No. 17-__

IN THE

Supreme Court of the United States

JEFFERY LEE,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for a Writ of Certiorari to the Alabama Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

In *Hurst* v. *Florida*, this Court applied the rule announced in *Ring* v. *Arizona*, 536 U.S. 584 (2002), and held that Florida's capital sentencing statute violated the Sixth Amendment because it allowed "a judge [to] increase[] [the] authorized punishment based on her own factfinding." 136 S. Ct. 616, 622 (2016).

In Alabama, at the time of Petitioner Jeffery Lee's trial, a capital murder conviction did not, on its own, authorize the the death penalty. Instead, a defendant convicted of a capital offense could be sentenced to death only after a separate sentencing hearing where "the trial court shall determine whether the aggravating circumstances *it finds* to exist outweigh the mitigating circumstances *it finds* to exist." Ala. Code § 13A-5-47 (2001) (emphasis added). The jury could issue an advisory verdict, but it "is not binding upon the court." § 13A-5-47(e).

Based on his independent factfinding, a judge sentenced Petitioner Lee to death under that statute, over-riding the jury's recommendation that Lee be sentenced to life in prison. The questions presented are:

1. Whether the Court should overrule *Harris* v. *Alabama*, 513 U.S. 504 (1995), pursuant to the rules announced in *Ring* and *Hurst*, because the statute used to sentence Petitioner violates the Sixth Amendment.

2. Whether *Hurst* is retroactive to a litigant who timely raised and preserved a claim based on *Ring*.

PARTIES TO THE PROCEEDING

Petitioner, who was the plaintiff and appellant below, is Jeffery Lee, a capital defendant in state custody. The respondent is the State of Alabama.

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PETITION FOR A WRIT OF CERTIORARI

Jeffery Lee respectfully petitions for a writ of certiorari to review the judgment of the Alabama Supreme Court.

OPINIONS BELOW

The unpublished opinion of the Alabama Court of Criminal Appeals (App., *infra*, 1a-12a) is reported at 2017 WL 543171. The decision of the Alabama Court of Criminal Appeals denying reconsideration (App., *infra*, 13a) is unreported. The decision of the Alabama Supreme Court, and certificate of judgment (App., *infra*, 15a-17a) are unreported. The decision of the Alabama Circuit Criminal Court of Dallas County (App., *infra*, 18a-23a) is unreported.

JURISDICTION

The Alabama Supreme Court's decision and certificate of judgment issued August 25, 2017. App., *infra*, 15a. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to 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[.]"

Alabama Code 1975 § 13A-5-47, provided in pertinent part:

> (a) After the sentence hearing has been conducted, and after the jury has returned an advisory verdict, or after such a verdict has been waived * * * the trial court shall proceed to determine the sentence.
>
> * * * *
>
> (c) Before imposing sentence the trial court shall permit the parties to present arguments concerning the existence of aggravating and mitigating circumstances and the proper sentence to be imposed in the case.
>
> (d) Based upon the evidence presented at trial, the evidence presented during the sentence hearing, and the presentence investigation report and any evidence submitted in connection with it, the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in Section 13A-5-

> 49, each mitigating circumstance enumerated in Section 13A-5-51, and any additional mitigating circumstances offered pursuant to Section 13A-5-52. The trial court shall also enter written findings of facts summarizing the crime and the defendant's participation in it.
>
> (e) 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 * * * * While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

INTRODUCTION

In Alabama, a capital murder conviction did not, on its own, authorize the imposition of the death penalty. A defendant convicted of a capital offense could be sentenced to death only after a separate sentencing hearing where "the trial court shall determine whether the aggravating circumstances *it finds* to exist outweigh the mitigating circumstances *it finds* to exist." Ala. Code § 13A-5-47 (emphasis added). The jury could issue an advisory verdict, but it "is not binding upon the court." § 13A-5-47(e). In other words, Alabama law (as in Florida) allows "a judge to increase[] [the] authorized punishment based on [his] own factfinding." *Hurst* v. *Florida*, 136 S. Ct. 616, 622 (2016).

