No. 18-5103
CAPITAL CASE

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

BRIEF IN OPPOSITION

STEVE MARSHALL
Alabama Attorney General

Lauren A. Simpson
Assistant Attorney General
*Counsel of Record

OFFICE OF ALA. ATT'Y GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
lsimpson@ago.state.al.us

August 13, 2018

CAPITAL CASE

QUESTIONS PRESENTED
(Restated)

1. Whether Rieber's trial counsel rendered ineffective assistance by declining to pursue a defense strategy that contradicted Rieber's own statements and by failing to present mitigation testimony that contradicted the defense's successful mitigation strategy.

2. Whether the Alabama Court of Criminal Appeals violated Rieber's constitutional rights by refusing to consider a claim that was procedurally barred and by denying relief as to a claim for which Rieber offered only a silent record.

3. Whether Rieber's death sentence is unconstitutional because a judge imposed the sentence, despite the fact that this Court approved judicial sentencing in *Harris v. Alabama*, 513 U.S. 504 (1995), that this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), did not overrule Harris prospectively or retroactively, and that Alabama has changed its sentencing scheme to require jury sentencing going forward.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

INTRODUCTION

On the evening of October 9, 1990, Jeffery Day Rieber murdered Glenda Phillips Craig, a married mother of two young daughters who had the misfortune of being on duty at a convenience store in Huntsville, Alabama. The murder was caught on the store's security camera, which showed Rieber shooting Craig in the head, ransacking the cash register, then shooting her again, when she was lying helpless on the floor, before making his escape.

Defense counsel knew from the outset that the case would be difficult, particularly due to the damning security footage. Although Rieber was convicted of robbery-murder, a capital offense, the defense put forth an effective case in mitigation, and the jury recommended 7–5 that Rieber be sentenced to life without parole. The trial court considered that recommendation but ultimately sentenced Rieber to death, in part based on the particular heinousness of his crime.

Rieber now presents this Court with two primary issues: ineffective assistance of counsel and the constitutionality of his death sentence. For the reasons that follow, neither issue merits certiorari.

STATEMENT OF THE CASE

A. Facts of the offense

In late September or early October 1990, Jeffery Rieber purchased a twenty-two-caliber revolver for $30. Over the next few days, he was seen multiple times at Mobil-Mart #1 in Huntsville, where Glenda Craig worked as a cashier. One witness testified that Craig seemed apprehensive around Rieber; the witness, fearing that a robbery was imminent, advised Craig to call the police. On the afternoon of October 9, Craig asked another customer for Rieber's identity.

That evening, just before 8 p.m., Rieber returned to the convenience store when Craig was alone. The store's surveillance camera recorded what happened next:

> Mrs. Craig was alone in the store, standing behind the checkout counter to the defendant's left. The defendant passed outside the eye of the camera for a few moments and then returned to stand facing the victim across the counter. The defendant immediately withdrew the twenty-two caliber revolver from his clothing and fired a shot at Mrs. Craig. Her left arm went up in a defensive posture, and she fell to the floor behind the counter.
>
> The defendant proceeded to open the cash register at the counter, stuffing the contents into his pockets. The defendant then leaned over the counter in such a fashion that the victim was within his view. He extended his arm and shot Mrs. Craig a second time.
>
> He then fled the store. The expert testimony reflects that Mrs. Craig was shot at very close range, that the first bullet pierced her left wrist completely, and then lodged about one inch under her scalp in the back of her head. The second bullet entered

> her brain just behind her left ear, and according to the testimony, was the eventual cause of death.
>
> Glenda Craig remained alive for some minutes until a store patron found her and until her husband came in to find her lying helpless, bleeding from the nose and mouth. She was transported to a hospital, where she underwent resuscitative effects and eventually died.

(C. 5287–90.)[1] Rieber was apprehended a few hours later. (C. 5290.)

B. The trial

Rieber was indicted on one count of robbery-murder on December 7, 1990. (C. 3871–72; *see* ALA. CODE § 13A-5-40(a)(2) (1975).) A jury was struck on April 7, 1992, and the presentation of witnesses began the next day. On April 10, the jury found Rieber guilty of robbery-murder. (C. 6740–41.)

At the time of Rieber's trial, the ultimate decision as to sentence in a capital case was made by the trial court, a sentencing procedure this Court approved in *Harris v. Alabama*, 513 U.S. 504 (1995). The jury heard evidence as to aggravating and mitigating circumstances during the penalty-phase proceeding, then rendered an advisory verdict. If the jury did not unanimously find the existence of at least one aggravating circumstance, then it was obligated to recommend life without parole, and the trial court would likewise be bound to sentence the defendant accordingly. If the jury unanimously found

1. Record citations are to the postconviction record in Rieber v. State, CR-15-0355 (Ala. Crim. App.).

an aggravator, however, then it had to weigh any proven aggravating circumstances against the mitigating circumstances offered by the defense and recommend either death (by at least 10–2) or life without parole (by at least 7–5). The trial court then took the jury's recommendation into consideration when it conducted its own weighing of the aggravators and mitigators, often adopting the jury's recommendation but sometimes disagreeing with it.[2]

While the defense may present anything it chooses in mitigation, aggravating circumstances are limited to those provided in section 13A-5-49 of the Code of Alabama. Many capital offenses in Alabama have "overlapping" aggravating circumstances proven beyond a reasonable doubt by the jury's guilt-phase verdict; for example, robbery-murder, Rieber's crime, has an overlapping aggravator in section 13A-5-49(4).

