

No. 17-9132
CAPITAL CASE

In the SUPREME COURT of the UNITED STATES

◆

BOBBY WAYNE WALDROP,
Petitioner,

v.

JEFFERSON S. DUNN, Commissioner of the
Alabama Department of Corrections, et al.,
Respondents.

◆

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

**BRIEF OF RESPONDENTS IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

Steve Marshall
Alabama Attorney General

Henry M. Johnson
Assistant Alabama Attorney General
Counsel of Record *

Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130-0152
Tel: (334) 353-9095
Fax: (334) 353-3637
hjohnson@ago.state.al.us

July 20, 2018

CAPITAL CASE

QUESTION PRESENTED FOR REVIEW (Rephrased)

Should this Court grant certiorari to review Waldrop's claim that the trial court sentenced him to death on the basis of his race where that claim is procedurally defaulted from habeas review, entirely without merit, and not worthy of certiorari consideration?

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OPINIONS BELOW

In 1998, Bobby Wayne Waldrop murdered his maternal grandparents during the course of a robbery in Randolph County, Alabama. Waldrop was convicted on three counts of capital murder and sentenced to death for that offense. Waldrop's convictions and death sentence were affirmed on direct appeal. *Waldrop v. State*, 859 So. 2d 1138 (Ala. Crim. App. 2000), *aff'd*, 859 So. 2d 1181 (Ala. 2002), *cert. denied*, *Waldrop v. Alabama*, 540 U.S. 968 (2003).

Waldrop subsequently filed a petition for post-conviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. Following an evidentiary hearing, the state circuit court entered an order denying Waldrop's petition. (Vol. 26, Tab #R-74.)¹ The Alabama Court of Criminal Appeals affirmed the circuit court's judgment, and the Alabama Supreme Court denied his petition for writ of certiorari. *Waldrop v. State*, 987 So. 2d 1186 (Ala. Crim. App. 2007).

Waldrop next filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Alabama. District Court Judge W. Keith Watkins entered a memorandum opinion and final judgment denying Waldrop's petition. *Waldrop v. Thomas*, No. 3:08-cv-515-WKW, 2014 WL 1328138 (M.D. Ala. Mar. 31, 2014). Judge Watkins denied Waldrop's Motion to Alter or Amend

¹ The citation format, with volume and tab numbers, refers to the state-court record. Respondents filed the state-court record and the index of that record (i.e., the habeas checklist) in the district court on September 18, 2008. Doc. 18.

the Judgment. *Waldrop v. Thomas*, No. 3:08-cv-WKW, 2015 WL 476227 (M.D. Ala. Feb. 5, 2015). The Eleventh Circuit affirmed the district court's judgment. Pet. App. A. The Eleventh Circuit denied Waldrop's petition for rehearing and rehearing *en banc*. Pet. App. B.

STATEMENT OF JURISDICTION

The statement of jurisdiction that is contained on page 1 of Waldrop's petition for writ of certiorari is correct. But, he has not articulated any basis for this Court to invoke its discretionary jurisdiction under Supreme Court Rule 10.

STATEMENT OF THE CASE

A. The Proceedings Below

Waldrop is on death row because he brutally murdered his handicapped grandparents, stabbing his grandfather forty-three times and slitting his grandmother's throat as she told him she loved him. Following a five-day trial, a Randolph County, Alabama jury found Waldrop guilty of the capital offense of murdering his grandfather, Sherrell Prestridge, during the course of a robbery, in violation of section 13A-5-40(a)(2) of the Code of Alabama (1975), the capital offense of murdering his grandmother, Irene Prestridge, during the course of a robbery, in violation of section 13A-5-40(a)(2) of the Code of Alabama (1975), and the capital offense of murdering two or more persons by one act or pursuant to one scheme or course of conduct, in violation of section 13A-5-40(a)(10) of the

Code of Alabama (1975). (Vol. 1, pp. 158-60.) The Honorable Philip Dale Segrest presided over Waldrop's trial.

