

No. 24-7145
CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY DAY RIEBER,
Petitioner,

v.

JOHN Q. HAMM, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

**PETITIONER'S REPLY BRIEF
IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

DAVID R. KONKEL*
EMMA J. JEWELL
HAYLEY C. RICH-NOBLE
GODFREY & KAHN, S.C.
833 EAST MICHIGAN
STREET, SUITE 1800
MILWAUKEE, WI 53202
PHONE: 414-273-3500
dkonkel@gklaw.com
* *Counsel of Record*

Counsel to Petitioner

JUNE 2, 2025

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	1
I. The Court Should Grant This Petition Because Mr. Rieber’s Trial Counsel Was Patently Ineffective.....	1
II. The Court Should Grant This Petition Because The Lower Courts Failed To Account For The Full Prejudice From Sentencing Counsel’s Deficiencies	5
III. Mr. Rieber’s Petition Presents A Compelling Vehicle To Review The Constitutionality Of Alabama’s Now-Repealed Judicial Override Scheme In Light Of <i>Hurst</i>	8
CONCLUSION.....	13

TABLE OF AUTHORITIES

	Page
Cases:	
<i>Ex parte Bohannon</i> , 222 So. 3d 525 (Ala. 2016), <i>cert. denied</i> , 580 U.S. 1101 (2017).....	11
<i>Fletcher v. State</i> , 621 So. 2d 1010 (Ala. Crim. App. 1993).....	4
<i>Harris v. Alabama</i> , 513 U.S. 504 (1995).....	9, 10
<i>Hinton v. Alabama</i> , 571 U.S. 263 (2014).....	2
<i>Hurst v. Florida</i> , 577 U.S. 92 (2016).....	8, 9, 10, 11, 12, 13
<i>Lee v. Comm’r, Ala. Dep’t of Corr.</i> , 726 F.3d 1172 (11th Cir. 2013).....	12
<i>McKinney v. Arizona</i> , 589 U.S. 139 (2020).....	12
<i>Owen v. State</i> , 611 So. 2d 1126 (Ala. Crim. App. 1992).....	3, 4
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002).....	9, 12
<i>Schriro v. Summerlin</i> , 542 U.S. 348 (2004).....	12
<i>Silvey v. State</i> , 485 So. 2d 790 (Ala. Crim. App. 1986).....	4
<i>Spaziano v. Florida</i> , 468 U.S. 447 (1984), <i>overruled by Hurst v. Florida</i> , 577 U.S. 92 (2016).....	10
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	1, 2

<i>Teague v. Lane</i> , 489 U.S. 288 (1989).....	12
---	----

<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003).....	1, 6
---	------

Statutes:

Alabama Code § 13A-5-51(2)	6
----------------------------------	---

Alabama Code § 13A-5-51(6)	6
----------------------------------	---

Rules:

Ala. R. Crim. P. 32	3, 4, 7
---------------------------	---------

INTRODUCTION

The State of Alabama urges denial of certiorari on the grounds that Mr. Rieber’s claims are “factbound” and unworthy of review. But this case implicates serious constitutional questions on ineffective assistance of counsel at both the guilt and penalty phases, as well as the constitutionality of Alabama’s now-repealed judicial override scheme. Mr. Rieber’s claims rest not merely on factual disagreement, but on the improper application of important constitutional principles. Review is warranted.

ARGUMENT

I. The Court Should Grant This Petition Because Mr. Rieber’s Trial Counsel Was Patently Ineffective.

Under *Strickland v. Washington*, “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” 466 U.S. 668, 690-91 (1984). A court shows deference to defense counsel’s judgment as to which defenses to rely on at trial only if alternate strategies are fully pursued. *Wiggins v. Smith*, 539 U.S. 510, 511 (2003). Mr. Kempaner’s failure to investigate Mr. Rieber’s report of intoxication to Dr. Rogers was not a

reasonable strategic choice—it was a constitutionally deficient omission with a clear potential to alter the verdict.

Mr. Kempaner was well aware of Mr. Rieber’s drug use once he read the Rogers report. Dr. Rogers’ report indicated that Mr. Rieber said he had no recollection of the events of the evening because of heavy drug consumption in the period before the robbery. (Doc. 16-83 at 13; Doc. 16-86 at 130-132.) Mr. Kempaner had a duty to investigate his client’s statements, but he never followed up with Mr. Rieber about the facts reported to Dr. Rogers. Mr. Kempaner simply never considered the alternative voluntary intoxication defense because he failed to understand Alabama law—a “quintessential example of unreasonable performance under *Strickland*.” *Hinton v. Alabama*, 571 U.S. 263, 274 (2014). Mr. Kempaner’s glaring failure was compounded by his knowledge that the alibi defense on which he relied was doomed to fail.

