



By: /s/ Rachel Troutman  
Rachel Troutman - 0076741  
Supervisor, Death Penalty Department  
[Rachel.Troutman@opd.ohio.gov](mailto:Rachel.Troutman@opd.ohio.gov)  
**Counsel of Record**

By: /s/ Elizabeth Arrick  
Elizabeth Arrick – 0085151  
Assistant State Public Defender  
[Elizabeth.Arrick@opd.ohio.gov](mailto:Elizabeth.Arrick@opd.ohio.gov)  
Office of the Ohio Public Defender  
250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394/ (614) 644-0708 (FAX)

Counsel For Appellant

### **CERTIFICATE OF SERVICE**

I hereby certify that I delivered a copy of the foregoing **Notice of Additional Authority** on counsel for the State of Ohio at the address listed below via ordinary U.S. Mail, postage prepaid, on this 4th day of October, 2016:

Mr. Ronald W. Springman, Jr.  
Chief Assistant Prosecuting Attorney  
Hamilton County Prosecutor  
Appellate Division  
230 E. 9th St. Suite 4000  
Cincinnati, OH 45202

And

Mr. Steven Taylor  
Counsel for Amicus Curiae  
Chief Assistant Prosecuting Attorney  
Franklin County Prosecutor  
373 South High Street, 13<sup>th</sup> Floor  
Columbus, OH 43215

By: /s/ Rachel Troutman  
Rachel Troutman - 0076741

No. \_\_\_\_\_

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

OCTOBER TERM, 2015

---

RYAN GERALD RUSSELL, *Petitioner*,

v.

STATE OF ALABAMA, *Respondent*.

---

ON PETITION FOR WRIT OF CERTIORARI TO  
THE ALABAMA COURT OF CRIMINAL APPEALS

---

**PETITION FOR A WRIT OF CERTIORARI**

---

RANDALL S. SUSSKIND\*  
JACQUELINE D. JONES  
122 Commerce Street  
Montgomery, Alabama 36104  
rsuskind@eji.org  
(334) 269-1803

*Counsel for Petitioner Ryan Russell*

*\*Counsel of Record*

June 23, 2016

Exhibit A

## CAPITAL CASE

### QUESTIONS PRESENTED

1. Should this Court grant this certiorari petition , vacate the judgment below, and remand this case for further consideration in light of this Court's recent decision in Foster v. Chatman, 136 S. Ct. 1737 (2016)?
2. Should this Court grant this certiorari petition , vacate the judgment below, and remand this case for further consideration in light of this Court's recent decision in Hurst v. Florida, 136 S. Ct. 616 (2016)?

**TABLE OF CONTENTS**

QUESTIONS PRESENTED ..... I

TABLE OF CONTENTS ..... ii

TABLE OF CITED AUTHORITIES ..... iii

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

RELEVANT CONSTITUTIONAL PROVISIONS ..... 2

STATEMENT OF THE CASE ..... 3

REASONS FOR GRANTING THE WRIT ..... 7

    I.    THIS COURT SHOULD GRANT CERTIORARI, VACATE  
          THE JUDGEMENT BELOW, AND REMAND THIS CASE  
          TO THE COURT OF CRIMINAL APPEALS FOR FURTHER  
          CONSIDERATION IN LIGHT OF FOSTER V. CHAPMAN ..... 7

    II.   THIS COURT SHOULD GRANT CERTIORARI AND  
          VACATE MR. RUSSELL'S DEATH SENTENCE BECAUSE,  
          ALABAMA'S DEATH PENALTY SCHEME, LIKE THAT  
          INVALIDATED BY THIS COURT IN HURST V. FLORIDA,  
          REQUIRES A JUDGE TO INDEPENDENTLY DETERMINE  
          WHETHER AGGRAVATING CIRCUMSTANCES EXIST  
          AND WHETHER THEY OUTWEIGH MITIGATING  
          CIRCUMSTANCES ..... 11

CONCLUSION ..... 15

APPENDIX A      Alabama Court of Criminal Appeals opinion, Russell v. State, No.  
                    CR-10-1910, 2015 W.L. 3448853 (Ala. Crim. App. May 29,  
                    2015), and order denying rehearing on October 16, 2015.

APPENDIX B      Alabama Supreme Court order denying certiorari, Ex parte Russell, No.  
                    1150074 (Ala. February 19, 2016).

## TABLE OF CITED AUTHORITIES

### CASES

<u>Batson v. Kentucky</u> , 476 U.S. 79 (1986) . . . . .	4, 6
<u>Floyd v. Alabama</u> , No. 15-7553, 2016 WL 3369418 (U.S. June 20, 2016) . . . . .	11
<u>Foster v. Chatman</u> , 136 S. Ct. 1737 (2016) . . . . .	7, 8, 9, 10, 11
<u>Harris v. Alabama</u> , 513 U.S. 504 (1995) . . . . .	12
<u>Hurst v. Florida</u> , 136 S. Ct. 616 (2016) . . . . .	11, 12, 13, 14
<u>Johnson v. Alabama</u> , No. 15-7091, 2016 WL 1723290 (U.S. May 2, 2016) . . . . .	13
<u>Johnson v. California</u> , 545 U.S. 162, 172 (2005) . . . . .	10
<u>Kirksey v. State</u> , No. CR-09-1091, 2014 WL 7236987 (Ala. Crim. App. Dec. 19, 2014) . . . . .	13, 14
<u>Kirksey v. Alabama</u> , No. 15-7912, 2016 WL 378578 (U.S. June 6, 2016) . . . . .	13
<u>Miller-El v. Dretke</u> , 545 U. S. 231, 241 (2005) . . . . .	8, 10, 11, 12
<u>Ring v. Arizona</u> , 536 U.S. 584 (2002) . . . . .	11
<u>Russell v. State</u> , No. CR-10-1910, 2015 W.L. 3448853 (Ala. Crim. App. May 29, 2015) . . . . .	passim
<u>Ex parte Russell</u> , No. 1150074 (Ala. Feb. 19, 2016) . . . . .	1, 6
<u>Snyder v. Louisiana</u> , 552 U. S. 472 (2008) . . . . .	8
<u>Wimbley v. Alabama</u> , No. 15-7939, 2016 WL 410937 (U.S. May 31, 2016) . . . . .	13

### STATUTES

28 U.S.C. § 1257(a) . . . . .	1
Ala. Code § 13A-5-46 . . . . .	12

Ala. Code § 13A-5-47 ..... 4, 12, 13  
Fla. Stat. § 921.141 ..... 12

---

**PETITION FOR WRIT OF CERTIORARI**

---

Ryan Russell respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

**OPINIONS BELOW**

The opinion of the Alabama Court of Criminal Appeals affirming Mr. Russell's conviction and death sentence, Russell v. State, No. CR-10-1910, 2015 W.L. 3448853 (Ala. Crim. App. May 29, 2015), is not yet reported and is attached at Appendix A, along with that court's order denying rehearing. The order of the Alabama Supreme Court denying Mr. Russell's petition for a writ of certiorari, Ex parte Russell, No. 1150074 (Ala. Feb. 19, 2016), is unreported and attached at Appendix B.

**JURISDICTION**

On May 29, 2015, the Alabama Court of Criminal Appeals issued an opinion affirming Mr. Russell's capital murder conviction and death sentence. Russell v. State, No. CR-10-1910, 2015 W.L. 3448853 (Ala. Crim. App. May 29, 2015). On October 16, 2015, the court denied Mr. Russell's rehearing application. On Feb. 19, 2016, the Alabama Supreme Court denied Mr. Russell's petition for a writ of certiorari. Ex parte Russell, No. 1150074 (Ala. Feb. 19, 2016). On May 4, 2016, Justice Thomas extended the time to file this petition until June 23, 2016. Mr. Russell invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

## **RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS**

The Sixth Amendment of the United States Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . .

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

Excessive bail shall not be required, nor excessive fines be imposed, nor cruel and unusual punishments inflicted.

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 and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alabama's capital sentencing statute, Ala. Code § 13A-5-47(e), reads:

In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to Section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

## STATEMENT OF THE CASE

This is a case in which the death penalty has been imposed. On January 15, 2009, Mr. Russell was indicted in Shelby County, Alabama on one count of capital murder for the intentional death of Katherine Gillespie, who was under the age of fourteen years-old. (C. 17.)<sup>1</sup> At trial the State's theory was that Mr. Russell had intentionally killed Katherine, his cousin and legal guardian. The defense maintained that the shooting was accidental. Her body was found when police officers entered Ryan Russell's home in June 2008. (R. 957, 960.) He was found unconscious in the shower surrounded by pills. (R. 1132-33.) Forensic evidence ultimately showed that Katherine died instantly from a single, close range gunshot to the back of her head as she crouched down behind a dryer. (R. 1447.)