Following the presentation of evidence and instructions from the trial court, the jury recommended that Waldrop be sentenced to life without parole. *Id.* at 157. After holding a separate sentencing hearing, the trial court found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Waldrop to death. *Id.* at 162-71. In sentencing Waldrop to death, the trial court concluded that "this is not a close case. This was a cold, heinous, atrocious, and cruel killing. A needless killing. And, if we are going to have a death penalty, this case was made for it." (Vol. 7, Tab #R-30, p. 37.)

On direct appeal, the Alabama Court of Criminal Appeals remanded Waldrop's case with instructions to the trial court to make corrections to its sentencing order and then affirmed his convictions and death sentence on return to remand. *Waldrop v. State*, 859 So. 2d 1138 (Ala. Crim. App. 2000). The Alabama Supreme Court affirmed his convictions and sentence. *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002). This Court denied his petition for writ of certiorari. *Waldrop v. Alabama*, 540 U.S. 968 (2003).

Waldrop next filed a petition for post-conviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. The state circuit court denied his petition after holding a hearing on several of his claims. (Vol. 26, Tab #R-74.)

The Court of Criminal Appeals affirmed the circuit court's judgment, and the Alabama Supreme Court denied his petition for writ of certiorari. *Waldrop v. State*, 987 So. 2d 1186 (Ala. Crim. App. 2007).

Waldrop then filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Alabama. Following briefing by the parties, District Court Judge W. Keith Watkins entered a memorandum opinion and final judgment denying his petition. *Waldrop*, 2014 WL 1328138, at *100. Judge Watkins granted Waldrop a certificate of appealability as to his penalty-phase ineffective-assistance-of-counsel claims. *Id.* at 99.

The Eleventh Circuit granted Waldrop's motion to expand his certificate of appealability to include his claim alleging that the trial court improperly considered his race in deciding to sentence him to death and his claim that Alabama's capital-sentencing scheme and his death penalty are unconstitutional. The Eleventh Circuit affirmed the district court's judgment. Pet. App. A.

B. Statement of the Facts

The robbery-murders in this case, accomplished with knives, were as brutal as they come. There is no doubt that Waldrop committed this offense and is worthy of the death penalty. On direct appeal, the Court of Criminal Appeals summarized the facts of his crime as follows:

Testimony presented at trial indicated that Waldrop and his wife Clara Waldrop resided with Waldrop's grandparents, Sherrell

and Irene Prestridge. Sherrell had heart and hip problems and had difficulty walking. Irene was bedridden and blind and suffered from diabetes. Because of Sherrell's and Irene's infirmities, the living room of their house had been converted into a bedroom with two hospital beds where they slept. Testimony indicated that Waldrop knew that Sherrell and Irene received their Social Security checks on the first and the third of each month.

At some time between 10:30 a.m. and 2:00 p.m. on April 5, 1998, Waldrop and Clara left the Prestridge's house and checked into a hotel in Anniston. At 1:00 p.m. that same day, Clara and Waldrop pawned Sherrell's lawn mower. That afternoon Waldrop smoked an undetermined amount of crack cocaine.

During the evening of April 5, Clara and Waldrop returned to the Prestridge's house. Testimony indicated that Waldrop was not high when he returned to the house. While in his grandparents' bedroom, Waldrop and Sherrell began arguing about money. Waldrop stabbed Sherrell with a knife, and a scuffle ensued. Waldrop cut Sherrell's throat and attempted to choke him. Because Sherrell appeared to be breathing, Waldrop continued to stab Sherrell several times. In a statement Waldrop made to the police, which was introduced at trial, Waldrop stated that "[i]t looked like [Sherrell] was suffering." (C. 182-84.) After Waldrop stabbed Sherrell in the back, he appeared to stop breathing. Testimony indicated that Irene was screaming loudly throughout the incident.

After killing Sherrell, Waldrop went outside and removed gloves from the trunk of his car. Waldrop returned to the house and instructed Clara to kill Irene. Both Waldrop and Clara then put on gloves.

