

No. 15- \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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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

\_\_\_\_\_  
**PETITION FOR WRIT OF CERTIORARI**  
\_\_\_\_\_

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March 24, 2016

## CAPITAL CASE

### QUESTIONS PRESENTED

In this death penalty case, the postconviction court signed the Alabama Attorney General's 89-page "PROPOSED MEMORANDUM OPINION" without making a single modification and without even striking the word "PROPOSED" from the caption of its judicial opinion, one business day after receiving it. The first question presented is:

1. Does federal court deference to a judicial opinion adopted under circumstances where there is grave reason to doubt the postconviction court even read it violate AEDPA or the Due Process clause?

Also presented are the following questions:

2. Does *Martinez v. Ryan* apply to claims of ineffective assistance of trial counsel where the key evidence supporting the claim was precluded from consideration in state court due to the incompetence of state post-conviction counsel?

3. In the limited circumstance where a capital defendant has meticulously followed the *Lackawanna v. Coss* procedures to challenge an invalid prior conviction used as an aggravating circumstance, but at every step of the way was procedurally barred, should this Court allow the capital defendant to challenge the prior conviction in his capital post-conviction proceedings under *Johnson v. Mississippi*?

4. Should this Court grant, vacate and remand this death penalty case in light of its recent decision in *Hurst v. Florida*, where the judge made factual findings unsupported by the jury, who was impermissibly told that Mr. Hamm had been previously charged with "armed robbery" when he was in fact only convicted of *simple* robbery?

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## **PETITION FOR WRIT OF CERTIORARI**

Petitioner Doyle Lee Hamm respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit affirming the denial of his petition for a writ of habeas corpus in this death penalty case.

### **OPINIONS BELOW**

The federal district court's original decision denying Mr. Hamm federal habeas relief is unreported, but is available at *Hamm v. Allen*, No. 5:06-cv-00945-KOB, 2013 WL 1282129 (N.D. Ala. Mar. 27, 2013). On reconsideration, the district court issued an opinion amending the prior decision in part, and declining the issuance of a certificate of appealability on any issues. That opinion is unreported, but available at 2013 WL 4433781 (Aug. 15, 2013). A copy of the original opinion is attached as Appendix A, and a copy of the district court's opinion on reconsideration is attached as Appendix B. The Eleventh Circuit's decision affirming the district court's judgment is reported at *Hamm v. Commissioner, Alabama Department of Corrections*, 620 F. App'x 752 (11th Cir. 2015) [hereinafter *Hamm v. Commissioner*] (per curiam). A copy of that opinion is attached as Appendix C.

### **JURISDICTION**

The Eleventh Circuit rendered its decision in this case on August 3, 2015, and denied rehearing on October 26, 2015. A copy of the Eleventh Circuit's order denying rehearing is attached as Appendix D. On January 19, 2016, Justice Thomas

extended the time for filing this petition to and including March 24, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

**RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS**

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), codified in relevant part at 28 U.S.C. § 2254(d), provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Sixth Amendment to the United States Constitution provides in part:

In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

This Alabama death penalty case has been plagued by due process failures since its inception. At his capital sentencing trial in Alabama in 1987, Mr. Hamm's appointed attorney put on a total of *19 minutes of mitigation evidence* and *no* mental health expert to testify about his serious brain damage. The sentencing jury was told that he had previously been convicted of "*armed robbery*" in Tennessee, when in fact he had only been convicted of simple "robbery," due to the neglect of his attorney. In addition, the prior conviction, which formed the entirety of the state's new evidence on aggravation, was facially improper because Mr. Hamm's guilty plea was transparently invalid—not to mention, he was factually innocent. Mr. Hamm's trial attorney did nothing to investigate either issue.

In state post-conviction proceedings, the court-appointed attorney failed to actually call the mental health expert that previous post-conviction counsel had lined up to testify at the evidentiary hearing, and instead only attempted to introduce the expert's affidavit, resulting in the exclusion of Mr. Hamm's expert mental health evidence. And worst of all, after that evidentiary hearing, the state judge abdicated his judicial office by adopting verbatim the Alabama Attorney General's 89-page "PROPOSED MEMORANDUM OPINION" one business day after receiving it, without making a single alteration (not even striking the word "PROPOSED" from the opinion). To this day, the factual findings in this death penalty case are based on the "PROPOSED MEMORANDUM OPINION" that one of the members of the Eleventh Circuit panel, Judge Adalberto Jordan, said he does

not even “believe for a second” was reviewed by the state post-conviction judge. Oral Argument at 24:50-25:28, *Hamm v. Commissioner*, 620 F. App’x 752 (No. 13-14376-P) [hereinafter Oral Argument]. This case epitomizes the worst aspects of the death penalty as actually practiced in Alabama.

There are several reasons to grant certiorari, but the most important reason is because the Eleventh Circuit violated due process and separation of powers, and misapplied AEDPA, by deferring to the Alabama Attorney General on findings of fact and conclusions of law. As Judge Jordan stated at oral argument in this case, there is simply no way that the state judge reviewed the “PROPOSED MEMORANDUM OPINION” submitted by the Attorney General. “I don’t believe it for a second,” Judge Jordan declared. “I know what AEDPA deference requires me to do, and I don’t speak for my colleagues, but I’m telling you: I don’t believe for a second that that judge went through 89 pages in a day and then filed that as his own. As if he had gone through everything, went through his notes, the transcript, the exhibits, and the like. It just can’t be done! It just can’t be done.” Oral Argument at 24:50-25:28.

Despite that, the Eleventh Circuit opinion defers to the factual findings of the Alabama Attorney General’s “PROPOSED MEMORANDUM OPINION.” This death penalty case presents this Court with the opportunity to rectify the problem of sham judicial opinions in capital cases. This Court should decide whether AEDPA requires, or due process allows, federal court deference to a state court’s ghostwritten opinion.

## Statement of the Facts

This case grows out of the tragic death of Patrick Cunningham in Cullman County, Alabama. On the night of January 24, 1987, Mr. Cunningham was working as the night clerk at the Anderson Motel and was fatally shot during the course of a robbery. Vol.2-TR-259.<sup>1</sup> Two individuals were initially found in the car used to commit the crime: Regina Roden and Douglas Roden. Vol.3-TR-489-504. The Rodens claimed that they had been kidnapped by Mr. Hamm and held in captivity at gunpoint. Vol.3-TR-489; Vol.5-TR-907; Vol.5-TR-838. After time in detention in the county jail (Vol.5-TR-855-56), Regina and Douglas Roden changed their story and told the police that they were the unwitting accomplices to Doyle Hamm, whom they identified as the trigger-man. Vol.5-TR-832; Vol.5-TR-916.

