

Nos. 16A450, 16-595

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**In the Supreme Court of the United States**

THOMAS D. ARTHUR, PETITIONER

*v.*

STATE OF ALABAMA, RESPONDENT

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF ALABAMA

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**CAPITAL CASE**

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**REPLY BRIEF FOR PETITIONER**

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## REPLY

The State's Opposition to Arthur's Motion for Stay of Execution ("Opposition" or "Opp.") disregards the substance of Mr. Arthur's constitutional claim in favor of a misplaced argument that this Court does not have jurisdiction to review the order of the Alabama Supreme Court denying Mr. Arthur's request for relief from the State's unconstitutional sentencing scheme. The State's argument is without merit.

1. The State argues that the decision of the Alabama Supreme Court "rested solely on state procedural and equitable grounds" and "did not reach the merits." (Opp. at 1, 2.) There is absolutely no basis for this argument. The order of the Alabama Supreme Court, which *denied* Mr. Arthur's petition for review under *Hurst*, did so without offering any reasons for its denial at all, Pet. App. 1a, but certainly did not *dismiss* the petition for want of jurisdiction. *See, e.g., Tarvin v. Tarvin*, 266 Ala. 214 (1957) (appeal "dismissed for want of jurisdiction"); *see also Burns Church, Inc. v. Ala. District Council of the Assemblies of God, Inc.*, 168 So. 3d 1188 (Ala. 2014) (Mem.) (Moore, C.J., dissenting from affirmance without opinion and arguing that the court "should have dismissed" the appeal for lack of jurisdiction).

Indeed, the fact that there was a dissent from the denial of relief indicates that the decision to deny Mr. Arthur's petition was not a "straightforward" application of a jurisdictional rule as the State asserts, but a decision on the merits of Mr. Arthur's constitutional claim. If the Alabama Supreme Court

had lacked jurisdiction, it would have dismissed Mr. Arthur's petition on that basis—instead it considered, and denied, the petition.

Moreover, the dissenting Alabama Supreme Court judge, Justice Murdock, was the same judge who concurred only in the result (suggesting that he viewed the decision as limited to its particular facts) from the Alabama Supreme Court's recent opinion purporting to uphold Alabama's capital sentencing scheme—contravening *Hurst*—in *In re Bohannon v. State*, No. 1150640, 2016 WL 5817692 (Ala. Sept. 30, 2016), which further indicates that the basis for decision went to the merits, not to the State's spurious jurisdictional argument.

2. Further, it is clear that the Alabama Supreme Court *did* have jurisdiction to review its own death warrant and grant relief from a sentence imposed in violation of the United States Constitution. As the State all but concedes (while arguing that Mr. Arthur should have invoked a different procedural rule in filing his petition) (Opp. at 3), under Ala. Code § 12-2-2, the Supreme Court of Alabama has authority to “issue writs of certiorari and to grant injunctions and stays of execution of judgment.” *See also* Ala. Code § 12-2-7(2) (court has jurisdiction “in the issue and determination of writs of *quo warranto* and mandamus in relation to matters in which no other court has jurisdiction”); Ala Code § 12-2-7(3) (court has jurisdiction to “issue writs of injunction, habeas corpus, and such other remedial and original writs as are necessary to give to it a general superintendence and control of courts of inferior jurisdiction”). All these rules provided the Alabama Supreme Court with jurisdiction to review the merits of Mr. Arthur's *Hurst* petition.

Additionally, even the rule the State claims was inapposite, Ala. R. Crim. App. 8(d), expressly provides that the Alabama Supreme Court may “enter an order fixing a date of execution . . . *and may make other appropriate orders upon disposition of the appeal or other review.*” That rule, too, provided the Alabama Supreme Court with jurisdiction to review Mr. Arthur’s constitutional claim.

In short, because the Alabama Supreme Court did have jurisdiction to consider Mr. Arthur’s petition, which was premised on the State’s sentencing law being inconsistent with the Constitution of the United States, this Court, too, has jurisdiction and should grant certiorari on the merits pursuant to 28 U.S.C. § 1257(a) and a stay: “[W]hether a state law determination is characterized as entirely dependent on, resting primarily on, or influenced by a question of federal law, the result is the same: the state law determination is not independent of federal law and thus poses no bar to our jurisdiction.” *Foster v. Chatman*, 136 S. Ct. 1737, 1746 n.4 (2016) (citations omitted); *see also Stewart v. Smith*, 526 U.S. 856, 861 (2002) (“Our cases make clear that when resolution of [a] state procedural law question depends on a federal constitutional ruling, the state-law prong of the court’s holding is not independent of federal law, and our [direct review] jurisdiction is not precluded.”) (internal quotation marks and citations omitted) (alterations in original).

3. The State’s timeliness argument is equally without merit. As the Court is aware, Mr. Arthur’s death warrant was not issued until September 14, 2016 (and the Alabama Supreme Court did not release its *Bohannon* opinion purporting to distinguish its statutory scheme from the one ruled unconstitutional

in *Hurst* until September 30, 2016). Mr. Arthur sought review of the Alabama Supreme Court’s death warrant in time for the Alabama Supreme Court to issue its ruling and then promptly sought a stay in this Court. There is no prejudice to the State from Mr. Arthur’s unwillingness to multiply proceedings before it became absolutely necessary to do so to vindicate his constitutional rights—Mr. Arthur already had a pending Eighth Amendment appeal.<sup>1</sup>

4. Finally, the State’s reliance on the doctrine of “invited error” is equally misplaced. In *Ex Parte Deardorff*, cited by the State in its opposition, a defendant was precluded under this doctrine from challenging on appeal the admissibility of evidence that the defendant himself had presented to the court. 6 So. 3d 1235, 1242 (Ala. 2008). In stark contrast, the constitutional error that occurred in Mr. Arthur’s case deriving from the State’s unconstitutional sentencing scheme is not an error that Mr. Arthur invited. Rather, the error was the product of a hybrid advisory Alabama sentencing statute, a type of statute that this Court has since found to violate the Sixth Amendment. Mr. Arthur did not induce the court to make the constitutional error.

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<sup>1</sup> The State suggests that Mr. Arthur should have appealed the September 14 Order, instead of Alabama’s Order of yesterday (Opp. at 4), but that hardly supports a laches argument: even if it were necessary to appeal the September 14 Order separately—and it is not—the time to seek *certiorari* from that order has not expired.

**CONCLUSION**

For the foregoing reasons and the reasons stated in his application, 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,

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