Clara cut and stabbed Irene approximately two times. Waldrop grabbed the knife Clara had in her hand, put a pillow over Irene's face, and stabbed Irene in the chest and the throat. During a videotaped statement, Waldrop stated that, before he stabbed Irene, she told him that she loved him. Additionally, a statement Christy Waldrop, Waldrop's sister, made to the police revealed that Waldrop had told her that, during the incident, Irene told Sherrell that she loved him and that she would see him in heaven. (R. 862-63.)

After the killings, Waldrop went into the bathroom and cleaned off the blood. Waldrop instructed Clara to take Sherrell's wallet. Clara took the wallet out of Sherrell's back pocket and put it in her purse. Waldrop put the clothing he was wearing during the killing and the knives in a plastic bag, and he and Clara left the house. Waldrop threw the bag into the river.

Gregory Wanger, a forensic pathologist, testified that he performed autopsies on the bodies of Sherrell and Irene Prestridge. Wanger stated that Sherrell sustained 43 stab and cut wounds to the head, neck, back, and chest, and that Irene sustained 38 stab and cut wounds, including wounds to the heart and lungs.

Waldrop, 859 So. 2d at 1144-45.

REASONS FOR DENYING THE PETITION

The questions presented by Waldrop, which overlap to such a degree that the Respondents have chosen to address them together, do not merit this Court's certiorari review. Waldrop's racial bias claim is procedurally defaulted from habeas review because he did not exhaust the state court remedies for that claim, and he has failed to show that cause and prejudice or a fundamental miscarriage of justice exist to excuse the default. Assuming that his claim is not defaulted, which it is, Waldrop has not presented a compelling issue of national interest, nor has he identified a conflict in the lower courts concerning the application of this Court's precedent. *See* Rule 10, Rules of the Supreme Court of the United States. Indeed, Waldrop's claim is entirely devoid of merit because it is premised on an incorrect account of what transpired at his second sentencing hearing.

I. This Court Should Deny Certiorari Because Waldrop’s Claim That The Trial Court Sentenced Him To Death Based On His Race Is Procedurally Defaulted, Without Merit, And Unworthy Of Certiorari Review.

Waldrop contends that the Eleventh Circuit erroneously concluded that his racial bias claim is procedurally defaulted from habeas review because he did not properly raise that claim in state court. Pet. at 6-25. This Court should deny certiorari for at least three reasons.

A. This Court Should Deny Certiorari Because Waldrop Did Not Properly Raise This Claim In State Court.

As a critical threshold matter, this Court should deny certiorari because Waldrop improperly raised his racial bias claim for the first and only time on discretionary review. The Eleventh Circuit correctly held that Waldrop’s claim is procedurally defaulted because he failed to exhaust the state court remedies available for that claim and because he has not shown cause and prejudice or a fundamental miscarriage of justice to overcome the default. Pet. App. A at 14-17. That failure alone is fatal. *See* 28 U.S.C. § 1257(a); R. Stern, et. al., *Supreme Court Practice* § 3.16, at 168 (8th ed. 2002) (“It is essential to the jurisdiction of the Supreme Court under § 1257(a) that a substantial federal question has been properly raised in the state court proceedings.”). This Court repeatedly has held that it will not consider federal-law questions that were not properly presented in state court. *See, e.g., Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (“This Court

has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim ‘was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.’ ”) (quoting *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997)).

In *Wainwright v. Sykes*, 433 U.S. 72, 82 (1977), this Court established the doctrine of procedural default. That doctrine was created to ensure that federal habeas petitioners first seek relief in state court “in accordance with established state procedures.” *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001). Under that doctrine, “[a] state prisoner seeking federal habeas relief cannot raise a federal constitutional claim in federal court unless he first properly raised the issue in the state courts.” *Id.* In other words, a federal habeas petitioner must have afforded the state courts a full and fair opportunity to decide the federal constitutional claims presented in his federal habeas petition. *O’Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999) (“[T]he state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition.”); *McNair v. Campbell*, 416 F.3d 1291, 1305 (11th Cir. 2005) (“It is well established that when a petitioner has failed to exhaust his claim by failing to fairly present it to the state courts and the state court remedy is no longer available, the failure also constitutes a procedural bar.”).