In this case, the prosecutor used six of his twenty-seven peremptory strikes to remove five of the six eligible African-American jurors and the one eligible juror labeled "other." Mr. Russell was tried by a jury that had one African-American juror. (Supp. R. 25.) African-Americans constitute only 11% of the total population of Shelby County. The State also used another peremptory strike to remove another juror whose race was listed as "other." (Supp. R. 26-27.) On November 19, 2010, the jury convicted Mr. Russell of capital murder. (C. 126, 406.)

During the sentencing phase, the State sought to prove the existence of one

---

<sup>1</sup>"C." refers to the clerk's record. "R." refers to the trial transcript. "Supp. C." refers to the supplemental clerk's record.

aggravating circumstance - that Katherine's death was especially heinous, atrocious and cruel as compared to other capital murders. Defense counsel objected to this circumstance being submitted to the jury and moved for a directed sentence of life without parole. The trial court overruled counsel's objections and denied the motion. (R. 1801-02.) On November 22, 2010, the jury found this circumstance to exist and returned a non-binding advisory recommendation for a sentence of death. (C. 128, R. 1850.)

After a separate sentencing hearing, the trial judge, as required under Alabama law, independently determined the existence and weight of aggravating and mitigating circumstances. See Ala. Code § 13A-5-47(d)&(e). In finding that Katherine's death was heinous, atrocious and cruel, the trial judge relied heavily on her status as a child and her status as Mr. Russell's 'daughter' / legal ward. The judge also relied on the prosecutor's arguments that Katherine had been chased to her death. (C. 151-158.) Based on these findings, the judge sentenced Mr. Russell to death.

Counsel for Mr. Russell filed a timely appeal to the Alabama Court of Criminal Appeals arguing, among other things, that Mr. Russell's case should be remanded for a hearing in accordance with Batson v. Kentucky, 476 U.S. 79 (1986) because the State's striking of 83% of the eligible African-Americans from jury created an inference of discrimination. Counsel also pointed out that Mr. Russell's record contained instances of disparate treatment, which, when coupled with the number of strikes and the diversity of the jurors, sufficed to meet the minimal showing for an inference of discrimination. For

example, though many of the white jurors seated were strongly in favor of the death penalty, some were moderately in favor of the death penalty and others expressed the view that they were neutral. However, black venire members who were moderately in favor of or neutral towards the death penalty were struck by the State.<sup>2</sup>

Also, there was a white male juror, B.C. (No. 24), who was 22 years old and single, and was allowed to serve. Yet a 20 year-old single black male, C.A. (No. 5), was dismissed as was a 33 year-old single black female, K.L. (No. 57). Compare Questionnaire of Juror B.C. with Questionnaires of Jurors C.A. and K.L. One black venire member, A.H.(No. 39), who was dismissed had been arrested but so had two white jurors, M.S. (No. 83) and W.T. (No. 89). Compare Questionnaire of Juror A.H. with Questionnaires of Jurors M.S. and W.T.

The Alabama Court of Criminal Appeals did not evaluate whether Mr. Russell had made a prima facie showing of racial discrimination in jury selection under Batson and its progeny; nor did the court order a Batson hearing at which the prosecution could have proffered its reasons for striking more than 80% of the eligible black venire members.

---

<sup>2</sup>Juror M.J. (No. 50) and Juror T.K (No. 54), who are White, indicated on their juror questionnaires (question no. 77) that their philosophy toward the death penalty was "neutral." See Juror M.J. Questionnaire; Juror T.K. Questionnaire. Similarly venire members E.B. (No. 17), K.L. (No. 57) and C.P. (No. 73), who are African-American, also said they were neutral towards the death penalty. White jurors M.S. (No. 83), J.H. (No. 42), R.G. (No. 38), F.G. (No. 34) were all moderately in favor of the death penalty. See Questionnaires of Jurors M.S., J.H., R.G., and F.G. Veniremembers C.A. (No. 5) and A.H. (No. 39), who are African-American, also were moderately in favor of the death penalty. See Questionnaires of Prospective Jurors E.B., K.L., C.P., C.A., and A.H. The white jurors served but the black veniremembers were struck by the State. (Supp. C. 25-27.)

Instead the court proffered its own reasons for the State's strikes. See Russell, 2015 W.L. 3448853 at \*7 (“After reviewing the questionnaires and the extensive voir dire examination, we can easily discern why the State struck prospective jurors C.P., C.A., A.H., K.L., and E.B.”). The Court did not, however, address or analyze whether the reasons it supplied had been evenly applied to both black and white potential jurors. Id. The court found no violation of Batson v. Kentucky and upheld Mr. Russell's conviction. Id. at \*7-\*8, \*37.

The Court of Criminal Appeals also upheld Mr. Russell's death sentence. Id. at \*37. However one judge dissented and found that Mr. Russell was ineligible for the death penalty as there was no legal or factual basis for the trial court's finding of the only aggravating circumstance at issue in this case. Russell, 2015 W.L. 3448853, at \*39, \*41 (Welch, J., dissenting) (finding “simply no authority” to support notion that “a breach of trust by a parent or a person acting in the place of a parent is a consideration in determining whether a murder was especially heinous, atrocious, or cruel compared to other capital offenses.”); Id. at \*48 (rejecting any finding that murder was heinous, atrocious or cruel based on psychological torture as too speculative because “[t]here simply is no evidence allowing that Katherine was chased or that she knew he was about to die.”).

On July 6, 2015, Mr. Russell petitioned the Alabama Court of Criminal Appeals for a rehearing. The court denied that petition on October 16, 2015. Mr. Russell then filed a Petition for Writ of Certiorari to the Court of Criminal Appeals on November 20, 2015, which the Alabama Supreme Court denied on February 19, 2016. Ex Parte Russell, No.

1150074 (Feb. 19, 2016). Mr. Russell now respectfully petitions for a Writ of Certiorari to review the judgment of the Alabama Court of Criminal Appeals in this case.

### REASONS FOR GRANTING THE WRIT

**I. THIS COURT SHOULD GRANT CERTIORARI, VACATE THE JUDGEMENT BELOW, AND REMAND THIS CASE TO THE COURT OF CRIMINAL APPEALS FOR FURTHER CONSIDERATION IN LIGHT OF FOSTER V. CHAPMAN.**

In Foster v. Chapman, 136 S. Ct. 1737 (2016), this Court emphasized that lower courts simply cannot “blind [them]selves to the ... existence” of evidence of discrimination by accepting explanations for striking black jurors where a prosecutor has “willingly accepted white jurors with the same traits that supposedly rendered [ a black juror] an unattractive juror.” Foster, 136 S. Ct. at 1748, 1750. In finding evidence of purposeful discrimination, this Court relied in part on the State’s dismissal of an African-American juror because, among other things, she was divorced. Id. at 1750. However, this Court found the State’s proffered reason dubious because the State had accepted three other white jurors who also were divorced. Id. Similarly, this Court rejected the State’s claim that a 34 year-old African-American juror was too young when several white jurors under the age of 36 were allowed to serve. Id. at 1750-51. This Court also acknowledged that it had “no quarrel with the State’s general assertion that it could not trust someone who gave materially untruthful answers on voir dire,” but found it difficult to credit this “otherwise legitimate reason” where a white juror had given “practically the same answer.” Id. at 1751. See also id. at 1754 (discrediting prosecutor’s claim that he objected to an African-American juror because

among other things his wife worked at a hospital when prosecutor accepted white juror who also worked at a hospital).

This Court stressed that “[i]f a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination.” Foster, 136 S. Ct. at 1754 (quoting, Miller-El v. Dretke, 545 U. S. 231, 241 (2005)), Snyder v. Louisiana, 552 U.S. 472, 483 (2008) (reversing and finding “implausibility” of prosecutor's explanation for strikes reinforced by acceptance of white jurors with similarities to African-Americans removed).

Here, the Court of Criminal Appeals claimed that it reviewed the questionnaires and voir dire examination and “easily” determined why the State struck five of the six African-American prospective jurors:

Juror C.P. indicated that she had a nephew who had been prosecuted in the same county for murder; prospective juror A.H. stated during voir dire that he had been arrested and prosecuted but acquitted by a jury of the offense of animal cruelty; prospective juror C.A. stated that he was a full-time college student and had a job that paid an hourly wage and that he did not wish to serve as a juror; prospective juror E.B. stated that he was neutral toward the death penalty and that he was not sure if the State should be allowed to impose the death penalty; and prospective juror K.L. said that she was in the medical field and was a member of the American Society of Clinical Pathologists.

Russell, 2015 W.L. 3448853, at \*7. The court concluded that each of these reasons generally were race neutral and sufficed to deny Mr. Russell’s request for a Batson hearing.