In *Hurst*, the petitioner filed for a writ of certiorari because the Florida Supreme Court "persist[ed] in holding that this Court's opinion in *Ring* v. *Arizona*,

536 U.S. 584 (2002), has no controlling authority in [Florida]." Pet. at 22, *Hurst* v. *Florida*, 136 S. Ct. 616 (2016) (No. 14-7505).

The Court granted certiorari, applied the rule previously announced in *Ring* to Florida's capital sentencing statute, and concluded that Florida's law violated the Sixth Amendment. *Hurst*, 136 S. Ct. at 622. The Court reasoned that the "analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's." *Ibid*. In striking down the statute, the Court rejected Florida's attempt to "treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Ibid*. After applying *Ring*, the Court concluded that it would overrule the two decisions that had upheld Florida's capital sentencing statute: *Spaziano* v. *Florida*, 468 U.S. 447 (1984) and *Hildwin* v. *Florida*, 490 U.S. 638 (1989) (per curiam). The Court explained that *Ring* had "washed away the logic of *Spaziano* and *Hildwin*." *Id*. at 624.

The same issues that led the Court to grant review in *Hurst* are present in the decision below. Relying on this Court's pre-*Ring* decision in *Harris* v. *Alabama*, 513 U.S. 504 (1995)—which upheld Alabama's capital sentencing statute—Alabama courts have persisted in holding that neither *Ring* nor *Hurst* have any application to Alabama's law. But for several decades before this Court decided *Hurst*, Alabama courts acknowledged that the state's capital punishment statute mirrors the scheme in Florida. *Ex parte Waldrop*, 859 So. 2d 1181, 1188-90 (Ala. 2002) (treating Florida's statute as analogous for purposes of *Ring* analysis); *Ex parte Harrell*, 470 So. 2d 1309, 1317 (Ala. 1985) ("Alabama's procedure permitting judicial override is almost identical to the scheme used in Florida.");

Knotts v. *State*, 686 So. 2d 431, 448 (Ala. Crim. App. 1995) ("[W]e find persuasive those cases interpreting the Florida statutes because Alabama's death penalty statute is based on Florida's sentencing scheme.").

It is now time to reconsider *Harris* v. *Alabama*, 513 U.S. 504 (1995). *Ring* overruled *Walton* v. *Arizona*, 497 U.S. 639, 643 (1990), which had upheld Arizona's capital sentencing statute. *Hurst* overruled *Hildwin* and *Spaziano*, which had upheld Florida's statute. Together, those decisions have washed away the logic of *Harris*, and demonstrate that Alabama's capital sentencing is unconstitutional.

Because this is the only Court that can reconsider *Harris*, the decision below warrants the Court's review. It is time for Alabama's error to be corrected, before it is too late for Petitioner.

STATEMENT

1. The law at issue in this case is Ala. Code § 13A-5-47 (2001).[1] Under that statute, a capital murder conviction does not, on its own, authorize the imposition of the death penalty; rather, a defendant can be sentenced to death only after a separate sentencing hearing where "the trial court shall determine whether the aggravating circumstances *it finds* to exist

[1] In 2017, the Alabama legislature amended this provision to disallow the trial court from overriding the jury's sentencing recommendation. In doing so, the legislature limited such changes to those "charged with capital murder after April 11, 2017," and made clear the changes "shall not apply retroactively to any defendant who has previously been convicted of capital murder and sentenced to death prior to April 11, 2017." Ala. Code § 13A-5-47.1 (2017). Lee was sentenced under the old statute, and brings this challenge based on the text of the law in effect at the time. This Petition thus refers to the law in the present tense.

outweigh the mitigating circumstances *it finds* to exist." Ala. Code § 13A-5-47 (2001) (emphasis added);

After the jury verdict, the judge can hear and consider additional evidence not presented to the jury concerning the existence of any aggravating or mitigating circumstances. Then "the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance * * * [and] each mitigating circumstance, while imposing a sentence of life without parole or death." § 13A-5-47(d). "[I]n doing so, the trial court shall consider the recommendation of the jury contained in its advisory verdict," but the jury's advisory verdict "is *not binding* upon the court." § 13A-5-47(e) (emphasis added).

