No. 15-8753
CAPITAL CASE

In the SUPREME COURT of the UNITED STATES

DOYLE LEE HAMM,

Petitioner,

v.

Commissioner,
Alabama Department of Corrections,

Respondent.

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

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Should this Court decline to review Hamm's claim that the Constitution does not require federal courts to defer to the adoption by the trial court of the State's proposed order denying the post-conviction petition where this claim was not raised in the lower court and, in any event, is without merit?

2. Should this Court decline to review Hamm's claim that this Court should expand the narrow exception in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), where this claim is not worthy of certiorari review, does not involve a split, and is meritless?

3. Should this Court decline to review Hamm's claim that the State improperly relied on unconstitutionally obtained prior convictions as an aggravating circumstance where the claim is procedurally defaulted, is not worthy of certiorari consideration, and is without merit?

4. Should this Court decline to review Hamm's claim that *Hurst v. Florida*, 136 S. Ct. 616 (2016), entitles him to be resentenced where the claim was not presented in the lower court and is without merit?

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STATEMENT OF THE CASE

A. The Proceedings Below

On September 26, 1987, Doyle Lee Hamm was convicted of one count of capital murder for the death of Patrick Cunningham. Specifically, Hamm was found guilty of murder during a robbery in violation of Alabama Code, §13A-5-40(a) (2). (Vol. 6, Tab#15, p. 1193) The trial court accepted the jury's recommendation and sentenced Hamm to death. (Vol. 7, Tab#28, p. 1327)

On direct appeal, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Hamm's conviction and death sentence. *Hamm v. State*, 564 So. 2d 453 (Ala. Crim. App. 1989), *aff'd*, 564 So. 2d 469 (Ala. 1990). This Court denied Hamm's petition for writ of certiorari. *Hamm v. Alabama*, 498 U.S. 1008 (1990).

Hamm filed a petition for post-conviction relief under Rule 32 of the Alabama Rules of Criminal Procedure in December of 1991. (Vol. 21, Tab#40, p. 2080) An evidentiary hearing was held on the post-conviction petition. (Vol. 21, Tab#42, p. 1) After the evidentiary hearing, the trial court denied the post-conviction petition. (Vol. 33, Tab#58) The Alabama Court of Criminal Appeals affirmed the denial of the post-conviction petition. *Hamm v. State*, 913 So. 2d 460 (Ala. Crim. App. 2002). (Vol. 33,

Tab#59) The Alabama Supreme Court and this Court denied Hamm's petition for writ of certiorari. (Vol. 33, Tab#60, 61)

Hamm then filed a petition for writ of habeas corpus. (Doc. 1) On March 27, 2013, Judge Karon O. Bowdre entered a memorandum opinion and final judgment denying the habeas petition. (Docs. 26, 27) Hamm then filed a motion to alter or amend judgment. (Doc. 28) This motion was granted in part to strike a sentence from the memorandum opinion and denied in part. (Docs. 31, 32) The Eleventh Circuit affirmed the denial of the habeas petition. *Hamm v. Commissioner*, 620 Fed. App'x. 752 (11th Cir. 2015).

B. Statement of the Facts

1. Facts of the crime

On January 24, 1987, Patrick Cunningham was working the 3:00 p.m. to 7:00 a.m. shift as the desk clerk of Anderson's Motel in Cullman, Alabama. (Vol. 2, p. 271) Kathryn Flannagan, who was traveling from Florida to Missouri, stopped at the motel around 10:30 p.m. to rent a room for the night. (Vol. 2, p. 299) While Ms. Flannagan was filling out the registration form, a small-framed white man entered the lobby and asked to rent a room for three. (Vol. 2, pp. 300-301) Mr. Cunningham told the man that rooms were not rented without a reservation and the man left the lobby.

(Vol. 2, pp. 301-302) Mr. Cunningham told Ms. Flannagan that they did not rent to locals. (Vol. 2, pp. 302-303) Minutes later, as Ms. Flannagan was about to leave the lobby, the same man came into the lobby, accompanied by a second man. (Vol. 2, p. 303) The second man was larger than the first man and was wearing a faded green army fatigue jacket. (Vol. 2, p. 303) Mr. Cunningham gave Ms. Flannagan her key, pointed to her room, and told her it "looks like there is going to be trouble." (Vol. 2, p. 303)