Unlike this Court in Foster, the Alabama Court of Criminal Appeals did not analyze whether these facially race neutral reasons were being disparately applied to exclude African-Americans. Had it done so, the court just as easily would have discovered that the reasons it proffered tended to evince rather than disprove racial discrimination. For example, the Court of Criminal Appeals posited that Prospective Juror K.L. was dismissed because she was in the “medical field and was a member of he American Society of Clinical Pathologists.” Russell, 2015 W.L. 3448853, at \*7. However at least four other white jurors also were or had been “in the medical field.” Juror B.Q. was a registered nurse and had been since 1978. (Questionnaire of Juror B.Q. at 4.) Juror C.B. and her spouse were both in the medical field: physical therapist and practice administrator for Growing Up Pediatrics (Questionnaire of Juror C.B. at 2, 4.). K.J. (Alternate Juror), though recently unemployed had been a medical assistant for 6 years and her husband was an orthotic brace fitter. (Questionnaire of Juror K.G. at 2, 4.) Additionally Juror F.G. was a retired respiratory therapist who had practiced for 24 years. (Questionnaire of Juror F.G. at 4.) Therefore if, as the Court of Criminal Appeals claimed the prosecutor dismissed Prospective Juror K.L., who is African-American, because she was in the medical field but accepted four white jurors who were also in the medical field, then under both Foster and Miller-El, the prosecutor engaged in purposeful race discrimination. Foster, 136 S. Ct. at 1754. (discrediting prosecutor’s claim that he objected to an African-American juror because among other things his wife worked at a hospital when prosecutor accepted white juror who also worked at a

hospital); Id. at 1754 (“If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination . . . .”) (internal quotes omitted), Miller-El, 545 U.S. at 241 (2005) (same).

Similarly, the Court of Criminal Appeals stated that Prospective Jurors C.P. and A.H. may have been dismissed legitimately because of connections to the criminal justice system: C.P.'s nephew had been prosecuted in the county for murder and A.H. had been prosecuted but acquitted for animal cruelty when he was in high school - more than 25 years prior to Mr. Russell's trial. Russell, 2015 W.L. 3448853, at \*7; (Questionnaire of Prospective Juror A.H. at 2, 5). However relying on these reasons runs afoul of Foster because the prosecutor did not dismiss K.G. (Alternate), whose half brother had been convicted for drug related offenses,(R. 609-10, Questionnaire of Juror K.G. at 5); nor M.S. or W.T. both of whom had been arrested but not convicted (Questionnaire of Juror M.S. at 5), (Questionnaire of Juror W.T. at 5); nor R.A. who indicated that his son had appeared before the judge in drug court (Questionnaire of Juror R.A. at 5). Again, if the prosecutor's reasons were the same as those given by the Court of Criminal Appeals, then these reasons would tend to support rather than negate Mr. Russell's Batson claim. Foster, 136 S. Ct. at 1754, Miller-El, 545 U.S. at 241.

“The Batson framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process.” Johnson v. California, 545 U.S. 162, 172 (2005). Mr. Russell has presented evidence that raised

‘suspicions and inferences’ of discrimination: five of six eligible black prospective jurors were dismissed from the venire, they shared little in common except their race and they gave answers or shared characteristics with white jurors who were accepted by the State. This Court has found that “[h]appenstance is unlikely to produce this disparity.” Miller-El, 545 U.S. at 241. Moreover, in evaluating Mr. Russell’s claim, Foster requires judges to undertake a “sensitive inquiry” and consult “all of the circumstances that bear upon the issue of racial animosity” 136 S. Ct. at 1748. The court below should not have simply relied on reasons deemed acceptable when applied to white venire members but used to dismiss black venire members. Id. at 1754. Accordingly, this Court should grant certiorari, vacate the lower court’s decision, and remand the case for the Alabama courts to reconsider Mr. Russell’s Batson claim in light of the decision in Foster v. Chatman. See Floyd v. Alabama, No. 15-7553, 2016 WL 3369418 (U.S. June 20, 2016) (mem) (granting certiorari, vacating opinion and remanding defendant’s Batson claims, which included instances of disparate treatment, to Alabama Court of Criminal Appeals in light of Foster).

**II. THIS COURT SHOULD GRANT CERTIORARI AND VACATE MR. RUSSELL’S DEATH SENTENCE BECAUSE, ALABAMA’S DEATH PENALTY SCHEME, LIKE THAT INVALIDATED BY THIS COURT IN HURST V. FLORIDA, REQUIRES A JUDGE TO INDEPENDENTLY DETERMINE WHETHER AGGRAVATING CIRCUMSTANCES EXIST AND WHETHER THEY OUTWEIGH MITIGATING CIRCUMSTANCES.**

Capital defendants have a Sixth Amendment right to “a jury determination of any fact which the legislature conditions an increase in their maximum punishment.” Ring v.

Arizona, 536 U.S. 584, 589 (2002). In Hurst v. Florida, 136 S. Ct. 616 (2016), this Court applied the Ring decision to Florida’s capital punishment statute and invalidated it, holding that the Sixth Amendment requires “Florida to base [the imposition of a] death sentence on a jury’s verdict, not a judge’s fact finding.” 136 S. Ct. at 624. Alabama’s current death penalty statute, under which Mr. Russell was sentenced, is virtually identical to the Florida statute that was struck down in Hurst. See Harris v. Alabama, 513 U.S. 504, 508 (1995) (“Alabama’s death penalty statute is based on Florida’s sentencing scheme . . .”). Like Florida law, Alabama law allows a jury to reach a non-binding advisory sentencing recommendation but requires a judge to independently make “the critical findings necessary to impose the death penalty.” Hurst, 136 S. Ct. at 622 (2016); Ring, 536 U.S. at 608 n.6 (both Florida and Alabama have “hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations”); Fla. Stat. § 921.141(3); Ala. Code §13A-5-46, 13A-5-47. Alabama’s death penalty scheme, therefore, is in direct conflict with this Court’s Hurst finding that “the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury’s mere recommendation is not enough.” Hurst, 136 S. Ct. at 619 (2016). Given that Mr. Russell’s sentence was handed down by a judge rather than a jury, it should be vacated in light of Hurst.

Mr. Russell was found guilty of murder of a person under the age of fourteen. However this verdict did not include an aggravating factor that would make Mr. Russell

eligible to receive a death sentence in Alabama. At the sentencing phase of Mr. Russell's trial, a jury found that his crime was especially heinous, atrocious, or cruel and the jury recommended a death sentence. However, this advisory recommendation was "not binding upon the court." Ala. Code §13A-5-47(e). Mr. Russell could only be sentenced to death after the trial judge found the existence of the one statutory aggravating circumstance arguably at issue here and determined that the weight of that circumstance was greater than that of any mitigating circumstances. Id. However, Alabama's requirement of a judge-made determination of facts necessary to impose a sentence of death runs a foul of the Sixth Amendment's requirement that a jury must find each fact necessary to impose a death sentence. Hurst, 136 S. Ct. at 619.

Citing Hurst, this court recently has vacated several Alabama death sentences because the same flaws that existed in the Florida sentencing scheme still are present in the Alabama statute. Wimbley v. Alabama, No. 15-7939, 2016 WL 410937 (U.S. May 31, 2016) (mem.), Johnson v. Alabama, No. 15-7091, 2016 WL 1723290 (U.S. May 2, 2016) (mem.), and Kirksey v. Alabama, No. 15-7912, 2016 WL 378578 (U.S. June 6, 2016) (mem.).

The Kirksey case is substantially similar to Russell's case. Like the defendant in Kirksey, Mr. Russell was found guilty of murder made capital because the victim was less than 14 years old. See Kirksey v. State, No. CR-09-1091, 2014 WL 7236987, at \*1 (Ala. Crim. App. Dec. 19, 2014), Russell v. State, No. CR-10-1910, 2015 W.L. 3448853, at \*1 (Ala. Crim. App. May 29, 2015). In both cases, the jury issued an advisory

recommendation of death based on one aggravating circumstance – that the murder was especially heinous atrocious and cruel in comparison to other capital cases. Kirksey, 2014 WL 7236987, at \*1, Russell, 2015 W.L. 3448853, at \*1. The Kirksey defendant, like Mr. Russell, was sentenced to death after a separate sentencing hearing at which a trial judge independently found the existence of the heinous, atrocious and cruel aggravating circumstance and that it outweighed any mitigating circumstances. Id. As it did with the Kirksey case, this Court should grant certiorari, vacate Mr. Russell’s death sentence and remand for further consideration in light of Hurst. Kirksey v. Alabama, No. 15-7912, 2016 WL 378578 (U.S. June 6, 2016) (mem.).

## CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant certiorari to the Alabama Court of Criminal Appeals and declare that Mr. Russell's constitutional rights were violated.

