

No. 16-595  
CAPITAL CASE

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**IN THE SUPREME COURT OF THE UNITED STATES**

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◆  
THOMAS D. ARTHUR,  
Petitioner,

v.

STATE OF ALABAMA,  
Respondent.

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

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**BRIEF IN OPPOSITION TO ARTHUR'S PETITION FOR  
WRIT OF CERTIORARI**

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**EXECUTION SCHEDULED FOR NOVEMBER 3, 2016**

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## STATEMENT OF THE CASE

This case arises out of the Alabama Supreme Court's denial of a motion to vacate or stay Arthur's November 3, 2016, execution date. Arthur sought the equitable relief of a stay of execution by a motion relying on Rule 8(d) of the Alabama Rules of Appellate Procedure. Arthur filed his Rule 8(d) motion on November 1, 2016, the State of Alabama opposed the motion on state procedural and equitable grounds that same day—without addressing the merits of his federal claim—and the court denied his motion on November 2. Arthur's petition for certiorari review of the Alabama Supreme Court's denial of his motion follows.

The State of Alabama requested the active execution warrant on July 21, 2016. Arthur filed an opposition to the setting of his execution date on August 11, citing this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), in support of his opposition. On September 14, the Alabama Supreme Court affixed November 3, 2016, as the appropriate time for imposition of Arthur's sentence of death.

The active execution warrant in this case represents the seventh occasion the Alabama Supreme Court has had to order the execution of Arthur's sentence. The prior six execution dates were stayed based on Arthur's long-term manipulation of the federal and state courts through civil litigation and successive collateral attacks. In the most notable case, Arthur received a reprieve based on the presentation of perjured testimony. *Arthur v. State*, 71 So. 3d 733 (Ala. Crim. App. 2010). Arthur also

filed five 42 U.S.C. § 1983 complaints prior to filing the Rule 8(d) motion underlying this proceeding.<sup>1</sup>

## REASONS FOR DENYING THE PETITION

Petitioner Thomas Arthur seeks certiorari review of an administrative decision of the Alabama Supreme Court that rested solely on state procedural and equitable grounds. The fact that Arthur challenges a straightforward application of Rule 8(d) of the Alabama Rules of Appellate Procedure, wholly independent of federal constitutional considerations, removes this case from the scope of this Court's certiorari review. *See* 28 U.S.C. § 1257(a) (2016) (permitting certiorari review of judgment by the highest court of a State "where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution"). Even if this Court indulged Arthur's argument that federal jurisdiction exists over a Rule 8(d) determination made by the Alabama Supreme Court, certiorari review would properly be denied where Arthur failed to seek review in this Court after the Alabama Supreme Court rejected his initial opposition to the issuance of an execution warrant, which was also based on *Hurst v. Florida*, 136 S. Ct. 616 (2016).

Arthur's appearance before the Alabama Supreme Court, as indicated by his motion for a stay, was pursuant to Rule 8(d), which governs the *issuance* of execution warrants. Although Arthur cited this Court's decision in *Hurst* in support of his

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1. *See Arthur v. King*, 500 F.3d 1335 (11th Cir. 2007) (first); *Arthur v. Allen*, 248 F. App'x 128 (11th Cir. 2007) (second); *Arthur v. Ala. Dep't of Corrs.*, No. 07-15877 (11th Cir. July 29, 2008) (third); *Arthur v. Allen*, 574 F. Supp. 2d 1252 (S.D. Ala. 2008) (fourth); *Arthur v. Comm'r, Ala. Dep't of Corrs.*, No. 16-15549 (11th Cir. Nov. 2, 2016) (fifth). Arthur's daughter also filed a § 1983 action on his behalf prior to his second scheduled execution date. *Stone v. Allen*, No. 07-0681-WS-M, 2007 WL 4209262 (S.D. Ala. Nov. 27, 2007).

motion, the Alabama Supreme Court did not reach the merits of that claim. Indeed, because Alabama law does not envision a challenge to a conviction or sentence by way of Rule 8(d), the Alabama Supreme Court was without grounds to offer Arthur a merits decision on the validity of his sentence under the Constitution. This reality is best illustrated by the fact that the State did not even address the merits of Arthur's *Hurst* claim in its opposition to the motion for a stay.

*Hurst* was announced on January 12, 2016. Despite the fact that the Alabama Supreme Court had previously issued execution warrants pertaining to Arthur on six occasions, Arthur did nothing to challenge his sentence pursuant to *Hurst* prior to filing his motion for a stay in the Alabama Supreme Court on November 1, 2016, just two days prior to his execution. This filing occurred forty-eight days after the Alabama Supreme Court issued the seventh execution warrant pertaining to Arthur.

