No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JEFFERY DAY RIEBER,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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Dated: June 29, 2018.

CAPITAL CASE

QUESTIONS PRESENTED

1. Did Mr. Rieber's trial counsel provide constitutionally ineffective assistance by failing to pursue a lesser included alternative defense and failing to develop obvious mitigating evidence?

2. Is the Alabama Court of Criminal Appeals' practice of refusing to review ineffective assistance of appellate counsel claims solely based on the absence in the record of counsel's reasons for making key decisions contrary to the rights established by the Court in *Strickland v. Washington*, 466 U.S. 668 (1984)?

3. Did Alabama's capital sentencing scheme, which permitted a judge to reject the jury's sentencing verdict, violate the Sixth Amendment right to a trial by jury and, if so, should that holding apply to Mr. Rieber?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

All parties to the proceeding are listed in the caption. The Petitioner is not a corporation.

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PETITION FOR WRIT OF CERTIORI

Petitioner Jeffery Day Rieber respectfully petitions this Court for a writ of certiorari to review the judgment of the Alabama Supreme Court in this action.

OPINIONS AND ORDERS BELOW

The Memorandum decision of the Alabama Court of Criminal Appeals, *Rieber v. State of Alabama*, No. CR-15-0355 (Ala. Crim. App. Sept. 1, 2017), is unreported and is reproduced at Petitioner's Appendix ("App.") A. The Alabama Court of Criminal Appeals October 20, 2017 Notice, overruling Mr. Rieber's Application for Rehearing, is reproduced at App. E. The Supreme Court of Alabama's February 2, 2018 Certificate of Judgment, denying Mr. Rieber's Petition for Writ of Certiorari, is reproduced at App. C. The appealed November 13, 2015 Order of the Madison County Circuit Court is unreported and is reproduced at App. D.

STATEMENT OF JURISDICTION

The Judgment of the Alabama Court of Criminal Appeals was entered on September 1, 2017. App. B. The Supreme Court of Alabama denied Petitioner's Petition for a Writ of Certiorari on February 2, 2018. App. C. This Court entered an order on April 26, 2018, extending the time to file this Petition until July 2, 2018. The Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

1. U.S. Const. amend. VI, App. F.
2. U.S. Const. amend. VIII, App. G.
3. U.S. Const. amend. XIV, App. H.

4. ALA. CODE § 13A-5-46 (1982), App. I.

5. Ala. S.B. 16 (Ala. Act 2017-131), App. J.

6. Fla. Stat. § 921.141 (2015), App. K.

INTRODUCTION

This Petition raises important questions about the requirements for effective assistance of counsel in capital cases and the validity of Alabama's former statute permitting judicial override of a jury's recommendation of life imprisonment, not death.

The facts, litigation tactics, and sentencing here all were extraordinary. The defense that Mr. Rieber was at work and could not have shot the victim was baseless. To the contrary, his employment records showed he left work hours before the crime, and there was a videotape of the shooting. Thus, any minimally effective defense would involve denying defendant's criminal culpability for the shooting, rather than denying that he in fact was or could have been present at the scene of the crime. And there was a substantial ground for doubting the defendant's criminal culpability for capital murder, in the form of an independent expert assessment that the defendant had ingested a combination of drugs and alcohol that rendered him incapable of recalling the shooting or forming a criminal intent. Rather than pursue any such defense or any corroborating evidence, trial counsel put on a doomed alibi defense, claiming petitioner was somewhere else.

Despite determining that Mr. Rieber shot the victim, a majority of the jury nonetheless recommended that he not be subject to the death penalty, but instead

be sentenced to life in prison without parole. Under Alabama's sentencing scheme at the time, however, the jury did not have the final word. Instead, there were additional sentencing proceedings to be tried before the judge. Mr. Rieber's counsel — the architect of the alibi-but-not-intoxication defense — recognized that he was completely ill-prepared to handle the sentencing proceeding and brought in another lawyer to help. There was much work to be done in terms of identifying corroborating evidence of Mr. Rieber's diminished capacity, his childhood addiction to illegal drugs, the absence of aggravating circumstances, and the arbitrariness of death in this case when courts in cases with far worse facts chose life. Instead, Mr. Rieber's sentencing lawyer did nothing. Literally. As his billing records and the sentencing proceedings reflect, Mr. Rieber's sentencing lawyer, brought in to remedy the admitted deficiencies of his trial lawyer, billed no time between the jury recommendation and the judicial hearing, and he offered no corroborating witnesses on the critical issue of diminished capacity. The result was entirely too predictable. The judge overrode the jury's recommendation and sentenced Mr. Rieber to death.

The proceedings below should have resulted in a finding of ineffective assistance of counsel and a recognition that Alabama's judicial override violates the Sixth and Eighth Amendments, as incorporated by the Fourteenth Amendment. Neither happened. Instead, the proceedings below misapplied this Court's decision in *Wiggins v. Smith*, 539 U.S. 510 (2003), and related cases and allowed the woefully deficient performance of petitioner's lawyers at both the guilt and sentencing stages to go unremedied. The Alabama Supreme Court went on to deny

that Alabama's since-abandoned judicial override system is unconstitutional, despite the contrary conclusion reached by this Court in *Hurst v. Florida*, 577 U.S. ___, 136 S. Ct. 616 (2016), concerning Florida's materially indistinguishable system. By denying that the judicial override is unconstitutional, the court below obviated the need to address questions of retroactivity or the effect of Alabama's decision to alter its system prospectively. This Court's review is needed to correct this injustice.

STATEMENT OF THE CASE

A. Procedural History.

On April 10, 1992, Mr. Rieber was convicted of capital murder, under ALA. CODE § 13A-5-40(a)(2). (Clerk's Record ("C.") 6704-6741.) The next day, the jury recommended, by a vote of seven to five, that he be sentenced to life imprisonment without parole. (Supplemental Record ("C. Supp.") 96-99.) On June 26, 1992, the Hon. Jeri Blankenship overrode the jury recommendation, pursuant to former ALA. CODE § 13A-5-46, and sentenced Mr. Rieber to death by electrocution. (C. 6892.) The trial court denied a motion for a new trial and re-sentencing on August 25, 1992. (C. Supp. 189.)