In Rieber's case, the penalty phase began on April 11, 1990. The defense presented seven witnesses on his behalf, who offered testimony about his good character, lack of violence, and religious conversion. (*See* C. 5829–30.) The jury recommended by a vote of 7–5 that Rieber be sentenced to life without parole. (C. 6844.)

2. As will be discussed more fully in issue II, judicial sentencing was eliminated by legislation in April 2017. *See* Pet. App'x J (enrolled text of SB 16, codified as Ala. Laws Act 2017–131); *see also* Pet. App'x I (superseded version of ALA. CODE § 13A-5-46 (1975), providing sentencing procedure)).

Two months later, after receiving a presentence investigation report (C. 6848–51), the trial court held a final sentencing hearing. After considering additional testimony from Rieber's mother, the trial court disagreed with the jury's recommendation and sentenced Rieber to death. In so doing, the court emphasized the heinousness of Rieber's actions:

> The capital offense was especially heinous, atrocious or cruel compared to other capital offenses. The Court reaches this conclusion based upon the following evidence:
>
> (a) The victim of this crime was completely defenseless and posed no threat to the defendant.
>
> (b) The defendant had stalked the victim for several days before the murder. She was aware of his presence and was apprehensive and afraid of him.
>
> (c) Defendant planned this crime in advance. He had purchased the weapon used to murder the victim several days ahead of time and had been to the store on several occasions before the murder, including the afternoon of the same day.
>
> (d) Defendant intended to kill the victim. He made no effort to conceal his face from the victim. Once he approached the victim he immediately shot her and robbed the cash register, not giving her an opportunity to deliver the money to him without being killed or wounded.
>
> (e) The victim suffered pain when she was initially shot by the defendant. This gunshot pierced her left wrist and lodged one inch below her skull. The evidence supports a finding that this first shot would have caused extreme pain and that perhaps the second shot could have done the same since the victim lived for some time before she died.
>
> (f) The most brutal aspect of the defendant's conduct occurred when, after the defendant had rendered the victim completely

> helpless on the floor behind the counter, and after he had already stolen the money, he leaned over and delivered another shot which expert testimony establishes killed the victim. The Court finds the evidence as shown by the tape and as testified to by the forensic examiner fully supports a finding that the defendant shot the victim twice, once before she fell and once after, at a very close range. The Court finds that this was a conscienceless and pitiless killing performed for no reason whatsoever. Even though after the first shot the victim posed absolutely no threat to the defendant, the defendant did not find it in his heart to spare the victim and did not recognize her humanity or her right to live. By any standard acceptable to civilized society, this crime was extremely wicked and shockingly evil. It was perpetrated under circumstances which caused fear and pain to the victim, and the evidence indicated that there was utter indifference on the part of the defendant to this fear and pain. The Court recognizes that all capital offenses are heinous, atrocious and cruel to some extent, but the degree of heinousness, atrociousness and cruelty which characterizes this offense exceeds that common to all capital offenses.

(C. 5291–93.)

C. Direct appeal

Rieber's trial counsel represented him on direct appeal as well. They first filed a motion for new trial, based in part on a meritless *Batson v. Kentucky*, 476 U.S. 79 (1986), claim,[3] which was denied. (1 Supp. 183–85, 189.)

On June 17, 1994, the Alabama Court of Criminal Appeals affirmed Rieber's conviction and death sentence. *Rieber v. State*, 663 So. 2d 985 (Ala.

3. Attempting to inject error into the record and thereby secure relief for Rieber, lead counsel Richard Kempaner claimed that **he** had struck the lone Asian venireperson for racially motivated reasons. (1 Supp. 183.)

Crim. App. 1994). The Alabama Supreme Court likewise affirmed on May 19, 1995. *Ex parte Rieber*, 663 So. 2d 999 (Ala. 1995). This Court denied certiorari on November 27, 1995. *Rieber v. Alabama*, 516 U.S. 995 (1995) (mem.).

D. State postconviction proceedings

Rieber's state postconviction (Rule 32) proceedings were extraordinarily protracted, in large part due to the circuit judge's delayed and erroneous orders, which ultimately resulted in three mandamuses. In brief, Rieber filed a pro se Rule 32 petition in February 1997 (C. 18–55), then an amended petition through counsel in January 2004 (C. 639–64). After the circuit judge retired, the presiding circuit judge finally reassigned the matter to herself in November 2014, and on November 13, 2015, almost nineteen years after postconviction proceedings began, she denied Rieber's amended petition. Pet. App'x D.

The Alabama Court of Criminal Appeals affirmed on September 1, 2017, Pet. App'x A, and the Alabama Supreme Court denied certiorari on February 2, 2018, Pet. App'x C. After an enlargement of time, Rieber filed his petition for certiorari in this Court on June 29, 2018.[4]

4. Rieber also filed a petition for writ of habeas corpus in the Northern District of Alabama on March 2, 2018. That case has been stayed pending the outcome of the present matter. Order, Rieber v. Dunn, 5:18-cv-00337 (N.D. Ala. July 5, 2018), Doc. 11.

REASONS THE PETITION SHOULD BE DENIED

Rieber presents two primary issues, both with multiple sub-parts. No issue in his petition is worthy of certiorari.

