No. 18-5103

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

# REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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Dated: August 24, 2018.

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Petitioner Jeffery Day Rieber asks the Court to grant his Petition for Certiorari to review his counsel's unconstitutionally ineffective assistance and to review Alabama's unconstitutional former capital sentencing scheme.

### I. THE COURT SHOULD GRANT THE PETITION TO REVIEW THE PATENTLY INEFFECTIVE ASSISTANCE OF MR. RIEBER'S COUNSEL.

With respect to the ineffective assistance of counsel claim at the trial stage, the State's Brief in Opposition warrants two rejoinders.

First, the State observes that Mr. Kempaner, Mr. Rieber's trial counsel, had twenty-five years of experience as a criminal defense attorney, and he had appeared in at least 15 capital cases. While this might be loose circumstantial proof of his competence, the direct evidence in the case completely undercuts such proof. Mr. Kempaner's judgment and knowledge were so impaired that he was not the right lawyer to represent anyone charged with a crime, let alone one that carried the death penalty.

Mr. Kempaner firmly believed that if he struck a potential juror on racial grounds, this would guarantee reversal because it violated the prospective juror's rights. Or, as he put it, "I set about that we got some error into the record so if he did get convicted, which I thought he would, it would get reversed," by striking a juror of east Asian ancestry. (R. 300-01.) This was a view he held at trial, urged on appeal as one of the key grounds, and even as late as the 2011 post-conviction hearing, he did not understand why he did not prevail on this frivolous argument.

(R. 325.) A trial lawyer with such poor judgment hardly deserves deference on his strategy decisions.

Second, Mr. Kempaner totally misunderstood Alabama law at the time insofar as it allowed for voluntary intoxication to serve as the basis for negating specific intent. He said he was "not sure, not on good ground on using self-induced intoxication to negate intent." (R. 322-23.) Had he been aware of relevant Alabama law, he would have known that the cases Mr. Rieber relied on in the Petition more than establish the viability of a lesser included manslaughter option for the jury in this case. The State relies on *Crosslin v. State,* 446 So. 2d 675 (Ala. Crim. App. 1983), to suggest otherwise. But in *Crosslin,* the judgment of conviction was reversed precisely because the jury was not permitted to find that Mr. Crosslin's drug consumption may have precluded his ability to form the specific intent required for capital murder.

> "The standard to be applied in this state is that in a capital case the jury must be instructed on each lesser-included offense which has 'any basis in the evidence.' *Beck v. State,* 396 So. 2d 645 at 658 (Ala. 1980); *Ex parte Kyzer,* 399 So. 2d 330 (Ala. 1981). A lesser included offense instruction should be given if 'there is any reasonable theory from the evidence which would support the position.' *Hopper v. Evans,* 456 U.S. 605, 102 S. Ct. 2049, 72 L. Ed. 2d 367 (1982); *Chavers v. State,* 361 So. 2d 1106 (1978); *Fulghum v. State,* 291 Ala. 71, 75, 277 So. 2d 886, 890 (1973). Our decisions are to the effect that 'Every prisoner at the bar is entitled to have charges given, which, without being misleading, correctly stated the law of his case, and are supported by *any evidence, however weak, insufficient, or doubtful in credibility.*' (Emphasis added.) *Gibson v. State,* 89 Ala. 121, 8 So. 98

(1889). *See also Burns v. State,* 229 Ala. 68, 155 So. 561 (1934).

> "No matter how strongly the facts may suggest that appellant was not so intoxicated at the time he committed the offense that he was incapable of forming the necessary specific intent, the jury should have been instructed on manslaughter as a lesser included offense since there was a 'reasonable theory from the evidence which would support the position.'"