The Alabama Court of Criminal Appeals affirmed the conviction and death sentence. *Rieber v. State*, 663 So. 2d 985 (Ala. Crim. App. 1994). The Court of Criminal Appeals subsequently denied rehearing. The Alabama Supreme Court affirmed in *Ex parte Rieber*, 663 So. 2d 999 (Ala. 1995). The Supreme Court denied rehearing on June 23, 1995. Mr. Rieber filed a timely petition for writ of certiorari

in the United States Supreme Court. The Court denied his petition on November 27, 1995.

On February 24, 1997, Mr. Rieber filed a petition for post-conviction relief in Madison County Circuit Court, under Alabama Rule of Criminal Procedure 32, seeking to set aside his conviction and death sentence. He filed an amended Rule 32 petition on January 26, 2004. (C. 639-664.) The amended petition claimed that his trial and appellate counsel were ineffective, denying Mr. Rieber his Sixth Amendment rights, and that Alabama's judicial override statute, ALA. CODE § 13A-5-46, was unconstitutional. (C. 649-52, 655-61.) The trial court, the Hon. Laura Jo Hamilton (Judge Blankenship had passed away) held a hearing on October 3-5, 2011. Following Judge Hamilton's retirement, the case was reassigned to the Hon. Karen Hall. On the basis of the 2011 hearing record, Judge Hall denied Mr. Rieber's amended Rule 32 petition on November 13, 2015, including his claims for ineffective assistance of counsel and his claim challenging the constitutionality of the judicial override of the jury's life imprisonment recommendation. (App. D-76.)[1]

Mr. Rieber appealed Judge Hamilton's Order, including her holdings on ineffective assistance of counsel and Alabama's judicial override statute. Brief of Petitioner-Appellant Jeffery Day Rieber at 29-61, 71-76, *Rieber v. State*, No. CR-15-0355 (Ala. Crim. App. April 1, 2016). On September 1, 2017, the

[1] We note that Judge Hall's decision is, essentially, a verbatim reproduction of the State's proposed order – typos and all. (*See* C. 2763-90.)

Alabama Court of Criminal Appeals affirmed the denial of Mr. Rieber's Rule 32 petition, including his claims of ineffective assistance and his challenge to the judicial override statute. Memorandum, *Rieber v. State*, No. CR-15-0355 (Ala. Crim. App. Sept. 1, 2017) (App. A-47). The court denied Mr. Rieber's Application for Rehearing on October 20, 2017. (App. E-1.)

Mr. Rieber filed a Petition for Writ of Certiorari in the Supreme Court of Alabama on November 3, 2017, claiming, among other things, ineffective assistance of counsel and that Alabama's judicial override statute was unconstitutional. Petition for Writ of Certiorari at 27-38, 46-79, *Rieber v. State*, No. 1170093 (Ala. Nov. 3, 2017). On February 2, 2018, the Alabama Supreme Court denied Mr. Rieber's petition for writ of certiorari. (App. C-1.)

B. Factual History.

Mr. Rieber was arrested on October 10, 1990 in connection with a robbery/homicide the prior evening at a convenience store in Huntsville, Alabama. He was charged with murder committed in the course of a robbery, a death penalty-eligible offense. Attorney Richard Kempaner was appointed to represent Mr. Rieber on October 24, 1990. (Reporter's Transcript ("R.") 292.)

Guilt Phase

Mr. Kempaner described the case as "one of the strongest [he had] ever seen." (R. 337.) A surveillance video from the convenience store showed the perpetrator shooting the clerk twice at about 8:00 p.m. A high school friend of Mr. Rieber's testified that he saw Mr. Rieber at the store before the incident and identified him

as the same person later shown on the video as the perpetrator. (C. 3020, 6344-49.) A search of Mr. Rieber's residence and car late that night produced the gun that had been used in the crime, a large amount of cash in small denominations, and clothing identical to that worn by the perpetrator on the video. (C. 6410-15.)

After reviewing the evidence obtained in discovery – in particular, the video and the seized evidence – Mr. Kempaner was "confident" Mr. Rieber would be convicted. (R. 298-99.) Indeed, he told Mr. Rieber's mother that if Mr. Rieber did not plead guilty, removing the possibility of the death penalty, Mr. Kempaner would see her at Mr. Rieber's funeral. (R. 299-301.) After Mr. Kempaner's motion to suppress evidence was denied, he pursued an alibi defense based on Mr. Rieber being at work at the time of the robbery, even though open file discovery of the State's file showed that Mr. Rieber left work shortly after noon, well in advance of the crime.

Mr. Kempaner made one effort at an alternative defense. He moved to have Mr. Rieber examined by a mental health professional at the Taylor-Hardin Institute "to determine the mental condition of the defendant at the time of the alleged offense." (R. 302; C. Supp. 42.) Dr. Kathy A. Rogers, Ph.D., a psychologist at Taylor-Hardin, examined Mr. Rieber. In her report, she noted that Mr. Rieber said he had no recollection of the events of the evening because of drug consumption before the robbery/homicide. (R. 303; C. Supp. 328-30.) Even though Dr. Rogers appreciated that Mr. Rieber had a reason to lie, she found it more likely than not

that Mr. Rieber was telling the truth about his drug consumption and its effects. (R. 303; C. Supp. 330-33.)

Mr. Kempaner testified that he did not pursue the possibility of a lesser-included manslaughter defense because he was hazy and unsure whether self-induced intoxication could be a basis for a manslaughter charge, and he did not think that "self-induced drunkenness – self-induced alcohol or drugs at the time ... was [a] ... defense." (R. 322-23.) Mr. Kempaner did not ask Mr. Rieber about his mental state or drug use during the day of the robbery or other facts and circumstances surrounding the incident. (R. 303-04, 328-29.) Mr. Kempaner's file contains no indication that he made any effort to investigate whether there was corroboration of Mr. Rieber's drug or alcohol use on October 9, 1990. (C. 2978-5742; *see* R. 303-04.) He thus made the decision to pursue the flawed alibi defense without assessing the strength of the alternative strategy of the lesser-included offense of manslaughter portended by the Rogers report, an alternative that would have neutralized the seized evidence and the video.

Once it was clear to Mr. Kempaner that Mr. Rieber would not accept the plea offer, "[he] set about making sure that we got some error in the record so if he did get convicted, which I thought he would, it would get reversed." (R. 300-01.) This effort consisted of striking an American of East Asian ancestry on racial grounds. Mr. Kempaner believed that, because this violated the rights of the struck juror, "it would get reversed." (R. 300-01, 323-25.) As late as the Rule 32 hearing in October,

2011, Mr. Kempaner remained perplexed as to why he lost on this obviously meritless issue. (R. 323-25.)

