No. 17-7535
CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

VERNON MADISON,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

On Petition for a Writ of Certiorari to the
Alabama Supreme Court

BRIEF IN OPPOSITION TO MADISON'S PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

(Rephrased)

Should this Court grant certiorari in an eleventh-hour challenge, improperly filed in state court, to the constitutionality of a death sentence where Alabama has made a prospective procedural change to its capital sentencing scheme, explicitly legislating that the procedural change should not be applied retroactively?

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INTRODUCTION

This case is unworthy of certiorari review, at the very least for the extreme and unreasonable delay in which this case was presented. Last April, Alabama legislatively enacted a prospective procedural change to the manner in which capital defendants are sentenced. Petitioner Vernon Madison, whose third capital trial ended in a jury recommendation of life without parole but whom the trial court ultimately sentence to death, filed a challenge to the constitutionality of his death sentence in the Alabama Supreme Court on January 24, 2018—less than thirty-one hours before his scheduled execution. Beyond its lack of merit, the petition was procedurally defective, as it was both untimely and filed in an improper court. The Alabama Supreme Court quickly denied the petition. Pet. App. A.

Madison now asks this Court to grant certiorari review of an administrative decision of the state supreme court that rested on state procedural and equitable grounds. Rule 8(d)(1) of the Alabama Rules of Appellate Procedure provides that the Alabama Supreme Court "shall at the appropriate time enter an order fixing a date of execution" and "may make other appropriate orders upon disposition of the appeal or other review." It does not provide an avenue for postconviction challenges to the constitutionality of the death penalty not raised in any lower court. Simply put, Madison's petition was filed with disregard for the state procedural rules. This Court faced a similar challenge from Thomas Arthur, another Alabama death row inmate, in November 2016 and denied certiorari. *Arthur v. Alabama*, 137 S. Ct. 831 (2017) (mem.). The Court should do likewise in this case.

Finally, even if there were no procedural obstacles to review, Madison's claim is meritless. Madison's spends the majority of his petition discussing the problems of judicial override, Pet 8-17, but that is off-point. Apart from the fact that this Court has held that judicial sentencing is constitutional, *see Harris v. Alabama*, 513 U.S. 504 (1995), Madison largely fails to mention that the 2017 Act specifically stated that this legislative decision to end judicial sentence in capital cases did not apply retroactively to inmates, such as Madison, who were sentenced to death before the effective date of the Act. A state legislative decision concerning the retroactive application of a state sentencing statute does not provide a federal constitutional question sufficient for certiorari review.

STATEMENT OF THE CASE

On April 18, 1985, Cpl. Julius Schulte, a Mobile police officer, responded to a domestic disturbance between Vernon Madison and his girlfriend, Cheryl Green. As Cpl. Schulte sat in his patrol car, Madison crept up on him, shot him twice in the back of the head at point-blank range, then shot Green in the back while she attempted to shield her eleven-year-old child from the gunfire. *Madison v. State*, 718 So. 2d 90, 94, 97 (Ala. Crim. App. 1997).

Madison was thrice tried and convicted of capital murder. *Madison v. State*, 545 So. 2d 94 (Ala. Crim. App. 1987); *Madison v. State*, 620 So. 2d 62 (Ala. Crim. App. 1992); *Madison*, 718 So. 2d 90; *aff'd*, *Ex parte Madison*, 718 So. 2d 104 (Ala. 1998); *cert. denied*, *Madison v. Alabama*, 119 S. Ct. 521 (1998) (mem.). After the first two trials, the jury recommended death, and the trial court followed that recommendation and sentenced Madison to death. After the final trial, however, the jury recommended life without parole by a vote of 8-4, but the court, after considering that recommendation, again sentenced Madison to death.