After Ms. Flannagan got into her car, she looked back inside the lobby and saw the second man (the one in the green army fatigue jacket) pointing a gun in the direction of the desk. (Vol. 2, pp. 308, 330) Ms. Flannagan was not able to see behind the desk because her view of the desk was obstructed. *Hamm v. State*, 564 So. 2d 453, at 455. The first man was standing near the door and Ms. Flannagan also noticed a "banged up" early 1970's car parked, with its engine running, just outside the door to the Anderson Motel. (Vol. 2, pp. 302, 305) Ms. Flannagan also testified that it looked like there was one more person in the car. (Vol. 2, p. 305)

Ms. Flannagan acted like she did not see anything and drove to a nearby convenience store where she called the police. (Vol. 2, pp. 309, 342-344) She told the dispatcher that the Anderson Motel was being robbed. The dispatcher told Ms. Flannagan to return to the motel to meet the police,

which she did. (Vol. 2, p, 310-344) Ms. Flannagan gave the officers a statement and a description of the two men she saw in the motel. (Vol. 2, pp. 310, 344)

Lieutenant Larry Waldrop of the Cullman County Sheriff's Department was the first officer to arrive at the crime scene and found the victim's body behind the reception desk. (Vol. 3, pp. 403-407) The victim had been killed by a single gunshot to the head from a .38 caliber pistol. *Hamm*, 564 So. 2d at 455. The victim's wallet, containing approximately $60 was missing. In addition, the cash drawer of the motel was missing over $350. *Id.*

The day after the murder Douglas Roden was found driving a car that matched the description of the car Ms. Flannagan saw at the Anderson Motel. Ms. Flannagan later positively identified this vehicle as the one she saw at the motel. *Id.* Roden took the officers from the Cullman Police Department to a trailer park in Cullman where they arrested Hamm. *Id.* While searching the trailer, officers seized a nickel-plated .38 caliber pistol, numerous rounds of .38 caliber ammunition, a faded green army fatigue jacket with .38 caliber bullets in the pocket, some knives, and other clothing. *Id.*

After being taken to jail, Hamm gave a statement in which he denied any involvement in the murder of Patrick Cunningham. The next day, Hamm gave a second statement and confessed to the murder. Hamm's statement was played for the jury.

During the investigation of this case, the Cullman Police Department learned that Doug Roden and Regina Roden were involved in the murder. Doug Roden was the other person who entered the motel lobby and Regina Roden remained outside the motel in the car. In exchange for being allowed to plead guilty to lesser offenses, both of the Rodens testified against Hamm at his trial. *Id.*[1]

2. Facts from the post-conviction evidentiary hearing

On July 26, 1999, an evidentiary hearing was held on Hamm's post-conviction petition. Hamm was represented at trial by Hugh Harris and Martha Williams. Early in the preparation of their case, Mr. Harris and Ms. Williams recognized that the weight of the evidence was stacked against them due to Hamm's confession and developed their trial strategy accordingly. The evidence against Hamm was indeed strong, as evidenced by his subsequent conviction and death sentence.

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[1] A more detailed statement of the facts can be found in the direct appeal opinion of the Alabama Court of Criminal Appeals. *Hamm v. State*, 564 So. 2d 453, 455-457 (Ala. Crim. App. 1989).

Mr. Harris has been practicing law since 1976, and had worked for eleven years as a district attorney in Cullman. (Vol. 21, Tab #42, p. 30) In those eleven years he had tried between seventy-five and a hundred cases, more than any other lawyer in Cullman County. (Vol. 11, p. 31) To aid him in his defense of Hamm, Harris received and made use of materials from the Capital Resource Center. (Vol. 21, Tab#42, pp. 31-32) Harris also testified that his attendance at every district attorneys' seminar between 1976 and 1987 helped him defend Hamm. (Vol. 21, Tab#42, p. 32) Harris had a good working relationship with the judge who presided over Hamm's case, Judge Fred Folsom. (Vol. 21, Tab#42, pp. 32-33) Hamm's other counsel, Martha Williams, had practiced law for seventeen years at the time of the Rule 32 hearing. (Vol. 21, Tab#42, p. 53)

Williams testified that she and Harris spent hundreds of hours on Hamm's case. (Vol. 21, Tab#42, p. 60) They spent eight days in trial, had two separate oral arguments before the Alabama Court of Criminal Appeals and the Alabama Supreme Court. (Vol. 21, Tab#42, p. 60) Harris had very liberal access to Hamm and met with Hamm more than twenty-five times prior to the trial. (Vol. 21, Tab#42, p. 33) Harris had a good working relationship with Hamm, a relationship he maintained after the trial. (Vol.