At trial, Mr. Kempaner called a series of witnesses in a futile attempt to establish that Mr. Rieber had an alibi. The witnesses were easily impeached and discredited. (R. 329-30; C. 6603-45.) At the close of the evidence, the jury found Mr. Rieber guilty as charged. (C. 6704-41.)

To handle the sentencing phase of the case, Mr. Kempaner successfully moved for the assistance of another lawyer, Dan Moran, to perform two specific tasks: (1) "develop mitigating evidence"; and (2) research pertinent death penalty case law, including Alabama law with respect to the application of the death penalty. (C. Supp. 45-46.)

Penalty Phase

At the sentencing hearing before the jury, which by a seven to five vote recommended life imprisonment, Mr. Moran placed into evidence the Rogers report, in which Dr. Rogers stated that she believed that Mr. Rieber was under the influence of drugs at the time of the crime, and unaware of what he was doing. The prosecution vigorously attacked the report, claiming Mr. Rieber "invented" the evidence of drug use and asking whether the jury thought "this man knew he was trying to convince the doctor of something that might save his life." (C. 6806, 2808.) Thus, it was clear that the State also would challenge the Rogers report at the binding sentencing hearing before Judge Blankenship. Nevertheless, at that hearing, Mr. Moran offered no corroboration for the report. The need for the

missing corroboration, portended by the prosecution's attack on the Rogers report, resurfaced during a post-sentencing motion for a new trial when Judge Blankenship specifically asked whether there was any evidence corroborating the Rogers report. Defense counsel offered none. (C. 6908-09.)

Mr. Moran's time records show that during the critical period between the jury recommendation and the binding hearing before Judge Blankenship, he did nothing. Nor did Mr. Moran ever bring to the court's attention any Alabama case law in which persons found guilty of homicides far worse than the homicide in this case were sentenced to life imprisonment without parole. Instead, Mr. Moran referred to a single case, *Hamilton v. State*, 520 So. 2d 155 (Ala. Crim. App. 1986), a case with a far more egregious homicide than here, in which the defendant sentenced to death bragged about his killing the victim and said he would do it again. Mr. Moran argued to the court that he "couldn't think of a case that was more on target with Rieber than *Hamilton versus the State*." (C. 6916-18.) Judge Blankenship overrode the jury recommendation and imposed the death penalty. In particular, she found that the crime was heinous, atrocious, and cruel in significant part because she found that Mr. Rieber had stalked the victim for three or four days before the crime. (C. 6889.) In fact, neither the evidence nor Alabama law supported a finding of stalking.

Several weeks later, the attorneys asked Judge Blankenship to reconsider the sentence and to order a new trial. (C. Supp. 183-85, 187-88.) At a hearing on this motion, Mr. Kempaner testified as to his motivation in excluding a juror of East

Asian ancestry, certain in his judgment that this would mandate a new trial. When Mr. Moran again alluded to the Taylor-Hardin report, Judge Blankenship asked whether there was any corroborative evidence that Mr. Rieber had "ingested alcohol or drugs before ... he went into the store." Mr. Moran responded, "there was not." (C. 6909.) In fact, there was an abundance of evidence. Mr. Moran simply failed to look for it. Not surprisingly, Judge Blankenship denied the motion.

Appeal

In their appeal of Mr. Rieber's conviction and sentence, Mr. Kempaner and Mr. Moran did not argue that there was insufficient evidence that Mr. Rieber had stalked the victim or that the finding Mr. Rieber stalked the victim was unsupported by Alabama law. Mr. Kempaner and Mr. Moran also failed to assert – or even mention – that the only testimony supporting that finding should have been excluded on hearsay grounds. Instead, the focus of their unsuccessful appellate argument was that the initial search and seizure were illegal and that Mr. Kempaner's strike of an Asian-American prospective juror required that the Court of Criminal Appeals vacate the conviction and sentence. Brief for Defendant, *Rieber v. State*, 663 So. 2d 985 (Ala. Crim. App. 1994) (No. 91-1500); (C. 4572-05).

Rule 32 Hearing

On October 3-5, 2011, Judge Hamilton held a post-conviction, Rule 32 hearing, principally on the claims of ineffective assistance of counsel at the guilt and penalty stages.

The hearing focused on drug parties, one of which took place on October 9, 1990, just before the crime. Jo Duffy testified that because she and her husband lived alone, with no parents at the house, it was a regular gathering place for drug parties, three or four times each week, beginning at 3:00 or 3:30 p.m., when she came home from work. While guests, including Mr. Rieber, regularly would consume marijuana and alcohol, they also consumed harder drugs, including LSD ("acid"), crystal meth and cocaine, if available. (R. 354-56.) Ms. Duffy, whose pregnancy precluded drug use on October 9, remembers Mr. Rieber coming to the party around dusk, consuming alcohol and smoking pot. (R. 356-59.)

Three other witnesses testified specifically as to the October 9 party. Sonya Williamson saw Mr. Rieber snorting crystal meth, smoking pot, and drinking alcohol. (R. 363-65.) Duane Maroney saw him consume acid. (R. 386.) Charity Hubert saw him consuming drugs from across the street. (R. 274.)

The October 9, 1990 drug party and the many that preceded it were not the extent of Mr. Rieber's drug use. Ms. Duffy said she saw Mr. Rieber use drugs in eighth grade. (R. 352.) Melissa Smallwood testified that she saw Mr. Rieber on drugs about 90 percent of the time, and she had known him since their sophomore or junior years in high school. (R. 371.) None of this should be surprising in light of Mr. Rieber's childhood years.

Mr. Rieber's siblings testified that he began to use drugs at age nine, when they all smoked marijuana brought into their house by their mother. (R. 186-87, 201-02, 223.) When Mr. Rieber's parents separated, and Mr. Rieber moved to

Alabama with his father, his mother mailed him marijuana. (R. 225.) The siblings testified to the obvious: Mr. Rieber became addicted at an early age and went from marijuana to heavier drugs. (R. 206-07.)

The evidence also established that Mr. Rieber was discharged from the Navy with a less than honorable discharge because of drug use. (R. 341-42; C. 7009-19.) If Rule 32 counsel could present this evidence to the court in 2011, it clearly was available to Mr. Kempaner and Mr. Moran during their representation of Mr. Rieber 20 years earlier – no doubt with more detail and clarity.