The State defends the Eleventh Circuit’s conclusion that Mr. Rieber was not prejudiced by trial counsel’s failure to pursue an intoxication defense because the evidence would not have entitled Mr. Rieber to a jury instruction on the lesser-included offense of manslaughter. But this holding is based on an unreasonable reading of the record. Two witnesses saw Mr. Rieber consuming drugs and alcohol

that night. At the Rule 32 hearing, Ms. Duffy testified that she saw Mr. Rieber consume drugs “around dark,” approximately “between 6:30, 7ish.” (Doc. 16-83 at 87.) Ms. Williamson also testified that she witnessed Mr. Rieber snorting crystal meth, smoking pot, and drinking alcohol “that night.” (*Id.* at 73-75.) Their testimony goes directly to timing and establishes that Mr. Rieber used drugs and consumed alcohol at night, in close proximity to the offense, and likely within an hour of the 8:00 p.m. convenience store robbery. The Eleventh Circuit disregarded the timing and corroborative value of this testimony, which was consistent with Mr. Rieber’s account to Dr. Rogers that he had consumed approximately “six or seven beers,” smoked “about six joints,” and used “three hits of ‘acid’” prior to the robbery. (Doc. 16-86 at 135.)

The evidence Mr. Kempaner should have investigated (but failed to pursue) required a lesser-included instruction. “[W]hen there is evidence of intoxication and the crime charged requires a specific intent, an instruction on the effects of intoxication and how it relates to any lesser included offense should be given.” *Owen v. State*, 611 So. 2d 1126, 1128 (Ala. Crim. App. 1992). An instruction is warranted even if evidence of the degree of the defendant’s intoxication is conflicting, because whether the defendant’s level of intoxication rises to the degree

necessary to reduce a charge from murder to manslaughter is a jury question. *Id.* See also *Fletcher v. State*, 621 So. 2d 1010, 1021 (Ala. Crim. App. 1993) (trial court's determination the appellant's intoxication did not rise to the requisite level "invaded the exclusive province of the jury") (citation omitted). The only question for the court is whether there is "a rational basis to support an instruction that intoxication could negate the specific intent and lower the charge to manslaughter." *Owen*, 611 So. 2d at 1128; see *Silvey v. State*, 485 So. 2d 790, 793 (Ala. Crim. App. 1986) ("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.'" (citation omitted)).

The State argues an instruction was not required because "two witnesses could not agree on what Rieber supposedly took or when he took it." (Opp'n Br. at 19.) But the possibility of conflicting testimony at the Rule 32 hearing does not mean a lesser included instruction was not required. See *Owen*, 611 So. 2d at 1128 (instruction warranted even if evidence of the degree of the defendant's intoxication is conflicting). Mr.

Rieber had a right to have the jury assess the credibility and sufficiency of the evidence, and Mr. Kempaner's complete failure to investigate this evidence was prejudicial.

This Court should not defer to the Alabama Court of Criminal Appeals' determination as a binding legal interpretation of state law. The Alabama court mischaracterized and misinterpreted the evidence of intoxication at the time of the offense because it similarly ignored and discounted key evidence of the time and quantity of Mr. Rieber's drug and alcohol consumption. Had Mr. Kempaner developed and presented the post-conviction evidence of Mr. Rieber's intoxication, the trial court would have been required to instruct the jury on the lesser-included offense of manslaughter. The Court should grant Mr. Rieber's petition as to the ineffective assistance of Mr. Kempaner.

II. The Court Should Grant This Petition Because The Lower Courts Failed To Account For The Full Prejudice From Sentencing Counsel's Deficiencies.

The Eleventh Circuit and lower courts minimized the prejudice caused by Mr. Moran's failure to corroborate Mr. Rieber's intoxication. 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 ensure that a similar argument could be met head on during the sentencing proceeding before Judge Blankenship. Since the sentencing strategy was to pursue two lines of mitigation, Mr. Rieber's good character and his drug use (lines not necessarily inconsistent) Mr. Moran was under a constitutional obligation to conduct a basic inquiry into Mr. Rieber's drug use. *Wiggins*, 539 U.S. at 521-22. Mr. Moran failed to meet this obligation.