21, Tab#42, pp. 33-34) Harris had no difficulty communicating with Hamm. (Vol. 21, Tab#42, p. 35)

Harris investigated Hamm's background in regards to his family, medical records, and past criminal records. (Vol. 21, Tab#42, pp. 11, 38) Harris spoke with Hamm's sister and mother several times. (Vol. 21, Tab#42, pp.16, 38, 39) Harris knew the extensive history of the members of Hamm's family, which was brought out at the sentencing hearing. (Vol. 21, Tab#42, p. 13) Harris brought in as much of this as Hamm would agree to. (Vol. 21, Tab#42, p. 13) Hamm became upset when Harris put his sister on the stand to go into their family history. Hamm told Harris that it was no one's business other that his family's what had occurred in his family history. (Vol. 21, Tab#42, p. 35) Harris wished to call Hamm's daughter to testify at the penalty phase, but did not out of respect for Hamm's wishes. (Vol. 21, Tab#42, p. 40)

Harris was also familiar with Hamm's own lengthy criminal history, but decided that that information would have been prejudicial to Hamm and, as a trial strategy, did not go into that information. (Vol. 21, Tab#42, p. 13) Harris felt that the records, which indicated that Hamm had served time on other crimes not brought out at trial, would actually have given enhancement to the death penalty phase. (Vol. 21, Tab#42, p. 15) Harris investigated

Hamm's prior convictions in Tennessee. (Vol. 21, Tab#42, pp. 16, 39) Harris contacted the courts there and received copies of the convictions, which were consistent with what Hamm had told him about these convictions. (Vol. 21, Tab#42, pp. 16, 39)

Harris requested that Hamm be evaluated at Taylor-Hardin Secure Medical Facility because of his epilepsy, and was familiar with the findings as to his mental and physical health from this evaluation. (Vol. 21, Tab#42, pp. 12, 14, 16, 47-48) Hamm was found competent to assist at trial, as well as competent at the time of the commission of the crime. (Vol. 21, Tab#42, p. 48)

Hamm repeatedly told Harris that there was nothing wrong with him. (Vol. 21, Tab#42, p. 18) From his meetings with him and extensive contact neither Harris nor Williams observed any evidence or indication that Hamm was not competent. (Vol. 21, Tab#42, pp. 18, 49, 62) Harris also conducted an investigation into Hamm's drug and alcohol use. (Vol. 21, Tab#42, p. 41) Hamm told him that "he could take it or leave it, but most of the time he decided to take it." (Vol. 21, Tab#42, p. 42)

Harris testified that the focus of his trial strategy was to challenge the introduction of Hamm's statement. (Vol. 21, Tab#42, p. 24) Harris's plan was to do everything he could to keep the confession out. (Vol. 21, Tab#42,

p. 36) If the confession came in, Harris testified, they would focus on damage control. (Vol. 21, Tab#42, pp. 24-25)

Harris did not believe that there were numerous errors at Hamm's trial. (Vol. 21, Tab#42, p. 24) Harris testified that his objections kept numerous photographs and exhibits from being admitted at the trial. (Vol. 21, Tab#42, p. 21) The worst of the pictures were kept out. (Vol. 21, Tab#42, p. 58) Harris testified that he made evidentiary challenges, which necessitated recalling some of the witnesses at trial. (Vol. 21, Tab#42, pp. 25-26) Harris also testified that his objections concerning the introduction of bullets from a green army jacket necessitated the prosecution bringing in witnesses from out-of-state, which delayed the trial. (Vol. 21, Tab#42, p. 45)

Hamm's attorneys made a conscious effort not to infuriate or upset the jury by needless objections. (Vol. 21, Tab#42, pp. 27, 58, 61) Harris did everything he could to accommodate and to stay in a good relationship with the jury. (Vol. 21, Tab#42, p. 27) Once Hamm's confession came in, however, all Harris could hope for was a sentence of life imprisonment, as opposed to death. (Vol. 21, Tab#42, pp. 27-28) The limitation on compensation did not affect Harris's representation of Hamm. (Vol. 21, Tab#42, p. 36)

REASONS FOR DENYING THE PETITION

The claims in Hamm's petition for writ of certiorari are subject to the Antiterrorism and Effective Death Penalty Act ("AEPDA"), 28 U.S.C. §2241, *et. seq*. Hamm has failed to show that the state court's opinion on these claims is "contrary to or an unreasonable application of, clearly established Federal law, as determined" by this Court. 28 U.S.C. §2254(d)(1). This Court should deny the certiorari petition for this reason alone.

Hamm has not raised any certworthy issue. The decision below does not implicate the split he asserts, and his claims are thoroughly factbound. Such review is not the proper domain of this Court. SUP. CT. R. 10. There is no split here, no novel issue presented, and no conflict alleged. This Court should, therefore, deny Hamm's petition for writ of certiorari.