Yet Mr. Moran presented no evidence about the October 9, 1990 party and the many preceding it at sentencing, nor did he offer evidence on Mr. Rieber's drug-laced life or the domestic instability of his childhood. On the critical question of corroborating Dr. Rogers' belief that Mr. Rieber, in fact, blacked out at the time of the robbery/homicide because of drugs, Mr. Moran produced nothing. Mr. Moran's time sheets show why: he did nothing between the jury recommendation on April 12, 1992, and the hearing before Judge Blankenship on June 19, 1992, and again before the re-argument several weeks later. These time sheets are credible because they show that he meticulously amended them upwards before submission, and he was still under the statutory maximum. (R. 339; C. 2940-44.)

One of the reasons Mr. Moran was appointed was to find pertinent case law on the appropriate penalty. (C. Supp. 45-46.) A simple review of the Alabama Statutes Annotated revealed at least four cases, all decided within seven years before Mr. Rieber's sentence, ending with a sentence of life imprisonment where the

homicide was far more egregious than Mr. Rieber's case. These cases reveal cruel murders involving axe killings, multiple stabbings, stompings rupturing internal organs, killings to prevent a victim from testifying, and sexual mutilation.

When confronted with Mr. Moran's failure to do what he was retained to do, a function essential to the basic requirement that the death penalty not be imposed arbitrarily, the Alabama Court of Criminal Appeals held that because this specific claim was not presented in the petition it would not consider the claim on review. The record reveals, however, that when Rule 32 counsel offered these cases, Judge Hamilton overruled a procedural objection and received them into evidence. (R. 162-63.) Had the objection been sustained, a motion to conform the pleadings to the proof could hardly have been denied since this judicially noticeable evidence came with no credibility baggage requiring further factual work by the State. The State did not cross-appeal the adverse evidentiary ruling, thus waiving its procedural bar argument.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT THIS PETITION TO REVIEW THE CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF MR. RIEBER'S TRIAL AND APPELLATE COUNSEL.

A. The Court Should Grant This Petition To Review Trial Counsel's Ineffectiveness At The Guilt Phase For Not Pursuing The Lesser Included Alternative Defense.

This Court has set forth a clear and unambiguous requirement that before trial counsel rejects an alternative strategy, he must fully explore that alternative. To use the Supreme Court terminology, courts give deference to trial counsel's

choices only if he fully pursues alternative strategies. *Wiggins*, 539 U.S. at 511; *see Hinton v. Alabama*, 571 U.S. 263, 274 (2014). In this case, there was no pursuit at all.

Once Mr. Kempaner received the Rogers report, he did nothing to pursue the drug intoxication defense. Had he done so, he would have learned that Mr. Rieber attended a party shortly before the crime at which he consumed hard drugs and that such parties were a regular part of Mr. Rieber's life. The Alabama Court of Criminal Appeals attempted to minimize this evidence, adopting the wording of the Circuit Court that Mr. Rieber consumed drugs "during the day of the offense." (App. A-16.) This is highly misleading.

Jo Duffy testified that on the day of the crime, Mr. Rieber came to the party around dusk and consumed drugs and alcohol: "the evening of the crime." (R. 356-59.) On October 9, the sun sets in Huntsville at 6:18 p.m., and twilight ends at 6:43 – approximately one and a half hours before the robbery, judicially noticeable facts, which demonstrate Mr. Rieber consumed multiple hard drugs vastly closer to the 8:00 p.m. crime than "during the day" suggests.

Why did Mr. Kempaner not pursue this line of defense so clearly portended by Dr. Rogers' report? Certainly not because he felt confident in the alibi defense he was pursuing. As noted, Mr. Kempaner predicted that, without a plea agreement, he would see Mr. Rieber's mother at Mr. Rieber's funeral.

Mr. Kempaner testified to several reasons he did not pursue the intoxication defense – none of which correctly stated the law. He said that drug use might be

mitigating at sentencing, but he was unsure whether it could be the basis for a manslaughter charge, and it might be used to negate intent, "but I'm not too sure – I'm not on good ground on what I just said. I can't say for sure." (R. 322.) Mr. Kempaner's ignorance of applicable law is comparable to the defense lawyer's failure in *Hinton*, 571 U.S. at 274.

The law in effect in Alabama fully supported the lesser included offense strategy. In *Ex parte Kyzer*, 399 So. 2d 330 (Ala. 1981), the Alabama Supreme Court reversed a murder conviction because the lesser included offense of manslaughter was not presented to the jury. In *Fletcher v. State*, 621 So. 2d 1010, 1019 (Ala. Crim. App. 1993), similarly, the failure to instruct on manslaughter required reversal. Fletcher had consumed four or five rocks of cocaine before the killing. The Alabama Court of Criminal Appeals cited numerous cases requiring the instruction where the defendant consumed far less drugs and alcohol than Mr. Rieber, noting the special importance of giving such an instruction in an intentional murder case.

The Court of Criminal Appeals simply ignored these cases. The court relied on Mr. Kempaner's explanation that he did not pursue the intoxication defense "because Rieber never brought it up." (App. A-14 – A-15.) Mr. Rieber certainly "brought it up" to Dr. Rogers, who believed him and referred to it in her report to Mr. Kempaner.

If Mr. Kempaner was unaware of the law, how can the Court of Criminal Appeals conceivably blame Mr. Rieber for "not bringing it up"? The court's

dismissal of the alternative intoxication defense, besides completely ignoring this Court's mandate that an alternative strategy only can be rejected if fully pursued, *Hinton*, 571 U.S. 263, seems to place the burden of understanding the complexities of lesser included offenses on the defendant himself. This voids a defendant's right to effective assistance of counsel and totally inverts the process by which legal decisions must be made at trial.

The Court of Criminal Appeals also relied on three cases decided years after Mr. Rieber's trial to support Mr. Kempaner's inexplicable failure to pursue the lesser included defense: *Windsor v. State*, 683 So. 2d 1027 (Ala. Crim. App. 1994), *Whitehead v. State*, 777 So. 2d 781, 833 (Ala. Crim. App. 1999) and *Ex parte McWhorter*, 781 So. 2d 330, 342-43 (Ala. 2000), the latter stating that there must be evidence of intoxication amounting to insanity to negate the intent element. While the *McWhorter* standard may well have been met here, it was not the law in 1992. In *Windsor*, the defendant had a beer – hardly the same as the hard drugs Mr. Rieber consumed. Indeed, the court in *Windsor* relied on the cases Mr. Rieber relies on here and stated that where there was evidence of intoxication – as Dr. Rogers concluded – the lesser included offense option must be presented to the jury. In *Whitehead*, there was no evidence of intoxication to warrant the lesser included instruction.