Respectfully Submitted,

---

RANDALL SUSSKIND\*  
JAQUELINE D. JONES  
122 Commerce Street  
Montgomery, AL 36104  
(334) 269-1803

*Counsel for Petitioner Ryan Russell*

\*Counsel of Record

June 23, 2016

**APPENDIX A:** Alabama Court of Criminal Appeals opinion, Russell v. State, No. CR-10-1910, 2015 W.L. 3448853 (Ala. Crim. App. May 29, 2015), and order denying rehearing on October 16, 2015

**APPENDIX B:** Alabama Supreme Court order denying certiorari, Ex parte Russell, No. 1150074 (Ala. February 19, 2016).

No. 15-9918

---

---

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

RYAN GERALD RUSSELL,  
*Petitioner,*

v.

STATE OF ALABAMA,  
*Respondent.*

On Petition for Writ of Certiorari to the  
Alabama Court of Criminal Appeals

**BRIEF IN OPPOSITION**

LUTHER STRANGE  
*Alabama Attorney General*  
Andrew L. Brasher\*  
*Solicitor General*  
Brett J. Talley  
*Deputy Solicitor General*  
OFFICE OF ALA. ATT'Y GEN.  
501 Washington Avenue  
Montgomery, AL 36130  
(334) 242-7300  
abrasher@ago.state.al.us  
\*Counsel of Record

July 26, 2016

*Counsel for State of Alabama*

---

---

Exhibit B

## CAPITAL CASE

## QUESTION PRESENTED (REPHRASED)

Ryan Gerald Russell (“Russell”) fatally shot his 11-year-old cousin, Katherine Helen Gillespie, while she was crouching in a 12-inch-wide space between the clothes dryer and a wall in Russell’s house. Russell fired the gun while pressing it against the back of her skull, killing her instantly. Police discovered Katherine’s body partially stuffed into a garbage can in the backseat of Russell’s Escalade.

The petition presents the following questions:

1. Has Russell waived or otherwise failed to preserve arguments under *Batson v. Kentucky*, 476 U.S. 79 (1986), that he failed to make to the state trial court?
2. There is no racial element to this case because Russell and his victim are both white. Should this Court review Russell’s incredibly weak and fact-specific *Batson v. Kentucky* claim, which was resolved in accordance with this Court’s precedent, including *Foster v. Chatman*, 136 S. Ct. 1737 (2016)?
3. Does this Court’s decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), invalidate a death sentence where a jury unanimously found beyond a reasonable doubt the existence of an aggravating circumstance and, on a vote of 12-0, recommended a sentence of death based on that circumstance?

**PARTIES**

The caption contains the names of all parties in the courts below.

## TABLE OF CONTENTS

QUESTION PRESENTED (REPHRASED) .....	i
PARTIES .....	ii
TABLE OF AUTHORITIES .....	v
STATEMENT.....	1
REASONS FOR DENYING THE WRIT .....	7
I. This Court should deny certiorari on the question about discrimination in jury selection under <i>Batson v. Kentucky</i> and <i>Foster v. Chatman</i> .....	8
A. This Court cannot reach the question that Russell presents .....	9
B. The Court of Criminal Appeals of Alabama correctly found that the record did not raise an inference of discrimination in the jury-selection process .....	12
II. Russell's sentence of death is consistent with <i>Ring</i> and <i>Hurst</i> and does not violate the Sixth Amendment.....	16
A. <i>Ring</i> and <i>Hurst</i> require the jury to find the existence of aggravating circumstances that make a defendant eligible for the death penalty .....	16
B. The jury unanimously found an aggravating circumstance that made Russell eligible for the death penalty .....	20

C. The weight of aggravating and mitigating circumstances is not a finding of fact or an element of a capital murder charge that must be found by the jury.....23

CONCLUSION.....27

**APPENDIX TABLE OF CONTENTS**

Verdict Form, *State of Alabama v. Ryan Gerald Russell*, No. CC-09-067 (Circuit Court for Shelby County, Alabama Nov. 22, 2010)..... 1a

Verdict Form, *State of Alabama v. Ryan Gerald Russell*, No. CC-09-067 (Circuit Court for Shelby County, Alabama Nov. 22, 2010)..... 2a

## TABLE OF AUTHORITIES

### Cases

<i>Adkins v. Warden, Holman CF</i> , 710 F.3d 1241 (11th Cir. 2013).....	11
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000).....	17
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986).....	1, 7
<i>Brice v. State</i> , 815 A.2d 314 (Del. 2003) .....	24
<i>Cent. Ala. Fair Hous. Ctr., Inc. v. Lowder Realty Co.</i> , 236 F.3d 629 (11th Cir. 2000).....	14
<i>Commonwealth v. Roney</i> , 866 A.2d 351 (Pa. 2005).....	24
<i>Ex parte Branch</i> , 526 So. 2d 609 (Ala. 1987).....	15
<i>Ex parte Floyd</i> , 190 So. 3d 972 (Ala. 2012).....	11
<i>Ex parte McGriff</i> , 908 So. 2d 1024 (Ala. 2004) .....	20
<i>Ex parte State</i> , Nos. CR–15–0619, CR–15–0622, CR– 15–0623, CR–15–0624, 2016 WL 3364689 (Ala. Crim. App. June 17, 2016)...	8, 20, 26
<i>Ex parte Waldrop</i> , 859 So. 2d 1181 (Ala. 2002) .....	18, 20, 26

<i>Foster v. Chatman</i> , 136 S. Ct. 1737 (2016).....	1, 7, 15
<i>Higgs v. United States</i> , 711 F. Supp. 2d 479 (D. Md. 2010).....	23
<i>Hurst v. Florida</i> , 136 S. Ct. 616 (2016).....	passim
<i>Johnson v. Alabama</i> , 136 S. Ct. 1837 (2016).....	8
<i>Johnson v. California</i> , 545 U.S. 162 (2005).....	10
<i>Kirksey v. Alabama</i> , 136 S. Ct. 2409 (2016).....	8
<i>Lee v. Comm'r, Ala. Dep't of Corr.</i> , 726 F.3d 1172 (11th Cir. 2013).....	23
<i>Miller–El v. Dretke</i> , 545 U.S. 231 (2005).....	15
<i>Nunnery v. State</i> , 263 P.3d 235 (Nev. 2011).....	24
<i>Oken v. State</i> , 835 A.2d 1105 (Md. 2003).....	24
<i>Petric v. State</i> , 157 So. 3d 176 (Ala. Crim. App. 2013).....	26
<i>Reeves v. State</i> , No. CR–13–1504, 2016 WL 3247447 (Ala. Crim. App. June 10, 2016).....	17
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002).....	1, 7, 17, 25

<i>Ritchie v. State</i> , 809 N.E.2d 258 (Ind. 2004).....	24
<i>Russell v. State</i> , No. CR-10-1910, 2015 WL 3448853 (Ala. Crim. App. May 29, 2015) .....	7
<i>Snyder v. Louisiana</i> , 552 U.S. 472 (2008).....	10
<i>State v. Fry</i> , 126 P.3d 516 (N.M. 2005).....	24
<i>State v. Gales</i> , 658 N.W.2d 604 (Neb. 2003).....	24
<i>United States v. Purkey</i> , 428 F.3d 738 (8th Cir. 2005) .....	23
<i>United States v. Sampson</i> , 486 F.3d 13 (1st Cir. 2007).....	23
<i>Walton v. Arizona</i> , 497 U.S. 639 (1990).....	17
<i>White v. State</i> , 179 So. 3d 170 (Ala. Crim. App. 2013).....	9
<i>Wimbley v. Alabama</i> , 136 S. Ct. 2387 (2016).....	8
 <b><u>Statutes</u></b>	
18 U.S.C. § 3553 .....	26
ALA. CODE § 13A-5-45 (1975).....	18, 20
FLA. STAT. § 921.141.....	22

**Rules**

ALA. R. APP. P. 45A.....11

**STATEMENT**

This is a capital case that involves two issues: the straightforward application of *Batson v. Kentucky*, 476 U.S. 79 (1986), which was not altered by this Court’s decision in *Foster v. Chatman*, 136 S. Ct. 1737 (2016), and a death sentence consistent with *Ring v. Arizona*, 536 U.S. 584 (2002) and *Hurst v. Florida*, 136 S. Ct. 616 (2016).

Ryan Gerald Russell murdered his 11-year-old cousin, Katherine Helen Gillespie, while she was living in his home. He shot her point-blank in the back of the head as she crouched in a small space between the clothes dryer and wall in his laundry room, killing her instantly. Russell then partially stuffed her into a garbage can in the backseat of his Cadillac Escalade, where her body was found.