I. This Court should decline to review Hamm's claim that the Constitution does not require federal courts to defer to the adoption by the trial court of the State's proposed order denying the post-conviction petition where this claim was not raised in the lower court and, in any event, is without merit.

This Court should deny certiorari on the first question presented for a number of reasons.

First, this claim was not considered by the Eleventh Circuit. In fact, Hamm did not ask the Eleventh Circuit to review this claim in his certificate

of appealability. The Eleventh Circuit granted Hamm's certificate of appealability to review the following issues:

1. Whether the district court erred in denying Hamm's federal constitutional challenge to the introduction and use of his prior Tennessee conviction as an aggravating circumstance;

2. Whether the district court erred in denying Hamm's federal constitutional ineffective assistance of counsel claim with respect to alleged *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), violations including failure to present mitigating evidence; and

3. Whether the district court erred in finding that the Supreme Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), did not apply to claims that ineffective assistance of appellate counsel constituted cause for procedural default.

The Eleventh Circuit did not address the trial court's adoption of the State's proposed order as an issue on appeal except to note in footnote 3 in the procedural history of the case that the trial court adopted verbatim the State's proposed memorandum opinion without striking the word "Proposed" from the order. *Hamm v. Commissioner*, 620 Fed. App'x. 752, 756 n.3 (11th Cir. 2015). The Eleventh Circuit also criticized this practice but noted that "this procedural shortcut has no bearing on our disposition of Hamm's federal habeas appeal." *Id.* (Citation omitted)

This Court will not consider questions that were not properly presented to or ruled on by the lower courts except in extraordinary circumstances. *See Taylor v. Freeland & Kronz,* 503 U.S. 638, 645-646

(1992). This case, as set forth below, presents no reason to deviate from that rule. For that reason alone, the writ should be denied as to this argument.

Second, this case would be a poor vehicle to consider the question because it arises under AEDPA. To be entitled to relief under AEDPA, Hamm must persuade the Court that the decision of Alabama Court of Criminal Appeals was contrary to, or an unreasonable application of, this Court's decision in *Anderson v. City of Bessemer*, N.C., 470 U.S. 564 (1985). *See* 28 U.S.C. §2254(d) (1). This potential roadblock is reason enough to deny certiorari. If the Court is to consider whether adoption of a State's proposed order is wrong, the more prudent vehicle to do so would be on post-conviction appeal.

Finally, Hamm is not entitled to relief on this claim because he has yet to show that any of the findings of fact or conclusions of law adopted by the circuit court are clearly erroneous. *Anderson, supra*, at 572 ("even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous.") (Citations omitted). As the Alabama Court of Criminal Appeals found: "Hamm does not cite any specific findings of fact or conclusions in the order that are unsupported by the record or the law." *Hamm v. State*, 913 So. 2d 460, 474 (Ala. Crim. App. 2002).

Instead, Hamm argues that he is entitled to relief because: the circuit court did not take the word "Proposed" out of the heading; the circuit court judge was not the trial judge in this case; a judge on the Eleventh Circuit (Judge Adalberto Jordan) was concerned about this fact during oral argument; and, the circuit judge adopted the proposed order three days after it was filed. None of these arguments entitle Hamm to certiorari review.

First, as set forth above, Hamm would be entitled to relief only if he shows that the findings of fact or conclusions of law in the proposed order are clearly erroneous. Hamm has not attempted to meet this burden. Next, while the circuit judge did not take the word "Proposed" out of the order and was not the trial judge in this case, there is nothing in the record to support Hamm's argument that the order was not the circuit judge's order. This judge was involved in the post-conviction proceedings for eight years and presided over the post-conviction evidentiary hearing. Moreover, there is absolutely nothing in the record indicating that the post-conviction judge was not familiar with this case, did not have an understanding of the issues that were presented in the post-conviction petition, or did not have adequate time (three days) to review the State's proposed order. Finally, while a judge on the Eleventh Circuit indicated that he was troubled by the post-conviction judge's handling of this matter, this was not an issue before the

panel and the panel indicated that this matter had no bearing on the disposition of Hamm's appeal. *Hamm v. Commissioner*, 620 Fed. App'x. 752, 756 n.3. Hamm's claim, therefore, is without merit and does not entitle him to certiorari review.[2]

II. This Court should decline to review Hamm's claim that this Court should expand the narrow exception in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), because the claim is not worthy of certiorari review, does not apply a spilt, and, in any event, is meritless.

