

Attachment A

Kelley's second cert
petition to the Alabama
Supreme Court

NO. 1131451

IN THE ALABAMA SUPREME COURT

EX PARTE KELLEY)
)
IN RE:) On Petition for Writ of
MICHAEL BRANDON KELLEY,) Certiorari to the
) Court of Criminal
) Appeals, CR-10-0642
Appellant,) (following remand to the
) Court of Criminal Appeals)
v.)
)
STATE OF ALABAMA,) On Appeal from the
) St. Clair County Circuit
Appellee.) Court, CC-09-73
)
)

**PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS**

Mark Loudon-Brown
LOU-004
mloudonbrown@schr.org
Patrick Mulvaney
MUL-027
pmulvaney@schr.org
Southern Center for Human Rights
83 Poplar Street NW
Atlanta, Georgia 30303
Tel: (404) 688-1202
Fax: (404) 688-9440

*Counsel to
Michael Brandon Kelley*

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

PROCEEDINGS BELOW 1

 GROUNDS FOR ISSUANCE OF THE WRIT 4

 I. THE COURT OF CRIMINAL APPEALS ERRONEOUSLY
 DISMISSED AN APPEAL THAT WAS NEVER TAKEN..... 4

CONCLUSION 7

APPENDIX

 EXHIBIT A Statement of Facts Presented to the
 Court of Criminal Appeals in Mr.
 Kelley's Application for Rehearing

 EXHIBIT B Court of Criminal Appeals
 Decision Following Remand

 EXHIBIT C Denial of Application for Rehearing

 EXHIBIT D Original Petition for Writ
 of Certiorari

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases

Ex parte David Eugene Davis,
No. 1131171 (Feb. 24, 2015) 3

Ex parte Michael Brandon Kelley,
No. 1131451 (Feb. 24, 2015) 2

Ex parte Michael Brandon Kelley, No. 1131451,
2015 WL 6828772 (Ala. Nov. 6, 2015) passim

Ex parte Michael Brandon Kelley,
No. 1131451 (Ala. Nov. 24, 2015) 5

Ex parte Michael Brandon Kelley,
No. 1131451 (Ala. June 21, 2016) 4

Ex parte Watkins, 109 So. 2d 671 (Ala. 1959) 6

Kelley v. State, No. CR-10-0642, 2014 WL 4387848
(Ala. Crim. App. Sept. 5, 2014) 1, 2

Kelley v. State, No. CR-10-0642, 2016 WL 3148447
(Ala. Crim. App. June 3, 2016) 3, 5

Kelley v. State, No. CR-10-0642
(Ala. Crim. App. March 17, 2017) 4

Rules

Ala. R. App. P. 39 passim

Ala. R. App. P. 40 3, Exhibit A

INTRODUCTION

Petitioner Michael Brandon Kelley respectfully requests that this Court grant a writ of certiorari to review the decision of the Alabama Court of Criminal Appeals dated March 17, 2017, which followed this Court's remand. In addition, Mr. Kelley respectfully requests that this Court grant a writ of certiorari on all of the claims still pending from his original petition for writ of certiorari, which this Court has not yet addressed.

PROCEEDINGS BELOW

Michael Brandon Kelley was found guilty of two counts of capital murder and one count of sexual torture.¹ (R. 934.) He was sentenced to death on each count of capital murder. (R. 984-85.) He has never been sentenced, however, on the count of sexual torture.

Mr. Kelley appealed the two capital convictions for which a sentence was imposed. The Court of Criminal Appeals affirmed his two capital murder convictions. *Kelley v. State*, No. CR-10-0642, 2014 WL 4387848 (Ala.

¹ Pursuant to Ala. R. App. P. 39, the Statement of Facts presented to the Court of Criminal Appeals in Mr. Kelley's Application for Rehearing is verified and attached as Exhibit A.

Crim. App. Sept. 5, 2014).² The Court also purported to affirm his sexual torture conviction. *Id.* at *1, n.1. However, because Mr. Kelley was not sentenced for sexual torture, that count was not ripe for appeal, and he did not appeal that count. Mr. Kelley made this argument in his application for rehearing before the Court of Criminal Appeals. *Id.*

In his original petition for certiorari to this Court, Mr. Kelley raised this claim as well as ten other claims.³ This Court granted Mr. Kelley's petition for certiorari "solely to determine whether the Court of Criminal Appeals lacked jurisdiction to review Kelley's sexual-torture conviction." *Ex parte Michael Brandon Kelley*, No. 1131451, 2015 WL 6828772, at *1 (Ala. Nov. 6, 2015). This Court did not grant or deny – and has never granted or denied – certiorari as to the other ten claims Mr. Kelley raised in his petition. *Compare* Order, *Ex parte Michael Brandon Kelley*, No. 1131451 (Feb. 24, 2015) ("IT IS ORDERED that

² This opinion, denying rehearing, substituted the opinion that had previously been issued on March 14, 2014, and that prior opinion was withdrawn. *Id.* at *1.

³ For the Court's convenience, Mr. Kelley's original petition for writ of certiorari is attached to this petition as Exhibit D.

the petition for writ of certiorari is granted as to Ground I.”), with Order, *Ex parte David Eugene Davis*, No. 1131171 (Feb. 24, 2015) (“IT IS ORDERED THAT the petition for writ of certiorari is granted as to Grounds I and II; Writ Denied as to all other grounds.”).

