

App No. _____

In the Supreme Court of the United States

THOMAS D. ARTHUR, PETITIONER

v.

STATE OF ALABAMA, RESPONDENT

**CAPITAL CASE
EXECUTION OF THOMAS D. ARTHUR
SCHEDULED FOR
THURSDAY, NOVEMBER 3, 2016**

**APPLICATION FOR STAY OF EXECUTION PENDING
DISPOSITION OF PETITION FOR A WRIT OF CERTIORARI**

SUHANA S. HAN

Counsel of Record

ADAM R. BREBNER

MEREDITH C. SHERMAN

STEPHEN S. MAR

AKASH M. TOPRANI

JUSTIN D. ROLLER

125 Broad Street

New York, NY 10004

(212) 558-4000

hans@sullcrom.com

Counsel for Petitioner Thomas D. Arthur

TABLE OF CONTENTS

	Page
Application For Stay Of Execution.....	1
Jurisdiction	1
Reasons For Granting The Stay	1
Conclusion	6
Appendix	1a
Appendix A, Supreme Court of Alabama Decision (Nov. 2, 2016)	1a

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983).....	2
<i>Bohannon v. State, In re</i> , No. 1150640, 2016 WL 5817692 (Ala. Sept. 30, 2016).....	4
<i>Holladay, In re</i> , 331 F.3d 1169 (11th Cir. 2003)	5
<i>Hunter v. Secretary</i> , No. 15 Civ. 1742 (M.D. Fla. Oct. 26, 2016).....	4
<i>Hurst v. Florida</i> , 136 S. Ct. 616 (2016).....	.passim
<i>Nelson v. Campbell</i> , 541 U.S. 637 (2004).....	5
<i>Ohio Execution Protocol Litig., In re</i> , 840 F. Supp. 2d 1044 (S.D. Ohio 2012).....	5
<i>Rauf v. Delaware</i> , No. 39-2016, 2016 WL 4224252 (Del. Aug. 2, 2016).....	3, 4
<i>Roche, In re</i> , 448 U.S. 1312 (1980).....	2
<i>Rostker v. Goldberg</i> , 448 U.S. 1306 (1980).....	3
<i>Schoenwetter v. Secretary</i> , No. 15-10099-P (11th Cir. Oct. 28, 2016).....	4

Cases—continued:

Teague v. Lane,
489 U.S. 288 (1989)..... 3

Wainwright v. Booker,
473 U.S. 935 (1985)..... 2, 5

Constitutional Amendments:

U.S. Const. amend. VI..... 2

U.S. Const. amend. VIII..... 5

Statute:

28 U.S.C. § 2101(f)..... 1

Rule:

Sup. Ct. R. 23..... 1

APPLICATION FOR STAY OF EXECUTION

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

Petitioner, Thomas Arthur, respectfully requests a stay of his execution, which is scheduled for November 3, 2016, pending this Court's disposition of his petition for a writ of certiorari filed concurrently with his application.

JURISDICTION

Petitioner asks this court to stay his execution in order to permit this Court to consider his Petition for Writ of Certiorari to the Alabama Supreme Court. Mr. Arthur filed his Petition for Writ of Certiorari concurrently with this Application for Stay of Execution. Pursuant to Supreme Court Rules 23.1 and 23.2, and under the authority of 28 U.S.C. Section 2101(f), the stay may lawfully be granted.

REASONS FOR GRANTING THE STAY

In the accompanying Petition for Writ of Certiorari, Mr. Arthur asks this Court to review the Alabama Supreme Court's decision not to grant relief, even though Mr. Arthur was sentenced pursuant to the same "hybrid" capital sentencing scheme deemed unconstitutional in Florida in this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). *Hurst* invalidated the

Florida death sentencing scheme that relied on a mere advisory recommendation by a jury followed by judicial factfinding of aggravating factors and a judicial imposition of the death penalty, because it violated the Sixth Amendment right to a jury. Mr. Arthur was sentenced to death by a judge in Alabama, following a non-unanimous jury recommendation for death, pursuant to a capital sentencing scheme that suffers from the same fatal defects as Florida's. Mr. Arthur's constitutional claim will become moot if he is executed as scheduled pursuant to an illegal sentence, in violation of *Hurst*. See *Wainwright v. Booker*, 473 U.S. 935, 936 (1985) (Mem.) (Powell, J. concurring).

A stay of execution is warranted where (1) "four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari," (2) there is "a significant possibility of reversal of the lower court's decision," and (3) there is "a likelihood that irreparable harm will result if [the execution] is not stayed." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (quoting *White v. Florida*, 458 U.S. 1301, 1302 (1982) (Powell, J., in chambers)). Where a stay is requested in conjunction with a writ of certiorari, as opposed to a direct appeal, the second factor takes on less importance. See *In re Roche*, 448 U.S. 1312, 1314 n.1 (1980). Further, "in a

close case, it may be appropriate to ‘balance the equities’—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.” *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (quoting *Holtzman v. Schlesinger*, 414 U.S. 1304, 1308-09 (Marshall, J., in chambers)). Mr. Arthur meets these standards.