This Court should deny certiorari review on the second question for two reasons.

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[2] In the amicus brief, counsel argues that Hamm's rights during the post-conviction proceedings were denied because the trial court appointed a local attorney to represent Hamm after his pro bono counsel indicated that he would no longer be able to represent him. The Alabama Court of Criminal Appeals extensively examined Hamm's claim that the circuit court erroneously dismissed pro bono counsel, *Hamm v. State*, 913 So. 2d 460, 467-474 (Ala. Crim. App. 2002), and rejected the claim. The Alabama Court of Criminal Appeals found that pro bono counsel indicated that he could no longer represent Hamm because of his teaching responsibilities, his young family, and because he would be out of the country during the evidentiary hearing. The Alabama Court of Criminal Appeals also noted that when pro bono counsel asked that he be allowed back on the case, he asked that the evidentiary hearing be scheduled at a time that was convenient for him. *Id.*, at 473-474. The Alabama Court of Criminal Appeals found: "[W]e can only conclude that the trial [court] did not abuse its discretion when it interpreted Harcourt's April 20, 1998, letter as a motion to withdraw and granted it, and when the court appointed other counsel to represent Hamm and declined to reappoint Harcourt. The court was understandably frustrated by Harcourt's attempts to manipulate the legal process and to interfere with the progress of the case." *Id.* at 473.

First, there is no real split on this issue. The fact that two Justices of this Court issued a statement in the denial of a certiorari petition does not indicate that this Court will further expand its holding in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). This is especially true where the two Justices did not dissent from the denial of the certiorari petition. Nor does the holding of the Ninth Circuit in *Dickens v. Ryan*, 749 F.3d 1302, 1317-1318 (9th Cir. 2014), indicate that a split exists because the facts in that case are distinguishable from the facts in the instant case. In *Dickens*, the Ninth Circuit remanded a new procedurally defaulted ineffective assistance of counsel claim to the district court for a determination of whether cause and prejudice existed under *Martinez*. *Id.* at 1317. Dickens presented a general claim that counsel did not direct the work of the court-appointed psychologist. In federal court, Dickens changed the claim and presented factual allegations that he suffered from FAS and organic brain damage. In Hamm's case, he specifically plead in his State post-conviction petition that his attorneys failed to present evidence that he suffered from brain damage. Hamm's ineffective assistance of counsel claim was presented to the State post-conviction court and is not procedurally defaulted. Hamm did not present any new facts to support his claim in his federal habeas petition. No

split exists in this case because the facts in this case are distinguishable from the facts in *Dickens*.

This Court's opinion in *Vasquez v. Hillery*, 474 U.S. 254 (1986), also does not require a remand because there was no evidence presented in the instant case that fundamentally altered the claim considered by the state courts. In this case, Hamm failed to present evidence to support the claim in his post-conviction petition – not that the evidence presented fundamentally altered the claim. This Court's holding in *Vasquez*, therefore, does not apply to the instant case.

Second, the underlying issue is not worthy of this Court's 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. 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. Hamm has not alleged compelling grounds for this Court to grant certiorari review of this claim. Moreover, the instant claims involve a simple application of established precedent to the facts of this case.

Hamm alleged in his State post-conviction petition and in his habeas petition that his attorneys were ineffective because they failed to present

evidence from experts like that offered by mitigation expert Gaye Nease and psychologist Dale Watson. Hamm asserted that counsel should have presented the mental health evidence offered by Dr. Watson that Hamm suffers from "neuropsychological impairment and presumptively brain damage" and is in the "borderline range of measured intellectual ability overall." However, Hamm did not present the testimony of either of these witnesses at the post-conviction evidentiary hearing. As the district court noted, "[P]ost-conviction counsel had the opportunity to present this evidence at the Rule 32 hearing and did not do so." (Doc. 26, pp. 106-107) In addition, while the affidavit of Gaye Nease was admitted into evidence, this evidence was cumulative to the evidence offered during the penalty phase of the trial and contained information concerning Hamm's criminal background that trial counsel did not want the jury to see because it would have been detrimental to Hamm. (Doc. 26, pp. 97-98)

The district court and the Eleventh Circuit properly found that the facts concerning Hamm's brain damage and intellectual functioning were not properly before those courts. Hamm attempted to present the affidavit of Dr. Dale Watson during the post-conviction evidentiary hearing. The State objected to the introduction of this affidavit. At that time, the post-conviction court reserved ruling on the State's objection. (Vol. 21, Tab#42,

pp. 18-19) At the conclusion of the post-conviction evidentiary hearing, the trial court sustained the State's objection to the affidavit and did not admit it into evidence. (Vol. 21, Tab#42, p. 63) The Alabama Court of Criminal Appeals affirmed this ruling by the post-conviction court, holding as follows:

> If the court had admitted the affidavit, the State would not have been able to examine Dr. Watson about his education and expertise, his testing methods, the validity of his conclusions, or any other areas appropriate for cross-examination. (Footnote omitted)

Hamm, 913 So. 2d at 478-479. Because Hamm did not call Dr. Watson to testify at the post-conviction hearing and because the trial court did not admit his affidavit into evidence, the district court and the Eleventh Circuit properly refused to consider this evidence. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) ("review under §2254(d) (1) is limited to the record that was before the state court that adjudicated the claim on the merits.").

Hamm argues that his post-conviction attorney's failure to present evidence on this claim in the State post-conviction proceedings raises a *Martinez v. Ryan* issue and entitles him to present this evidence in federal court. This Court's narrow exception in *Martinez* does not apply to the facts of this case. In *Martinez*, this Court modified the long-standing principle found in *Coleman v. Thompson*, 501 U.S. 722 (1991), that because "there is

no right to counsel in state collateral proceedings," a petitioner cannot allege the constitutional ineffectiveness of his post-conviction counsel as cause to overcome a claim that was procedurally defaulted during collateral proceedings. *Coleman*, 501 U.S. at 757. This Court in *Martinez* held, as follows:

> This opinion qualifies *Coleman* by recognizing a narrow exception. Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.

Martinez, 132 S .Ct. at 1315. This Court also explained that the phrase "initial-review post-conviction proceedings" referred exclusively to post-conviction proceedings at the trial court level. *Id.*, at 1317. This Court's narrow exception in *Martinez* – that inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial – does not apply here because Hamm's ineffective assistance of counsel claim is not procedurally defaulted. *Martinez*, 132 S. Ct. at 1315. As the Eleventh Circuit found:

> Hamm also argues that *Martinez* applies because his Rule 32 counsel was ineffective in not calling Dr. Watson to testify during the Rule 32 hearing. However, as discussed above, *Martinez* applies only in the context of overcoming *defaulted* ineffective-assistance-of-trial-counsel claims. Hamm's mitigation-related trial-counsel claim was not defaulted and was

> considered on the merits in state court; accordingly, collateral counsel's ineffective assistance is irrelevant to that claim.

Hamm v. Commissioner, 620 Fed. App'x. 752, 778 n.20 (11th Cir. 2015).

Because *Martinez* does not apply in this case, Hamm's claim is not worthy of certiorari consideration. This Court should, therefore, deny the writ as to this claim.

III. This Court should decline to review Hamm's claim that the State improperly relied on unconstitutionally obtained prior convictions as an aggravating circumstance where the claim is procedurally defaulted, is not worthy of certiorari consideration, and is without merit.

There are at least three reasons this Court should deny certiorari review on this claim. First, the claim is procedurally defaulted from this Court's review. The district court and the Eleventh Circuit properly found the claim to be procedurally defaulted because it was not raised at trial or on direct appeal. *Hamm v. Commissioner*, 620 Fed. App'x. 752, 770-777 (11th Cir. 2015); Doc. 26, pp. 64-66. Hamm attempted to present this claim for the first time in his post-conviction petition but the post-conviction court found the claim defaulted because it could have been raised at trial or on direct appeal but was not. *Hamm v. State*, 913 So. 2d 460, 479 (Ala. Crim. App. 2002). As the Eleventh Circuit found, Hamm has not shown cause and prejudice or a fundamental miscarriage of justice to excuse the procedural default. *Id.* at 772-777. Because this claim is procedurally defaulted and

Hamm has not shown cause and prejudice or a fundamental miscarriage of justice to overcome the default, this Court should deny Hamm's petition for a writ of certiorari.

This claim should also be denied because the underlying issue is not worthy of this Court's 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. 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. Hamm has not alleged compelling grounds for this Court to grant certiorari review of this claim. Moreover, the instant claim involves a simple application of established precedent to the facts of this case. For that reason, a decision in this case would be of such narrow scope and limited precedential value that it is not worthy of certiorari consideration. This Court should, therefore, deny the writ as to this claim.