The State argues the evidence Mr. Moran failed to develop regarding Mr. Rieber's drug use was "weak" and a "double-edged sword" while ignoring its legal relevance: the evidence corroborated and substantiated statutory mitigating factors under Alabama law, which the trial court explicitly rejected due to a lack of supporting evidence.

Specifically, the trial court rejected Alabama Code § 13A-5-51(2), that the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance, because it concluded there was "no evidence" corroborating Dr. Rogers' opinion that Mr. Rieber's memory lapse was more likely due to substance abuse. (Doc. 16-62 at 98.) As to Alabama Code § 13A-5-51(6), the capacity of the defendant to appreciate the criminality of his conduct or to conform his

conduct to the requirements of the law, the court again concluded that the only evidence relevant to that factor was the Rogers report and that evidence was “not sufficient” to support the mitigating circumstance. (Doc. 16-62 at 98.)

But as the Rule 32 hearing demonstrated, there was substantial evidence available that went directly to the mitigating factors rejected by the court for a lack of evidence. It was just never pursued. Had Mr. Moran presented all of the relevant and competent mitigating evidence of Mr. Rieber’s drug use, including the testimony from Dr. Alex Stalcup, an unchallenged expert in drug use and its effects whose testimony corroborated Mr. Rieber’s report to Dr. Rogers, the court would have been presented with compelling, corroborating evidence supporting at least two of the statutory mitigating factors in effect at the time of Mr. Rieber’s sentencing.

The prejudicial effect of Mr. Moran’s failure is highlighted further by the record on Mr. Rieber’s resentencing motion. At the resentencing hearing, Judge Blankenship asked Mr. Moran, point-blank: “was there anyone else before the Court that did testify to the effect that he ingested alcohol or drugs before the time he went into the store?” (Doc. 16-79 at 111.) Mr. Moran answered, “[n]o, there was not.” (*Id.*) But there were

multiple witnesses who could have testified to Mr. Rieber's use of drugs and alcohol. Mr. Moran just made no effort to find them or develop this mitigating, corroborating evidence. The fact that Judge Blankenship asked Mr. Moran directly about this evidence demonstrates the evidence mattered and would have made a difference in how she weighed the sentencing factors.

The State argues Mr. Rieber simply takes issue with how the lower courts weighed the sentencing factors. But this misrepresents Mr. Rieber's claim, which is based on his sentencing counsel's complete failure to investigate and present mitigating evidence in the first place. That the sentencing court would have weighed the sentencing factors differently goes to the prejudice caused by Mr. Moran's inexcusable failure to develop evidence that corroborated the Rogers report. Mr. Moran's representation of Mr. Rieber at sentencing was constitutionally deficient. Review is warranted.

III. Mr. Rieber's Petition Presents A Compelling Vehicle To Review The Constitutionality Of Alabama's Now-Repealed Judicial Override Scheme In Light Of *Hurst*.

The State's assertion that this Court's decision in *Hurst v. Florida*, 577 U.S. 92 (2016) has no bearing on this case ignores its implications. *Hurst* held that the Sixth Amendment forbids judicial

factfinding that exposes a defendant to the death penalty. *Id.* at 94. In Mr. Rieber’s case, the judge did just that. At sentencing, Judge Blankenship found additional facts and weighed an additional aggravating circumstance that the jury did not find: “[t]he evidence allows the Court to clearly conclude that the defendant, for at least three to four days, had stalked the victim” (Doc. 16-85 at 103.) Without this 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.

The State argues that Alabama’s former capital sentencing scheme must be constitutional because this Court upheld the judicial override scheme in *Harris v. Alabama*, 513 U.S. 504 (1995), and *Harris* has not been overruled. *Harris*, of course, predates *Hurst* by 20 years; in fact, *Harris* even predates *Ring v. Arizona*, 536 U.S. 584 (2002). In *Harris*, this Court upheld Alabama’s former judicial override scheme as consistent with the Eighth Amendment even though it did not define the weight a sentencing judge was to give an advisory jury verdict. *Harris*, 513 U.S. at 514-15. The *Harris* Court compared Alabama’s judicial override scheme to Florida’s noting, “Alabama’s capital sentencing scheme is much like that of Florida,” other than Florida’s sentencing

scheme required a judge to assign “great weight” to a jury’s recommendation. *Id.* at 508-09. In comparing Alabama and Florida, the *Harris* Court noted that Florida’s capital sentencing scheme had repeatedly been upheld as constitutional, relying on cases like *Spaziano v. Florida*, 468 U.S. 447 (1984), *overruled by Hurst v. Florida*, 577 U.S. 92 (2016). *See Harris*, 513 U.S. at 509-10.