The first issue, concerning ineffective assistance of counsel, is factbound and meritless. During the guilt phase, counsel were not ineffective for choosing a defense strategy that fit Rieber's own statements to police, nor were they ineffective for failing to argue for a lesser-included offense unwarranted by the facts of the case. During the penalty and sentencing phases, counsel were not ineffective for failing to cite cases "worse" than Rieber's, nor were they ineffective for failing to provide evidence of substance abuse and associated criminal acts when such evidence ran counter to the defense's penalty-phase presentation—a presentation that resulted in a jury recommendation of life without parole. Moreover, the Alabama Court of Criminal Appeals did not violate Rieber's constitutional rights by refusing to consider claims that were procedurally barred or by denying relief on claims for which Rieber offered only a silent record.

The second issue is yet another attempt by a death-sentenced defendant to convince this Court to invalidate Alabama's capital sentencing scheme after *Hurst v. Florida*, 136 S. Ct. 616 (2016). This Court held Alabama's capital punishment statute to be constitutional in *Harris v. Alabama*, 513 U.S. 504 (1995), including Alabama's provisions allowing judicial sentencing and "override" of jury

recommendations. This Court has consistently declined to consider petitions seeking to overrule or limit *Harris* in light of *Hurst*. For example, in *Bohannon v. Alabama*, 137 S. Ct. 831 (2017) (mem.), the Court denied certiorari when the Alabama Supreme Court held in *Ex parte Bohannon*, 222 So. 3d 525 (Ala. 2016), that Alabama's capital scheme remained constitutional after *Hurst*. Moreover, even if *Hurst* had an effect on Alabama's capital statutes, which it does not, *Hurst* has no retroactive effect, and it does not entitle Rieber to relief. Finally, the fact that Alabama enacted a procedural change to its capital sentencing scheme with only prospective effect does not render Rieber's sentence arbitrary and capricious, nor does it violate his equal protection rights. Therefore, certiorari is unwarranted.

I. Certiorari is unwarranted because Rieber's counsel rendered effective assistance.

In his first claim, Rieber contends that his counsel were ineffective at the guilt, penalty, and sentencing phases of his trial and on direct appeal. He further alleges that the state courts violated his constitutional rights by declining to consider an unpreserved claim and by refusing to grant relief on a silent record.

As this Court made plain in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), to prevail on a claim of ineffective assistance of counsel, a petitioner must show both that his counsel's performance was unconstitutionally deficient and that this deficient performance prejudiced his defense. Rieber cannot make this showing, and his meritless claims do not warrant certiorari.

A. Counsel were not ineffective for declining to pursue a defense unsupported by the evidence and contrary to Rieber's own statements.

Rieber first alleges that his lead counsel, Richard Kempaner, was ineffective for failing to present an intoxication defense. This claim is simply meritless.

Kempaner had more than twenty-five years of experience as a criminal defense attorney and had appeared in at least fifteen capital cases prior to Rieber's. (C. 7399, 7441.) He knew that the defense had little hope of success

in Rieber's case, as "[s]omeone that resembled the defendant was on a videotape shooting the deceased in the head twice and looking into the camera as he grabbed a six-pack and walked out of the store." (C. 7407.) Faced with poor options, Kempaner made a strategic choice to pursue a defense of mistaken identity, as Rieber had told police that he had never been at the scene of the crime. (C. 6459–61.)

Prior to trial, Rieber was evaluated by Dr. Kathy Rogers, a state psychologist, who rendered a forensic evaluation report and addendum in September and November 1991. In relevant part, Dr. Rogers reported:

> [Rieber] denied experiencing symptoms associated with a thought disorder, other than when using drugs. He reported a very significant history of drug abuse, dating back to when he was very young, about age 9. He has consumed alcoholic beverages heavily, and had used marijuana, cocaine, "angel dust," Valiums, Xanax, and other pills, as well as a great deal of "crystal meth," and "acid." He has had perceptual disturbances when using these drugs in the past.
>
> [. . .]
>
> Although Mr. Rieber stated that he does not have memory for a period of perhaps a couple of hours during the actual offense, he was well able to describe to me, at length and in detail, his behavior leading up to that time and immediately after that time. He stated that he had been using drugs during the time of the alleged offense, and it is my opinion, since I found no evidence of any type of memory impairment, that a reported lack of memory for that period of time would have been related to either substance abuse or deliberate misrepresentation of his memory, although the former is more likely in my opinion.
>
> ***
>
> Mr. Rieber did indicate to me that he had been drinking alcoholic beverages prior to the alleged offense, and had also smoked marijuana and used three hits of "acid." He also intimated that it

> is possible that he was slipped some other type of drug when he went to a friend's house before the alleged offense. He denied ever experiencing any type of blackouts when using "acid" in the past, and he has a fairly significant history of using "acid," dating back several years. He did report experiencing blackouts in the past when he was drinking, although this did not occur on a regular basis. He had consumed approximately six or seven beers prior to the alleged offense and smoked about six joints. Mr. Rieber does not possess a memory for the time surrounding the alleged offense. It is noted that although he may have not experienced blackouts when using mixed substances as he did on the evening of the alleged offense in the past, the combination of substances and the possibility that the "acid" which he used caused an idiosyncratic reaction, such that he experienced a blackout, is not untenable. In any event, his behaviors during the evening in question could possibly be attributed to the mixed substances and perhaps "bad acid," however, I found no evidence to indicate that any type of mental illness contributed in any manner to his actions during the time of the alleged offense.

(1 Supp. 327–29, 333.)

Rieber now contends that Kempaner should have pursued an intoxication defense and a lesser-included charge of manslaughter, based on Dr. Rogers's report, instead of a defense of mistaken identity. He faults counsel for failing to present the testimony he offered during the postconviction evidentiary hearing in support of his claim that he suffered a drug-induced blackout at the time of the murder. This claim is ineffective assistance is meritless.