In sum, Mr. Kempaner pursued a defense that he knew was a dead end. Dr. Rogers gave him the viable alternative of a lesser included manslaughter charge, which he never pursued – either because he did not understand his

obligations or because he misunderstood the law, or both. His failure constitutes ineffective assistance of counsel within the meaning of *Wiggins*, 539 U.S. 510, and its progeny.

B. The Court Should Grant This Petition To Review The Ineffectiveness Of Mr. Rieber's Counsel At The Penalty Phase.

Mr. Kempaner asked the Circuit Court for permission to hire an additional attorney to assist at the penalty phase to "develop mitigating evidence" and research pertinent death penalty cases. (C. Supp. 45-46.) Mr. Moran did neither.

First, had Mr. Moran simply checked the Alabama Statutes Annotated, he would have found several helpful cases far "worse" than Mr. Rieber's where the death penalty was not imposed. In *Johnson v. State*, 479 So. 2d 1377 (Ala. Crim. App. 1985), *Handley v. State*, 515 So. 2d 121 (Ala. Crim. App. 1987), and *McCall v. State*, 501 So. 2d 496 (Ala. Crim. App. 1986), all cases that ended with a sentence of life imprisonment, the facts were far "worse" than in Rieber's case. In *Bradley v. State*, 577 So. 2d 541 (Ala. Crim. App. 1990), where the victim had stab wounds through the lung, the heart, the liver, and bruises and tears in her vaginal area, indicating sexual mutilation, and there were cuts between her fingers suggesting that she tried to defend herself against the lethal attack, the court imposed a life sentence. *Bradley* was decided the same year as the crime in this case.

Mr. Moran's acknowledgment that a case where the death penalty was imposed (*Hamilton*) was "on target" with his client's situation, and failing to bring to the attention of the sentencing court readily accessible examples of "worse" cases where the death penalty was not imposed, must constitute *per se* ineffectiveness.

The Court of Criminal Appeals dealt with this issue by sweeping this gross incompetence under the rug of procedural bar, ignoring the record in the case. (App. A-1.) Mr. Moran neglected to do his job; had he done so, the death penalty could not have been imposed without ignoring this Court's mandate against arbitrary and capricious sentencing. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

Next, the Court of Criminal Appeals noted that Mr. Moran called various family members and friends to testify as to Mr. Rieber's good moral character and positive traits. He also presented the Rogers report. (App. A-21 – A-22.) The Court neglected to mention, however, that when the Rogers report was presented to the jury at the penalty phase, the prosecution fiercely attacked it as a last gasp effort by Mr. Rieber to save himself, arguing Mr. Rieber "invent[ed]" the drug use in an attempt to create mitigating evidence. "Do you think this man knew he was trying to convince this doctor of something that might save his life ...?" (C. 6806.) "Now I ask you again, do you think this man knows what's going on, and ... he's working, trying his best to get it to come out to what he felt like would be more favorable to him?" (R. 6808; C. 6802-15.)

This attack put Mr. Moran on notice that the Rogers report needed corroboration at the binding sentencing hearing before the court. Unfortunately, Mr. Moran did nothing between the jury penalty phase and the sentencing hearing before the judge to counter the prosecutor's blistering attack on the Rogers report.

The State, the circuit court, and now the Court of Criminal Appeals, have simply ignored this evidence. Mr. Moran's time sheets clearly show that although

he fine-tuned them to reflect tenths of hours, and he was still under the statutory cap of $1,000, he entered no time for the critical period between the two sentencing proceedings.

The Court of Criminal Appeals' statement that "the record indicates that Moran introduced as much mitigating evidence concerning Rieber's background as was available to him" is, of course, true. (App. A-22.) That can be said of any attorney, yet it begs the question as to what should have been available had he thoroughly investigated the facts, as *Wiggins*, 539 U.S. 510, requires. Testimony at the Rule 32 hearing more than 20 years after the events demonstrated that a wealth of such evidence corroborating the Rogers report was available at the time of sentencing. But Mr. Moran chose not to look for it. Just as in *Wiggins*, "[t]he record ... underscores the unreasonableness of counsel's ... failure to investigate thoroughly ... from inattention, not reasoned strategic judgment." *Id.*, at 526.

In addressing prejudice from Mr. Moran's failure, the Court of Criminal Appeals adopted the findings of the circuit court verbatim, which the circuit court, in turn, adopted verbatim from the State's proposed findings.

> [T]he testimony presented by Rieber at evidentiary hearing from his siblings and friends, and acquaintances, and Dr. Stalcup focused on Rieber's history of drug abuse. Much of the same evidence was presented to the jury by way of Dr. [Roger's (*sic*)] report and does not support Rieber's assertion that Mr. Moran's performance was deficient.

(App. A-21 (emphasis added).)

But when Judge Blankenship asked, at a post-hearing proceeding, whether there was anything in the record supporting the Rogers report, the answer was "no." (C. 6908-09.) Judge Blankenship obviously shared the State's view at the time that, without corroboration, the Report was of little to no weight. (C. Supp. 183-89.) Notwithstanding this clear history, a report that was given no weight at trial by Alabama and the sentencing court suddenly is supposed to be accepted as sufficient proof of the underlying facts. What was then necessary corroboration has now miraculously transformed into unnecessary cumulative evidence. The prejudice stemming from Mr. Moran's failure to do anything between the jury recommendation and the actual sentencing should not be rendered insignificant by this fictional redefinition of the evidence. Mr. Rieber was fatally prejudiced by Mr. Moran's inactivity before Judge Blankenship's sentencing. The sought-after corroborative evidence was there. By doing nothing, he could not present it.

C. The Court Should Grant This Petition To Review The Constitutionality Of The Practice By The Alabama Court Of Criminal Appeals Of Refusing To Review Allegations Of Ineffective Assistance Of Appellate Counsel Solely Because Of The Absence In The Record Of Counsel's Reasons For Making Key Decisions.