Katherine had attended the YMCA Hargis Day Camp in Chelsea during the summer of 2008. R. 972–73, 1421–22.<sup>1</sup> Her mother had died when she was seven years old, and she had no legal father. R. 1044–45. She lived with her grandmother in Boaz, Alabama for three years before moving in with Russell, who became her legal guardian and who was in the process of adopting her at the time of her murder.<sup>2</sup> R. 1044, 1116, 1548–49. Russell picked her up

---

<sup>1</sup> “C.” refers to the clerk’s record. “R.” refers to the trial transcript.

<sup>2</sup> Russell and Katherine were cousins because their grandfathers were brothers. C. 56, 264.

from day camp on Monday, June 16, 2008, at approximately 6:00 p.m. R. 977, 987.

While driving his Cadillac Escalade along Inverness Parkway, Russell rear-ended a truck with three teenagers. R. 993–95, 1017–18. Because Russell left the scene of the accident and the teenagers were unable to get his license plate number, they followed him to his home on Carrie Downs Road. R. 995–98, 1019–20. Once there, Robert “Bo” Montiel and Andrew Stone tried to speak to Russell, who was sitting inside his vehicle in the driveway, but Russell ignored them. R. 998–1001, 1021–22.

At that point, Katherine exited the car; she was crying and visibly upset. R. 998–99, 1022. She said, “Please don’t call the police on my daddy. He didn’t mean to do anything wrong.” R. 999, 1022. While the teenagers attempted to talk to Russell, Katherine retrieved a garbage can from the street and then entered the garage; Russell honked the horn and the garage door opened. R. 1000–01, 1022. Russell backed the Escalade into the garage, and the garage door closed. R. 1001, 1005, 1023.

Stone called his parents, who then called the police; the parents and police had arrived at Russell’s residence by approximately 6:30 p.m. R. 1005–06, 1012, 1025. They knocked on Russell’s door, but no one would answer. R. 890–93. Because the injuries sustained by the teenagers were not serious, the police informed them that nothing further could be done at that time. R. 896.

At approximately 8:00 p.m. that evening, Russell's stepmother spoke with his ex-girlfriend, Emily Webber, and asked her to go by Russell's home because their grandfather had died and because she had been unable to reach Russell on the phone. R. 1037–38, 1049–51. Webber and a friend, Nick Barnes, went to Russell's house home at approximately 8:30 p.m. R. 1052. Although the lights in the house were out, Webber saw "flickering from a television" in the bedroom. R. 1100. She looked through the garage door window and saw the shadow of a person about Russell's height standing between the two vehicles inside the garage. R. 1054. She called out and beat on the door, but there was no response. R. 1054–55.

Webber discovered that the garage door was unlocked and entered. R. 1056–57. She noticed that the back hatch on the Escalade was open with wet towels inside and that the two front airbags had been deployed. R. 1063. Webber and Barnes called the police, which led to the discovery of Katherine's body inside the Escalade. R. 959, 1063–64, 1067. Police then searched the house and found Russell unresponsive and lying in the fetal position in a shower next to some oblong pills. R. 1130–33.

Katherine's body had been partially stuffed upside-down inside a garbage can; her body was visible only from the waist down, and she was covered in bloody towels and clothes. R. 963, 1082–83, 1155, 1262, 1430. Katherine had abrasions on the stomach, lower chest, and hands, and her eyelids appeared swollen and heavy. R. 1161–64. The medical examin-

er noted contusions on her chest and the lower third of her left thigh, which were consistent with impact from an air bag. R. 1436, 1443. The medical examiner testified that the star-shaped wound on Katherine's head was caused by a contact gunshot wound and that the gunshot wound fractured her skull, causing extensive intracranial hemorrhaging, essentially causing her skull to "blow[] up." R. 1444–46.

In processing the house for evidence, law enforcement agents found a washing machine near the Escalade full of bloody water, clothes, cell phones, and a .40 caliber shell casing. R. 1185, 1270–73. A bullet core, bullet jacket and three pieces of lead retrieved from the inside of Katherine's head was determined to be from a .40 caliber bullet; also, the medical examiner also found another .40 caliber shell casing inside the plastic bag that contained Katherine's body. R. 1200, 1336, 1339, 1433–34.

Several weeks later, while cleaning out Russell's house, his sister discovered a .40 caliber pistol underneath the couch in the garage; ballistics testing revealed that this was the weapon that fired the .40 caliber shell casings recovered from the washing machine and the plastic bag. R. 1202–07, 1240, 1243, 1248.

A blood-spatter expert testified that it was his opinion that the blood stains in the laundry room were consistent with a gunshot wound, that Katherine had been "crouching" in a 12-inch-wide space between the clothes dryer and the wall, and that her head was approximately 18-36 inches above the ground at the time she was shot. R. 1491–94, 1505.

On January 15, 2009, the Shelby County Grand Jury indicted Russell for one count of capital murder for the death of Katherine pursuant to ALA. CODE § 13A-5-40(a)(15) (1975). C. 1, 17–18. On November 8, 2010, voir dire began. R. 7. The voir dire process was extensive, lasting three days and comprising more than 700 pages of the record. R. 7–808. On November 12, 2010, the jury was struck and sworn, and the trial began. R. 835–37. Russell did not make a *Batson* motion at trial or raise any objection to the jury-selection process. The jury returned a verdict finding Russell guilty of capital murder of a child under the age of 14; the jurors were individually polled and confirmed the verdict. C. 13, 126; R. 1679–80.

After the penalty phase of trial, the jury unanimously found beyond a reasonable doubt that the capital offense was especially heinous, atrocious, or cruel, and it unanimously recommended that Russell be sentenced to death. C. 127–28; R. 1850. These findings are reflected in special verdict forms that are reproduced as an appendix to this brief. *See* BIO App. 1a–2a.

The trial court ordered a pre-sentence investigation and later conducted a sentencing hearing on December 16, 2010. C. 13, 132–37; Vol. 12, Dec. 16, 2010 Hearing, R. 1–13.<sup>3</sup> The trial court issued a more detailed amended sentencing order on January 5, 2011. C. 151–58. After weighing the statutory and

---

<sup>3</sup> The pagination for the record begins anew with each hearing, so volume numbers and hearing dates are included when necessary.

non-statutory mitigating circumstances against the statutory aggravating circumstance found by the jury, the trial court followed the jury's recommendation and sentenced Russell to death. C. 145, 151–58; Vol. 12, December 16, 2010, R. 8–12.

### REASONS FOR DENYING THE WRIT

This is a heavily fact-bound case that presents no novel questions for this Court to answer and involves no circuit split in need of resolution. Rather, Russell takes issue with the routine application of this Court's precedents under *Foster v. Chatman*, 136 S. Ct. 1737 (2016) and *Hurst v. Florida*, 136 S. Ct. 616 (2016), which did not expand this Court's holdings in *Batson v. Kentucky*, 476 U.S. 79 (1986) and *Ring v. Arizona*, 536 U.S. 584 (2002), respectively.

The petition argues that *Foster* requires his case to be remanded for a new consideration of his *Batson* claim. Russell did not raise a *Batson* objection at trial, which would preclude or, at least, complicate this Court's review. Moreover, this Court's decision in *Foster* did not alter the *Batson* analysis, and Russell's unpreserved *Batson* claim was nevertheless addressed by the Court of Criminal Appeals of Alabama. *Russell v. State*, No. CR-10-1910, 2015 WL 3448853 (Ala. Crim. App. May 29, 2015). Russell's claim is exceedingly weak, and the state court found race-neutral reasons for striking each prospective juror that Russell claims was improperly removed. *Id.* at \*5.

Russell's sentence is also consistent with *Ring* and *Hurst*. On a special verdict form, the jury in this case unanimously found beyond a reasonable doubt the aggravating circumstance that the capital offense was especially heinous, atrocious, or cruel, which made Russell eligible for the death penalty. *See* BIO App. 1a. The jury then, by a vote of 12-0, unanimously advised that Russell be sentenced to death. *See*

BIO App. 2a. Following the jury's recommendation, the judge determined that Russell did, in fact, deserve that sentence. The heinous, atrocious, or cruel aggravating circumstance was the sole aggravating circumstance that the judge considered. Russell's sentence of death fits well within the parameters set out in *Ring* and applied in *Hurst*.

Although this Court has remanded other cases for the Alabama courts to apply *Hurst* in the first instance, there is no reason for a similar remand in this case. After this Court remanded *Johnson v. Alabama*, 136 S. Ct. 1837 (2016), *Wimbley v. Alabama*, 136 S. Ct. 2387 (2016), and *Kirksey v. Alabama*, 136 S. Ct. 2409 (2016), to the Court of Criminal Appeals of Alabama for further consideration in light of *Hurst*, the Court of Criminal Appeals determined that Alabama's capital-sentencing scheme is consistent with *Hurst* and does require the jury to make the findings of fact necessary for the imposition of the death penalty. *Ex parte State*, Nos. CR-15-0619, CR-15-0622, CR-15-0623, CR-15-0624, 2016 WL 3364689 (Ala. Crim. App. June 17, 2016). Because the Alabama courts have held Alabama's capital-sentencing scheme to be constitutional under both *Ring* and *Hurst*, a remand in this case would be pointless.