This Court held that the “Court of Criminal Appeals lacked jurisdiction to review Kelley’s sexual-torture conviction,” and therefore “reverse[d] the Court of Criminal Appeals’ judgment insofar as it affirms Kelley’s sexual-torture conviction.” *Ex parte Kelley*, 2015 WL 6828772, at *7. The Court remanded the case. *Id.*

Following this Court’s decision and remand, the Court of Criminal Appeals issued an opinion purporting to dismiss Mr. Kelley’s appeal from the conviction for sexual torture. *Kelley v. State*, No. CR-10-0642, 2016 WL 3148447 (Ala. Crim. App. June 3, 2016) (attached as Exhibit B). Mr. Kelley timely sought rehearing of that opinion pursuant to Rule 40 of the Alabama Rules of Appellate Procedure, arguing that because Mr. Kelley was never sentenced on the

sexual torture count, he never appealed that count, and there was no appeal pending for the court to dismiss.⁴

On March 17, 2017, the Court of Criminal Appeals overruled Mr. Kelley's application for rehearing. *Kelley v. State*, No. CR-10-0642 (Ala. Crim. App. March 17, 2017) (attached as Exhibit C). Mr. Kelley now timely seeks certiorari as to that adverse ruling and also requests that this Court now consider the remaining claims that this Court has not yet addressed in his original petition for certiorari.

GROUND FOR ISSUANCE OF THE WRIT

I. THE COURT OF CRIMINAL APPEALS ERRONEOUSLY DISMISSED AN APPEAL THAT WAS NEVER TAKEN.

On November 6, 2015, this Court held, in *Ex parte Kelley*, 2015 WL 6828772, at *3, that "[b]ecause a judgment of conviction was not entered for th[e sexual-torture] offense, Kelley's sexual-torture conviction was not ripe for appeal." Accordingly, "[t]he Court of Criminal Appeals

⁴ Simultaneous with his application for rehearing, Mr. Kelley also filed, out of an abundance of caution, a "Motion for this Court to Address the Remainder of the Petition for Writ of Certiorari to the Court of Criminal Appeals at the Appropriate Time." That Motion was denied on June 21, 2016. *Ex parte Michael Brandon Kelley*, No. 1131451 (Ala. June 21, 2016).

lacked jurisdiction to review Kelley's sexual-torture conviction." *Id.* at *7. On November 24, 2015, this Court entered a certificate of judgment, reversing the case in part and remanding. *Ex parte Michael Brandon Kelley*, No. 1131451 (Ala. Nov. 24, 2015) (reversing in part and remanding).

On June 3, 2016, the Court of Criminal Appeals issued a decision purporting to dismiss Mr. Kelley's appeal as to the sexual torture count. *Kelley v. State*, 2016 WL 3148447. Mr. Kelley timely filed a motion to reconsider that ruling, arguing that the Court of Criminal Appeals could not dismiss an appeal that was never taken. Rather, Mr. Kelley argued, the appellate court should have remanded the case to the trial court for sentencing as to the sexual torture conviction. On March 17, 2017, the Court of Criminal Appeals denied Mr. Kelley's request for rehearing.

As Mr. Kelley consistently has argued, unless and until he is sentenced for sexual torture, he is in no position to appeal the proceedings relating to that count and never has. *See Ex parte Kelley*, 2015 WL 6828772, at *4 ("not only could Kelley not have appealed his sexual-torture conviction, but he also did not attempt to do so"). There

was no appeal of the sexual torture count pending to begin with, so there was no such appeal for the Court of Criminal Appeals to dismiss. *Ex parte Watkins*, 109 So. 2d 671, 673 (Ala. 1959) ("A court's jurisdiction and power until invoked lie dormant, and if the court proceeds in a manner in which its jurisdiction has not been invoked . . . the proceedings are without jurisdiction . . ."). The decision of the Court of Criminal Appeals below, therefore, conflicts with the prior decisions of this Court. See Ala. R. App. P. 39(a)(1)(D)(1).

Accordingly, pursuant to Alabama law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, this Court should reverse the decision of the Court of Criminal Appeals insofar as it addresses an appeal that was never pending and remand the case with instructions to the Court of Criminal Appeals to remand the case to the trial court so Mr. Kelley can be sentenced on the sexual torture count.

Mr. Kelley also respectfully requests that the Court address the remaining claims presented in his original petition for certiorari, which have not yet been ruled upon, and grant certiorari in this death penalty case

pursuant to Alabama law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The original petition is attached as Exhibit D for this Court's convenience and is hereby incorporated by reference.

CONCLUSION

Pursuant to Alabama Rule of Appellate Procedure 39, Alabama law, and the federal Constitution, and for all of the reasons set forth above and in the attached and incorporated original petition for certiorari, Mr. Kelley respectfully requests that this Court grant certiorari in this death penalty case.

Respectfully submitted,

/s/ Mark Loudon-Brown

Mark Loudon-Brown

LOU-004

mloudonbrown@schr.org

Patrick Mulvaney

MUL-027

pmulvaney@schr.org

Southern Center for Human Rights

83 Poplar Street NW

Atlanta, Georgia 30303

Tel: (404) 688-1202

Fax: (404) 688-9440

Counsel to

Michael Brandon Kelley

Dated: March 29, 2017