The circuit court found that the crime was heinous, atrocious, and cruel in significant part because it found that Mr. Rieber had stalked the victim for three or four days before the crime. Specifically, the trial court stated: "[t]he evidence allows the Court to clearly conclude that the defendant, for at least three to four days, had stalked the victim," had targeted the store and the victim, and had caused the

victim to be afraid when he appeared. (C. 6889.) Without the stalking finding, the court would not have overridden the jury's recommendation of life without parole.

Indisputably, the stalking finding was erroneous because the evidence of Mr. Rieber's presence at the store was unsupported. The finding was based on the court's belief that a witness (Mr. Erskine) saw Mr. Rieber enter the convenience store where the crime occurred several days before the crime and heard the victim say she was afraid of the petitioner. Mr. Erskine testified, however, that the person he saw enter the store a few days before the crime drove a car with a Tennessee license plate. (R. 775, 778.) When shown a picture of Mr. Rieber's car, Mr. Erskine acknowledged that it had an Alabama license plate. Specifically, he testified, "it does now," clearly confirming his recollection that the car he saw at the time did not have Alabama plates. (R. 778.) There was no evidence that Mr. Rieber ever drove a car with a Tennessee license plate.

Instead of challenging the court's finding that Mr. Rieber was even present at the store three or four days before the crime, appellate counsel conceded in briefing on appeal that the evidence supported his presence at the store.

> Although the evidence *supports* a finding that Appellant had "cased" the store prior to the killing, there was no evidence he "stalked the victim." Even the State in argument says "the word stalked may be a little too strong." The evidence *clearly showed* the victim was apprehensive of Appellant and inquired about him to two people, one of whom told her in effect not to worry about it.

(C. 4592 (emphasis added).) The phrase challenging the stalking finding is completely overwhelmed by the incredible admissions that Mr. Rieber "cased" the store and that the victim "clearly" was afraid of Mr. Rieber. The evidence could not show – clearly or otherwise – that the victim was afraid of Mr. Rieber, when the evidence did not even support a finding of Mr. Rieber's presence at the store. Moreover, the inference of her fear was based on inadmissible hearsay.

No competent counsel conceivably could have made those concessions. Nevertheless, in its decision in this case, the Alabama Court of Criminal Appeals refused to even consider the argument of appellate ineffectiveness solely because it did not know why trial counsel failed to appeal the basis for the stalking finding. In doing so, the court unconstitutionally relied on an irrebuttable presumption of competency.

Instead of disputing the basis of the stalking finding used by the trial court as a reason for overriding the jury recommendation, appellate counsel pursued a frivolous argument on appeal – that a violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), required reversal. At trial, *Mr. Rieber's counsel* intentionally excluded a juror of Asian ancestry on racial grounds. *See supra*, at 8. On appeal, counsel contended that his invited error constituted impermissible racial discrimination by the State, rendering petitioner's trial unconstitutional under *Batson*. No competent counsel would make this argument. If successful, criminal defense counsel would routinely engage in constitutionally-prohibited discrimination for the sole purpose of winning a new trial if the first trial did not produce an acquittal. Remarkably,

despite the repeated rejection of his argument, Mr. Kempaner testified in 2011 that he still could not understand why he did not prevail on the issue. (R. 323-25.)

Counsel's pursuit of the frivolous *Batson* issue, by itself, should rebut the presumption of competency established in *Strickland v. Washington*, 466 U.S. 668 (1984). Regardless, the Court of Criminal Appeals was constitutionally prohibited from, in effect, using an irrebuttable presumption of competency to avoid addressing counsel's failure to raise on appeal the basis for the trial court's erroneous stalking finding. Requiring evidence of counsel's subjective reasons directly conflicts with *Strickland*, which establishes an objective test for effectiveness. *Id*., at 688. Under *Strickland*, a court must look at the entire record to determine whether a defendant has met the burden of establishing deficient performance. *Id*., at 690.

This is an ideal case for the Court to end Alabama's repeated reliance[2] on an irrebuttable presumption of competency "that conflicts with relevant decisions of [the] Court." S. Ct. R. 10(c). There simply are no possible circumstances in which a competent lawyer could concede that a critically important – but erroneous – factual finding was correct. The Alabama Court of Criminal Appeals violated Mr. Rieber's right to due process under *Strickland* by refusing to even consider the record to determine whether there objectively was a legitimate strategic reason to omit a

[2] *Broadnax v. State*, 130 So. 3d 1232, 1255 (Ala. Crim. App. 2013); *Stallworth v. State*, 171 So. 3d 53, 92 (Ala. Crim. App. 2013); *Hooks v. State*, 21 So. 3d 772, 793 (Ala. Crim. App. 2008); *Davis v. State*, 9 So. 3d 539, 546 (Ala. Crim. App. 2008); *Clark v. State*, 196 So. 3d 285, 312 (Ala Crim. App. 2015).

challenge on appeal to the basis for the erroneous finding of stalking – a finding that was a significant reason the trial court overrode the jury recommendation.

II. THE COURT SHOULD GRANT THIS PETITION TO REVIEW THE CONSTITUTIONALITY OF THE JUDICIAL OVERRIDE OF THE JURY'S SENTENCING RECOMMENDATION OF LIFE IMPRISONMENT WITHOUT PAROLE.

Mr. Rieber was convicted of capital murder in Madison County, Alabama Circuit Court on April 11, 1992. (App. A-4.) The next day, following the penalty phase hearing to the jury, the jury recommended, by a vote of seven to five, that Mr. Rieber be sentenced to life imprisonment without the possibility of parole. (C. Supp. 96-99; App. A-4.) At the time of his conviction, Alabama law permitted a judge to reject the jury's sentencing verdict. ALA. CODE § 13A-5-46. Pursuant to that statute, on June 26, 1992, following the penalty phase hearing to the court, the Madison County Circuit Court, the Hon. Jeri Blankenship, overrode the jury's life recommendation and sentenced Mr. Rieber to death by electrocution. (C. Supp. 100-113; App. A-4.)

On January 12, 2016, this Court, in *Hurst*, 136 S. Ct. 616, held that Florida's capital sentencing scheme, pursuant to which the judge could override the jury's sentencing recommendation, violated the Sixth Amendment right to a trial by jury because the court, not the jury, made the findings that support the sentence. In particular, *Hurst* makes clear that a jury, not a judge, must find all facts that could expose a defendant to the death penalty. 136 S. Ct. at 624.