2. On April 12, 2000, Jeffery Lee was convicted of three counts of homicide, and one count of attempted homicide, in violation of Ala. Code §§ 13A-5-40(a)(2) and (a)(10). App., *infra*, 1a. The trial court then conducted a "hybrid" sentencing proceeding to determine whether Lee should be sentenced to life in prison, or to death.

The trial court instructed the jury at the penalty phase that it still had to find the alleged aggravator and, if it found the aggravator, had to determine if the aggravator outweighed any mitigators, before it could recommend death. RE 1215; T19-R458. The jury was instructed specifically that "[t]he fact that Jeffery Lee has been convicted in this case in and of itself is not an aggravating circumstance." RE 1202; T19-R445. In other words, the jury had to find an aggravator other than the underlying conviction. The trial court also made clear that the jurors had to determine anew in the penalty phase whether the aggravating circumstance was established for purposes of the sentencing recommendation. RE 1195-02; T19-R438-45.

The "death-qualified" jury returned a recommendation, by a vote of seven to five, for life without parole. *Lee* v. *State*, 898 So. 2d 790, 807-08 (Ala. Crim. App. 2001). Because the verdict form did not specify the jury's reasons, we do not know if the recommendation meant that they did not find an aggravator, or that they did not believe that it outweighed the mitigators. Regardless, a majority of the jury voted for life.

The jury's recommendation, however, was only advisory. Ala. Code § 13A-5-47(e) (2001). The trial court conducted its own fact-finding hearing, and considered evidence not presented to the jury. RE 1219, 1221-29; T22-R462, 464-72. The sole aggravator, according to the State, was the conviction itself. RE 1219; T22-R462. Based on its own factual findings, the trial court overrode the jury's recommendation, and sentenced Mr. Lee to death. App., *infra*, 2a; *id*. at 26a.

The Alabama Court of Criminal Appeals remanded the case to the trial court on October 26, 2001, after concluding that the trial court failed to explain why it rejected the jury's recommendation for life in prison. App., *infra*, 27a; *Lee* v. *State*, 898 So. 2d 790, 808 (Ala. Crim. App. 2001). While the case was on remand, this Court issued *Ring* v. *Arizona*, 536 U.S. 584 (2002). App., *infra*, 2a. In *Ring*, the Court held that defendants facing a sentence of death are "entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589.

Thereafter, the trial court issued more detailed factual findings to justify its decision to override the jury's recommendation for life without parole. *Lee*, 898 So.2d at 856. Lee argued that under *Ring* the trial court could not make factual findings that increased his penalty beyond what the jury's verdict allowed—

meaning he could not be sentenced to death. The trial judge rejected this argument, observing that this Court had "specifically upheld Alabama's capital murder sentencing procedure," which he explained "vests sentencing authority in the trial judge but requires the judge to consider advisory jury verdicts." *Ibid*.[2] Based on his independent findings, the judge concluded that, notwithstanding the jury's recommendation, "a greater sentence than life without parole is warranted in this case." *Id*. at 856-57.

Because *Ring* was decided while Lee's direct appeal was still pending, the Alabama Court of Criminal Appeals ordered the parties to file supplemental briefs addressing the applicability of *Ring* to Lee's case. App., *infra*, 2a. The Alabama Court of Criminal Appeals held that the Alabama statute used to sentence Lee was consistent with *Ring*. *Id*. at 3a. The Alabama Supreme Court and this Court denied Lee's petitions for writ of certiorari. *Ibid*.