**I. This Court should deny certiorari on the question about discrimination in jury selection under *Batson v. Kentucky* and *Foster v. Chatman*.**

Because Russell never raised a *Batson* objection at trial, this Court cannot consider his arguments

that his Equal Protection rights were violated. Furthermore, the Court of Criminal Appeals of Alabama addressed Russell's *Batson* claim on appeal and found that race-neutral reasons for removing each of the prospective jurors existed. *Foster* involved a straightforward application of *Batson* to a specific fact scenario in a Georgia case and did not change the *Batson* analysis.

**A. This Court cannot reach the question that Russell presents.**

Russell did not raise a racial discrimination claim at trial. Instead, the first time that he raised this claim was on appeal. Because there was no contemporaneous *Batson* challenge, the Court of Criminal Appeals of Alabama should never have considered Russell's *Batson* claim.

The Court of Criminal Appeals of Alabama has suggested that a *Batson* claim "is not an inquiry that can be initiated on appeal as a result of a plain-error review." *White v. State*, 179 So. 3d 170, 193 (Ala. Crim. App. 2013). The Court observed that "both the federal and state courts have consistently held that the failure to make a timely [*Batson*] objection effectively waives any arguments based on improprieties in jury selection which the defendant might urge pursuant to *Batson*." *Id.* at 198. *Batson* contemplates a contemporaneous challenge to the prosecutor's strikes to allow the prosecutor to present his rationale for the contested strikes at the time they are made, thereby giving the court an opportunity to correct any error before trial and preserving a record for appeal.

Indeed, even this Court has implied that a timely objection is necessary for a proper *Batson* challenge: “*Batson* held that **because the petitioner had timely objected** to the prosecutor's decision to strike all black persons on the venire, the trial court was in error when it flatly rejected the objection without requiring the prosecutor to give an explanation for his action.” *Johnson v. California*, 545 U.S. 162, 169–70 (2005) (emphasis added) (internal citation and quotations omitted).

This Court recognized that making a timely *Batson* challenge is crucial because of the importance that the trial court plays in the *Batson* inquiry: “[R]ace-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's firsthand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie peculiarly within a trial judge's province.” *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) (internal citation and quotations omitted).

The petitioners in both *Batson* and *Foster* made timely objections to a pattern of racially discriminatory strikes of prospective jurors by the prosecution.

Nevertheless, in this case, the Court of Criminal Appeals of Alabama did review Russell's *Batson* claim for “plain error,” a special provision of Ala-

bama law for capital cases. *See* Pet. App. A 17; ALA. R. APP. P. 45A.<sup>4</sup> This state-law standard requires a heightened showing of “unfair prejudicial impact on the jury’s deliberations.” Pet. App. A 15. This is a difficult standard to meet and would preclude or, at least, complicate this Court’s review.

Because the claim was waived at trial and revived by the state-law plain-error review, it is not clear that there remains a federal claim for this Court to review. One Eleventh Circuit Judge has suggested that an Alabama appellate court in this procedural posture does “not decide a *Batson* claim at all; rather, it decided a state law claim bearing the *Batson* label.” *Adkins v. Warden, Holman CF*, 710 F.3d 1241, 1258 (11th Cir. 2013) (Tjoflat, J., dissenting). One Justice on the Supreme Court of Alabama has agreed. *See Ex parte Floyd*, 190 So. 3d 972, 978–84 (Ala. 2012) (Murdock, J., concurring in the result).

Nothing in *Batson* contemplates the problem that Russell presented the Alabama appellate courts. Rather than raise a *Batson* challenge at the time of his trial and establish a contemporaneous record of evidence of the alleged discriminatory strikes and race-neutral explanations, Russell’s counsel declined to

---

<sup>4</sup> Alabama’s plain error doctrine is explained in Rule 45A of the Alabama Rules of Appellate Procedure: “In all cases in which the death penalty has been imposed, the Court of Criminal Appeals shall notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant.”

challenge the jury he received. Because no objection was made at trial, no hearing was held. Russell criticizes the state appellate court for engaging in a plain error review to determine if the record raised an inference of racial discrimination in the juror-selection process. However, Russell forced the appellate court to engage in this type of review by failing to make a record of the alleged discrimination in the trial court. Applying the heightened “plain-error” standard of review, the state appellate court reasonably required Russell to support his waived argument with something more than tenuous juror comparisons and the number of black jurors struck.

Because Russell did not object to the allegedly discriminatory peremptory strikes, he did not preserve his *Batson* claim. The Alabama courts thus adjudicated a state-law claim, and this Court should not grant Russell’s petition for writ of certiorari.

**B. The Court of Criminal Appeals of Alabama correctly found that the record did not raise an inference of discrimination in the jury-selection process.**

Even assuming this Court could address the supposed *Batson* claim that Russell waived by failing to object during the jury-selection process, his petition merely seeks a more thorough review of the case-specific factual questions involving the State’s peremptory strikes of prospective jurors. His arguments do not raise a compelling reason to invoke this Court’s jurisdiction.

Russell did not raise a *Batson* objection at trial. The Court of Criminal Appeals, engaging in state-law plain-error review, decided the *Batson* issue. After examining “the voir dire examination of the prospective jurors, which consists of over 700 pages of the record and the 14-page juror questionnaires,” the Court discerned race-neutral reasons for each of the challenged strikes. Pet. App. A 18.

The only purported evidence of discrimination that Russell identifies is the fact that the State used five of its twenty-seven peremptory strikes to remove all but one black juror from the venire and that some of the black jurors struck by the State had similar characteristics to some of the white jurors on the final jury. Russell made those precise arguments to the Court of Criminal Appeals of Alabama. Russell may disagree with that Court’s findings, but he identifies nothing in *Foster* that would require a different *Batson* analysis by that Court.

As Russell recognizes, “African-Americans constitute only 11% of the total population of Shelby County.” Pet. 3. One of the twelve jurors in Russell’s case was black, or 8.3% of the jury, slightly under 11%. Had two of the twelve jurors been black, they would have comprised 16.7% of the jury, slightly over 11%. While a simple statistical analysis may not prove or disprove racial discrimination, the Eleventh Circuit has recognized that “the unchallenged presence of jurors of a particular race on a jury substantially weakens the basis for a *prima facie* case of discrimination in the peremptory striking of jurors of that race.” *Cent. Ala. Fair Hous. Ctr., Inc. v. Lowder Real-*

*ty Co.*, 236 F.3d 629, 638 (11th Cir. 2000). In Russell's case, the one black member of the jury was almost precisely in line with the demographics of Shelby County.

The comparisons that Russell attempts to draw between black veniremembers that were struck by the State and white members of the final jury are meager at best. And because he raised no objection during the trial, the State was unable to offer race-neutral reasons at the time. Years later, Russell argued his *Batson* claims in the Court of Criminal Appeals of Alabama but was unsuccessful. Although it was nearly five years after his initial trial, that Court examined the record and determined that it did not raise an inference of racial discrimination in the jury-selection process. *Foster* would not change the analysis that the Court conducted.

For his part, Russell has never advanced a theory about why the prosecutors would have specifically endeavored to strike black jurors from a case in which a white man murdered his 11-year-old white female cousin. Applying the heightened "plain-error" standard of review, the Court of Criminal Appeals of Alabama reasonably required Russell to support his waived argument with more than bare numbers and weak juror comparisons.

This Court in *Foster* required far more than that when deciding that a *Batson* violation had occurred. In *Foster*, this Court reiterated that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence

tending to prove purposeful discrimination.” *Foster*, 136 S. Ct. at 1754 (quoting *Miller–El v. Dretke*, 545 U.S. 231, 241 (2005)). However, this Court also relied on substantial additional case-specific evidence, including evidence that the prosecution’s stated reasons for striking were inconsistent and fluctuating, that the prosecution misrepresented the record, and that a persistent focus on race permeated the prosecution’s jury selection file.

In Russell’s case, the prosecution never offered shifting explanations for striking black jurors because Russell never made a *Batson* objection at trial. There is also no indication or allegation that the prosecution ever misrepresented the record and no evidence that the prosecution had any particular preoccupation with race in its jury selection file.