To meet the fair presentation standard, “state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process.” *Boerckel*, 526 U.S. at 845. Because this doctrine is grounded in notions of comity, if the state court “identifies a specific constitutional claim, ignores the fact that the claim has been defaulted, and decides the claim on the merits, we treat the claim on habeas review as if the petitioner had not defaulted the claim and pass on its merits.” *Peoples v. Campbell*, 377 F.3d 1208, 1235 n.55 (11th Cir. 2004). But such a waiver requires specific action by the reviewing court. *Id.* Otherwise, the habeas court applies the “well-established principle that a state appellate court’s routine plain error review of a conviction or sentence *does not*, standing alone, excuse a procedural default.” *Id.* (emphasis in original).

The exhaustion doctrine is clear. Raising a claim “for the first and only time in a procedural context in which its merits will not be considered unless ‘there are special and important reasons’ ” does not “constitute ‘fair presentation.’ ” *Castille v. Peoples*, 489 U.S. 346, 351 (1989). *See also Mauk v. Lanier*, 484 F.3d 1352, 1357-58 (11th Cir. 2007) (“[T]he Supreme Court in *Castille* explicitly rejected the argument that ‘the submission of a new claim to a State’s highest court on discretionary review constitutes a fair presentation.’ ”); *St. Helen v. Senkowski*, 374 F.3d 181, 183 (2d Cir. 2004) (“[R]aising a federal claim for the first time in an

application for discretionary review to a state’s highest court is insufficient for exhaustion purposes.”); *Falconer v. Lane*, 905 F.2d 1129, 1134-35 (7th Cir. 1990) (“[A] petitioner who raised for the first and only time his federal constitutional claims to a state’s highest court under a discretionary procedure ha[s] not fairly presented the issues for review.”); *Satterwhite v. Lynaugh*, 886 F.2d 90, 92 (5th Cir. 1989) (“[T]he presentation of claims on discretionary review to the state’s highest court does not constitute ‘fair presentation’ for exhaustion purposes.”).

There are two exceptions to the procedural default rule. First, a habeas petitioner can obtain federal review of an otherwise defaulted claim if he shows “both cause excusing the default and actual prejudice resulting from the bar.” *Hill v. Jones*, 81 F.3d 1015, 1022-23 (11th Cir. 1996). “Cause and prejudice is a conjunctive standard, both prongs of which must be satisfied in order for procedural default to be excused and to allow a federal court to review the merits of a claim for habeas relief.” *Antone v. Strickland*, 706 F.2d 1534, 1541 (11th Cir. 1983). Second, a federal habeas court may review the merits of an otherwise defaulted claim to correct a “fundamental miscarriage of justice.” *Hill*, 81 F.3d at 1023. But, a petitioner can show a fundamental miscarriage of justice only with an “actual innocence” claim. *Schlup v. Delo*, 513 U.S. 298, 316 (1995). “Without any new evidence of innocence, even the existence of a concededly meritorious

constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim.” *Id.*

Here, Waldrop raised his racial bias claim for the first time in the petition for writ of certiorari that he filed in the Alabama Supreme Court. (Vol. 10, Tab #R-38, pp. 34-37.) The Alabama Supreme Court granted certiorari on two separate and distinct issues. *Waldrop*, 859 So. 2d at 1184 (explaining that the court granted certiorari “to determine whether the trial court’s sentencing order stated specific reasons for overriding the jury’s recommendation of life imprisonment” and to determine the impact, if any, of *Ring v. Arizona*, 536 U.S. 584 (2002), on his sentence). Those are the only issues that the court addressed. *Id.*

In Alabama, “[c]ertiorari review is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons for the issuance of the writ.” Ala. R. App. P. 39 (a). This language is nearly identical to that at issue in *Castille*, which states that an appeal “is not a matter of right, but of sound judicial discretion, and an appeal will be allowed only when there are special and important reasons therefor.” Pa. R. App. P. 1114 (a).

The Eleventh Circuit correctly found, under the clear rules governing exhaustion set forth in *Castille*, *Boerckel*, and *Mauk*, that Waldrop “did not exhaust the Alabama state court remedies for his racial bias claim” because he raised that

claim for the first and only time on discretionary review. Pet. App. A at 16. And, the Eleventh Circuit correctly concluded that his racial bias claim is procedurally defaulted from habeas review because those state court remedies are no longer available to him because of state-law procedural bars. *Id.* For that reason alone, this Court should deny certiorari review.