Finally, the district court and the Eleventh Circuit properly found that they had no jurisdiction to entertain a challenge to the validity of Hamm's Tennessee convictions. *Hamm v. Commissioner*, 620 Fed. App'x. 620, 764-770 (11th Cir. 2015); Doc. 26, pp.60-64. In *Lackawanna County District*

Attorney v. Coss, 532 U.S. 394 (2001), this Court, adopting the rationale in the companion case of *Daniels v. United States*, 532 U.S. 374 (2001), held, as follows:

> [O]nce a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), the conviction may be regarded as conclusively valid. See *Daniels, post,* at 382, 121 S.Ct. 1578. If that conviction is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained.

Coss, 532 U.S. at 403-404.

Hamm's case is not distinguishable in any relevant way from *Coss*. Hamm is seeking to challenge expired Tennessee convictions that were used to support one of the aggravating circumstances in his case. Hamm unsuccessfully attempted to challenge his Tennessee convictions. Hamm cannot now challenge the Tennessee convictions in this habeas petition on the ground that the convictions were unconstitutionally obtained. *Coss*, *supra*. As the district court found:

> At this point, Hamm's Tennessee convictions are conclusively valid because he already has unsuccessfully attacked the convictions in the State of Tennessee and in the federal courts of the Sixth Circuit. Because his current situation falls directly within one of the considerations that limits federal jurisdiction, and does not fall with any exception to that limitation, it follows that this court is without authority to address the claim.

(Doc. 26, p. 64)

Hamm contends that his case is controlled by the rule announced by this Court in *Johnson v. Mississippi*, 486 U.S. 578 (1988), and not by this Court's opinion in *Coss*. In *Johnson*, the defendant was convicted of murder in Mississippi in 1982 and was sentenced to death. His death sentence was predicated, in part, on the fact that he had been convicted of a felony in New York in 1963. After the Mississippi death sentence had been affirmed by the Supreme Court of Mississippi, Johnson's 1963 conviction was reversed. *Id.*, at 580-582. Johnson then unsuccessfully challenged his death sentence on the ground that the New York conviction was invalid and could not be used as an aggravating circumstance. *Id*, at 583-584. This Court granted certiorari "to consider whether the Federal Constitution requires a reexamination of petitioner's death sentence" and concluded that it does. *Id.*, at 584-590.

Hamm's argument that *Johnson* requires that he be given relief fails because the facts in this case are distinguishable from the facts in *Johnson*. As noted above, in *Johnson*, the petitioner's prior New York conviction had already been reversed when he sought relief from his Mississippi death sentence. The question in *Johnson*, therefore, was "whether the state court was correct in concluding that the reversal of the New York conviction did

not affect the validity of a death sentence based on that conviction." 486 U.S. at 580. In the instant case, Hamm's Tennessee convictions have not been reversed. In fact, Hamm has not been successful in challenging his Tennessee convictions. Hamm's reliance on this Court's holding in *Johnson* does not entitle him to relief. As the Eleventh Circuit found: "*Johnson* simply does not address convictions that have never been overturned, nor does it discuss the scope of a federal court's review of presumptively valid but challenged convictions used in imposing a death sentence." *Hamm v. Commissioner*, 620 Fed. App'x. at 767. Hamm's argument, therefore, does not entitle him to certiorari review.

IV. This Court should decline to review Hamm's claim that *Hurst v. Florida*, 136 S. Ct. 616 (2016), entitles him to be resentenced where the claim was not presented in the lower court and is without merit.

Hamm did not argue in the Eleventh Circuit that his case should be vacated and remanded in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016). This Court will not consider questions that were not properly presented to or ruled on by the lower courts except in extraordinary circumstances. *See, e.g., Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646 (1992). This case presents no reason to deviate from that rule. For that reason alone, the writ should be denied as to this argument.

In addition, Hamm is not entitled to a remand based on this Court's opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016), because his death sentence is constitutional. *Ring v. Arizona*, 536 U.S. 584 (2001), holds that a jury must find the existence of the facts that increase the range of punishment to include the imposition of the death penalty. In *Ring,* this Court applied the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to death penalty cases. In so doing, it overruled part of *Walton v. Arizona*, 497 U.S. 639 (1990). This Court held that Arizona's death penalty statute violated the Sixth Amendment right to a jury trial "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 585. Thus, a trial court cannot make a finding of "any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589. Only the jury can.

Hurst did not add anything of substance to *Ring*. In *Hurst*, the State of Florida prosecuted a defendant for simple murder. Florida did not ask a jury to find the existence of any aggravating circumstance at the guilt phase. *Hurst*, 136 S. Ct. at 621-622. At the sentencing phase, the jury also did not find the existence of any particular aggravating circumstance. *Id.* The judge, however, did find aggravating circumstances and imposed a death sentence. Applying *Ring*, the Court held the resulting death sentence unconstitutional because "the judge alone [found] the

existence of an aggravating circumstance" that expanded the range of punishment to include the death penalty. *Hurst*, 136 S. Ct. at 624.

