; *Bohannon v. Alabama*, No. 16-6746; *Shaw v. Alabama*, No. 16-5726.

[15] *Arthur v. Alabama*, 16-595. The other two have not been scheduled for conference.

Again, only the warrant of execution obtained by the state stands in the way of the Court considering this case in accordance with its normal judicious procedure and Mr. Smith from being alive to benefit from the clarification of the law that must come from this Court's resolution of the questions raised in these other cases.

CONCLUSION

The Court should enter an order granting reconsideration and stay Mr. Smith's execution pending the later of (a) the disposition of the petitions for certiorari in *Bohannon v. Alabama*, *Shaw v. Alabama*, and *Arthur v. Alabama*, or (b) the disposition of Mr. Smith's petition for certiorari in No. 16-7070.

Respectfully submitted,

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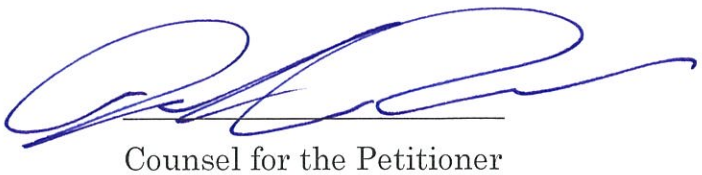
Certification of Counsel Pursuant to Rule 44.2

I certify that the foregoing Motion for Reconsideration of Denial of Application for Stay of Execution is presented in good faith and not for delay. I further certify that the grounds of the motion are intervening circumstances of a substantial or controlling effect — namely, the indication of four Justices that they would grant the stay of execution — and that such grounds have not been previously presented in support of the entry of a stay.



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