

No. 17-6847

IN THE
SUPREME COURT OF THE UNITED STATES

JOE CLARENCE SMITH,
PETITIONER,

-vs-

STATE OF ARIZONA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION

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CAPITAL CASE

NO EXECUTION DATE SCHEDULED

QUESTION PRESENTED FOR REVIEW

Following the issuance of its opinion affirming the district court's denial of relief in Petitioner Joe Clarence Smith's collateral attack upon a final state judgment under 28 U.S.C. § 2254, did the Ninth Circuit abuse its discretion when it denied Smith's motion to remand the case to the district court to amend his federal habeas petition by adding a new claim grounded in this Court's 2016 decision *Hurst v. Florida*?

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DECISION BELOW

In June 2017, the Ninth Circuit denied Smith's petition for *en banc* rehearing when no judge requested a vote on the matter. (Pet. App. A-1.) Months before, a three-judge panel of the Ninth Circuit had denied Smith's motion to remand and amend his habeas petition. (*Id.* A-2.) Nearly a year earlier, the Ninth Circuit had affirmed the district court's denial of Smith's habeas petition. (*Id.* A-54.)

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to consider a writ of certiorari after rendition of a judgment. The Ninth Circuit denied Smith's petition for rehearing *en banc* on June 20, 2017. (Pet. App. A1.) This Court granted Smith an extension of time in which to file his petition for a writ of certiorari until November 17, 2017. *Smith v. Ryan*, No. 17A260. Smith timely filed his petition on that very date. *Smith v. Ryan*, No. 17-6847.

PROVISIONS INVOLVED, IF ANY

The Sixth Amendment to the United States Constitution provides in part

In all criminal prosecutions, the accused shall enjoy . . . an impartial jury . . .

. The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law

INTRODUCTION

Some 40 years ago, on January 1, 1976, Sandy Spencer's teenage nude body was discovered in the desert near Phoenix, Arizona. (Pet. App. A-133.) Her mouth had been taped shut after being stuffed with dirt causing asphyxiation. (*Id.*) Prior to death, she had been bound. (*Id.*) Smith had stabbed her 19 times in her pubic region causing a vaginal tear. (*Id.*) Smith had embedded a sewing needle in her left breast, and repeatedly stabbed her breast. (*Id.*)

A month later, February 1976, Neva Lee's teenage nude body was discovered in the desert. (*Id.*) Like Sandy Spencer, Neva Lee died from asphyxiation due to soil obstructing her airways. (*Id.*) She also had been bound. (*Id.*) Smith had punctured and stabbed her in the chest, abdomen, and breasts, and damaged her vulva. (*Id.*)

At the time Smith killed Sandy Spencer and Neva Lee; he had been on probation for raping Alice Archibeque. (A-6.) While on probation, he had also raped Dorothy Fortner. (*Id.*) Decades after these horrific murders, Smith comes to this Court apparently more for delay than for relief. *See Smith v. Arizona*, 552 U.S. 985 (2007).

STATEMENT OF THE CASE

On May 26, 2016, the Ninth Circuit filed its Opinion affirming the district court's dismissal of Smith's petition for a writ of habeas corpus. (Pet. App. A-3.) Months before the Ninth Circuit's decision in Smith's case, this Court decided *Hurst v. Florida*, 577 U.S. ___, 136 S. Ct. 626 (2016), on January 12, 2016. Smith's certiorari petition is based on the mistaken belief that the *Hurst* decision changed

capital sentencing law and is retroactively applicable to his 28 U.S.C. § 2254 habeas case. (Pet. 3, 6.)

Rather than file any motion based on the *Hurst* decision shortly after that decision, Smith waited until the day before the statute of limitation under 28 U.S.C. § 2244(d)(1)(C) would expire. Smith then moved to remand the case to the district court based on *Hurst*, or in the alternative, for leave to file a second or successive habeas petition. (ECF 51 *Smith v. Ryan*, No. 14-99008, filed January 11, 2017.) He did this even after the Ninth Circuit had denied rehearing *en banc* in September 2016 in his case affirming the denial of his habeas petition, and after Smith had obtained an extension to file his petition for certiorari from the Ninth Circuit’s judgment in that case.