446 So. 2d at 682.

Here, the evidence demonstrated that Mr. Rieber consumed alcohol and numerous hard drugs in the period just before the homicide. While it is true that different witnesses saw different drug consumption, that in no way makes their testimony inconsistent, as the State suggests. They just saw him at different times. The State also ignores evidence of unusual behavior by Mr. Rieber shortly after the homicide: testimony by Dennis Howell that Mr. Rieber rocked in stone silence for about 45 minutes that same evening – something he had never seen before. (R. 381.) Further, the State quotes that part of the trial court decision that minimizes the drug consumption evidence, stressing that Mr. Rieber used drugs "at some point during the day of the offense." (C. 2872.) The State might just as well have said "the decade" of the offense. Evidence at the Rule 32 hearing, set forth in the Petition, proves that the drug parties did not begin until 3:00-3:30 in the afternoon, and that Mr. Rieber was seen consuming these various drugs around dusk or early evening – in short, within an hour or hour and a half before the crime. (Petition for Cert. ("Petition") 15.) Mr. Kempaner was well aware of Mr. Rieber's drug use once he read the Rogers report. Further, this defense was not inconsistent

with Mr. Rieber's denial that he was at the scene of the crime. In sum, there was ample evidence supporting a lesser included offense of manslaughter, loudly portended by Dr. Rogers' report, which Mr. Kempaner never pursued.

Trial counsel never considered the alternative because of a complete failure to understand Alabama law on the subject. The failure to pursue the defense laid out by Dr. Rogers – who ended up believing Mr. Rieber – was especially glaring in light of the fact trial counsel conceded that the alibi defense on which he relied almost certainly would fail.

With respect to the ineffective assistance of counsel at the sentencing phase, Mr. Rieber brings two points to the Court's attention.

First, Mr. Moran's failure to present cases "worse" than the instant case constituted constitutionally inadequate representation because such cases demonstrate that the application of the death penalty to Mr. Rieber was arbitrary and capricious. The State claims that because the Rule 32 Petition did not allege this failure, consideration of the issue is procedurally barred. The State completely overlooks the fact that when it raised that objection at the Rule 32 hearing, the court overruled the objection – on the obvious basis that had it been sustained, a motion to conform the pleadings to the proof could hardly have been denied as there was no prejudice to the State in the admission of published Alabama case law. Mr. Rieber prevailed on the admissibility of the evidence, over the State's objection, and the State did not cross-appeal that adverse ruling. The admission into evidence of Alabama cases no longer can be attacked on procedural grounds.

On the merits, the State claims that whether the cases are "worse" or not is a "nuanced question." (Brief in Opposition 17.) No amount of supposed "nuance" can render the application of the death penalty in this case other than arbitrary and capricious when it was not imposed in the cases referred to. The gore and gross brutality evidenced in those cases more than speaks for itself, and the life sentence imposed in each of those cases points unmistakably to the need for a similar sentence here.

Second, the State suggests in its response that the only evidence tendered by the defense at the sentencing stage was evidence showing that Mr. Rieber was a good person, that the conduct at issue was aberrational and, therefore, he should not be subject to the death penalty. This misreads the record.

The Rogers report was placed into evidence before the sentencing jury and, as shown in the Petition, the State aggressively attacked it on the ground that it was self-serving and of no weight. Mr. Moran did nothing after the jury's recommendation to insure that a similar argument could be met head on in the sentencing proceeding before Judge Blankenship. If, as the State contends, Mr. Moran's effectiveness was established by the jury's 7 to 5 vote for life imprisonment, then the State should agree that the sentencing proceeding before the jury was the final word on sentencing, a position the State has fought bitterly throughout this case.

Mr. Moran's failure becomes painfully obvious when, at the subsequent hearing, Judge Blankenship specifically asked whether there was any evidence

corroborating the Rogers report and, despite the abundance of such evidence as shown at the Rule 32 hearing almost twenty years later, the answer had to be, there was none. (C. Supp. 183-89.) The State's argument that Mr. Rieber has "presented no facts indicating that the court would have been more sympathetic had it known further details of his sordid past," (Brief in Opposition 19), suggests that Judge Blankenship was engaged in a meaningless inquiry when she asked whether there was evidence corroborating the Rogers report. There is no basis to so conclude, and there is every basis to conclude, as the 2011 hearing showed, that diligent counsel would have presented such evidence. Since the sentencing strategy was to pursue two lines of mitigation, Mr. Rieber's good side and his drug use, lines not necessarily inconsistent, Mr. Moran was under a constitutional obligation to conduct enough of an inquiry into Mr. Rieber's drug use to answer Judge Blankenship's question affirmatively. His failure constitutes ineffective representation within the meaning of *Wiggins v. Smith*, 539 U.S. 510 (2003).