Waldrop does not dispute that he raised his racial bias claim for the first and only time on discretionary review, but he raises two arguments in an attempt to sidestep the procedural default. His arguments are without merit.

First, Waldrop contends that the Eleventh Circuit improperly ignored this Court's decisions in *Buck v. Davis*, 137 S. Ct. 759 (Feb. 22, 2017), and *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (Mar. 6, 2017), which, in his view, mandate that federal courts must address claims of racial bias in the judicial system. Pet. at 15-20. Because those decisions stand for no such thing, he is mistaken.

In *Buck*, 137 S. Ct. at 768-69, the petitioner's trial counsel called an expert witness at the penalty phase of his trial who opined that there was an "[i]ncreased probability" that the petitioner would commit future violence because he is black. Because the attorney who represented the petitioner at his first state post-conviction proceeding failed to argue that his trial counsel was ineffective for presenting that evidence, the federal district court, in 2006, "properly, under then-governing law," held that his claim was procedurally defaulted. *Id.* at 767. In

2014, the petitioner attempted to re-open his 2006 judgment by filing a motion under Rule 60(b)(6) of the Federal Rules of Civil Procedure. *Id.* The district court denied the motion, and the Fifth Circuit denied a certificate of appealability. *Id.*

In reversing and remanding the petitioner’s case, this Court held that the rule, set forth in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), providing that “a claim of ineffective assistance of counsel defaulted in a Texas post-conviction proceeding may be reviewed in federal court if state habeas counsel was constitutionally ineffective in failing to raise it, and the claim has ‘some merit’ ” applies to the petitioner’s claim. *Id.* at 779-80. Indeed, this Court cautioned that the petitioner could not obtain relief “unless he is entitled to the benefit of this rule – that is, unless *Martinez* and *Trevino*, not *Coleman*, would govern his case were it reopened. If they would not, his claim would remain unreviewable and Rule 60(b)(6) relief would be inappropriate.” *Id.* at 780

Thus, this Court, in *Buck*, held that the Fifth Circuit erred in denying the petitioner a certificate of appealability because *Martinez* and *Trevino* operate to excuse the default of his ineffective-assistance-of-counsel claim. *Id.* Because *Martinez* and *Trevino* have no bearing on Waldrop’s case, *Buck* is inapposite.

In *Peña-Rodriguez*, 137 S. Ct. at 861-62, the petitioner’s trial counsel obtained affidavits from two jurors in which they averred that another juror “had expressed anti-Hispanic bias toward [him] and [his] alibi witness.” Citing

Colorado’s no-impeachment rule, the trial court denied the petitioner’s motion for new trial, and the Colorado Supreme Court affirmed. *Id.* at 862. In reversing and remanding the petitioner’s case, this Court held that “the Sixth Amendment requires that the no-impeachment rule give way” where there is evidence that “a juror [made] a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant[.]” *Id.* at 869. But, this Court’s ruling was narrow. Indeed, the Court held that “there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury’s deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror’s vote to convict.” *Id.*

The no-impeachment rule, of course, is not at issue in Waldrop’s case, and *Peña-Rodriguez* neither addresses the exhaustion doctrine nor creates another avenue for a petitioner to obtain merits review of an otherwise defaulted claim. Moreover, as will be shown in Argument I(B) in this brief, the trial court did not consider Waldrop’s race at all in sentencing him to death. Thus, *Peña-Rodriguez*, like *Buck*, is inapposite.²

² To the extent that Waldrop asserts that *Tharpe v. Sellers*, 138 S. Ct. 545 (Jan. 8, 2018), is relevant to his racial bias claim, he is mistaken. Pet. at 19-20. There, the Court held simply that the Eleventh Circuit applied an incorrect standard in denying the petitioner’s motion for a certificate of appealability and accordingly

Second, Waldrop contends that the Eleventh Circuit erred in holding that his racial bias claim is defaulted because, in his view, he fairly presented it to the state courts. Br. at 21-25. He asserts that his claim was fairly presented because the Alabama Supreme Court was authorized to address his claim under plain error review and because counsel in a death penalty case must file a cert petition in the Alabama Supreme Court. *Id.* The Eleventh Circuit thoroughly reviewed and rejected those arguments. Pet. App. A at 16-17.