As this Court wrote in *Strickland*:

> There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . [S]trategic choices

> made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

466 U.S. at 689–91. Here, Kempaner's decision not to pursue an intoxication defense or the lesser-included offense instruction was reasonable for three reasons.

First, Kempaner and his co-counsel, Dan Moran, "agreed that at the time[,] [Dr. Rogers's report] didn't make any difference[;] our position was that it wasn't [Rieber] that did the shooting, so it didn't make any difference what his mental state was." (C. 7411–12.) Because Rieber had told police that he was never at the murder scene (C. 6459), his mental state during the time of the murder was irrelevant. Moreover, according to Kempaner, Rieber never mentioned the possibility of a drug-induced blackout during their discussions. (C. 2873, 7412, 7436–37.)

Second, the evidence of intoxication upon which Rieber relied during his postconviction proceedings was hardly compelling. Four of Rieber's friends who had seen him on the day of Craig's murder testified that he was a longtime drug abuser, and none of them reported ever seeing him become violent or black out when they frequently used drugs together. For example, Jo Duffy,

who had known Rieber since at least middle school, testified that "Jeff was always Jeff"—Rieber did not have a massive personality change when he was high, and she never saw him lose control, become violent, or black out. (C. 7464–65, 7468.) Derrell Dwayne Maroney, another friend, did not see Rieber become violent or black out on the day of the murder, and he added, "It was a surprise to me when I was told later that he had robbed a store." (C. 2872.) In other words, had Rieber suffered a blackout, it would have been an idiosyncratic reaction, based on his usual behavior while high. Moreover, Rieber's friends could not agree on what drugs he used that day or when he did so. This conflicting testimony, given by drug-abusing witnesses recalling a night twenty years in the past, does not concretely establish what Rieber consumed on the night of the murder, and it certainly does not give credence to the theory that he killed Craig during a drug-induced blackout.

Further, as the circuit court explained, these witnesses would not have been permitted to testify about his history of substance abuse at his trial because "'[e]vidence that someone was a habitual drug user is not evidence that that person was intoxicated at the time of the murder.'" (C. 2871 (quoting *Whitehead v. State*, 777 So. 2d 781, 833 (Ala. Crim. App. 1999).) Their testimony "that Rieber had been using drugs at some time during the day of the offense would not have proven that he was intoxicated at the time of the offense." (C. 2872 (citing *Windsor v. State*, 683 So. 2d 1027 (Ala. Crim. App.

1994).) In sum, the only evidence of Rieber's alleged blackout is his self-serving statement to Dr. Rogers, who did not have the benefit of his friends' testimony that when Rieber was high, "Jeff was always Jeff" and did not have blackouts.

Third, the evidence presented did not establish that Rieber was entitled to an intoxication manslaughter instruction. As the Court of Criminal Appeals explained in 1983, several years prior to Rieber's trial:

> It is true that the degree of intoxication necessary to negate specific intent and, thus, reduce the grade of an offense must amount to "insanity." Mere drunkenness, voluntarily produced, is never a defense against a criminal charge, and can never palliate or reduce the grade of an offense, unless it is so extreme as to render impossible some mental condition which is an essential element of the criminal act. Partial intoxication will not avail to disprove the specific intent; the intoxication must be of such character and extent as to render the accused incapable of discriminating between right and wrong—stupefaction of the reasoning faculty.

Crosslin v. State, 446 So. 2d 675, 681–82 (Ala. Crim. App. 1983) (internal citations omitted). Nothing Rieber presented at his trial or during his postconviction hearing established that level of intoxication.

While the defense's strategy was not ultimately successful, that alone does not constitute proof of ineffective assistance of counsel. *See, e.g.*, *Chanthakoummane v. Stephens*, 816 F.3d 62, 73 (5th Cir. 2016); *United States v. Morsette*, 653 F. App'x 499, 502 (9th Cir. 2016); *King v. Parker*, 443 F. App'x 369, 371 (10th Cir. 2011); *Nave v. Delo*, 62 F.3d 1024, 1036 (8th Cir. 1995). Rieber's experienced attorneys made the decision to pursue a defense that was

at least supported by their client's own statements to police. That they failed to present an unsupported intoxication defense instead does not render their guilt-phase presentation deficient, nor was Rieber prejudiced by counsel's failure to request instruction on a lesser-included offense that was unwarranted. The state courts correctly denied relief on this issue, and certiorari is unwarranted.

B. Counsel were not ineffective for failing to present mitigation evidence harmful to the defense's successful mitigation strategy, and the Alabama Court of Criminal Appeals correctly declined to consider a procedurally barred claim.

Rieber's second sub-claim raises two issues. First, he asks this Court to grant certiorari to review the Alabama Court of Criminal Appeals' decision not to review one of his claims because it was procedurally barred on state-law grounds. Second, he argues that co-counsel Moran was ineffective for failing to find and present evidence bolstering Dr. Rogers's report. Neither claim is cert-worthy.