At the guilt-phase, the state presented the accomplice testimony of Regina and Douglas Roden, who both testified in exchange for lenience (Vol.5-TR-902; Vol.5-TR-843), and additionally a statement obtained from Doyle Hamm after lengthy interrogation (Vol.6-TR-1080). As the federal district court noted, “both of the Rodens entered into an agreement with the state whereby they would testify against appellant at trial, which they did, in exchange for being allowed to plead guilty to lesser offenses.” *Hamm v. Allen*, App. at 5a (quoting *Hamm v. State*, 564

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<sup>1</sup> Citations in this form refer to the volumes of the state court record in this case, which was filed in full in the District Court. See Notice of Manual Filing, *Hamm v. Allen*, No. 5:06-cv-00945 (N.D. Ala Mar. 27, 2013), ECF No. 13. Citations to the “TR” portions of the state court record refer to the trial court transcript; citations to the “PCR” portions refer to the post-conviction record; citations to the “PCH” portions refer to the post-conviction hearing transcript.

So.2d 453, 455-57). Apart from that, there was no direct, independent evidence, nor any physical evidence, as to who actually pulled the trigger. Mr. Hamm was nevertheless convicted of intentional capital murder during a robbery.

The jury penalty phase trial began on September 28, 1987 at 11:15 a.m. Vol.7-TR-1201. Mr. Hamm's attorney made a *two-transcript-page opening statement*. Vol.7-TR-1210. The state incorporated the evidence from the guilt phase and moved to admit only two exhibits, State's Exhibits No. 1-A and 1-B, corresponding to prior Tennessee convictions from 1978. Vol.7-TR-1213. Mr. Hamm's trial counsel argued against their admission solely on the ground that "he just received them this morning"—he did not challenge their validity.

Defense counsel called only two witnesses, Doyle Hamm's sister and a bailiff, *see* Vol.7-TR-1214 to 1240, *for a total of 19 minutes of trite testimony*. Trial counsel did not call a mental health expert or introduce the thousands of pages of documents that proved mitigation. That same day, after a lengthy lunch break, the jury returned a death verdict, at 4:30 P.M., by a vote of 11 to 1. Vol.7-TR-1307.

The circuit court sentenced Mr. Hamm to death on the basis of two aggravating circumstances: (1) the prior convictions in Tennessee; and (2) the fact that the murder occurred during the course of a robbery, which was already included in the jury's guilt-phase verdict. *Hamm v. State*, 564 So.2d 453, 466 (Ala. Crim. App. 1989).

In state post-conviction, original post-conviction counsel discovered a wealth of never before presented mitigating evidence, including the fact that Mr. Hamm

suffers from brain damage. The evidence was admitted into evidence at the state post-conviction hearing, *see* Vol.21-PCH-5-7, with the exception of the expert evidence of Dr. Dale Watson. The evidence that original post-conviction counsel discovered, none of which was presented at the penalty phase, included:

- (1) Lengthy criminal records of his family members (Vol.11-PCR-128 through Vol.12-PCR-212; Vol.15-PCR-978 through Vol.17-PCR-1399); and Supplemental PCR (Exhibits)).
- (2) School, medical and mental health records. (PCR-978-1399; Supplemental PCR (Exhibits)). These included a history of seizures, head injuries, and of drug and alcohol abuse that was never investigated. (Vol.17-PCR-1311 to 1399; Vol.16-PCR-1195 to Vol.17-PCR-1275; Supplemental PCR). The records even show that Mr. Hamm has a history of “chronic seizure disorder”. (Vol.17-PCR-1368). All of these things can cause brain damage.
- (3) Testimony from a social worker, Gaye Nease, who prepared a chronology noting a long history of head injuries and extraordinarily poor background. (Vol.11-PCR-185 to 211; Supplemental PCR).

But what tied all of this mitigation together was the affidavit and report of the mental health expert, Dr. Dale Watson. The other mitigating evidence showed that Mr. Hamm had a terrible upbringing and recurring head trauma. What was never presented, and could not be proven without the testimony of an expert psychologist, was linking his upbringing, poor performance in school, seizure, and head injury history, with actual proof of brain damage, and then showing how his

brain damage diminished his criminal responsibility. Dr. Watson's proposed testimony did just that: he concluded that Mr. Hamm has "neuropsychological impairment and presumptively brain damage," and that there are "indications of impaired 'executive functions,'" among other deficits, which "are sufficient to have a significant impact upon his daily functioning." (Vol-11-PCR-168). This evidence was key to linking a terrible childhood, a poor upbringing, and impaired judgment.

After previous post-conviction counsel was removed by the post-conviction court, the court, over Mr. Hamm's objection, appointed new counsel for Mr. Hamm for the hearing. Mr. Hamm *pro se* introduced the documentary evidence. Newly appointed counsel then only called Mr. Hamm's trial counsel to testify. Inexplicably, post-conviction counsel never called Dr. Watson, despite the fact that in his affidavit he stated he was ready to testify; nor did she ever call the mitigation expert, Gaye Nease, who had done all the mitigation investigation. Instead, post-conviction counsel merely attempted to introduce Dr. Watson's affidavit, and when the post-conviction court excluded that affidavit as not an acceptable replacement for actual testimony, she made no attempt to then call Dr. Watson, no request to continue the hearing, nor did she take any other measures whatsoever to introduce this critical evidence.

Postconviction counsel also discovered through investigation that not only were Mr. Hamm's Tennessee convictions transparently invalid, for want of a valid plea colloquy, but that he was also factually innocent of these convictions. Both the transcript of plea colloquy (Vol.13-PCR-522 to 537) and the showing his innocence

(Vol.12-PCR-213 through Vol.15-PCR-852) were submitted to the Rule 32 Court and remains undisputed. The postconviction court, however, ruled that these claims were procedurally barred because Mr. Hamm could have challenged these convictions earlier.