Contrary to Waldrop's assertions in his petition, there is nothing about Alabama's appellate procedure that removes it from the *Castille* rubric. That the Alabama Supreme Court requires counsel in death penalty cases to prepare a petition for writ of certiorari in no way lessens the Court's discretion on when to grant those petitions. And that the Alabama Rules of Appellate Procedure allow the Alabama Supreme Court to consider plain error "whether or not the error or defect was brought to the attention of the trial court or the Court of Criminal Appeals," Ala. R. App. P. 39 (a)(2)(A), "*does not*, standing alone, excuse a procedural default." *Peoples*, 377 F.3d at 1235 n.55 (emphasis in original).

Likewise, the Alabama Supreme Court's general statement that, after reviewing the record, it could find "no evidence that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor" is not granted the writ, vacated the lower court's judgment, and remanded for reconsideration of that issue. *Id.* at 546-47. Thus, *Tharpe* is inapposite.

sufficient to overcome Waldrop's default. That language was not the Supreme Court's own but, rather, a wholesale quotation from the conclusion of the Alabama Court of Criminal Appeals – a court that did not have Waldrop's racial bias claim before it. Moreover, if that kind of general language is sufficient to allow Waldrop to belatedly bring otherwise defaulted claims in a habeas petition, then the exhaustion requirement has little remaining relevance. “The teeth of the exhaustion requirement comes from its handmaiden, the procedural default doctrine.” *Smith v. Jones*, 256 F.3d 1135, 1138 (11th Cir. 2001). Waldrop's novel approach would effectively defang it.

Comity and precedent dictate that state courts control whether or not they will excuse a petitioner's failure to exhaust a claim. The Alabama Supreme Court did not do so here, and because Waldrop does not argue and, in any event, cannot show cause and prejudice or actual innocence, his racial bias claim is procedurally defaulted.³ This Court should deny certiorari review.

B. This Court Should Deny Certiorari Because Waldrop's Racial Bias Claim Is Without Merit.

Even if Waldrop's claim is not procedurally defaulted from habeas review, which it is, his claim is without merit. For that additional reason, this Court should deny certiorari review.

³ Waldrop asserts in passing that his default should be excused to avoid a “miscarriage of justice,” but he fails to make the actual innocence argument required by this Court's precedent. Pet. at 19.

On direct appeal, the Court of Criminal Appeals remanded Waldrop's case with instructions to the trial court to make corrections to its sentencing order. *Waldrop*, 859 So. 2d at 1152. At the hearing on remand, the trial court stated the following regarding Alabama's capital-sentencing scheme and its then-provision for judicial override of a jury's sentencing recommendation:

The Supreme Court of the United States, and I want to be very, very careful in how I state what I am about to state. I don't want to be misunderstood about this. The Supreme Court of the United States has recognized the validity of the Alabama statutory scheme that allows a judge to override a jury and to impose a death sentence even if life without parole is suggested; and, to impose life without parole, even if a death sentence were suggested by the jury. The wisdom of that position is that judges can be in a position to have a broader range of experience in dealing with capital cases.

(Vol. 7, Tab #R-30, p. 35.) The court then shared its own experience in imposing the death penalty and explained its decision to override the jury's recommendation in Waldrop's case:

So, that left four cases in which I have imposed a death sentence. In two of those cases I have overridden the jury, and this has to be understood, it has nothing to do with why you do things, you know. The why is, on imposing the death sentence, is because the aggravating circumstances outweigh the mitigating circumstances, and the person did it, and that's all you take into account. If I had not imposed the death sentence, I would have sentenced three black people to death and no white people. And, that's the reason that the Supreme Court of the United States trusts the judgment of judges, perhaps, a little bit more.