As to the first claim—that the Court of Criminal Appeals erred in deeming a claim procedurally barred—Rieber contends that Moran was ineffective for failing to call to the trial court's attention "readily accessible examples of 'worse' cases where the death penalty was not imposed," Pet. 18, and faults the appellate court for "sweeping this gross incompetence under the

rug of procedural bar, ignoring the record in the case," Pet. 19. Rieber ignores the fact that the Court of Criminal Appeals acted in accordance with state law. The claim at issue was not raised until his post-hearing brief in 2013, nine years after his amended petition was filed, and thus was not properly presented to the circuit court. (C. 2370–72.) As the Court of Criminal Appeals explained:

> This specific claim was not presented to the circuit court in either the original or amended versions of Rieber's Rule 32 petition below; therefore, it has not been properly preserved for our review. "The general rules of preservation apply to Rule 32 proceedings." *Boyd v. State*, 913 So. 2d 1113, 1123 (Ala. Crim. App. 2003). A Rule 32 petitioner cannot raise on appeal a postconviction claim that was not included in his or her petition or amendments. *See Arrington v. State*, 716 So. 2d 237, 239 (Ala. Crim. App. 1997) ("An appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition."). Because this claim was not properly preserved for review, it will not be considered by this Court.

Pet. App'x A-18. This rule of preservation and presentation does not infringe upon Rieber's constitutional rights.

Moreover, the underlying claim is meritless, as Rieber failed to meet the *Strickland* standard. As the punctuation in his petition (i.e., "worse," Pet. 18) indicates, the question of whether the facts of one capital case are worse than those of another is a nuanced question. Putting the facts of the four cases he located before the trial court could have had the opposite of the intended effect. Rieber failed to show that Moran was unaware of these cases or that his failure

to present them to the trial court was not a product of his sound judgment as an experienced attorney. He also failed to present any evidence that "no competent counsel" would have failed to present facts from other cases in such a manner. *E.g.*, *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000). Second, Rieber failed to show prejudice. While the defense won a 7–5 jury recommendation of life without parole, the court found that this murder was especially heinous, atrocious, or cruel because Rieber stalked and shot his helpless victim. (C. 5291–92.) Rieber cannot explain how presenting these four cases would have swayed the court's judgment that his crime "was extremely wicked and shockingly evil" and that the cruelty of his offense "exceeds that common to all capital offenses." (C. 5293.)

Turning then to the second claim, Rieber argues that Moran rendered deficient performance pursuant to *Wiggins v. Smith*, 539 U.S. 510 (2003), for failing to present evidence of his drug use like that presented during the postconviction hearing in order to bolster Dr. Rogers's report. This claim is meritless.

During the penalty phase, Moran put on seven mitigation witnesses, whose testimony focused on "Rieber's good character, his gentle nature, his lack of violence, and his willingness to help others." Pet. App'x D-62. Moran also presented Dr. Rogers's report. Pet. App'x D-62–63. While the prosecution made the entirely logical inference that Rieber had exaggerated his drug abuse

with Dr. Rogers for his own benefit (C. 6806, 6808), the jury still rendered a 7–5 recommendation of life without parole. In other words, the defense's presentation was effective.

Instead, Rieber now insists that counsel should have presented evidence that painted a vastly less sympathetic picture of him: he had sold drugs, he had been in a relationship with a young teenager when he was nineteen, and she began to use the hard drugs that Rieber did during their relationship. (C. 2895.) He cannot prove deficient performance in this respect—again, the jury **recommended life without parole**—nor can he prove prejudice. The trial court already believed that Rieber had committed a heinous crime, as is evidenced by its sentencing order. Rieber presented no facts indicating that the court would have been more sympathetic had it known further details of his sordid past. As the circuit court rightly concluded in rejecting this claim:

> [T]here is no reasonable probability that if the witness testimony concerning Rieber['s] history of drug and alcohol abuse presented at the evidentiary hearing had been presented at the judicial sentencing it would have persuaded the trial court to follow the jury's recommendation. Also, as noted above, evidence that Rieber sold drugs and was in a sexual relationship with and providing illegal drugs to a teenage girl would not have been mitigating.

(C. 2896–97.) The state courts correctly denied relief on this issue, and certiorari is unwarranted.

C. The Alabama Court of Criminal Appeals correctly refused to grant relief on a silent record, and counsel were not ineffective for failing to raise a meritless claim on direct appeal.

In his third sub-claim, Rieber again raises two issues: the Alabama Court of Criminal Appeals erred by refusing to grant relief on a silent record, and counsel were ineffective on direct appeal for failing to challenge the trial court's finding that Rieber stalked Craig. This claim is not cert-worthy.

As this Court set forth in *Strickland*, 466 U.S. at 689, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" In Alabama, "[i]t is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim." *Broadnax v. State*, 130 So. 3d 1232, 1255 (Ala. Crim. App. 2013); *see* ALA. R. CRIM. P. 32.3 ("The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief."). The Court of Criminal Appeals has stated, "When a record is silent as to the reasons for an attorney's actions we must presume that counsel's conduct was reasonable." *Hooks v. State*, 21 So. 3d 772, 793 (Ala. Crim. App. 2008). Further, "[i]f the record is silent as to the reasoning behind counsel's actions,

the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim." *Davis v. State*, 9 So. 3d 539, 546 (Ala. Crim. App. 2008) (quotation omitted). The Eleventh Circuit has offered similar reasoning:

> "Counsel's competence . . . is presumed, and the [petitioner] must rebut this presumption by *proving* that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (emphasis added) (citations omitted). An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption. Therefore, "where the record is incomplete or unclear about [counsel]'s actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment." *Williams v. Head*, 185 F.3d 1223, 1228 (11th Cir. 1999); *see also Waters v. Thomas*, 46 F.3d 1506, 1516 (11th Cir. 1995) (en banc) (noting that even though testimony at habeas evidentiary hearing was ambiguous, acts at trial indicate that counsel exercised sound professional judgment).

Chandler, 218 F.3d at 1314 n.15 (citations edited).