In short, this Court and the Alabama Supreme Court described types of evidence tending to prove purposeful discrimination that could conceivably apply here long before the Court of Criminal Appeals of Alabama decided the *Batson* issue in Russell’s case. See *Miller–El*, 545 U.S. at 241; *Ex parte Branch*, 526 So. 2d 609, 622–23 (Ala. 1987). As discussed above, the additional case-specific factors considered by this Court in *Foster* do not apply to Russell’s case. Because *Foster* offers no additional applicable guidance, were this case to be remanded, the Court of Criminal Appeals of Alabama would simply conduct an identical *Batson* analysis and come to the same conclusion, that the record in Russell’s case does not raise an inference of discrimination and that there is no plain error regarding an alleged *Batson* violation.

Because *Foster* did not change the legal principles of *Batson*, and certainly did not do so in any way that would apply to this case, this Court should not grant Russell's petition for writ of certiorari.

**II. Russell's sentence of death is consistent with *Ring* and *Hurst* and does not violate the Sixth Amendment.**

Russell erroneously argues that Alabama's death penalty sentencing procedures violate the Sixth Amendment because they allow a judge to determine whether to sentence someone who is convicted of capital murder to either death or life-without-parole. He relies on two decisions to support this argument: *Ring v. Arizona* and *Hurst v. Florida*. He claims that these cases hold that the Sixth Amendment does not allow "a non-binding advisory sentencing recommendation by the jury" or a sentence that is "handed down by a judge rather than a jury." Pet. 12. Russell misunderstands *Ring*, *Hurst*, and the way that Alabama's capital sentencing statute works. Because the jury unanimously found a statutory aggravating factor beyond a reasonable doubt (BIO App. 1a) and unanimously recommended that he be sentenced to death (BIO App. 2a), his death sentence is constitutional under any conceivable reading of *Hurst*.

**A. *Ring* and *Hurst* require the jury to find the existence of aggravating circumstances that make a defendant eligible for the death penalty.**

*Ring* 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*. As the Court of Criminal Appeals of Alabama has recognized, the “United States Supreme Court’s opinion in *Hurst* was based solely on its previous opinion in *Ring*.” *Reeves v. State*, No. CR–13–1504, 2016 WL 3247447, at \*37 (Ala. Crim. App. June 10, 2016). This Court did not extend or alter its holding in *Ring*. In *Hurst*, the State of Florida did not ask a jury to find the existence of any aggravating circumstance at the guilt or penalty phases. *Hurst*, 136 S. Ct. at 621–22. The judge, however, did find aggravating circumstances and imposed a death sentence. In *Hurst*, this Court likened Florida’s sentencing scheme to Arizona’s in *Ring* because “Florida [did] not require the jury to make the critical findings necessary to impose the death penalty.” *Id.* at 622. Instead, “the judge alone [found] the existence of an aggravating circumstance” that expanded the range of punishment to include the death penalty. *Id.* at 624. In contrast, Alabama’s statute and case law

make it clear that the jury must unanimously find the existence of at least one aggravating circumstance beyond a reasonable doubt to impose the death penalty. See ALA. CODE § 13A-5-45(f) (1975); *Ex parte Waldrop*, 859 So. 2d 1181, 1190 (Ala. 2002).

There is no reason to remand this case for the Alabama courts to evaluate *Ring* and *Hurst* because the Alabama courts have already held that Alabama's sentencing scheme is consistent with *Ring* and *Hurst*. The Alabama Supreme Court held that state law is consistent with *Ring* several years ago:

*Ring* [*v. Arizona*, 536 U.S. 584 (2002)] and *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)] do not require that the jury make *every* factual determination; instead, those cases require the jury to find beyond a reasonable doubt only those facts that result in “an increase in a defendant's authorized punishment ...” or “expose [ ] [a defendant] to a greater punishment ....” *Ring*, 536 U.S. at 602, 604, 122 S. Ct. at 2439, 2440 (quoting *Apprendi*, 530 U.S. at 494, 120 S. Ct. 2348). Alabama law requires the existence of only one aggravating circumstance in order for a defendant to be sentenced to death. ALA. CODE 1975, § 13A-5-45(f). The jury in this case found the existence of that one aggravating circumstance .... At that point, [the defendant] became “exposed” to, or eligible for, the death penalty.

*Ex parte Waldrop*, 859 So. 2d at 1190 (emphasis in original). Similarly, the Court of Criminal Appeals of Alabama has recently explained that Alabama's capi-

tal sentencing statute is still constitutional under *Hurst*:

[U]nder Alabama's capital-sentencing scheme, a capital defendant is not eligible for the death penalty unless the jury unanimously finds beyond a reasonable doubt, either during the guilt phase or during the penalty phase of the trial, that at least one of the aggravating circumstances in § 13A-5-49 exists. Unlike both Arizona and Florida, which conditioned a first-degree-murder defendant's eligibility for the death penalty on a finding by *the trial court* that an aggravating circumstance existed, Alabama law conditions a capital defendant's eligibility for the death penalty on a finding by *the jury* that at least one aggravating circumstance exists. If the jury does not unanimously find the existence of at least one aggravating circumstance, the trial court is foreclosed from sentencing a capital defendant to death. If the jury unanimously finds that at least one aggravating circumstance does exist, then the trial court must proceed to determine the appropriate sentence. Although the trial court in Alabama must also make findings of fact regarding the existence or nonexistence of aggravating circumstances, the trial court's findings are not the findings that render a capital defendant eligible for the death penalty, as was the case in *Ring* and *Hurst*. Under Alabama law, only a jury's finding that an aggravating circumstance exists will expose a capital defendant to the death penalty.

*Ex parte State*, 2016 WL 3364689, at \*11.

Russell erroneously contends that Alabama's capital sentencing scheme "is virtually identical to the Florida statute that was struck down in *Hurst*." Pet. 12. Although the Alabama and Florida capital sentencing schemes are similar in many respects, they are different where it matters for the Sixth Amendment.

Unlike in Florida, Alabama law does not expose a defendant to a possible sentence of death based on a trial court's finding that an aggravating circumstance exists. Rather, Alabama law requires that the jury must unanimously find the existence of at least one aggravating circumstance beyond a reasonable doubt to impose the death penalty. *See* ALA. CODE § 13A-5-45(f) (1975); *Ex parte Waldrop*, 859 So. 2d at 1190. Alabama courts have unambiguously said that the jury, not a judge, must unanimously find beyond a reasonable doubt the presence of an aggravating circumstance and that "[i]f the jury determines that no aggravating circumstance as defined in § 13A-5-49 exists, the jury must return a verdict, binding on the trial court, assessing the penalty of life imprisonment without parole." *Ex parte McGriff*, 908 So. 2d 1024, 1038 (Ala. 2004).

**B. The jury unanimously found an aggravating circumstance that made Russell eligible for the death penalty.**

The jury in this case unanimously found an aggravating circumstance, which is all that *Ring* and *Hurst* require. The jury made that finding on a spe-

cial verdict form, BIO App. 1a, and then unanimously recommended that Russell be sentenced to death on another special verdict form, BIO App. 2a. In sentencing Russell, the judge considered the single aggravating circumstance that the jury unanimously found to exist. The judge considered no aggravating circumstances, independent of a jury's factfinding, that would be necessary for the imposition of the death penalty.

*Hurst*, as Russell recognizes, states that a sentencing judge cannot “find an aggravating circumstance, independent of a jury's factfinding, that is **necessary** for imposition of the death penalty.” *Hurst*, 136 S. Ct. at 624 (emphasis added). Russell argues that he “could only be sentenced to death after the trial judge found the existence of the one statutory aggravating circumstance,” which contravenes *Hurst*. Pet. 13. According to Russell, *Hurst* prevents a sentencing judge from making any findings of fact that are separate from a jury's determinations. That is not what *Hurst* and *Ring* say. A trial court cannot find the presence of an aggravating circumstance that the jury has not found that is **necessary** to increase a defendant's authorized punishment to the sentence of death. If a jury has found the existence of at least one aggravating circumstance, then any additional factfinding by a trial court would not be necessary for the imposition of the death penalty.

The record reveals that nothing in Russell's case runs afoul of this Court's holding in *Hurst*. In *Hurst*, “the maximum punishment Timothy Hurst could

have received without any judge-made findings was life in prison without parole,” and the “judge increased Hurst's authorized punishment based on her own factfinding.” *Hurst*, 136 S. Ct. at 622. In Russell's case, the maximum punishment he could have received without judge-made findings was death, and the trial court did not increase his authorized range of punishment based on its own factfinding. Rather, the jury increased Russell's authorized punishment based on its unanimous agreement that the State had proven beyond a reasonable doubt the existence of an aggravating circumstance. *See* BIO App. 1a.