In the years since, Lee has continued to challenge his sentence as unconstitutional under *Ring*, because the judge, rather than the jury, made factual findings used to sentence him to death. *See id*. at 3a-4a. But Lee's *Ring* arguments have been rebuffed because Alabama courts have repeatedly and erroneously concluded that *Ring* did not affect the constitutionality of Alabama's death penalty statute.

3. On January 12, 2016, this Court decided *Hurst* v. *Florida*, 136 S. Ct. 616 (2016). The issue in *Hurst* was whether Florida's capital punishment statute violated *Ring*. As in Alabama, Florida's statute established a "hybrid" sentencing procedure: after a guilty verdict,

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[2] Presumably, the sentencing court was referring to *Harris* v. *Alabama*, 513 U.S. 504 (1995).

the court conducted a sentencing hearing where it instructed the jury that it could recommend the death penalty "if it found at least one aggravating circumstance beyond a reasonable doubt." *Id*. at 619-20. In *Hurst*, the jury recommended death. *Ibid*. As in Alabama, Florida's capital punishment statute required the court to conduct an "independent determination" of the existence and non-existence of aggravating and mitigating factors, and following that procedure, the court sentenced Hurst to death. *Ibid*.

This Court struck down Florida's capital sentencing statute, concluding that the "analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's." 136 S. Ct. at 621-22.

4. Alabama's capital punishment statute was based on the Florida statute found unconstitutional in *Hurst*. *See Harris* v. *Alabama*, 513 U.S. 504, 508-09 (1995) ("Alabama's capital sentencing scheme is much like that of Florida. Both require jury participation in the sentencing process but give ultimate sentencing authority to the trial judge."). For decades, Alabama courts have recognized the similarities between the two statutes. *See Knotts* v. *State*, 686 So. 2d 431, 448 (Ala. Crim. App. 1995) ("[W]e find persuasive those cases interpreting the Florida statutes because Alabama's death penalty statute is based on Florida's sentencing scheme.").

Given the similarities between Alabama's statute and Florida's statute, Lee filed a state habeas petition on April 23, 2016. App., *infra*, 25a-39a. In that petition, Lee renewed his challenge to the constitutionality of his sentence under *Ring* and *Hurst*. See *id*. at 33a-38a. The trial court granted the State's motion to dismiss Lee's Rule 32 petition on August 5, 2016, without conducting a hearing. *Id*. at 18a-23a.

The Alabama Court of Criminal Appeals affirmed, reasoning that Lee's claim was barred because Lee had raised a *Ring* claim, and Alabama courts had already concluded that the statute was constitutional. App., *infra*, 9a. The court further reasoned that *Hurst* did not apply retroactively to Lee's case, even though that decision applied the rule established in *Ring*, and Lee had maintained a challenge to his sentence based on *Ring*. *Id*. at 11a. The Alabama Supreme Court denied Lee's petition for writ of certiorari. *Id*., 15a-17a.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD ACCEPT REVIEW TO RECONSIDER AND OVERRULE *HARRIS* V. *ALABAMA* BECAUSE THAT DECISION CANNOT BE RECONCILED WITH *HURST* OR *RING*.

A. The Court initially upheld laws permitting judicial fact-finding during capital sentencing in Florida, Arizona, and Alabama.

a. Florida's capital sentencing statute provided that first-degree murder qualified as a capital felony punishable by death or life imprisonment. Fla. Stat. § 782.04(1)(a) (1987). The law provided that a "person who has been convicted of a capital felony shall be punished by death" only if a separate sentencing hearing "results in findings by the court that such person shall be punished by death." *Ibid*. "[O]therwise such person shall be punished by life imprisonment and shall be ineligible for parole." *Ibid*.