Here, Kempaner testified at Rieber's postconviction hearing, yet Rieber failed to ask him about his decision not to raise the issue of the trial court's finding that Rieber stalked Craig. The Court of Criminal Appeals correctly denied relief, explaining:

> [B]ecause Rieber failed to question [Kempaner] about why he chose not to raise the stalking issue on direct appeal, the record is silent as to whether [Kempaner's] decision not to make that argument was strategic. For this reason, Rieber failed to satisfy his burden of proving that [Kempaner's] performance was deficient or that his performance prejudiced Rieber pursuant to Rule 32.3, Ala. R. Crim. P.

Pet. App'x A-28–29. There is no need for this Court to grant certiorari to review a state court's application of state law.

Moreover, even if the Court of Criminal Appeals erred—which it did not—the underlying claim is meritless. Rieber can prove neither *Strickland* prong, as counsel are not ineffective for failing to raise a meritless issue. *E.g.*, *Washington v. Boughton*, 884 F.3d 692, 701 (7th Cir. 2018); *Sanders v. Cullen*, 873 F.3d 778, 815 (9th Cir. 2017); *United States v. Regaldo*, 518 F.3d 143, 149 n.3 (2d Cir. 2008); *United States v. Sanders*, 165 F.3d 248, 253 (3d Cir. 1999); *Ludwig v. United States*, 162 F.3d 456, 459 (6th Cir. 1998). Both state appellate courts determined that the trial court's conclusions as to stalking were justified, as the Alabama Supreme Court explained:

> The Court of Criminal Appeals set out in its opinion the trial court's findings with respect to this issue. Suffice it to say that the evidence supports those findings. The evidence indicates that Rieber had "cased" the store and had stalked Ms. Craig for several days before the murder. Testimony and the videotape from the surveillance camera at the store clearly indicate that Ms. Craig was aware of Rieber's presence and was apprehensive and afraid of him. As the Court of Criminal Appeals pointed out, evidence as to the fear experienced by the victim before death is a significant factor in determining the existence of the aggravating circumstance that the murder was especially heinous, atrocious, or cruel.

Ex parte Rieber, 663 So. 2d at 1003 (footnote omitted). Therefore, even if Rieber could prove deficient performance on this issue, he cannot prove prejudice.[5]

For the foregoing reasons, the state courts correctly denied relief on this issue, and certiorari is unwarranted.

II. Certiorari is unwarranted because Rieber's death sentence was constitutionally imposed and remains constitutional.

In Rieber's second claim, he essentially asks this Court to overrule *Harris v. Alabama*, 513 U.S. 504 (1995), based on an erroneous interpretation of *Hurst v. Florida*, 136 S. Ct. 616 (2016). He also asks the Court to make any decision overruling *Harris* retroactive so that it would apply to his case. He raises four sub-claims: (1) Alabama's capital sentencing scheme, which permitted judicial override, is unconstitutional post-*Hurst*, (2) *Hurst* should apply retroactively to cases on collateral review, (3) Rieber's death sentence was arbitrary and capricious, and (4) Alabama's procedural change to its capital sentencing statutes should be applied retroactively. None of these issues merits certiorari.

5. Nor can Rieber prove prejudice regarding counsel's *Batson* claim. While the claim was meritless, the circuit court correctly noted that "Rieber presented no evidence demonstrating what issues Mr. [Kempaner] and Mr. Moran could have raised on direct appeal that would have caused the Alabama Court of Criminal Appeals or the Alabama Supreme Court to reverse his conviction or sentence." Pet. App'x D-70.

A. Alabama's former capital sentencing scheme was constitutional, and *Hurst* did not overrule *Harris*.

Rieber first contends that Alabama's capital sentencing scheme in use at the time of his conviction—the scheme that this Court upheld in *Harris*—has been rendered unconstitutional by *Hurst*. This claim is not cert-worthy, as *Hurst* in no way overruled *Harris*.

In *Harris*, this Court rejected the argument that Alabama's capital sentencing scheme was unconstitutional because it allowed judges instead of juries to impose a capital sentence. Alabama has relied on *Harris* to sentence hundreds of murderers since 1995. "[T]he States' settled expectations deserve our respect." *Ring v. Arizona*, 536 U.S. 584, 613 (2002) (Kennedy, J., concurring).

The Court has consistently declined to grant a petition to address whether to overrule *Harris* in light of *Hurst*. As the Court declined to do so in *Bohannon v. Alabama*, 137 S. Ct. 831 (2017) (mem.)—an appeal from the Alabama Supreme Court's decision finding that Alabama's capital scheme was constitutional after *Ring* and remained so post-*Hurst*—and has continued to decline to consider the issue in every subsequent certiorari petition raising the issue, there is no need for the Court to grant certiorari in Rieber's case.

Alabama's capital punishment system is constitutional under *Hurst*. In *Ring*, the Court applied the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000),

to death penalty cases, holding that although a judge can make the "selection decision," the jury must find the existence of any fact that makes the defendant "eligible" for the death penalty by increasing the range of punishment to include the imposition of the death penalty. There, the Court held that Arizona's death penalty statute violated the Sixth Amendment right to a jury trial "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 585. Thus, a trial court cannot make a finding of "any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589. Only the jury can.