Now, frankly, if there's going to be a death penalty in the State of Alabama, and it is going to be judged based on weighing the aggravating circumstances against the mitigating circumstances, then

... Bobby Waldrop needs to get the death sentence, and if we are not going to do it that way, then we don't need to do it at all. Not at all.... And, this is what I have to look at when I apply the aggravating against the mitigating circumstances in this case. It is not even close. Even when I give full measure, full and complete measure, as much weight as can be given, to the fact that there are no prior convictions, this is not a close case. That was a cold, heinous, atrocious, and cruel killing. A needless killing. And, if we are going to have a death penalty, this case was made for it.

Id. at 36-37. The court concluded its discussion with the following statement:

“And I would not be applying the law equally to everybody if Bobby Waldrop doesn't get the death sentence in this case.” *Id.* at 38.

Thus, Waldrop's claim is based on a single line from the second sentencing hearing before the trial court following remand by the Court of Criminal Appeals. As shown above, the court explained that its only consideration in imposing the death penalty was “weighing the aggravating circumstances against the mitigating circumstances.” (Vol. 7, Tab #R-30, p. 36.) The line that Waldrop plucks to support his claim lies at the very heart of this discussion. *Id.* The court explained, “The why is, on imposing the death sentence, is because the aggravating circumstances outweigh the mitigating circumstances, and the person did it, and that's all you take into account. Nothing else. If I had not imposed the death sentence, I would have sentenced three black people to death and no white people. And, that's the reason the Supreme Court of the United States trusts the judgment of judges, perhaps, a little bit more.” *Id.* In context, it is clear the court is

explaining that it bases its decisions on the weighing of the relevant factors alone. The court says as much, and it simply is not plausible that a judge with decades of experience would believe that the “Supreme Court of the United States trusts the judgment of judges” because those judges take race into account at sentencing.

Rather, the court was merely explaining that fact-based sentencing will result in jury overrides, regardless of race. This was apparently clear to Waldrop’s counsel at the time of sentencing, who remarked, “I appreciate the Court wanting to treat, and going out of its way to treat, people fairly, equally, without deference to race, as far as race and the death penalty[.]” (Vol. 7, Tab #R-30, p. 39.); *see also, Hays v. State of Ala.*, 85 F.3d 1492, 1502 (11th Cir. 1996) (“But, this mention was only part of an extended discussion of elements favoring the imposition of the death penalty ... And, even if the Alabama Supreme Court did look at historical statistics, it might just as well not have been to ‘balance the books’ but to find some motivation to explain the jury’s failure to impose the death penalty.”).

In short, the trial court did not sentence Waldrop, who is white and who brutally murdered his white grandparents, to death based on his race. Instead, the court weighed the aggravating and mitigating circumstances and, in sentencing him to death, emphasized that “this is not a close case. This was a cold, heinous, atrocious, and cruel killing. A needless killing. And, if we are going to have a death penalty, this case was made for it.” (Vol. 9, Tab #R-30, p. 37.) Because

Waldrop's racial bias claim plainly is without merit, this Court should deny certiorari review.

C. This Court Should Deny Certiorari Because Waldrop's Racial Bias Claim Is Not Worthy Of Certiorari Review.

Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons. *See Faye v. Noia*, 372 U.S. 391, 436 (1963); Rule 10, Rules of the Supreme Court of the United States ("A petition for writ of certiorari will be granted only for compelling reasons."). In addition, the demands on this Court's time mandate that it select for review only those truly important cases that will have a wide ranging impact.

Waldrop has not alleged compelling grounds for this Court to grant certiorari review of his racial bias claim. Even assuming that his claim is not procedurally defaulted from habeas review and entirely without merit, which it is, Waldrop improperly seeks case-specific error correction. For that additional reason, his case is not worthy of certiorari review, and this Court should deny certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny certiorari.

Respectfully Submitted,

Steve Marshall
Alabama Attorney General

s/ Henry M. Johnson
Henry M. Johnson
Assistant Alabama Attorney General
Counsel of Record *

Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130-0152
Tel: (334) 353-9095
Fax: (334) 353-3637
hjohnson@ago.state.al.us

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