Over twenty years later this Court reconsidered the constitutionality of Florida’s capital sentencing scheme in *Hurst*. In *Hurst*, this Court held that Florida’s judicial override scheme violated the Sixth Amendment because it permitted a judge to impose the death penalty based on her own factfinding. *Hurst*, 577 U.S. at 98-100. This Court explicitly overruled its prior decisions upholding the constitutionality of Florida’s sentencing scheme, including its decision in *Spaziano* (which the *Harris* Court cited), “to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury’s factfinding, that is necessary for imposition of the death penalty.” *Id.* at 102. Post-*Hurst*, the reasoning in *Harris* that a jury’s role can be merely advisory is no longer sound. *Hurst* requires that a jury find all facts necessary to expose a defendant to the death penalty. Because the Judge in Mr. Rieber’s case engaged in independent factfinding to impose

the death penalty Mr. Rieber's death sentence is unconstitutional under *Hurst*.

The State also argues that Alabama's former capital sentencing scheme must be constitutional because the Alabama Supreme Court recently held as much and it notes that this Court denied the *certiorari* petition in *Ex parte Bohannon*, 222 So. 3d 525 (Ala. 2016), *cert. denied*, 580 U.S. 1101 (2017). But *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. *Id.* at 527. In this case, to the contrary, Mr. Rieber's jury voted 7-5 for life imprisonment. *Bohannon* provides no support for the State's position.

The State further argues Mr. Rieber's death sentence is constitutional because even without the judge's independent fact finding, at least one aggravating circumstance—that the offense was committed during a robbery—was automatically established by the guilt-phase verdict and this single aggravating circumstance was all that was needed to make Mr. Rieber eligible for the death penalty. (Opp'n Br. at 28.) But allowing an aggravator to be implicit or automatically established is an end-run around the constitutional requirement that a jury make the factual findings necessary to expose a

defendant to death. The Court should grant Mr. Rieber’s petition to hold that the aggravator used to impose a death sentence cannot be implied in a jury verdict. *See Ring*, 536 U.S. at 609 n.7, (“We do not reach the State’s assertion that any error was harmless because a pecuniary gain finding was implicit in the jury’s guilty verdict.”); *Lee v. Comm’r, Ala. Dep’t of Corr.*, 726 F.3d 1172, 1198 (11th Cir. 2013) (“Indeed, *Ring* itself specifically left open and did not decide the question of whether the aggravator used to impose a death sentence could be implicit in the jury’s verdict.”).

Finally, the State argues *Ring* and *Hurst* do not apply retroactively. In support, the State cites *Schriro v. Summerlin*, in which this Court held *Ring* does not apply retroactively to cases already final on direct review. 542 U.S. 348 (2004). The State also points to *McKinney v. Arizona*, which relied on *Schriro*. 589 U.S. 139, 145 (2020). The State argues that because *Ring* does not apply retroactively then *Hurst* cannot be retroactive either. But even the majority in *Schriro* did not deny the holding in *Ring* is “implicit in the concept of ordered liberty,” satisfying the first criterion under *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion). *Schriro*, 542 U.S. at 359 (Breyer, J., dissenting). And *Hurst* went further than *Ring*, marking the first time this Court struck down

judicial override. The watershed significance of *Hurst* for defendants sentenced pursuant to judicial override warrants continued scrutiny.

Mr. Rieber asks this Court to grant his Petition because Alabama's former capital sentencing scheme permitted the judge in his case to find additional facts not found by the jury and override the jury's recommendation of life imprisonment. Because Mr. Rieber was sentenced to death in a manner the Sixth Amendment forbids, his sentence should be vacated.

CONCLUSION

For the reasons stated, Mr. Rieber respectfully requests that the Court grant his petition for a writ of certiorari.

Respectfully submitted,

/s/ David R. Konkel

David R. Konkel*

Emma J. Jewell

Hayley C. Rich-Noble

GODFREY & KAHN, S.C.

833 East Michigan Street,
Suite 1800

Milwaukee, WI 53202

Phone: 414-273-3500

Email: dkonkel@gklaw.com

**Counsel of Record*

Counsel for Petitioner

Direct Inquiries To:

David R. Konkel

414-273-3500