Hurst did not add anything of substance to *Ring*. In *Hurst*, Florida prosecuted a defendant for first-degree murder. *Hurst*, 136 S. Ct. at 620. The jury did not unanimously find the existence of an aggravating circumstance at either the guilt or penalty phase of trial. Instead, it returned an advisory recommendation of 7–5 in favor of death. *Id.* Because the jury found no aggravating circumstance, the trial court should have imposed a life without parole sentence. Instead, the judge found an aggravating circumstance herself and imposed a death sentence, making both the eligibility and selection determinations. *Id.* Applying *Ring*, the Court held the death sentence unconstitutional because "the judge alone [found] the existence of an

aggravating circumstance" that expanded the range of punishment to include the death penalty. *Id*. at 624.

In *Ex parte Bohannon*, the Alabama Supreme Court considered *Ring*, *Hurst*, and its prior decision in *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002), then found that Alabama's capital scheme remained constitutional. First, the court noted that "*Ring* and *Hurst* require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty—the plain language in those cases requires nothing more and nothing less." 222 So. 3d at 532. "Accordingly, because in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment." *Id.* As for the claim that *Hurst* requires that the jury weigh the aggravating and mitigating circumstances, the court explained that "*Hurst* does not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment." *Id.* Finally, the court concluded that *Hurst* does not hold that "the Sixth Amendment requires that a jury **impose** a capital sentence." *Id.* at 533. Indeed, Alabama's capital sentencing scheme at the time of Bohannon's trial—and Rieber's—was in line with Justice Scalia's concurrence in *Ring*:

> What today's decision says is that the jury must find the existence of the **fact** that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding or aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.

Ring, 536 U.S. at 612–13 (Scalia, J., concurring).

Rieber's case does not bear the infirmity present in *Hurst*. Rieber's jury unanimously found the existence of an aggravating circumstance when it convicted him of robbery-murder, as the fact that a murder was committed during a robbery is an "overlapping" statutory aggravator. ALA. CODE § 13A-5-49(4) (1975). This is all that *Ring* and *Hurst* required to make a capital defendant death-eligible. That a judge imposed Rieber's sentence does not offend *Hurst* (nor *Ring*), and this Court's decision in *Harris* remains untouched—as it should. Finally, as discussed below, the Court should not call into question a longstanding precedent like *Harris* because its decision on the question would have no prospective effect, given that Alabama amended its sentencing procedure in 2017 to end judicial sentencing. Therefore, certiorari is unwarranted.

B. *Hurst* has no retroactive application.

Rieber's second sub-claim builds on the errors of the previous sub-claim and adds a further layer of fallacy by arguing that *Hurst* should have

retroactive application to his case. For the reasons that follow, this claim is meritless.

Hurst did not announce a new rule of constitutional law. Rather, *Hurst* was an application of *Ring* to the unique circumstances in Florida. As this Court has explicitly held that *Ring* is not retroactively applicable to cases on postconviction review, *Schriro v. Summerlin*, 542 U.S. 348 (2004), *Hurst* must also have no retroactive effect. Rieber's claim that *Hurst* announced either a new substantive rule or a watershed rule of procedure on par with *Gideon v. Wainwright*, 372 U.S. 335 (1963), is simply unfounded and is premised upon his erroneous contention that *Hurst* invalidated judicial sentencing.

As support for retroactive application, Rieber points to the fact that the Florida Supreme Court is applying *Hurst* to defendants sentenced between *Ring* and *Hurst*. *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016). But the Florida courts have applied *Hurst* retroactively under unique Florida law retroactivity principles that have no bearing in Alabama. *See id.* at 1275. Federal law does not require for *Hurst* to be applied, retroactively or otherwise, in Alabama, and Rieber is due no relief. Therefore, certiorari is unwarranted.

C. Rieber's death sentence was not arbitrarily and capriciously imposed.

Third, Rieber contends that his death sentence was arbitrarily and capriciously imposed, violating his Eighth Amendment rights and *Gregg v. Georgia*, 428 U.S. 153 (1976). This claim does not merit certiorari.

Rieber argues that it is unfair for him to be sentenced to death after a 7–5 jury recommendation when Hurst, the Florida inmate, also received a 7–5 vote and is being resentenced. Pet. 31. As discussed above, Hurst is being resentenced because Hurst's jury failed to find an aggravating circumstance necessary to make him death-eligible. There is no comparable problem in Rieber's case. The states are not constitutionally obligated to promulgate identical sentencing schemes, and Rieber's **non-binding jury recommendation** was overridden as part of a scheme upheld in *Harris*.

Indeed, on direct appeal, the state appellate courts held that Rieber's sentence was proper and not arbitrarily imposed:

> We have reviewed the trial court's findings concerning the aggravating and mitigating circumstances in this case. The trial court found two aggravating circumstances: 1) that the capital offense was committed while the appellant was engaged in the commission of a robbery in the first degree, and 2) that the capital offense was especially heinous, atrocious, or cruel when compared to other capital offenses. The trial court considered as a mitigating circumstance[] the fact that the appellant had no significant history of prior criminal activity and the fact of the appellant's good reputation and character before this offense. The trial court considered the psychiatric evaluation of the appellant, including evidence of substance abuse, but concluded that this evidence did

> not establish the mitigating circumstance that the capital offense was committed while the appellant was under the influence of extreme mental or emotional disturbance. The trial court also found that the evidence concerning the appellant's substance abuse was not sufficient to establish the mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The trial court also found that the appellant's age, 23 years, was not a mitigating circumstance in this case. Our review of the record leads us to conclude that the trial court's findings are supported by the record. We find no evidence that the appellant's sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. Our independent weighing of the aggravating and mitigating circumstances convinces us that death is the appropriate and proper sentence in this case.
>
> Furthermore, the appellant's sentence of death is not disproportionate to the penalty imposed in similar cases, considering the crime and this appellant. *See Beck v. State*, 396 So. 2d 645, 654 n.5 (Ala. 1980).

