

No. 17-6397

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL BRANDON KELLEY,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for Writ of Certiorari
to the Alabama Court of Criminal Appeals

**REPLY TO ALABAMA'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

MARK LOUDON-BROWN
PATRICK MULVANEY
SOUTHERN CENTER
FOR HUMAN RIGHTS
83 Poplar Street NW
Atlanta, GA 30303
Phone: (404) 688-1202
Fax: (404) 688-9440
mloudonbrown@schr.org
pmulvaney@schr.org

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**REPLY TO ALABAMA’S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

I. KELLEY’S PETITION IS TIMELY.

The State argues that this Court lacks jurisdiction because Kelley’s petition is untimely. Alabama Br. at 10-17. The State is incorrect.

Kelley was not required to file a petition for certiorari following the Alabama Supreme Court’s order remanding his case in November of 2015. This Court’s Rule 13.1 states:

A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

The Alabama Supreme Court did not issue an order denying discretionary review in 2015. Rather, the only order in which Alabama’s highest court denied discretionary review was entered on May 19, 2017, from which Kelley sought certiorari.

The State suggests that the Alabama Supreme Court’s grant of certiorari as to one claim in February of 2015 constituted an implicit denial of other claims in his petition,¹ but it does not contend that Kelley should have sought certiorari in this

¹ The State cites a concurrence in *Ex parte Hinton*, 172 So. 3d 332 (Ala. 2008), for the proposition that a grant of review as to one ground constitutes a denial as to others. Alabama Br. at 10. However, the decision in *Hinton* had nothing to do with splitting a case into pieces based on some type of implicit denial of certiorari. Moreover, the very same day that the court granted certiorari in Kelley’s case with the statement, “IT IS ORDERED that the petition for writ of certiorari is granted as to Ground I,” Order, *Ex parte Kelley*, No. 1131451 (Ala. Feb. 24, 2015), it issued an order in another capital case that stated: “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.*” Order, *Ex parte Davis*, No. 1131171 (Ala. Feb. 24, 2015) (emphasis added).

Court within ninety days of that order.² Instead, the State argues that Kelley’s time to file a petition with this Court began to run on November 24, 2015, the day the Alabama Supreme Court issued its certificate of judgment *remanding* the case. Alabama Br. at 13-14.³ But the judgment of November 24, 2015, reversed and remanded the case; it did not affirm anything, it did not finalize anything, and it was not a denial of discretionary review.

Nor did the Court of Criminal Appeals issue a certificate of judgment affirming Kelley’s convictions and death sentence in response to the Alabama Supreme Court’s decision in November of 2015.⁴ This is because the Alabama Supreme Court *remanded the case*. On remand, the Court of Criminal Appeals dismissed Kelley’s appeal in part. *Kelley v. State*, No. CR-10-0642, 2016 WL 3148447, at *1 (Ala. Crim. App. June 3, 2016). That is, the court dismissed the part of the appeal that related to the sexual torture count but left intact the capital convictions and death sentence. Kelley then sought certiorari in the Alabama Supreme Court. That request was denied, and only then did the Court of Criminal

² Nor could it, as the Alabama Supreme Court addressed an argument involving the capital convictions when it issued its decision in November of 2015. *Ex parte Kelley*, No. 1131451, 2015 WL 6828772, at *6-7 (Ala. Nov. 6, 2015).

³ The State also claims that after the Alabama Supreme Court issued its certificate of judgment remanding the case in 2015, “Kelley waited.” Alabama Br. at 13. But Kelley did not “wait.” Kelley litigated the reversed and remanded case in the lower court and then returned to the Alabama Supreme Court when he had the opportunity to do so.

⁴ A certificate of judgment from the Alabama Court of Criminal Appeals is required for a final judgment under Alabama law. *See* Ala. R. App. P. 41; Ala. R. Crim. P. 32.2(c); *Ex parte State*, 566 So. 2d 758, 759 n.2 (Ala. 1990) (“A judgment of the Court of Criminal Appeals is not final until that court issues its certificate of judgment”); *Pratte v. State*, 465 So. 2d 483, 484 (Ala. Crim. App. 1985) (“A judgment of this court is not final until the certificate of judgment is issued”).

Appeals issue the only certificate of judgment it has ever issued in the case. Kelley then timely sought certiorari in this Court.