As to ineffective assistance of counsel on appeal, the State effectively admits that Alabama consistently relies on an irrebuttable presumption of counsel competency if the case record does not include reasons explaining counsel's actions. For example, it cites *Hooks v. State*, 21 So. 3d 772, 793 (Ala. Crim. App. 2008), where the court said that "[w]hen a record is silent as to the reasons for an attorney's actions we must presume that counsel's conduct was reasonable." (Brief in Opposition 20.) The Court should grant certiorari to end Alabama's reliance on this irrebuttable presumption.

The State also argues Mr. Rieber's contention of appellate ineffectiveness was meritless because "[b]oth state appellate courts determined that the trial court's conclusions as to stalking were justified …." (*Id*. at 22.) In support, it quotes an Alabama Supreme Court statement that the evidence indicated Mr. Rieber "cased" the store. (*Id*.) The court could hardly have found otherwise because – incredibly – Mr. Rieber's counsel admitted in the appeal brief that the evidence *supported* the finding, (Petition 22-23), when, on the contrary, the record demonstrably refutes the finding. Mr. Rieber was prejudiced by Alabama's reliance on the unconstitutional presumption of competency.

## II. ALABAMA'S FORMER CAPITAL SENTENCING SCHEME, AND MR. RIEBER'S SENTENCE, BOTH SUFFER FROM THE SAME CONSTITUTIONAL FLAW IDENTIFIED BY THE COURT IN *HURST V. FLORIDA*, 577 U.S. ___, 136 S. CT. 616 (2016).

The State argues that Alabama's former capital sentencing scheme, ALA. CODE § 13A-5-46 (1982), must be constitutional because this Court has not said otherwise, and the Alabama Supreme Court recently held as much. In particular, the State claims that *Harris v. Alabama*, 513 U.S. 504 (1995), is still good law, and it notes that the Court denied the *certiorari* petition in *Ex parte Bohannon*, 222 So. 3d 525 (Ala. 2016), *cert denied*, 137 S. Ct. 831 (2017). *Harris*, of course, predates *Hurst* by 20 years; in fact, *Harris* even predates *Ring v. Arizona*, 536 U.S. 584 (2002). And *Bohannon* did not address a true judicial override of a jury's recommendation of life imprisonment. Rather, the *Bohannon* jury voted 11-1 that Mr. Bohannon be sentenced to death. In this case, to the contrary, Mr. Rieber's jury

voted 7-5 for life imprisonment. Hence, *Harris* and *Bohannon* provide no support for the State's position.

Next, the State claims that "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." (Brief in Opposition 29.) In fact, there is a comparable problem in Mr. Rieber's case. As the State admits, "the trial court [had] the benefit of information and experience beyond the jurors' …." *Id.* at 31. That is precisely the problem. Mr. Rieber's trial judge found additional facts and weighed an additional aggravating circumstance that the jury did not find. "The evidence allows the Court to clearly conclude that the defendant, for at least three to four days, had stalked the victim …." (C. 6889.) Without the stalking finding, which the jury did not find or weigh in the balance, the trial court would not have overridden the jury's recommendation of life without parole. Hence, the fatal flaw in *Hurst* exists in this case as well.

Finally, the State argues that the Court should not apply *Hurst* or the new Alabama capital sentencing statute retroactively to Mr. Rieber because "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." (Brief in Opposition 32.) It is unthinkable that any minor "disruptions in administrating justice" could outweigh the inequity of executing Mr. Rieber based on an unconstitutional statute. As the State notes, when Connecticut abolished its death penalty, the Connecticut

Supreme Court mandated that the change be applied retroactively to inmates who were sentenced to death before the passage of the new law. *Id*. at 33; *see State v. Santiago*, 318 Conn. 1, 122 A.3d 1, 10 (2015). The same was true in Illinois, Maryland, and New Jersey, all of which chose to spare the life of death row inmates sentenced before those states abolished the death penalty. The Court should do the same with respect to death row inmates in Alabama whose sentences are based on unconstitutional judicial overrides of advisory jury verdicts for life imprisonment without parole.

## CONCLUSION

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

Respectfully submitted,

GODFREY & KAHN, S.C.

Dated: August 24, 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 2,327 words.

Dated: August 24, 2018. By: *s/ James A. Friedman*
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