In fact, Russell's sentence is constitutional even under the broadest possible interpretation of *Hurst*. Following *Hurst*, and out of an abundance of caution, Florida amended its capital sentencing statute to state that a “court may consider only an aggravating factor that was unanimously found to exist by the jury.” FLA. STAT. § 921.141(3)(a)(2). That is precisely what happened in Russell's case. After the penalty phase, on a special verdict form, Russell's jury unanimously found the existence of the aggravating factor that the capital offense was especially heinous, atrocious, or cruel. *See* BIO App. 1a. That was the only aggravating circumstance that the trial court considered during sentencing. *See* C. 156. Russell identifies no aggravating factors making him eligible for the death penalty that were found by the trial court but not found by the jury. Thus, Russell's jury clearly made “the critical findings necessary to impose the death penalty.” *Hurst*, 136 S. Ct. at 622.

**C. The weight of aggravating and mitigating circumstances is not a finding of fact or an element of a capital murder charge that must be found by the jury.**

In his effort to fit this case into *Hurst's* framework, Russell's petition erroneously conflates two separate issues: (1) whether an aggravating circumstance exists and (2) whether the aggravating circumstances outweigh the mitigating circumstances. The first issue is a finding of fact that may be submitted to a jury. The second is not; instead, it is a prudential determination that hundreds of judges make every day in non-capital sentencing. Russell cites no cases that support his contention that the weighing of aggravating and mitigating factors is a finding of fact that must be made by a jury. On the contrary, courts have uniformly held that a judge may perform the "weighing" of factors and arrive at an appropriate sentence without violating the Sixth Amendment.<sup>5</sup>

---

<sup>5</sup> See *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1198 (11th Cir. 2013) ("*Ring* does not foreclose the ability of the trial judge to find the aggravating circumstances outweigh the mitigating circumstances."); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); *United States v. Purkey*, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); *Higgs v. United States*, 711 F. Supp. 2d 479, 540 (D. Md. 2010) ("Whether the aggravating factors presented by the prosecution outweigh the mitigating factors presented by the defense is a *normative* question rather than a

Russell distorts the holding of *Hurst*. According to Russell, the determination of whether “the weight of [an aggravating] circumstance was greater than that of any mitigating circumstances” is a finding of fact that the jury must make in order to impose the death penalty, and an advisory verdict by the jury is insufficient under *Ring*. Pet. 13. *Hurst* did not say either of those things. *Hurst* did not declare that a recommendation by the jury about whether to sentence a defendant to death or life-without-parole is unconstitutional. *Hurst* also did not say that the weighing of aggravating and mitigating circumstances is a find-

---

*factual one.*”); *Nunnery v. State*, 263 P.3d 235, 253 (Nev. 2011) (“[T]he weighing of aggravating and mitigating circumstances is not a fact-finding endeavor.”); *Brice v. State*, 815 A.2d 314, 322 (Del. 2003) (*Ring* does not apply to the weighing phase because weighing “does not increase the punishment.”); *Ritchie v. State*, 809 N.E.2d 258, 266 (Ind. 2004) (“In *Bivins v. State*, 642 N.E.2d 928, 946 (Ind. 1994), we concluded, as a matter of state law, that ‘[t]he determination of the weight to be accorded the aggravating and mitigating circumstances is not a ‘fact’ which must be proved beyond a reasonable doubt but is a balancing process.’ *Apprendi* and its progeny do not change this conclusion.”); *Oken v. State*, 835 A.2d 1105, 1158 (Md. 2003) (“[T]he weighing process never was intended to be a component of a ‘fact finding’ process.”); *State v. Gales*, 658 N.W.2d 604, 627–29 (Neb. 2003) (“[W]e do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review be undertaken by a jury.”); *State v. Fry*, 126 P.3d 516, 534 (N.M. 2005) (“[T]he weighing of aggravating and mitigating circumstances is thus not a ‘fact that increases the penalty for a crime beyond the prescribed statutory maximum.’”); *Commonwealth v. Roney*, 866 A.2d 351, 360 (Pa. 2005) (“[B]ecause the weighing of the evidence is a function distinct from fact-finding, *Apprendi* does not apply here.”).

ing of fact. Instead, this Court merely made it clear that an advisory verdict could not function as a substitute for a jury's factual finding that an aggravating circumstance exists, which is necessary to expose a defendant to the death penalty. *Hurst*, 136 S. Ct. at 622.

*Hurst* held that a jury's non-unanimous advisory verdict that recommends death cannot be considered a factual finding that an aggravating circumstance exists, which would qualify a defendant for the sentence of death. As this Court made clear, Florida was not permitted to "treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Hurst*, 136 S. Ct. at 622. *Ring* requires only that a jury "find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 609. The Alabama capital sentencing scheme, unlike Florida's former capital sentencing scheme, requires the jury to unanimously find the existence of an aggravating circumstance beyond a reasonable doubt. That meets the specifications of *Ring* and *Hurst* to the letter.

The Court of Criminal Appeals of Alabama has recently reaffirmed its understanding that the balancing of aggravating and mitigating circumstances is not a factual determination "susceptible to any quantum of proof" and that *Ring* and *Apprendi* do not require a jury to engage in the weighing process:

[T]he weighing process is not a factual determination or an element of an offense; instead, it is a moral or legal judgment that takes into account a theoretically limitless set of facts

and that cannot be reduced to a scientific formula or the discovery of a discrete, observable datum.....

[...]

Thus, the determination whether the aggravating circumstances outweigh the mitigating circumstances is not a finding of fact or an element of the offense. Consequently, *Ring* and *Apprendi* do not require that a jury weigh the aggravating circumstances and the mitigating circumstances.

*Petric v. State*, 157 So. 3d 176, 252–53 (Ala. Crim. App. 2013) (quoting *Ex parte Waldrop*, 859 So. 2d at 1189–90). See also *Ex parte State*, 2016 WL 3364689, at \*8 (quoting *Ex parte Waldrop*, 859 So. 2d at 1189).

The Sixth Amendment does not apply differently in death penalty cases. The weight of aggravating and mitigating circumstances is no more a factfinding in a death penalty case than the weight of “the nature and circumstances of the offense and the history and characteristics of the defendant” is a factfinding in a non-capital case. 18 U.S.C. § 3553. The Sixth Amendment provides the right to a trial by jury, not a sentencing by jury.

Regardless, the radical change in constitutional law that Russell proposes would not even affect his sentence because the jury in this case unanimously recommended that Russell be sentenced to death on a special verdict form. See BIO App. 2a. Even had the law required the judge to give controlling effect to the jury’s balancing of aggravating and mitigating

circumstance, the judge still would have sentenced Russell to death. All of Russell's arguments about whether a judge can constitutionally weight aggravating and mitigating circumstances are irrelevant to his own case.

Russell has not demonstrated how his sentence is unconstitutional under *Ring* and *Hurst*, and this Court should not grant his petition for writ of certiorari.

#### CONCLUSION

The Court should deny the petition.

Respectfully submitted,

LUTHER STRANGE  
*Alabama Attorney General*  
Andrew L. Brasher\*  
*Solicitor General*  
Brett J. Talley  
*Deputy Solicitor General*  
OFFICE OF ALA. ATT'Y GEN.  
501 Washington Avenue  
Montgomery, AL 36130  
(334) 242-7300  
abrasher@ago.state.al.us

July 26, 2016

*Counsel for State of Alabama*

\*Counsel of Record

# APPENDIX

**APPENDIX TABLE OF CONTENTS**

Verdict Form, *State of Alabama v. Ryan  
Gerald Russell*, No. CC-09-067 (Circuit  
Court for Shelby County, Alabama Nov.  
22, 2010) ..... 1a

Verdict Form, *State of Alabama v. Ryan  
Gerald Russell*, No. CC-09-067 (Circuit  
Court for Shelby County, Alabama Nov.  
22, 2010) ..... 2a

IN THE CIRCUIT COURT OF SHELBY COUNTY,  
ALABAMA

STATE OF ALABAMA,

Plaintiff,

vs.

CASE NO.: CC-09-067

RYAN GERALD RUSSELL,

Defendant.

VERDICT

Do you unanimously agree that the State of Alabama has proven beyond a reasonable doubt that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses?

Yes [checkmark]

No \_\_\_\_\_

Robert W. Grubb \_\_\_\_\_

Foreperson (signature)

Robert W. Grubb \_\_\_\_\_

Foreperson (print name)

11/22/2010 \_\_\_\_\_

Date

IN THE CIRCUIT COURT OF SHELBY COUNTY,  
ALABAMA

STATE OF ALABAMA,

Plaintiff,

vs.

CASE NO.: CC-09-067

RYAN GERALD RUSSELL,

Defendant.

VERDICT

We, the jury, recommend that the Defendant  
RYAN GERALD RUSSELL, be sentenced to death.  
The vote is as follows:

12 \_\_\_ Death

0 \_\_\_ Life imprisonment without parole

Robert W. Grubb  
Foreperson (signature)

Robert W. Grubb  
Foreperson (print name)

11/22/2010  
Date