Subsequent to the hearing, on Friday, December 3, 1999, the Alabama Attorney General filed a “PROPOSED MEMORANDUM OPINION” with the circuit court. Vol.11-PCR-29 (stamped “FILED IN OFFICE DEC 3, 1999”). The very next business day, on Monday, December 6, 1999, the circuit court signed the “PROPOSED MEMORANDUM OPINION” without so much as removing the word “proposed” or making a single alteration to the document. Vol. 11-PCR-117 (stamped “FILED IN OFFICE DEC 6, 1999”).

IN THE CIRCUIT COURT OF CULLMAN COUNTY, ALABAMA

DOYLE LEE HAMM, ) 029  
 Petitioner, )  
 )  
 vs. ) CASE NO. CC 87-121.60  
 ) FILED IN OFFICE  
 STATE OF ALABAMA, ) DEC 3 1999  
 Respondent. )

ROBERT BATES  
 CIRCUIT CLERK  
 CULLMAN COUNTY

**PROPOSED MEMORANDUM OPINION**

Based on the evidence presented at trial and the hearing on the Rule 32 petition, the Court enters the following findings of fact and conclusions of law:

**PROCEDURALLY BARRED CLAIMS**

Rule 32.1 states that, subject to the limitation of Rule 32.2, “any defendant who has been convicted of a criminal offense may institute a proceeding in the court of original conviction to secure appropriate relief” on various grounds that are set out in Rule 32.1(a)-(e). Rule 32.1 expressly states that relief under Rule 32 is limited to the extent that the claims raised by a Rule 32 petition may be procedurally defaulted from a circuit court’s review. The Alabama Rules of Criminal Procedure, at Rule 32.2(a), unambiguously state which category of claims raised by a Rule 32 petitioner

CONCLUSION 117

For the reasons stated above, Hamm is not entitled to relief on any of his claims. Hamm was represented at trial and on appeal by extremely able and experienced attorneys who at all times acted competently and professionally on his behalf. Hamm was convicted and sentenced to death because of the overwhelming evidence against him and the brutality of the crime and not because of any act or omission of his attorney.

DONE this the 6 day of December, 1999.

*[Signature]*  
 DON L. HARDEMAN  
 CIRCUIT JUDGE

FILED IN OFFICE  
 DEC 6 - 1999  
 ROBERT BATES  
 CIRCUIT CLERK  
 CULLMAN COUNTY

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This is what the court's order looks like still today, as signed, in this death penalty case: "PROPOSED MEMORANDUM OPINION."

The Alabama Court of Criminal Appeals affirmed, *Hamm v. State*, 913 So.2d 460 (2002), holding that there was no ineffective assistance, and agreeing with the procedural default finding on appeal related to the prior convictions. It also found no issue with the court's adoption of the "PROPOSED MEMORANDUM OPINION." The Alabama Supreme Court denied certiorari, No. 1011483 (2005).

Mr. Hamm filed for federal habeas corpus. Almost 7 years after filing, the district court denied the petition in full, *Hamm v. Allen*, App. at 2a, and refused to grant a certificate of appealability on any issues, App. at 118a. The Eleventh Circuit granted a certificate of appealability on the ineffective assistance of counsel claim, the validity of the Tennessee convictions, and issues related to *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). Eight months after argument, the Eleventh Circuit affirmed. *Hamm v. Commissioner*, App. at 118a.

### **REASONS FOR GRANTING THE WRIT**

#### **I. AEDPA Does Not Require, and the Constitution Does Not Permit, Federal Courts to Defer to the Factual Findings and Legal Conclusions of a State Attorney General's Office.**

The Alabama Attorney General wrote the state court's "PROPOSED MEMORANDUM OPINION." As the Eleventh Circuit noted in a footnote, "The Rule 32 Court did not even strike the word 'Proposed' from the order." *Hamm v. Commissioner*, App. at 122a. Because the factual findings in this case are not based

on a judicial opinion that reasonable jurists can have any confidence was even reviewed by the postconviction court, the federal courts cannot defer to the findings on habeas corpus.

**A. Any Reasonable Jurist Would Conclude that the State Court Did Not Review the Proposed Findings**

As Judge Adalberto Jordan stated during oral argument in this case, there is no way that the state judge reviewed the proposed factual findings and conclusions of law in Mr. Hamm's case. Judge Jordan's exchange with counsel for the State of Alabama is clear on this, and extremely revealing:

Judge Jordan: [...] it's a bit odd, is it not, that the Alabama Rule 32 judge takes the State's proposed findings and conclusions, 89 pages worth, and files them as the judge's own within a day of receiving them, without even taking the time to take out the word "proposed"? That doesn't engender much confidence in the Alabama State Court system, right? (Oral Argument at 22:50-23:25.)

Beth Jackson Hughes: If there was anything in there that was clearly erroneous, then I would ... (Oral Argument at 23:25-23:29.)

Judge Jordan: But you don't know of any – but the point is – if you've sat through a hearing, and all of us have been trial judges, and someone gives you 89 pages worth of proposed findings and conclusions, assuming you have no other work to do that day, it'll take you every single minute of that day to go through those 89 pages, assuming you did. That can't make anybody feel good about the system. Right? (Oral Argument at 23:29-23:58.)

Beth Jackson Hughes: Well, if I...

Judge Jordan: You'd be up in arms if he, if that judge had taken Mr. Hamm's proposed findings and conclusions with the word "proposed" and had filed them in court the next day as his own. You'd be up in

arms, right? (Oral Argument at 23:59-24:11.) [...]

Judge Jordan: [...] But I'm telling you that it bothers the heck out of me. (Oral Argument at 24:23-24:27.)

Beth Jackson Hughes: I understand that, but ... (Oral Argument at 24:27-24:28.)

Judge Jordan: This is not a two or three page order where the judge dictates findings from the bench, and says, "get me a proposed order," and you already know what the judge was going to do, or was going to rule. This is almost 90 pages worth of stuff. And it's detailed! As it should have been! (Oral Argument at 24:29-24:44.)

Beth Jackson Hughes: And there's not anything before this court to say that it wasn't his findings, he was at the hearing, he ... (Oral Argument at 24:44-24:50.)

Judge Jordan: I know, and I'm telling you ... (Oral Argument at 24:49.)

Beth Jackson Hughes: He heard it. (Oral Argument at 24:50.)