Rieber v. State, 663 So. 2d at 998 (citation edited).

> Pursuant to Ala. Code 1975, § 13A–5–53, we have carefully searched the record of both the guilt phase and the sentencing phase of Rieber's trial, and we have found no reversible error. In reviewing the sentence in this case, we find no evidence that it was imposed under the influence of passion, prejudice, or any other arbitrary factor. We find that the guilty verdict and the sentence are supported by the evidence. Our independent weighing of the aggravating and mitigating circumstances convinces us that the sentence of death is appropriate for this defendant. Considering the crime and the defendant, we find that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases. Accordingly, the Court of Criminal Appeals properly affirmed Rieber's conviction and sentence of death. That court's judgment is affirmed.

Ex parte Rieber, 663 So. 2d at 1015 (citation edited).

Again, Rieber was sentenced for his heinous crime under a scheme upheld by the *Harris* Court. The jury was almost equally split as to their penalty recommendation, and the trial court, with the benefit of information and experience beyond the jurors', properly sentenced Rieber to death. Therefore, certiorari is unwarranted.

D. Rieber's equal protection rights are not violated because Alabama's procedural amendment to its capital sentencing statutes only has prospective application.

Finally, Rieber contends that his death sentence is unconstitutional because of a recent legislative change to Alabama's capital sentencing scheme. This claim does not merit certiorari.

In April 2017, the Alabama legislature enrolled SB 16 (codified as Ala. Laws Act 2017–131), which removed the judicial override provision from the capital statutes. *See* Pet. App'x J. Importantly, the act did not alter or amend any penalty for a capital crime. Rather, all the act did was make the jury's previously non-binding sentencing recommendation binding upon the trial court. By its terms, Act 2017–131 has only prospective effect. Pet. App'x J-10.

Rieber claims that as a result of the act, "no person tried today can be given the sentence Mr. Rieber received, death where the jury has voted for life[.]" Pet. 33. This is inaccurate. The **sentence** Rieber received was death—only the **procedure** by which that sentence was imposed has been amended.

Indeed, if Rieber were to be resentenced today, he could still be sentenced to death.

As this Court has recognized, "[t]he Fourteenth Amendment does not require absolute equality or precisely equal advantages." *Ross v. Moffitt*, 417 U.S. 600, 612 (1974) (quotation omitted). The Court has further recognized that while making changes in the law prospectively effective may create certain inequities, these are outbalanced by the serious disruptions in administrating justice that would result from retroactive application. *Stovall v. Denno*, 388 U.S. 293, 300 (1967). Were Act 2017–131 to be given retroactive application, every capital case prior to 2017 would necessarily have to be revisited and all of the sentencing procedures reexamined. This was not the result intended by the legislature, which clearly made the changes in Act 2017–131 prospective only. Had the act made a substantive change to Alabama's capital sentencing statutes, such as abolishing the death penalty or making Rieber's crime a non-capital offense, then retroactive effect might be warranted. Instead, all the act did was put the final sentencing authority in the hands of the jury instead of the trial court. This is merely a procedural change to the capital sentencing scheme.

By way of example, a distinction can be drawn between the procedural statutory change at issue in Alabama and the substantive statutory change that gave rise to constitutional concerns in Connecticut when that state

abolished the death penalty by legislation with prospective effect. *State v. Santiago*, 122 A.3d 1, 7–8 (Conn. 2015). The Connecticut Supreme Court held that limiting abolition of the death penalty to prospective application violated the state's constitutional prohibition against cruel and unusual punishment because capital punishment no longer comported with standards of decency or served a penological goal in that state. *Id.* at 9, 46–119. As the death penalty was no longer a sentencing option, that court held that executing inmates who had been sentenced prior to the law's passage would be an excessive and disproportionate punishment. *Id.* at 85–86.

The abolition of the death penalty in Connecticut constituted a substantive change to that state's law because it removed a punishment from consideration for all classes of offenders. By contrast, the change wrought to Alabama's capital sentencing scheme by Act 2017–131 is merely procedural. The death penalty remains a legal, proper sentence for those convicted of capital murder. All along, Alabama juries have been tasked with finding an aggravating circumstance necessary to make defendants death-eligible, and judges have been obligated to consider their advisory penalty-phase verdicts. The only change is that as of April 11, 2017, these advisory verdicts are now binding.

As a final note, judicial override has gone in both directions in Alabama. While the majority of override cases have ended in death sentences, several

have resulted in an override in favor of life without parole. *E.g.*, *Berry v. State*, CR-12-0467, at 1 (Ala. Crim. App. Mar. 7, 2014) (noting override of 10–2 death recommendation). Presumably, these inmates would disagree with Rieber's position that they should be entitled to the benefit—or, more properly, the detriment—of jury sentencing.

There is no reason for this Court to grant certiorari on this issue, much less revisit *Harris*. Rieber was sentenced to death under a constitutionally adequate sentencing procedure for a heinous murder, and neither *Hurst* nor Act 2017–131 has invalidated that sentence. Therefore, certiorari is unwarranted.

CONCLUSION

This Court should deny certiorari.

Respectfully submitted,

STEVE MARSHALL
Alabama Attorney General

s/ Lauren A. Simpson
Lauren A. Simpson
Assistant Attorney General
*Counsel of Record

OFFICE OF ALA. ATT'Y GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
lsimpson@ago.state.al.us