On April 11, 2017, Alabama enacted a law prospectively abolishing judicial sentencing in capital cases. 2017 Ala. Laws Act 2017-131 ("the Act"). Resp't App. A By its terms, the Act does not apply to any defendant convicted and sentenced prior to its enactment. *Id.* § 2 ("This act . . . shall not apply retroactively to any defendant who has previously been convicted of capital murder and sentenced to death prior to the effective date of this act"). All that the Act did was effect a prospective procedural change to the manner in which Alabama imposes sentences in capital cases, removing

the final weighing of aggravating and mitigating circumstances by the trial judge and making the jury's penalty-phase vote, heretofore a recommendation, binding. The death penalty remains constitutional in Alabama, distinguishing these circumstances from those recently faced in Connecticut when that state prospectively abolished capital punishment. *See State v. Santiago*, 122 A.3d 1 (Conn. 2015).

Since his third trial, Madison has sought relief at all levels. On November 6, 2017, this Court granted the State's petition for writ of certiorari, finding that the state court's determination that Madison was competent to be executed was not unreasonable. *Dunn v. Madison*, 138 S. Ct. 9 (2017). Two days later, the State moved the Alabama Supreme Court to set Madison's long-overdue execution. Madison filed a response on November 9, though he raised no challenge concerning the Act at that time. Resp't App. B. On November 16, the Alabama Supreme Court granted the State's motion and set Madison's execution date for January 25, 2018.

On January 24—less than thirty-one hours before his scheduled execution, and 288 days after the Act went into effect—Madison filed a "petition for relief from unconstitutional sentence" in the Alabama Supreme Court, contending that his death sentence had been invalidated by the prospective procedural change implemented by the Act. Resp't App. C. This petition was baseless, but more importantly, it was procedurally defective. As such, five hours later, the Alabama Supreme Court correctly denied the petition. Pet. App. A.

REASONS FOR DENYING THE PETITION

I. Madison seeks certiorari review of a decision resting solely on state procedural and equitable grounds.

Madison asks this Court to grant certiorari review of a decision that was properly dismissed on state procedural and equitable grounds. He attempted to bring his eleventh-hour petition before the Alabama Supreme Court by citing Rules 2(b) and 8(d)(1) of the Alabama Rules of Appellate Procedure and section 12-2-2 of the Code of Alabama (1975). Resp't App. C at 2. These provisions did not, however, create a proper vehicle for his challenge.

Section 12-2-2 states:

> The justices of the Supreme Court shall have authority to issue writs of certiorari and to grant injunctions and stays of execution of judgment, subject to the limitations prescribed by this code and the Alabama Rules of Appellate Procedure, as judges of the circuit courts are authorized to grant the same.

This section does not vest in the Alabama Supreme Court original jurisdiction over petitions such as Madison's. On the contrary, the Alabama Constitution of 1901 vests the court with original jurisdiction of cases and controversies only "as provided by this Constitution." ALA. CONST. 1901, art. VI, § 140(b)(1). This limitation is key, because absent an explicit constitutional grant of authority to present such claims to the Alabama Supreme Court in the first instance, the court's original jurisdiction is limited to the issuance of "such remedial writs or orders as may be necessary to give it general supervision and control of courts of inferior jurisdiction." *Id.* art. VI, § 140(b)(2). The court's appellate jurisdiction is "as may be provided by law." *Id.* art. VI, § 140(c).

Here, Madison's petition failed to come within the original jurisdiction of the Alabama Supreme Court, as he failed to identify a constitutional provision granting that court original jurisdiction. See *Ex parte Evett*, 89 So. 2d 88, 90 (Ala. 1956) (acknowledging that "the Constitution does not invest the Supreme Court with original jurisdiction in criminal actions"); *see also Worthington v. Worthington*, 111 So. 224, 449 (Ala. 1927) ("[T]he jurisdiction of this court is in general revisory, and appellate only, with the exceptions named in the Constitution, and this motion does not come within any of the exceptions mentioned in the Constitution."). In *Russo v. Alabama Department of Corrections*, 149 So. 3d 1079, 1081–82 (Ala. 2014), the Alabama Supreme Court recognized the constitutional limitations on its original jurisdiction, barring relief where an action was not first filed in the circuit court—for example, as in Madison's case. In other words, Madison had no standing to raise a constitutional claim in the Alabama Supreme Court in the first instance, as that court is governed by strict discretionary review and extraordinary application rules.[1] *See* ALA. R. APP. P. 21 and 39; *see also Ex parte Williams*, 795 So. 2d 785, 787 n.1 (Ala. 2001) (recognizing that certiorari review is at discretion of Alabama Supreme Court, even in cases where sentence of death was imposed); *cf. Smith v. Jones*, 256 F.3d 1135 (11th Cir. 2001) (recognizing Alabama Supreme Court's certiorari review is discretionary).