Judge Jordan: And I'm telling you that I know what AEDPA deference is, and I know what we're supposed to do with regards to state court findings, and I'm telling you, that it sticks in my craw. And I don't believe it for a second. I know what AEDPA deference requires me to do, and I don't speak for my colleagues, but I'm telling you: I don't believe for a second that that judge went through 89 pages in a day and then filed that as his own. As if he had gone through everything, went through his notes, the transcript, the exhibit, and the like. It just can't be done! It just can't be done. That's just a comment. (Oral Argument 24:50-25:28.)

Beth Jackson Hughes: Okay. Okay. And, as you said, it doesn't have anything to do with any of the issues that are before here, he didn't make any findings of the fact that, that—(Oral Argument at 25:29-25:35.) [...]

Judge Tjoflat: I think we all agree that it's bad practice, and the Alabama Supreme Court and the Court of Criminal Appeals have said so. (Oral Argument at 25:41-25:45.)

Beth Jackson Hughes: And that's correct, and I realize, and I actually challenged that in the ...(Oral Argument at 25:45-25:48.)

Judge Tjoflat: All the kinds of court have said so. (Oral Argument at 25:48-25:50.)

Beth Jackson Hughes: But, but—That's right. (Oral Argument at 25:49-25:50)

Judge Tjoflat: So, what the state should have done is told the judge to take it back and do it over again. (Oral Argument at 25:51-58.)

Beth Jackson Hughes: Well, I ... (Oral Argument at 25:59.)

Judge Tjoflat: Otherwise, you're just inviting a problem. (Oral Argument at 25:59-26:01.)

Beth Jackson Hughes: Yes, sir. (Oral Argument at 26:02.)

In its decision below, however, the Eleventh Circuit simply brushed this problem aside, in a short footnote, calling it a mere “procedural shortcut” that “has no bearing on our disposition of Hamm’s federal habeas appeal,” and then cited to one of that court’s previous decisions that requires deference to such opinions.

*Hamm v. Commissioner*, App. at 122a. In so holding, and in then deferring to the Attorney General’s factual and legal findings, the Eleventh Circuit erred.

## B. Ghostwritten Judicial Opinions Are a Recurring Problem in Alabama Death Penalty Cases

Ghostwritten judicial opinions are a recurring embarrassment for the collateral review process in many states. Alabama is, however, an egregious abuser of them. As a brief filed in this Court in 2009 noted, wholesale judicial adoption of proposed orders and opinions is “virtually the norm in Alabama capital post-conviction cases.” Brief for the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner at 5, *Wood v. Allen*, 558 U.S. 290 (2009) (No. 08-9156), 2009 WL 2445749. According to a study by the Equal Justice Initiative, 17 of the 20 recent capital cases at the time the study was written (2003) involved a ghostwritten opinion, *see id.* at 8, and that practice had continued unabated since the study, *id.* (noting 8 additional cases of wholesale adoption of findings in capital cases since 2003). Since that brief was filed, and after three opinions from the Alabama Supreme Court addressing the subject,<sup>2</sup> the practice continues. *See, e.g.,*

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<sup>2</sup> The Alabama Supreme Court has taken halfhearted measures to reverse two ghostwritten opinions in capital cases, while failing to ensure that any meaningful review of this practice will take place as long as the prosecution does not make too many outright blunders in drafting their opinion. In the first of these cases, *Ex parte Ingram*, 51 So.3d 1119 (Ala. 2010), the court threw out a proposed opinion where the state attorney general wrote an opinion that had the judge making findings based on his *personal knowledge of hearings he was not actually present for* – those hearings were in front of the previous judge in the case. In *Ex parte Scott*, No. 1091275, 2011 WL 925761 (Ala. Mar. 18, 2011), the Alabama Supreme Court threw out a judge verbatim adopting not even a proposed “opinion”, but the state’s answer to the habeas petition.

Outside of these two exceptional cases, however, the Alabama Supreme Court remains content to affirm almost any proposed opinion. In *Ex parte Jenkins*, 105 So.3d 1250 (Ala. 2012), the petitioner made a compelling showing that the judge could not possibly have read the proposed opinion, clearly showing that the judge was sitting in another city and could not possibly have received the prosecution’s proposal until hours before signing it. *Id.* at 1259. Like this case, the opinion was fairly detailed – 24 pages long and with over 30 transcript references. *Id.* The Alabama Supreme

*Van Pelt v. State*, CR-12-0703, 2015 WL 4876548 (Ala. Crim. App. Aug. 14, 2015) (affirming wholesale adoption of prosecution’s proposed opinion in capital case); *Spencer v. State*, CR-12-1837, 2015 WL 505353 (Ala. Crim. App. Feb. 6, 2015) (same); *Marshall v. State*, 182 So.3d 573 (Ala. Crim. App. 2014) (same); *Mashburn v. State*, 148 So.3d 1094 (Ala. Crim. App. 2013) (same); *see also Broadnax v. State*, 130 So.3d 1232, 1241 (Ala. Crim. App. 2013) (affirming wholesale adoption of prosecution’s proposed opinion in capital case because petitioner failed to challenge the adoption in post-judgment motion). As the NACDL Brief in *Wood* notes, these “opinions” are frequently adopted under circumstances that raise serious concerns about whether the findings are truly those of the court, or whether the court has instead abdicated its role to the State. Brief of National Association of Criminal Defense Lawyers at 9-11.

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Court, however, affirmed, holding that even if petitioner’s factual contentions were true, that only the record could be examined to determine whether the findings were not actually those of the court, and the record did not reflect the location of the judge or the date he received it—therefore his argument (based on essentially irrefutable facts regarding the location of the judge and the date of mailing) was mere “speculation and conjecture”. *Id.* at 1259-60. The court’s rule after *Jenkins* is that it will only throw out a proposed opinion where “*the record... clearly establishes* that the order signed by the trial court denying post-conviction relief is not the product of the trial court’s independent judgment,” *id.* at 1260 (emphasis added), and “the record” and “clearly established” will be read in the narrowest manner possible.

The Alabama Supreme Court has therefore sanctioned abdication of the judicial function in capital cases so long as the Attorney General’s Office makes sure not to make a blatant mistake in their phony opinion.