Recognizing that Alabama's capital sentencing scheme was virtually identical to the constitutionally defective, former Florida scheme, the Alabama legislature

passed, and Governor Ivey signed into law on April 11, 2017, Senate Bill 16 (Act 2017-131), ending judicial override and giving the people of Alabama the final say on sentencing in capital cases by vesting juries with the sole authority on whether to impose the death penalty, or life imprisonment, in capital cases. The new law amends ALA. CODE § 13A-5-46, the statute under which Mr. Rieber was sentenced, to require at least ten of 12 jurors to vote in favor of the death penalty before such a sentence may be imposed. If less than ten jurors vote for death, the court must sentence the defendant to life without parole. In other words, the jury, not the judge, makes the final decision on life or death. But the law expressly applies prospectively only.

Based on the Court's decision in *Hurst* and subsequent judicial and legislative determinations, Mr. Rieber's sentence raises several constitutional issues appropriate for Supreme Court review.

A. The Court Should Grant This Petition To Confirm That The Former Alabama Capital Sentencing Scheme, Pursuant To Which Mr. Rieber Was Sentenced To Death, Was Unconstitutional.

Alabama's former capital sentencing scheme, pursuant to which Mr. Rieber was sentenced to death, was nearly identical to the Florida sentencing scheme struck down in *Hurst*. *Compare* ALA. CODE § 13A-5-46 (1982) with Fla. Stat. § 921.141 (2015). In fact, the Alabama Supreme Court has admitted as much. *See Ex parte Harrell*, 470 So. 2d 1309, 1317 (Ala. 1985) ("Alabama's procedure permitting judicial override is almost identical to the scheme used in Florida.").

Hence, this Court's decision in *Hurst* should have been the death knell for the Alabama judicial override statute.

Yet subsequent to *Hurst*, Alabama's appellate courts consistently have held that *Hurst* does not apply to the former Alabama capital sentencing scheme and that Alabama's judicial override statute does not violate the Sixth Amendment.

> Our reading of *Apprendi*, *Ring*, and *Hurst* leads us to the conclusion that Alabama's capital-sentencing scheme is consistent with the Sixth Amendment.
>
> … 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." *Hurst* does not disturb this holding.

Ex parte Bohannon, 222 So. 3d 525, 532-33 (Ala. 2016) (citation omitted); *see Ex parte State*, 223 So. 3d 954, 963-64 (Ala. Crim. App. 2016) (holding Alabama's capital sentencing scheme constitutional under *Hurst*).

Those decisions ignore this Court's clear mandate in *Hurst*. The Court should grant this Petition to confirm that, pursuant to *Hurst*, Alabama's judicial override statute violated Mr. Rieber's the Sixth Amendment right to a trial by jury.

B. The Court Should Grant This Petition To Determine Whether, And To What Extent, The Holding In *Hurst* Should Apply Retroactively To Collateral Review Of Judicial Override Cases In Alabama.

The Florida Supreme Court has held that *Hurst* applies retroactively in some, but not all, collateral judicial override cases decided before *Hurst*. In

particular, the court has held that *Hurst* applies to cases that became final after *Ring v. Arizona*, 536 U.S. 584 (2002), but not to cases decided before *Ring*.

> Defendants who were sentenced to death under Florida's former, unconstitutional capital sentencing scheme after *Ring* should not suffer due to the United States Supreme Court's fourteen-year delay in applying *Ring* to Florida. In other words, defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by *Ring* should not be penalized for the United States Supreme Court's delay in explicitly making this determination. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases."

Mosley v. State, 209 So. 3d 1248, 1283 (Fla. 2016) (citation omitted); *see Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016) (holding that *Hurst* did not apply retroactively where the death sentence had become final before *Ring*).

Because Alabama appellate courts have refused to apply *Hurst* to Alabama's former capital sentencing scheme, not surprisingly, the Supreme Court of Alabama has not addressed whether *Hurst* should apply retroactively to pre-*Hurst* collateral review of Alabama override cases.[3] This Petition provides the Court an opportunity to apply the appropriate retroactivity analysis to judicial override cases post-*Hurst*.

The Florida Supreme Court's arbitrary cut off on retroactivity is flawed. The court acknowledged in *Mosley* that "[c]onsiderations of fairness and uniformity

[3] We note that the Court of Criminal Appeals of Alabama, while refusing to address whether the former Alabama capital sentencing scheme is unconstitutional under *Hurst*, stated in dicta that "[b]ecause *Ring* does not apply retroactively on collateral review, it follows that *Hurst* also does not apply retroactively on collateral review." *Reeves v. State*, 226 So. 3d 711, 757 (Ala. Crim. App. 2016).

make it very 'difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.'" 209 So. 3d at 1283. Yet the court made no effort to explain why those "considerations of fairness and uniformity" should not apply to "indistinguishable cases" decided before *Ring*, like Mr. Rieber's case. In fact, it would be particularly unfair in Mr. Rieber's case, where the jury voted seven to five for life imprisonment, to permit Mr. Rieber to face the death penalty while Mr. Hurst, Mr. Mosley, and others whose juries voted by a majority for death either receive a life sentence or a new sentencing hearing.

Hurst is not simply a rote application of *Ring* to Florida. If it were, Florida courts years ago would have struck down the state's judicial override statute. Rather, *Hurst* is the first time this Court expressly and unequivocally struck down judicial override statutes as violating the Sixth Amendment. A rule like that expressed in *Hurst*, striking down judicial override and holding that the death penalty must be imposed by a jury, is a rule elaborating on fundamental constitutional rights and, hence, is a substantive rule. *See Teague v. Lane*, 489 U.S. 288, 311 (1989); *see also Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 728 (2016); *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257, 1264 (2016). And this Court has held that such rules should apply retroactively to cases on collateral review. *Teague*, 489 U.S. 288.