1. Assuming arguendo that Madison could seek an original writ of habeas corpus in the Alabama Supreme Court, such relief would be governed by Rule 21 of the Alabama Rules of Appellate Procedure, which Madison did not cite to the Alabama Supreme Court as a basis for his request.

Moreover, Madison is not seeking issuance of a writ or remedial order involving the supervision or control of an inferior court, as he failed to first present the issue to any lower court. While section 12-2-2 grants the Alabama Supreme Court power to issue writs of certiorari, Madison's petition was necessarily silent as to which court such a writ would be directed. Nor could Madison rely on the common-law writ of certiorari, which is an appropriate method to have the courts determine an action only when there is no other prescribed method. Alabama has a prescribed method for seeking postconviction relief from an allegedly unconstitutional sentence: a petition properly filed in the circuit court pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. ALA. R. CRIM. P. 32.1(a), (c), 32.4. If Madison truly believed that the Act's prospective procedural change rendered his death sentence invalid, then he could have filed a Rule 32 petition within six months of the Act's effective date. *See* ALA. R. CRIM. P. 32.2(c). He could have made mention of this claim in his opposition to the State's motion to set an execution date. Instead, Madison waited 288 days—more than nine months—and filed a last-minute petition in the wrong court in a blatant attempt to stop his execution by embroiling the state court in a meritless proceeding.

The rules of appellate procedure that Madison cited below offer him no aid. Rule 2(b) provides that "[i]n the interest of expediting decision, or for other good cause shown," an appellate court may suspend the requirements of the Rules of Appellate Procedure. Rule 8(d)(1) states:

> When pronouncing a sentence of death, the trial court shall not set an execution date, but it may make such orders concerning the transfer of

> the inmate to the prison system as are necessary and proper. The supreme court shall at the appropriate time enter an order fixing a date of execution, not less than 30 days from the date of the order, and it may make other appropriate orders upon disposition of the appeal or other review. The supreme court order fixing the execution date shall constitute the execution warrant.

Neither rule, alone or in combination, justifies or excuses Madison's state petition. In particular, Rule 8(d) governs the issuance of execution warrants—it does not grant the Alabama Supreme Court new ways to exercise original jurisdiction. There is no provision in Rule 8(d) for the Alabama Supreme Court to grant relief from a conviction or sentence, as administrative action is predicated "upon disposition of the appeal or other review." Because Rule 8(d)(1) is administrative in nature and is operable only "upon disposition of the appeal or other review," Madison could not vindicate his constitutional claim by presenting it directly to the Alabama Supreme Court pursuant to Rule 8(d).

For reasons of federalism and comity, this Court should decline to exercise its certiorari jurisdiction because the state court's judgment rests upon on an independent and adequate state law ground. *See, e.g.*, *Berry v. Mississippi,* 552 U.S. 1007 (2007) (mem.); *Wilson v. Loew's Inc.*, 355 U.S. 597 (1958); *see also Beard v. Kindler*, 558 U.S. 53 (2009); *Coleman v. Thompson*, 501 U.S. 722 (1991). As Rule 8(d) could not provide a legal vehicle for Madison to challenge the constitutionality of his sentence after the Act, Madison has not presented the merits of his claim in the appropriate form to provide Alabama's judiciary a merits review, and this claim does not merit certiorari.

II. The non-retroactive procedural change to Alabama's capital sentencing scheme put in place by the Act did not render sentences imposed by judicial override unconstitutional.