**C. This Court Must Not Allow AEDPA Deference to Ghostwritten Judicial Opinions, Particularly When Those Opinions Are Adopted Under Circumstances Where a Reviewing Court Cannot Have Any Confidence That the Findings Were Fairly Adopted or Even Read by the Court**

While the facts underlying this adoption of the proposed opinion in this case are particularly egregious, the underlying problem of state courts abdicating their duty to carefully review each and every capital conviction is unfortunately common. The Alabama state courts have proven themselves unwilling or unable to address this problem, and the Eleventh Circuit is apparently of the view that wholesale adoption of opinions in capital cases simply does not present issues either under AEDPA or this Court's precedent. While this Court may not be capable of forcing the Alabama state courts to perform meaningful collateral review of capital convictions, it is capable of withholding AEDPA deference either on statutory or constitutional grounds when the state courts fail to meaningfully determine the facts and the law, and instead conduct these critical inquiries *de novo*. This is particularly required in capital cases because "death is different"; this Court has long emphasized that the constitution in capital cases contains "protections that the Constitution nowhere else provides." *Harmelin v. Michigan*, 501 U.S. 957, 993 (1991). When the State of Alabama has largely adopted a procedure that ensures capital prisoners will not have meaningful review of the many serious constitutional claims that can only be effectively raised in collateral proceedings, *see Trevino v. Thaler*, 133 S.Ct. 1911, 1921 (2013), the statutory text of AEDPA cannot be read to foreclose federal courts from their duty to provide independent review of these

claims if the state courts will not.

This Court’s recent decision in *Brumfield v. Cain* recognizes that the ultimate correctness of state court judicial findings is not the sole issue in the analysis under 28 U.S.C. § 2254(d)(2) for determining whether state court decisions are entitled to deference. 135 S. Ct. 2269 (2015). § 2254(d)(2) states that if the state court decision is “based on an *unreasonable determination of the facts* in light of the evidence presented in the State court proceeding” (emphasis added), the federal court is no longer bound to defer and instead reviews the claim under § 2254(a) alone (*de novo* review).<sup>3</sup> In *Brumfield*, the unreasonableness that this Court found was that the state court failed to afford an evidentiary hearing to a petitioner for whom the record disclosed at least a significant possibility that he was intellectually disabled. *Id.* at 2281-82. Critically, this Court did not require that the habeas petitioner actually demonstrate that the ultimate conclusion (that he was not intellectually disabled) was unreasonable—instead, the *procedure* that the state court used to make that determination led to it being deemed an unreasonable factual determination for purposes of § 2254(d)(2). *Id.*; accord Samuel R. Wiseman, *Habeas After Pinholster*, 53 B.C. L. Rev. 953, 984-86 (2012) (noting that flawed factual finding processes should result in failure to accord deference under

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<sup>3</sup> See, e.g., *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (“When a state court’s adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires.”). The same rule applies for § 2254(d)(2)—the remedy is identical in the statutory structure.

§ 2254(d)(2)). While failure to accord an evidentiary hearing in cases with genuine issues of material fact leads to an unreliable and unreasonable factual determination, so too does actually holding an evidentiary hearing but then letting the state attorney general's office make all the factual findings resulting from it without judicial review. Even if the findings in this case may be deemed ultimately to be correct—although to be clear, Mr. Hamm seriously disputes many of the factual findings—his claims must be scrutinized without the deference the lower courts have applied under AEDPA due to the broken and unreasonable state court fact-finding process. As the Eleventh Circuit noted that at least some of Mr. Hamm's claims were "close," *see Hamm v. Commissioner*, App. at 138a (describing one ineffective assistance of counsel claim as presenting a close question but deferring under AEDPA), the change in the standard of review would make a substantial difference in Mr. Hamm's case.

This interpretation of AEDPA is particularly required here in light of the principles of constitutional avoidance and the heightened standards of reliability underlying this Court's death penalty jurisprudence. This Court, as the Eleventh Circuit noted below, has long recognized that wholesale adoption of one side's factual findings and legal conclusions, even in ordinary civil litigation, raises due process concerns. *See, e.g., Anderson v. City of Bessemer*, 470 U.S. 564 (1985). And in the context of wholesale adoption of opinions in capital cases (albeit under the pre-AEDPA standards), this Court already identified three factors that when present raised due process and fairness concerns—specifically when "(1) a judge

solicits proposed findings *ex parte*, (2) does not provide the opposing party an opportunity to criticize the findings or to submit his own, or (3) adopts findings that contain internal evidence suggesting the judge may not have read them.” *Jefferson v. Upton*, 560 U.S. 284, 294 (2010) (per curiam); *see also id.* at 291 (emphasizing that the sections of the pre-AEDPA version of 28 U.S.C. § 2254(d) that were involved included “that the applicant was otherwise denied due process of law in the State court proceeding” and “that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding”). In this case, Mr. Hamm had no opportunity to contest the findings, and the findings themselves contain evidence suggesting the judge did not read them: specifically, the judge neither crossed off the word “proposed” nor made any other edits whatsoever. This Court has therefore already recognized that where the *Jefferson* factors are present, there are grave due process concerns; concerns that should motivate a reading of AEDPA to allow challenges to procedures which are fundamentally unfair and contrary to basic notions of due process, particularly in capital cases.

This Court can also reach the same conclusion under the constitution directly. Where a state court violates the due process clause in its resolution of claims, federal courts cannot be required to nonetheless recognize and defer to the defective process.

This Court should address the exceptionally important question of whether federal courts in life and death cases should defer to opinions that they have no confidence were even read by the state court judge that signed off on them. *See Sup.*

Ct. R. 10(a), 10(c). At the very least, given that *Brumfield* was decided well after oral argument and only shortly before the release of the decision below, this Court should grant, vacate, and remand to allow the Eleventh Circuit to reconsider its precedent on this issue in light of *Brumfield*.

**II. *Martinez v. Ryan* Should Apply to Ineffective Assistance of Counsel Claims Where Incompetent Presentation of the Evidence in Collateral Proceedings Hinders the Ability of the Federal Courts to Review the True Merits of the Claim.**

This Court issued an important, equitable ruling in *Martinez v. Ryan* in recognition of the fact that post-conviction proceedings are most often the only realistic way to litigate claims of ineffective assistance of counsel. 132 S.Ct. 1309 (2012). The court below, however, drew an artificial distinction between claims that were not presented in post-conviction proceedings at all and claims that were so hindered by inadequate post-conviction counsel as to deprive them of a meaningful opportunity to be heard. The promise of *Martinez* is not so limited, and this Court should so hold.