Alabama's sentencing practices differ from the procedures that Florida followed in *Hurst*. As Justice Scalia explained in his concurrence in *Ring*, "[w]hat today's decision says is that the jury must find the existence of the fact that an aggravating factor existed." 536 U.S. at 612 (Scalia, J., concurring). "Those States that leave the ultimate life-or-death decision to the judge may continue to do so — by requiring a prior jury finding of aggravating factors in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase." *Id.* at 612-613 (Scalia, J., concurring).

In most cases, Alabama has chosen the second and most "logical" option — to secure a jury determination of aggravating circumstances at the guilt phase. The elements of capital murder in Alabama mostly track aggravating circumstances. For example, one way the State can convict a person of capital murder is to show that the murder was committed during a robbery. *See* Ala. Code, §13A-5-40(a)(2). This same showing is also an aggravating factor for the purposes of sentencing. *See* Ala. Code, §13A-5-49(4). Alabama law expressly provides that "any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as

proven beyond a reasonable doubt for purposes of the sentencing hearing." Ala. Code, §13A-5-45(e).

As long as the jury finds the existence of at least one aggravating factor at the guilt phase, both the Supreme Court of Alabama and the Eleventh Circuit Court of Appeals have held that a resulting death sentence complies with *Ring*. In *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002), the Supreme Court of Alabama addressed the effect of *Ring* on the constitutionality of Alabama's sentencing scheme. There, the defendant had been convicted of two counts of murder during the course of a robbery in the first degree, in violation of Ala. Code §13A-5-40(a)(2) (1975). Id. at 1188. The Supreme Court of Alabama explained that "[b]ecause the jury convicted Waldrop of two counts of murder during a robbery in the first degree . . . the statutory aggravating circumstance of committing a capital offense while engaged in the commission of a robbery, Ala. Code 1975, § 13A-5-49(4), was 'proven beyond a reasonable doubt.'" *Id.* (citing Ala. Code §13A-5-45(e); Ala Code §13A-5-45(f)). The Court explained that "[o]nly one aggravating circumstance must exist in order to impose a sentence of death." *Id.* (citing Ala. Code §13A-5-45(f)). Because "the findings reflected in the jury's verdict alone exposed Waldrop to a range of punishment that had as its maximum the death penalty," the State had done "all *Ring* and *Apprendi* require." Id. The Eleventh

Circuit agreed with this reasoning in *Lee v. Commissioner, Alabama Department of Corrections*, 726 F.3d 1172, 1197-1198 (11th Cir. 2013).

The Alabama courts have applied *Waldrop*'s reasoning to affirm countless capital sentences. *E.g., Bryant v. State*, 951 So. 2d 732, 751 (Ala. Crim. App. 2003). Hamm was found guilty of murder during a robbery. The jury then necessarily found beyond a reasonable doubt the existence of the corresponding circumstance specified in Ala. Code §13A-5-49(4). That finding by the jury exposed Hamm to a range of punishment that has as its maximum the death penalty. That is all that *Ring* and *Hurst* require.

Hamm argues that the Eleventh Circuit's opinion suggests that the jury's consideration of evidence at the penalty phase and findings of aggravation do not matter because that Court refused to find that he was prejudiced when trial counsel failed to object when the jury was informed that he was charged with armed robbery rather than simple robbery. Hamm's argument is without merit. The Eleventh Circuit in no way suggested that findings of aggravation do no matter. The Eleventh Circuit considered an ineffective assistance of counsel claim and found no prejudice. In fact, there was no *Ring* argument made in the Eleventh Circuit and the Eleventh Circuit did not make a finding that aggravating circumstances do not matter based on a *Ring* analysis. Moreover, as set forth

above, there is no *Ring* or *Hurst* violation in this case because the jury unanimously found the murder during a robbery aggravating circumstance.[3]

Alabama's capital sentencing scheme is constitutional. This Court should refuse to grant certiorari on this claim because Hamm's death sentence was constitutionally imposed.

[3] Hamm also argues that this Court should hold his case in abeyance because a circuit court in Alabama found Alabama's death penalty statute unconstitutional. While it is true that one circuit court found Alabama's death penalty statute unconstitutional, the Alabama Supreme Court has upheld the constitutionality of Alabama's death penalty statute under *Ring*. *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002). This Court should therefore refuse to hold this case in abeyance.

CONCLUSION

For the foregoing reasons, this Court should deny Hamm's petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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