On February 17, 2017, the Ninth Circuit panel denied Smith’s motion. (Pet. App. A-2.) A month later—to the day—Smith petitioned for panel rehearing and petition for rehearing *en banc* from the denial of his motion to remand. (ECF 61 *Smith v. Ryan*, No. 14-9908, filed March 17, 2017.) On April 24, 2017, this Court denied Smith’s petition for certiorari from the 2016 judgment. *Smith v. Ryan*, 581 U.S. ___, 137 S. Ct. 1283 (2017). On June 20, 2017, the Ninth Circuit denied Smith’s petition for rehearing on his motion to remand based on *Hurst* after no judge requested a vote to rehear the matter *en banc*. (Pet. App. A-1.)

REASONS FOR DENYING THE WRIT

“A petition for a writ of certiorari will be granted *only* for *compelling* reasons.” Sup. Ct. R. 10 (emphasis added); *see City and County of San Francisco, Calif. v. Sheehan*, 575 U.S. ___, 135 S. Ct. 1765, 1774 (2015) (a grant of certiorari

jurisdiction is not a right, but a matter of judicial discretion). Here there is no reason, let alone a compelling one, to grant Smith's petition. The legal question at issue is whether the Ninth Circuit abused its discretion when it denied Smith's motion to remand after the Ninth Circuit had already affirmed denial of habeas relief. This is not the type of discretionary decision appropriate for review by this Court. *See* Sup. Ct. R. 10.

Moreover, the underlying claim based on *Hurst* is void of merit. Obviously, this Court understands what it held in *Hurst*. As discussed below, from a fair reading of *Hurst* this Court merely applied *Ring v. Arizona* 536 U.S. 584, 597 (2002), to the Florida capital sentencing system. Yet, in his petition and his Ninth Circuit motion to remand, Smith argued that the *Hurst* holding overruled long-established case law and "announced a new and retroactive rule that a capital jury must find beyond a reasonable doubt that the aggravating circumstances proven in a case outweigh the mitigating evidence." (Pet. 6.)

In *Kansas v. Marsh*, 548 U.S. 163 (2006), this Court expressly held that a capital sentencing system is constitutional that "directs imposition of the death penalty when a jury finds that aggravating and mitigating circumstances are in equipoise[.]" *Id.* at 181. This Court, in *Marsh*, reaffirmed the constitutionality of Arizona's capital sentencing, which places the burden of proving the existence of aggravating circumstances on the State and requires the defendant to proffer mitigation evidence. *Id.* at 172.

This Court reiterated that a state capital sentencing is constitutional when it

(1) rationally narrow[s] the class of death-eligible defendants; and (2) permit[s] a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime (citation omitted). So long as a state system satisfies these requirements, our precedents establish that a State enjoys a range of discretion in imposing the death penalty, *including the manner in which aggravating and mitigating circumstances are to be weighed* (citations omitted).

Id. at 173–74 (emphasis added). This has long been the law in capital sentencing. Once these two requirements are met, the sentencer has “unbridled discretion” in determining whether to impose the death penalty. *Tuilaepa v. California*, 512 U.S. 967, 979-80 (1994); *see also Harris v. Alabama*, 513 U.S. 504, 512 (1995) (the Constitution does not dictate how the mitigating and aggravating factors are to be weighed); *Romano v. Oklahoma*, 512 U.S. 1, 6-8 (1994) (once the requirements are met States have the traditional latitude to decide on how those who commit murder are punished).

Yet, without any citation to any of these cases by this Court in *Hurst*, Smith argues that this Court overruled this law and held that a capital jury must find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigation. (Pet. 6.) Additionally, this new rule must be applied retroactively to cases in habeas. (*Id.*)

Smith disregarded this Court’s key statement in *Hurst* that “[t]he analysis the *Ring* Court applied to Arizona’s sentencing scheme applies equally to Florida’s.” 136 S. Ct. at 621-22 (the holding that jurors, not judges, must find the aggravating circumstances that make a defendant eligible for the death penalty. *Ring*, at 597.) The problem this Court saw with the Florida capital system was that the jury

makes recommendations for a sentence, “but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge.” *Id.* at 622. Thus, the “maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole.” *Id.* This Court’s *Hurst* decision does not support Smith’s argument that it changed capital sentencing law and can be retroactively applied to his case.

Finally, in the denial of Smith’s previous certiorari petition, Justice Breyer noted that Smith had spent nearly 40 years, “most of the time in solitary confinement” awaiting execution. *Smith*, 137 S. Ct. at 1283. Yet, most of this delay was attributable to actions on behalf of Smith. This petition for certiorari demonstrates how more than a year of delay can be accomplished by raising a meritless issue.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully requests this Court to deny Smith’s most recent petition for writ of certiorari.

Respectfully submitted,

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