**A. Mr. Hamm's Post-conviction Counsel Incompetently Handled the Presentation of Key Evidence**

Trial counsel in Mr. Hamm's case did not conduct an adequate mental health investigation and did not discover evidence that Mr. Hamm suffered from brain damage. In state post-conviction, a full psychological evaluation of Mr. Hamm was conducted and revealed that he suffers from brain damage. The evidence of brain damage was documented in an affidavit by Dr. Dale Watson, who indicated that he was willing and prepared to testify at the Rule 32 hearing. *See* Vol.11-PCR-182.

However, appointed state post-conviction counsel, Pamela Nail, failed to call Dr. Watson to testify at the Rule 32 hearing, instead merely attempting to introduce his affidavit. Because Dr. Watson was not present, the court excluded his evidence, without any effort by Ms. Nail to ask for a postponement of the hearing to call Dr. Watson in person, or make any arrangement for an alternative means for him to testify. As a result, the crucial evidence of neuropsychological damage—namely Dr. Watson’s diagnosis based on several days of testing—was never considered by the state court reviewing the state habeas petition. Ms. Nail’s failure to call Dr. Watson and her sole reliance on Dr. Watson’s affidavit (which was ultimately excluded by the state Rule 32 court) amounted to ineffective assistance of counsel.

**B. The Decision Below Squarely Held That This Ineffective Performance Does Not Matter for a *Martinez* Claim**

Mr. Hamm argued to the Eleventh Circuit that state post-conviction counsel’s ineffectiveness in failing to call Dr. Watson at the Rule 32 hearing should serve as justification, under *Martinez*, to allow the federal courts to consider the evidence of brain damage that Dr. Watson diagnosed. The Eleventh Circuit’s opinion rejected the argument, declaring that “the review of this claim on federal habeas is ‘limited to the record that was before the state court that adjudicated the claim on the merits.’” *Hamm v. Commissioner*, App. at 142a (quoting *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011)). In footnote 20 of the panel’s unpublished opinion, this Court held that *Martinez* is limited to defaulted IAC claims and *simply does not apply* in the situation where a post-conviction counsel has pleaded the IAC

claim:

*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. Moreover, an unfavorable evidentiary ruling, while in some sense "procedural," is not a "procedurally defaulted" constitutional claim that can be overcome by cause and prejudice. And finally, to the extent that Hamm is raising an independent claim for ineffective assistance of his collateral counsel as a basis for habeas relief, such a claim is not cognizable. See *Martinez*, 132 S. Ct. at 1320.

*Hamm v. Commissioner*, App. at 143a.

The Eleventh Circuit's opinion creates an illogical situation that runs contrary to *Martinez*: a capital defendant is now better off having a worse post-conviction attorney. If he has an attorney who entirely fails to raise an IAC claim, he is entitled to federal review on the merits; but if he has a marginally less bad attorney who raises the claim but then does little to prove it, he is entitled to no federal review. This is a legal anomaly.

**C. The Eleventh Circuit's Holding is Contrary to the Considered Holdings of Other Circuit Courts of Appeals and the views of Two Justices of this Court, in a Confused Area of Law**

The whole basis of *Martinez* is the exercise of equitable discretion by the federal courts as to how much their independent review will be truncated by flawed state court proceedings. The equities in this death penalty case are exceptionally strong: the effect of the error was to leave a claim that had strong support with essentially none, thereby distorting the federal court's consideration of the issue.

Justices Breyer and Sotomayor have already indicated their belief that this

issue calls for full consideration. As Justice Breyer wrote, in a statement joined by Justice Sotomayor to the denial of cert in *Gallow v. Cooper*, 133 S.Ct. 2730, 2731 (2013), “A claim without any evidence to support it might as well be no claim at all.”

Justice Breyer continued:

In such circumstances, where state habeas counsel deficiently neglects to bring forward “any admissible evidence” to support a substantial claim of ineffective assistance of trial counsel, there seems to me to be a strong argument that the state habeas counsel's ineffective assistance results in a procedural default of that claim. The ineffective assistance of state habeas counsel might provide cause to excuse the default of the claim, thereby allowing the federal habeas court to consider the full contours of Gallow's ineffective-assistance claim. For that reason, the Fifth Circuit should not necessarily have found that it could not consider the affidavit and testimony supporting Gallow's claim because of *Cullen v. Pinholster*, 563 U.S. 170 (2011).”

*Id.*

*Gallow* involved a failure to present evidence on the ineffectiveness claim. The failure to present Dr. Watson’s testimony here similarly undermined the nature of the claim. Dr. Watson’s affidavit and testimony were the key to understanding the mountain of other mitigating evidence that Mr. Hamm presented. Without Dr. Watson’s evidence, the other evidence shows an extremely difficult upbringing and poor performance in school; however, *with* the mental health evidence, these voluminous records show a serious and severe biological impairment that connects the dots between the difficult upbringing, the school records and the mitigation of criminal responsibility in this case. Had Pamela Nail called Dr. Watson and examined his evidence, she would have shown that effective counsel would have presented a mitigation case that bore “no relation to the few

naked pleas for mercy actually put before the jury.” *Rompilla v. Beard*, 545 U.S. 374, 393 (2005).

*Gallow* expresses serious concern that incompetent post-conviction counsel can prevent courts from considering the “full contours” of a claim: the failure here falls into that category. *Gallow*, 133 S.Ct. at 2731. Because the full scope of Mr. Hamm’s claim has been precluded due solely to the incompetence of post-conviction counsel, *Martinez* should apply as a way to cure the default.

This Court already has a line of jurisprudence available to address this problem that it should draw on to clarify the application of *Martinez v. Ryan* in this context. In *Vasquez v. Hillery*, 474 U.S. 254 (1986), this Court established that the test for whether new evidence creates a “new claim” for exhaustion purposes, and thus makes the “new claim” procedurally defaulted, was whether the new evidence “fundamentally alter[ed]” the claim presented to the state courts so as to justify requiring the habeas petitioner to return to state court. 474 U.S. at 260. Dr. Watson’s evidence meets the *Vasquez* standard, and the Eleventh Circuit should have so held.