Finally, the State's argument is premised on the false claim that Kelley's petition for a writ of certiorari in the Alabama Supreme Court raised "only" an issue regarding his sexual torture conviction and not any *Batson*⁵ claim relating to his capital convictions. Alabama Br. at 8, 10, 13, 16. That is wrong, as Kelley explicitly asked the court below to review his *Batson* claim as it related to the capital convictions. In his original petition, filed prior to the remand proceedings, Kelley argued that the record raised an inference of racial discrimination in jury selection, thus entitling him to a remand for a *Batson* hearing. Pet. at 133-56. In his subsequent petition, filed following remand proceedings, he again raised his *Batson* argument in the court below:

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.

Alabama Br. App. A at 6-7. Accordingly, the petition below raised the *Batson* claim, Kelley's petition was timely, and this Court has jurisdiction.

⁵ *Batson v. Kentucky*, 476 U.S. 79 (1986).

II. THE ALABAMA COURT OF CRIMINAL APPEALS STATED EXPRESSLY THAT IT CONSIDERED KELLEY'S STEP ONE *BATSON* CLAIM UNDER THE CONSTITUTIONAL STANDARD.

The Alabama Court of Criminal Appeals explicitly applied *Batson*, *Kelley v. State*, No. CR-10-0642, 2014 WL 4387848, at *16-19 (Ala. Crim. App. Sept. 5, 2014), and held that Step 1 of the *Batson* inquiry was not satisfied, *id.* at *19. Yet the State of Alabama again seeks to hide the Alabama court's constitutional error behind state plain error review. This argument succeeded in *Floyd v. Alabama*, where at least two justices of this Court nevertheless found the facts "sufficiently troubling" and noted that a failure to grant certiorari is not an affirmance of the reasoning below. 138 S. Ct. 311 (2017) (Sotomayor, J., respecting the denial of certiorari).

The State's attempt to avoid the finding of a constitutional error in this case should fail, however, because the Court of Criminal Appeals applied the same Step 1 standard during its review that this Court applies to a Step 1 analysis under federal law. *See Foster v. Chatman*, 136 S. Ct. 1737, 1746-47 (2016) (reaching the merits because the state court's application of res judicata was not independent of the merits of the federal constitutional claim). The ruling of the Court of Criminal Appeals in this case hinged entirely on whether *Batson* Step 1 was satisfied, rather than any issue of state law. In addition, whereas *Floyd* addressed the fact-heavy weighing inquiry involved in Step 3 of the *Batson* inquiry, all Kelley requests is an acknowledgment that Step 1 of *Batson* was satisfied in this case given that, among

the other reasons set out in his Petition for Writ of Certiorari, the prosecution struck 100% of the prospective black jurors.

The Alabama courts have not been “steadfast in identifying, investigating, and correcting for improper bias in the jury selection process.” *Floyd*, 138 S. Ct. at 311 (Sotomayor, J., respecting the denial of certiorari). Rather than identifying improper bias, the Court of Criminal Appeals stated its belief that the race of the jurors was of no concern in this case, since both the defendant and the decedent were white. *Kelley v. State*, No. CR-10-0642, 2014 WL 4387848, at *18. Thus, the Court should summarily reverse and remand for a Step 2 inquiry.

CONCLUSION

For the foregoing reasons, this Court should grant Kelley’s petition for writ of certiorari, summarily reverse the judgment of the Alabama Court of Criminal Appeals, and remand the case for a *Batson* hearing.

Respectfully submitted,

MARK LOUDON-BROWN
PATRICK MULVANEY
SOUTHERN CENTER
FOR HUMAN RIGHTS
83 Poplar Street NW
Atlanta, GA 30303
Phone: (404) 688-1202
Fax: (404) 688-9440
mloudonbrown@schr.org
pmulvaney@schr.org

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with Supreme Court Rule 29, on January 2, 2018, I served a copy of the foregoing via first-class mail, postage prepaid, and via email, upon counsel for the Respondent:

Stephen M. Frisby
Assistant Attorney General
501 Washington Avenue
Montgomery, Alabama 36130-0152
Tel. 334-353-9095
Email: sfrisby@ago.state.al.us

/s/ Mark Loudon-Brown
Mark Loudon-Brown