Even if *Hurst* were considered a procedural rule, it is a "watershed" rule that courts should apply retroactively because it "implicate[s] the fundamental fairness

of the trial" and "'significantly improve[s] … pre-existing fact-finding procedures ….'" *Teague*, 489 U.S. at 312 (citation omitted); *see Montgomery*, 136 S. Ct. at 728; *Welch*, 136 S. Ct. at 1264. The watershed nature of the *Hurst* ruling is particularly compelling in Alabama, where studies have shown that judicial elections, as much as anything else, influence the override decision. *See* Equal Justice Initiative, *The Death Penalty in Alabama: Judge Override*, 4, 8, 16 (July 2011), https://eji.org/sites/default/files/death-penalty-in-alabama-judge-override.pdf ("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. … The data suggests that override in Alabama is heavily influenced by arbitrary factors such as the timing of judicial elections …."); *see also Woodward v. Alabama*, 571 U.S. 1045, 134 S. Ct. 405, 408-09 (2013) (Sotomayor, J., dissenting) ("What could explain Alabama judges' distinctive proclivity for imposing death sentences in cases where a jury has already rejected that penalty? … 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."). Removing the stain of electoral politics from death penalty decisions would be a milestone in Alabama jurisprudence and almost the definition of a "watershed" rule.

The Court should grant Mr. Rieber's petition to decide whether, and to what extent, the holding in *Hurst* should apply retroactively to collateral attacks on judicial override cases in Alabama decided before *Hurst*.

C. The Court Should Grant This Petition To Decide Whether Sentencing Mr. Rieber To Death Was Arbitrary And Capricious, In Violation Of Mr. Rieber's Eighth Amendment Rights.

The Eighth Amendment requires that there be a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Furman v. Georgia*, 408 U.S. 238, 313 (1972). Accordingly, this Court has barred "sentencing procedures that create[] a substantial risk that [a death sentence] would be inflicted in an arbitrary and capricious manner." *Gregg*, 428 U.S. at 188.

In *Hurst*, where the jury recommended the death penalty by a seven to five vote, which was insufficient under Florida law to constitute a recommendation of death, Mr. Hurst is being re-sentenced. *Hurst*, 136 S. Ct. at 620. Mr. Rieber, on the other hand, was sentenced to death when the jury in his trial, by the same seven to five vote, affirmatively recommended life imprisonment rather than death. And despite that affirmative jury vote for life imprisonment, Mr. Rieber, unlike Mr. Hurst, continues to face a death sentence. That is arbitrary and capricious.

The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures" as well as "state practice." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (citation omitted). Although there are 31 states that currently have active death penalty statutes, none of these states

permits a judge to impose the death penalty after a jury votes for life imprisonment. Alabama, in fact, was the final state to abolish judicial override. This constitutes not merely "national consensus," *see Kennedy v. Louisiana*, 554 U.S. 407, 426 (2008), but unanimous agreement that a sentence of death imposed by a judge contrary to a jury's life verdict does not comport with our evolving standards of decency and the Eighth Amendment's prohibition on cruel and unusual punishment.

> [O]ne of the most important functions any jury can perform in [deciding whether to impose a death sentence] is to maintain a link between contemporary community values and the penal system – a link without which the determination of punishment would hardly reflect "the evolving standards of decency that mark the progress of a maturing society."

Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15 (1968) (citations omitted). By abolishing judicial override, Alabama and other states have sought to strengthen that link and prevent a judge from interfering with the fundamental expression of those standards by the jury. In this case, the seven to five vote for life imprisonment was an expression of community values and, under the Eighth Amendment and this Court's clear precedent, it should be respected.

Furthermore, the judicial override in Mr. Rieber's case was arbitrary and capricious because of racial disparities in override cases in Alabama. In particular, Alabama circuit court judges overrode "jury life verdicts in cases involving white victims much more frequently than in cases involving victims who are black." *The Death Penalty in Alabama: Judge Override*, 5. "Seventy-five percent of all death

sentences imposed by override involve white victims, even though less than 35% of all homicide victims in Alabama are white." *Id.* One judge even felt the need to explain his imposition of the death penalty, despite a life verdict by the jury, as he "had sentenced three black defendants to death so he decided to override the jury's life verdict for a white defendant to balance out his sentencing record." *Id.*; *see Woodward*, 134 S. Ct. at 409-10 (Sotomayor, J., dissenting). Consistent with the generally arbitrary and capricious nature of judicial overrides in Alabama, Mr. Rieber's victim was white, and the trial judge sentenced Mr. Rieber to death. The Court should grant this Petition to address these violations of Mr. Rieber's Eighth Amendment rights.

D. The Court Should Grant This Petition To Decide Whether The Alabama Legislature Has Violated Mr. Rieber's Fourteenth Amendment Equal Protection Rights By Not Making The New Capital Sentencing Statute Retroactive.

As a result of Alabama's 2017 legislative abolition of judicial override, Senate Bill 16 (Act 2017-131), no person tried today can be given the sentence Mr. Rieber received, death where the jury has voted for life, and no person sentenced today can eventually be executed where the jury does not vote for death. The Alabama Legislature expressly made the new sentencing scheme prospective only. In other words, under both current Alabama law and U.S. Supreme Court precedent, a person in Mr. Rieber's precise situation today would receive a life sentence.

The Equal Protection Clause of the Fourteenth Amendment protects against "disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable," *Ross v. Moffitt*, 417 U.S. 600, 609 (1974).

Furthermore, it requires that where such disparity exists there must be a valid basis for it. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441-42 (1985).

There simply is no valid basis for distinguishing between someone like Mr. Rieber, who was sentenced to death despite a jury's vote for a life sentence, and a person sentenced by a jury today, under the new law, who cannot be sentenced to death if a jury does not affirmatively vote in favor of it, by at least a ten to two margin. And when there is no valid basis for a distinction, such a distinction violates the Equal Protection Clause. Remarkably, if Mr. Rieber were to prevail in his current collateral proceedings and receive a new sentencing hearing, and were the jury in that new hearing to vote seven to five for life without parole (precisely as the original jury voted), then under Alabama's new statute, Mr. Rieber himself no longer would face a death sentence.

The Court should grant this Petition to determine whether the Alabama Legislature's decision to apply the new capital sentencing statute prospectively only violates Mr. Rieber's Fourteenth Amendment rights.

CONCLUSION

For the reasons stated above and based on the entire record in this action, Jeffery Day Rieber asks this Court to grant this Petition for a Writ of Certiorari.

Respectfully submitted,

GODFREY & KAHN, S.C.

Dated: June 29, 2018. By: *s/ James A. Friedman*

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CERTIFICATION

I hereby certify that this brief conforms to the requirements of Sup. Ct. R. 33.1. The length of this brief is 8,970 words.

Dated: June 29, 2018. By: *s/ James A. Friedman*
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APPENDIX

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