Every other Circuit to consider the application of *Martinez* in a published opinion has noted that the principles of *Vasquez* apply to *Martinez*. While the Eleventh Circuit below simply held the claim defaulted without expressly considering whether Dr. Watson’s evidence fundamentally altered the claim, the Ninth Circuit, in almost identical factual circumstances, found that introducing new evidence from a psychologist for an ineffective assistance claim that previously

had no such support fundamentally altered the claim. *Dickens v. Ryan*, 740 F.3d 1302, 1317-18 (9th Cir. 2014). Specifically, it held that the standard for “fundamental alteration” was merely whether the new evidence placed the claim in a “significantly different and stronger evidentiary posture than it was when the state courts considered it.” 740 F.3d at 1318 (quoting *Aiken v. Spalding*, 841 F.2d 881, 883 (9th Cir. 1988)). Other circuits appear to apply a much more stringent definition of fundamental alteration. See *Gray v. Zook*, 806 F.3d 783 (4th Cir. 2015). In the unpublished opinion below in *Gallow*, the Fifth Circuit failed to consider the fundamental alteration question, similarly to the Eleventh Circuit here. *Gallow v. Cooper*, 505 F. App’x 285, 291 (5th Cir. 2012). Regardless, although Mr. Hamm argued below that *Martinez* should establish cause for the partial preclusion of his claim below, the Eleventh Circuit either failed to consider whether the “fundamental alteration” standard was met, or *sub silentio* held that it did not.

This Court should also take this case to clarify the relationship between the prejudice standard for ineffective assistance of counsel required to have a *Martinez* claim at all and the “fundamental alteration” standard in *Vasquez*. There is apparently a circuit split between this case, *Dickens*, and *Gray* regarding exactly how much evidence is required to fundamentally alter a claim. But in order for a habeas petitioner to be entitled to *Martinez* relief at all, he must show that his collateral review counsel committed errors that lead to a reasonable probability that the outcome would be different. See *Martinez v. Ryan*, 132 S.Ct. at 1318 (adopting standard from *Strickland v. Washington*, 466 U.S. 668 (1984)). Because of

the divergent views on the fundamental alteration standard throughout the circuits, substantial confusion exists on the application of *Martinez* to cases where the ineffective assistance of trial counsel claim had incomplete evidentiary support. The net result of that split is that there may be cases where inadequate collateral counsel failing to introduce evidence turns a winning claim into a losing one, but the claim is nonetheless precluded for lack of fundamental alteration even in circuits that apply *Vasquez*.

The best course this Court could take would be simply to eliminate the disparity between claims that were not pleaded at all and claims that were pled but evidentially hindered by inadequate post-conviction counsel, for the purposes of *Martinez*. Under the Ninth Circuit's test, in order for there to be a reasonable probability that the outcome would have been different (*Strickland*), it would seem to be a necessary condition that the new evidence offered on federal habeas puts the claim in a substantially stronger evidentiary posture than it was when the state courts considered the claim (*Dickens/Aiken*). By contrast, other circuits appear to place a far higher bar for fundamental alteration, one that continues to place petitioners who had marginally better counsel in a far worse position for *Martinez* purposes, even where the precluded evidence would have been reasonably likely to have changed the outcome. The *Martinez* inquiry would be made substantially easier by simply applying *Strickland's* prejudice inquiry in a straightforward manner—if incompetent performance of collateral counsel hindered the consideration of a substantial claim of ineffective assistance of trial counsel through

failing to introduce important evidence, and there is a reasonable probability that the result would have been different with effective performance, then the federal court can consider the claim under *Martinez*.

Regardless, this Court should clear up exactly what “fundamental alteration” means in the *Martinez* context, and whether that standard materially differs in some way from *Strickland*’s prejudice inquiry. Moreover, the Eleventh Circuit’s reasoning should not be allowed to stand in this death penalty case. The claims of ineffectiveness with respect to both trial and collateral counsel are substantial, and the key piece of evidence supporting his ineffective assistance of trial counsel claim was precluded. To let a man go to his death without any court even considering the key piece of evidence tying together the mitigation case that trial counsel should have put on, or without even considering whether the evidence substantially altered the claim put in front of the state courts, is unacceptable.

### **III. *Johnson v. Mississippi* Requires that a Capital Defendant Be Allowed to Test a Prior Conviction in Federal Habeas Corpus in the Limited Situation Where the *Lackawanna v. Coss* Procedures Are Not Available**

In separate habeas corpus litigation in Tennessee and the Sixth Circuit, Mr. Hamm followed, to the word, the *Lackawanna County District Attorney v. Coss* procedures applicable to non-capital cases in order to challenge the invalid prior Tennessee convictions from 1978. 532 U.S. 394 (2001). Mr. Hamm (1) filed a habeas petition in the state of Tennessee on multiple grounds (actual innocence, ineffective

assistance of counsel, involuntariness, among others), (2) appealed the denial of the petition to the Tennessee Court of Criminal Appeals, and (3) petitioned and was denied permission to appeal to the Tennessee Supreme Court, *see Hamm v. Tennessee*, 1997 WL 59435 (Tenn. Crim. App. Feb. 12, 1997). Mr. Hamm then (4) filed a federal habeas corpus petition under 28 U.S.C. § 2254 in the U.S. District Court for the Middle District of Tennessee (No. 98-00075); (5) upon denial, sought a Certificate of Appealability at the U.S. Court of Appeals for the Sixth Circuit (No. 98-6444); and (6) filed a petition for writ of certiorari with this Court (No. 98-9859). *At every step of the way*, Mr. Hamm was held procedurally barred from challenging his prior Tennessee convictions because of the new, two-year statute of limitations in the Tennessee habeas procedures.<sup>4</sup>

In the limited situation of this death penalty case, in which the federal habeas corpus petitioner has meticulously followed the procedural mechanism set forth in *Lackawanna v. Coss* but has been procedurally barred at every step from obtaining ancillary collateral review of a prior conviction from another state, *Johnson v. Mississippi* and the Eight Amendment requirement of heightened care in death penalty cases require that the petitioner be allowed to challenge his prior conviction in the death penalty habeas corpus proceedings.

*Johnson v. Mississippi* is the only Supreme Court capital case to address these matters and it squarely held that reliance on an invalid conviction used as a

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<sup>4</sup> Had trial counsel pursued these challenges in 1987, there would have been no timeliness bar because the statute of limitations had not yet run.

capital aggravator was unconstitutional, rejecting the claim of Mississippi courts that they need not take this fact into account. As the Supreme Court declared in *Johnson*, 486 U.S. at 586-87, a rule that would allow such limited review where other avenues are not open “is not even arguably arbitrary or capricious [...]. To the contrary, especially in the context of capital sentencing, it reduces the risk that such a sentence will be imposed arbitrarily.”