Beyond the procedural defects in Madison's state petition, which strongly counsel against certiorari, the constitutional claim is meritless. The Act, by its terms, provides a prospective procedural change in capital sentencing. It does not add or remove any penalty from the sentencer's consideration—all it does it make the jury's sentencing recommendation binding.

A useful counterpoint to Alabama's procedural change is Connecticut's substantive change. Connecticut abolished capital punishment on April 25, 2012, by legislation with prospective effect: no defendants could be sentenced to death from that point onward, but those inmates with death sentences would still be subject to that punishment. *Santiago*, 122 A.3d at 7–8. On review, the Connecticut Supreme Court held that prospective abolition violated the state's constitutional prohibition against cruel and unusual punishment. *Id.* at 9. The total abolition of the death penalty in Connecticut constituted a substantive change in the law. By contrast, the change wrought to Alabama's capital sentencing scheme by the Act is merely procedural. The death penalty remains a legal, proper sentence for those convicted of capital murder. All along, Alabama capital juries have been tasked with finding an aggravating circumstance necessary to make defendants death-eligible, and judges have been obligated to consider their sentencing recommendations. *See Ex Parte Bohannon*, 222 So. 3d 525, 532 (Ala. 2016) ("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."). The only procedural change is that as of April 11, 2017, these jury recommendations are binding in new capital trials.

The flip side of Madison's claim reveals the absurdity of his position. If, as Madison suggests, the Act must be given retroactive effect to invalidate his death sentence, then those capital defendants who received life sentences as a result of jury override must in turn be sentenced to death. This cannot be.

Further, Madison's challenge to the Alabama Legislature's decision to make state law changes to Alabama's capital sentencing statute (that were not mandated by this Court or the federal constitution) non-retroactive is meritless. State law changes cannot provide the basis for federal retroactivity relief. Here, the decision to limit the benefit of these later changes to state law does not implicate either the Equal Protection Clause or the Eighth Amendment. For example, in the federal habeas context, a state law ruling concerning retroactive application of a state sentencing statute generally provides no grounds for certiorari jurisdiction. *See Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (emphasizing that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions[] . . ." and that "a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.") (citing 28 U.S.C. § 2241; and *Rose v. Hodges*, 423 U.S. 19, 21 (1975) (per curiam)); *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (holding again that "it is only noncompliance with federal law

that renders a State's criminal judgment susceptible to collateral attack in the federal courts." (citing *Estelle*, 502 U.S. at 67 (citation and internal quotation omitted)).

Finally, the imposition of death in Madison's case (after all three trials) was neither arbitrary nor capricious. Madison executed a police officer who was sitting in his patrol car, then turned the gun on his girlfriend. He fired without regard for the safety of her child or anyone else in the neighborhood. Madison's crimes—capital murder and attempted murder—were cold-blooded, and his punishment is entirely appropriate. This claim does not merit certiorari.

III. Judicial override does not run afoul of *Hurst v. Florida* or *Ring v. Arizona*.

As a final claim, Madison argues that judicial override violates the rule this Court announced in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Madison fails to acknowledge that *Hurst* was merely an application of *Ring v. Arizona*, 536 U.S. 584 (2002), to Florida's capital scheme, and so announced no new rule. Alabama's capital sentencing statues were and are constitutional under *Ring* and *Hurst*, and this Court's finding that Alabama's capital scheme, including the provision at that time that provided for judicial sentencing, was constitutional has not been overturned. *See Harris v. Alabama*, 513 U.S. 504 (1995). In fact, this Court was squarely presented with a *Hurst* challenge more than a year ago and denied certiorari. *Bohannon v. Alabama*, 137 S. Ct. 831 (2017) (mem.). While "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case," *United States v. Carver*, 260 U.S. 482, 490 (1923), *Bohannon* presented a far better vehicle to consider the

issue than Madison's eleventh-hour, procedurally defective claim. It should come as no surprise that Madison neglects to mention *Bohannon*, despite the fact that he and Bohannon share counsel. This claim does not merit certiorari.

CONCLUSION

Wherefore, for the foregoing reasons, Respondent respectfully requests that this Court deny Madison's petition for writ of certiorari.

Respectfully submitted,

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