

Attachment B

Kelley's motion to the
Alabama Supreme Court
to address the remainder
of this cert petition

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,
Appellant,)	CR-10-0642
)	
v.)	On Appeal from
)	St. Clair County
STATE OF ALABAMA,)	Circuit Court, CC-09-73
)	
Appellee.)	

**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**

Michael Brandon Kelley respectfully moves this Court, pursuant to Rule 27 of the Alabama Rules of Appellate Procedure, to address the remainder of his previously-filed petition for writ of certiorari at the appropriate time.

In support of this Motion, Mr. Kelley states as follows:

1. Mr. Kelley was found guilty of two counts of capital murder and one count of sexual torture, and was subsequently sentenced to death for the two capital counts,

but has never been sentenced for the sexual torture count. (R. 934; 984-85.) Having not been sentenced for sexual torture, Mr. Kelley did not seek to invoke the jurisdiction of the Court of Criminal Appeals as to that count. Nevertheless, in *Kelley v. State*, No. CR-10-0642, 2014 WL 4387848, at *1 n.1 (Ala. Crim. App. Sept. 5, 2014), the Court of Criminal Appeals affirmed the sexual torture conviction, finding that it did have jurisdiction over that count.

2. 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 Kelley*, No. 1131451, 2015 WL 6828772, at *1 (Ala. Nov. 6, 2015). 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." *Id.* at *7.

3. On June 3, 2016, in *Kelley v. State*, No. CR-10-0642, 2016 WL 3148447 (Ala. Crim. App. June 3, 2016), the Court of Criminal Appeals issued an opinion purporting to

dismiss Mr. Kelley's appeal in part, specifically, the appeal from the sexual torture conviction.

4. As stated above, Mr. Kelley never sought to appeal the sexual torture count because sentence was never imposed on that count. And as this Court held, the Court of Criminal Appeals has never had jurisdiction over the sexual torture count. Accordingly, simultaneous with this filing Mr. Kelley is timely requesting rehearing before the Court of Criminal Appeals pursuant to Rule 40 of the Alabama Rules of Appellate Procedure. That application is attached as Attachment A.

5. Pursuant to Rule 40(a), however, only a party who "has not prevailed may apply for a rehearing," so this Motion is necessary in the event that Mr. Kelley is deemed to have been the "prevailing" party before the Court of Criminal Appeals. Should Mr. Kelley's time within which to seek further discretionary review from this Court not be tolled by his application for rehearing below, he requests that this Court address the remainder of his original petition for certiorari.

6. Alternatively, Mr. Kelley requests that once he is properly sentenced for sexual torture and has completed his

appeal of that count before the Court of Criminal Appeals,
he be permitted to proceed with his petition for writ of
certiorari in this Court. Only at that time will the
entire case be properly before this Court.

WHEREFORE, for these reasons and for any other reasons
that should appear to this Court, Mr. Kelley respectfully
requests that this Motion be granted.

Respectfully submitted,

/s/ Patrick Mulvaney
PATRICK MULVANEY, #MUL-027
Email: pmulvaney@schr.org

MARK LOUDON-BROWN,
Pending admission pro hac vice
Email: mloudonbrown@schr.org

Southern Center for Human Rights
83 Poplar Street NW
Atlanta, Georgia 30303
Phone: 404-688-1202
Fax: 404-688-9440

Counsel for
Michael Brandon Kelley