As the State noted in its state court response, Arthur had no standing under Rule 8(d) of the Alabama Rules of Appellate Procedure 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. *See* Ala. R. App. P. Rules 21 and 39; *see also Ex parte Williams*, 795 So. 2d 785, 787 n.1 (Ala. 2001) (recognizing that certiorari review is at the discretion of the Alabama Supreme Court, even in cases where a sentence of death was imposed); *cf. Smith v. Jones*, 256 F.3d 1135, (11th Cir. 2001) (recognizing the Alabama Supreme Court's certiorari review is discretionary). 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,” Arthur could not vindicate his *Hurst* claim by presenting it directly to the Alabama Supreme Court pursuant to Rule 8(d).<sup>2</sup>

Under Alabama law, all post-trial remedies seeking relief from a conviction or sentence are governed through the procedures contained in Rule 32 of the Alabama Rules of Criminal Procedure. Ala. R. Crim. P. 32.4. Assuming *arguendo* that Arthur 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 Arthur did not cite to the Alabama Supreme Court as a basis for his request. Further, Arthur did not even purport to present his claim as a “petition,” as is required by Rule 21(c). He did not comply with Alabama law pertaining to the very limited circumstances in which a sentence or conviction may be collaterally attacked, a fact that *a fortiori* prevents any argument that the Alabama Supreme Court reached the merits of his *Hurst* claim.

For reasons of federalism and comity, this Court should decline to exercise its certiorari jurisdiction because the state court judgment rests upon an independent and adequate state law ground *See, e.g., Berry v. Mississippi*, 552 U.S. 1007, 128 S. Ct. 528 (mem.) (2007); *Wilson v. Loew’s Inc.*, 355 U.S. 597, 78 S. Ct. 526 (1958); *see*

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2. Arthur has conceded this point in a filing on November 2, 2016, in the Circuit Court of Jefferson County, Alabama. Arthur has requested permission to file a successive post-conviction petition in that court because the Alabama Supreme Court did not discuss the merits of his *Hurst* claim, as he did not have any pending *Hurst* claim in any court. Motion for Leave to File a Successive Petition, Arthur v. State, 01-CC-87-577.63 (Jefferson County Cir. Ct. Nov. 2, 2016).



also *Beard v. Kindler*, 558 U.S. 53, 130 S. Ct. 612 (2009); *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546 (1991). As Rule 8(d) could not provide a legal vehicle for Arthur to challenge his sentence under *Hurst*, Arthur has not presented the merits of his *Hurst* claim in the appropriate form to provide Alabama's judiciary a merits review.

Further, there are no compelling reasons to grant the petition in this case, as required by Rule 10 of this Court's rules. In fact, there are compelling reasons *against* the grant of the writ. First, if the administrative orders of the Alabama Supreme Court issued under Rule 8(d) are reviewable in this Court, then Arthur could have brought this claim immediately after the Alabama Supreme Court issued the execution warrant on September 14. After all, that administrative action occurred after Arthur filed his opposition to the issuance of the execution warrant, citing *Hurst*, on August 11.

The state law procedural questions pertaining to Rule 8(d) of the Alabama Rules of Appellate Procedure, the state equitable considerations at play when the Alabama Supreme Court is faced with a dilatory, last-minute request for a temporary reprieve, and the lack of a clearly defined federal question make this case of little utility to this Court in carrying out its duties. Arthur could have begun developing a *Hurst* claim and navigating it through Alabama's post-conviction process at any time after January 12, 2016. In fact, Arthur was squarely on notice of the need to file proper procedure to have his *Hurst* claim properly presented after this Court's denial of the stay of execution in the Christopher Brooks case. *Brooks v. Alabama*, 136 S. Ct.

708 (mem.) (Sotomayor, J., concurring) (denying certiorari because of correct conclusion that “procedural obstacles would have prevented” the Court from granting relief). In the light of *Brooks*, Arthur was aware of the importance of presenting a federal claim to the state courts in compliance with procedural requirements. Arthur’s litigation history leaves no doubt that he had the ability to litigate his *Hurst* claim earlier, and using the proper procedures.

Arthur’s prior six execution dates were stayed based on his long-term manipulation of the federal and state courts through civil litigation and successive collateral attacks. It is clear that, had he so desired, Arthur could have brought his *Hurst* claim to the Alabama courts in proper form and using proper procedure, had he acted with promptness in January (or perhaps even August or September). Because he did not, this Court should not grant certiorari. Defining an important federal question out of the truncated filings and irregular procedure in this case would be akin to placing a square peg into a round hole.

Finally, the State of Alabama asserted the state law doctrine of invited error as to Arthur’s *Hurst* claim. At trial, Arthur specifically asked the circuit court and his sentencing jury for a sentence of death. *See, e.g., Arthur v. Thomas*, 739 F.3d 611, 615 (11th Cir. 2014); *Arthur v. State*, 711 So.2d 1031, 1089 (Ala. Crim. App. 1996). Both jury and judge obliged Arthur’s request. Having asked for his current sentence, Arthur cannot now claim error. *See Ex parte Deardorff*, 6 So. 3d 1235, 1241–42 (Ala. 2008) (recognizing that a criminal defendant cannot by his own voluntary conduct invite error and then seek to profit thereby). Again, application of the state law

doctrine of invited error is an adequate and independent state law ground for the Alabama Supreme Court's refusal to stay Arthur's execution under Rule 8(d) of the Alabama Rules of Appellate Procedure. It also makes consideration of the federal question (allegedly) presented inappropriate.

## CONCLUSION

Wherefore, for the foregoing reasons, Respondents respectfully request this Court deny Arthur's request for a stay of execution.

Respectfully submitted,

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BY—

**s/James Roy Houts**

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## **CERTIFICATE OF SERVICE**

I certify that on November 3, 2016, I filed this brief in opposition via electronic mail with the clerk of the court and in addition, I e-mailed an electronic copy of the brief to the following persons:

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