1. The Court is likely to grant certiorari, for reasons discussed in detail in Petitioner’s concurrently filed petition for certiorari. Mr. Arthur’s certiorari petition raises an issue of national constitutional concern, that arises with great frequency in capital litigation, and that a state court of last resort decided in conflict with an opinion of this Court. A determination by this Court on the constitutionality of Alabama’s death sentencing scheme is necessary to reconcile the law in Alabama with the decision of this Court in *Hurst*. See also *Rauf v. Delaware*, No. 39-2016, 2016 WL 4224252 at *1 (Del. Aug. 2, 2016) (Delaware Supreme Court decision holding Delaware’s capital sentencing, with a similar structure to Alabama’s, unconstitutional in light of *Hurst*). Mr. Arthur’s case also raises an important question related to whether this Court’s opinion in *Hurst* is retroactive, since Mr. Arthur is no longer on direct appeal. *Teague v. Lane*, 489 U.S. 288 (1989). Last week, both the Eleventh Circuit and the Middle District of Florida stayed death

penalty cases pending resolution of the question of *Hurst's* retroactivity. *Schoenwetter v. Secretary*, No. 15-10099-P (11th Cir. Oct. 28, 2016) (order staying appeal pending the Florida Supreme Court's resolution of the retroactive application of *Hurst*); *Hunter v. Secretary*, No. 15 Civ. 1742 (M.D. Fla. Oct. 26, 2016) (Dkt. No. 13) (same).

2. Mr. Arthur also meets the second part of the standard, namely whether there is a significant possibility of reversal. In *Hurst*, after evaluating the constitutionality of Florida's virtually identical death penalty sentencing scheme, eight members of this Court concluded that Florida's scheme was unconstitutional. It is more than reasonably probable that the this Court will issue a similar ruling with respect to Alabama's advisory jury sentencing scheme, which is identical to Florida's in all relevant respects. Indeed, the Supreme Court of Delaware (the only other state, aside from Florida and Alabama to use a so-called advisory "hybrid system" for death sentences) recently ruled Delaware's death penalty scheme unconstitutional. *Rauf*, 2016 WL 4224252 at *1. Alabama's decision upholding the constitutionality of its capital sentencing scheme in *In re Bohannon v. State*, No. 1150640, 2016 WL 5817692 (Ala. Sept. 30, 2016) is in conflict with those decisions and likely to be reversed.

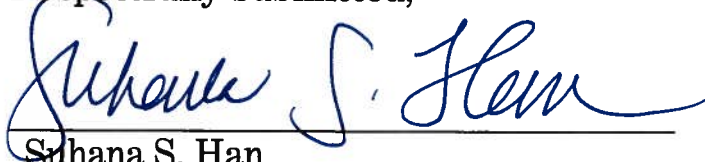
3. In order to adequately brief this Court on the important Questions Presented, Petitioner requires a temporary stay of execution. If it is not granted, Petitioner will suffer the most irreparable injury imaginable: enforcement of a death sentence that was imposed through an illegal sentencing procedure. Irreparable harm “is necessarily present in capital cases.” *Wainwright*, 473 U.S. at 935 n.1 (Powell, J., concurring).

4. Moreover, the equities in this case strongly favor a stay. While the State has a strong interest in the enforcement of its judgments, *see Nelson v. Campbell*, 541 U.S. 637, 650 (2004), it has no interest in executing a condemned prisoner in violation of the Constitution, *see In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) (“[W]e perceive no substantial harm that will flow to the State of Alabama or its citizens from postponing petitioner’s execution to determine whether that execution would violate the Eighth Amendment.”). The same is true of the public interest, which “has never been and could never be served by rushing to judgment at the expense of a condemned inmate’s constitutional rights.” *In re Ohio Execution Protocol Litig.*, 840 F. Supp. 2d 1044, 1059 (S.D. Ohio 2012), *motion to vacate stay denied*, 671 F.3d 601 (6th Cir. 2012), *motion to vacate stay denied sub nom. Kasich v. Lorraine*, 132 S. Ct. 1306 (2012).

CONCLUSION

This Court's decision in *Hurst* invalidates Alabama's death sentencing scheme. The Alabama Supreme Court refused to recognize the validity of *Hurst*, both as it applies generally to Alabama and specifically to Mr. Arthur. This Court should stay Mr. Arthur's scheduled execution and resolve the important constitutional issues raised by Mr. Arthur's petition for certiorari.

Respectfully submitted,



Suhana S. Han

Counsel of Record

Adam R. Brebner

Meredith C. Sherman

Stephen S. Mar

Akash M. Toprani

Justin D. Roller

125 Broad Street

New York, New York 10004

Telephone: (212) 558-4000

Fax: (212) 558-3588

E-mail: hans@sullcrom.com

Counsel for Petitioner

Thomas D. Arthur



IN THE SUPREME COURT OF ALABAMA

November 2, 2016

1951985

Ex parte Thomas Douglas Arthur. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Thomas Douglas Arthur v. State of Alabama) (Jefferson Circuit Court: CC-87-577; Criminal Appeals: CR-91-0718).

ORDER

The Petition to Vacate or Stay Order of Execution filed by Thomas Douglas Arthur on November 1, 2016, having been submitted to this Court,

IT IS ORDERED that the Petition to Vacate or Stay Order of Execution is DENIED.

Stuart, Bolin, Parker, Shaw, Main, and Bryan, JJ., concur.

Murdock, J., dissents.

I, Julia Jordan Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 2nd day of November, 2016.

A handwritten signature in cursive script that reads "Julia Jordan Weller".

Clerk, Supreme Court of Alabama

cc:

D. Scott Mitchell

James H. Hard IV

J. Scott Vowell

Jefferson County Circuit Clerk's Office

LaJuana Davis



IN THE SUPREME COURT OF ALABAMA

November 2, 2016

Suhana S. Han
Arnold Levine
Sara L. Manaugh
Jennifer L. Parkinson
John P. Rall
Jordan T. Razza
Bryan Allen Stevenson
Bill Pryor
Luther Strange
James Clayton Crenshaw
Kathryn D. Hubbard
Andy Scott Poole
Jason Kreag
Peter J. Neufeld