In this case, the jury heard more aggravation than it should have, in the form of Tennessee convictions that were both legally and factually invalid, and also heard far less mitigation than it should have as a result of a lack of proper investigation. Because trial counsel did not investigate the prior convictions or challenge them directly, Mr. Hamm was effectively hindered from doing so until post-conviction. At that point, Mr. Hamm had no recourse to challenge the prior convictions except in his death penalty post-conviction proceedings. This Court should therefore distinguish *Coss* in the limited context of capital cases where there are no other avenues open to challenge a prior conviction.

The failure to allow a death row inmate any avenue to challenge a prior criminal conviction that is used as an aggravating circumstance would run counter to *Johnson* and extend the non-capital *Coss* case too broadly into the special, limited circumstances of this type of capital case.

#### **IV. The Eleventh Circuit Undermined the Critical Fact-finding Function of the Sentencing Jury in Alabama in Violation of *Ring v. Arizona* and *Hurst v. Florida*.**

This Court should grant, vacate, and remand this case in light of *Hurst v.*

*Florida*, 136 S.Ct. 616 (2016). The Eleventh Circuit recognized that the sentencing jury was improperly presented with documents showing that Mr. Hamm was charged with “armed robbery” when in fact he was only convicted of simple robbery; however, the claim of ineffectiveness has been denied because the trial court’s sentencing order did not rely “upon the ‘armed robbery’ language in any way.” *Hamm v. Commissioner*, App. at 123a. The Eleventh Circuit recognized the holding that “Hamm was not prejudiced because the sentencing court considered the simple robbery convictions only in its sentencing order.” *Id.*

In effect, the Eleventh Circuit’s opinion suggests that the jury’s consideration of evidence at capital sentencing and findings of aggravation do not matter. This is precisely the type of undermining of the fact-finding function of the jury that violates *Hurst* and *Ring v. Arizona*, 536 U.S. 584, 597 (2002). In the State of Alabama, the jury plays a critical fact-finding function in capital sentencing. In *Beck v. Alabama*, 447 U.S. 625, 646 (1980), the Supreme Court specifically referred to the jury’s determination as “the jury’s fact-finding function.” The Supreme Court added:

[I]t is manifest that the jury’s verdict must have a tendency to motivate the judge to impose the same sentence that the jury did. Indeed, according to statistics submitted by the State’s Attorney General, it is fair to infer that the jury verdict will ordinarily be followed by the judge even though he must hold a separate hearing in aggravation and mitigation before he imposes sentence. Under these circumstances, we are unwilling to presume that a post-trial hearing will always correct whatever mistakes have occurred in the performance of the jury’s factfinding function.

*Id.* at 645-46.

The Alabama Supreme Court has been equally emphatic: “Under Alabama law, the jury plays an essential role in the capital-sentencing process.” *Ex parte Stephens*, 982 So.2d 1148, 1151 (Ala. 2006). In its various opinions, the Alabama Supreme Court has, in its own words, “stressed the importance of the statutory right to a fair advisory verdict by the jury,” *id.* at 1152, to the point that the Alabama Supreme Court applies the harmless error doctrine in relation to penalty-phase jury issues “with extreme caution.” *Id.* at 1153 (quoting *Ex parte Whisenant*, 482 So.2d 1247, 1249 (Ala. 1984)).

This Court recently decided a similar question in *Hurst*, stating clearly that courts cannot disregard the jury’s fact-finding function under the constitutional strictures of the Sixth, Eighth and Fourteenth Amendments. In a similar manner, in Mr. Hamm’s case, the sentencing jury was so misled as to Mr. Hamm’s culpability that the jury’s role was essentially abrogated. As three justices of this Court indicated in *Brooks v. Alabama*, 136 S.Ct. 708 (2016), the issue of how *Hurst* applies to Alabama is open. This Court should grant an order vacating and remanding to the Eleventh Circuit in light of this Court’s decision in *Hurst*.

This Court may also wish to hold this case in light of the fact that the Alabama Death Penalty has recently been held to be unconstitutional under *Hurst* and on other grounds. In *Alabama v. Billups*, No. CC-2005-001195.00 (Jefferson Cty. Cir. Ct. Mar. 3, 2016) *available at* [http://www.eji.org/files/Judge%20Todd's%20order%20striking%20down%20death%20penalty%203-3-16\\_0.pdf](http://www.eji.org/files/Judge%20Todd's%20order%20striking%20down%20death%20penalty%203-3-16_0.pdf), the state court held that the Alabama Death Penalty is unconstitutional, on *Hurst* and

other grounds. While the state has appealed, the fact remains that the death penalty has been declared unconstitutional. Nor is this holding unexpected—the Alabama death penalty provisions are largely based on Florida’s system. And under Alabama law, the judge can make findings of aggravating circumstances even if the jury has not so found, a classic *Hurst* violation.

Under Ala. Code § 13A-5-59, if the provisions of the Alabama Death Penalty are declared unconstitutional and cannot be reinterpreted to be constitutional, “the defendants who have been sentenced to death under this article shall be re-sentenced to life imprisonment without parole.” There is at least a strong likelihood that the death penalty will be so declared—a state court recently did. Because this Court has generally attempted to avoid deciding difficult constitutional questions in the absence of a necessity to do so, *see, e.g., United States v. Resendiz-Ponce*, 549 U.S. 102, 104 (2007), and Mr. Hamm will have a strong claim for resentencing under § 13A-5-59 that would need to be presented in state court if the Alabama Courts or this Court declares the Alabama Death Penalty unconstitutional under *Hurst*, a claim which was previously unavailable, this Court may wish to hold this case on its docket until the state courts or this Court finally determine whether Alabama’s death penalty is constitutional under *Hurst*, and if not, whether Mr. Hamm has a claim under § 13A-5-59.

CONCLUSION

For the foregoing reasons, Mr. Doyle Hamm prays that this Court grant a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

A handwritten signature in black ink that reads "Bernard E. Harcourt". The signature is written in a cursive style with a prominent, sweeping flourish at the end.

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**CERTIFICATE OF SERVICE**

I, Bernard E. Harcourt, hereby declare that on March 24, 2016, I served this Petition for Writ of Certiorari, including the appendix, on the Respondent by U.S. Priority Mail with postage prepaid, addressed as follows:

Beth Jackson Hughes  
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Respectfully submitted,



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