This additional sentencing proceeding is called a "hybrid" proceeding, where the jury could render an "advisory verdict," but does not specify the factual basis for its recommendation. Fla. Stat. § 921.141

(Supp. 1988). "Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." *Ibid*. And if the sentencing court imposed capital punishment, it would have to "set forth in writing its findings upon which the sentence of death is based." *Ibid*.

Although the judge must give the jury recommendation "great weight," *Tedder* v. *State*, 322 So. 2d 908, 910 (Fla. 1975) (per curiam), the sentencing order must "reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors," *Blackwelder* v. *State*, 851 So. 2d 650, 653 (Fla. 2003) (per curiam).

This system was challenged twice in the 1980s. In *Spaziano* v. *Florida*, the defendant was convicted of first-degree murder, but the jury recommended life in prison. 468 U.S. 447 (1984), overruled by *Hurst* v. *Florida*, 136 S. Ct. 616 (2016). Nevertheless, the sentencing court overrode the jury's advisory verdict and imposed the death penalty after finding two aggravating circumstances and no mitigating facts. *Id*. at 466. Spaziano challenged Florida's law under the Sixth Amendment, arguing that the jury must have the exclusive authority to find the facts necessary to impose death. The Court rejected this argument, finding no constitutional infirmity where "the trial judge is required to conduct an independent review of the evidence and to make his own findings regarding aggravating and mitigating circumstances," before imposing capital punishment. *Id*. at 466.

Five years later, in *Hildwin* v. *Florida*, the Court was "present[ed] once again with the question whether the Sixth Amendment requires a jury to specify the

aggravating factors that permit the imposition of capital punishment in Florida." 490 U.S. 638, 638 (1989) (per curiam), overruled by *Hurst* v. *Florida*, 136 S. Ct. 616 (2016). And once again, the Court concluded that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Id*. at 640-41. Florida's post-*Furman* capital sentencing statute—which concentrated the factfinding authority with the judge, not the jury—was upheld.

b. Arizona's capital sentencing statute was similar to Florida's. After a defendant was found guilty of first-degree murder, a "separate sentencing hearing * * * [would be] conducted before the court alone" to determine whether the sentence shall be death or life imprisonment. *Walton* v. *Arizona*, 497 U.S. 639, 643 (1990), overruled by *Ring* v. *Arizona*, 536 U.S. 584 (2002). In the course of that hearing, the sentencing judge had to independently "determine the existence or nonexistence of any of the aggravating or mitigating circumstances" and then determine whether death was the appropriate sentence. *Ibid*.; see also Ariz. Rev. Stat. § 13-703(B), (E) (West 2001). The sentencing court then had to "set[] forth its findings as to aggravating and mitigating circumstances," and if the judge found one or more aggravating circumstances, and the mitigating circumstances were not "sufficiently substantial to call for leniency," the judge was required to impose the death penalty. *Walton*, 497 U.S. at 643; see also Ariz. Rev. Stat. § 13-703(E), (F), (G).

In *Walton*, a death row inmate challenged Arizona's capital punishment statute under the Sixth Amendment, arguing that it was unconstitutional because it allowed a sentencing judge to find those facts necessary to impose the death penalty. Citing its decisions

in *Hildwin* and *Spaziano*, the Court rejected Walton's claim. 497 U.S. at 649. The Court reasoned the aggravating factors within Arizona's statute were merely "standards" to guide a sentencing judge, rather than "elements of an offense" that a jury would have to find beyond a reasonable doubt. *Id*. at 648. The Court also rejected Walton's attempt to distinguish Florida's sentencing scheme from Arizona's, observing that while "[i]t is true that in Florida the jury recommends a sentence," a Florida jury "does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Ibid*.

Like Florida, Arizona's capital sentencing law concentrated the fact-finding authority during sentencing with the judge, not the jury. And like Florida, it withstood Sixth Amendment scrutiny.

c. Alabama's capital sentencing statute even more closely resembled Florida's law than did Arizona's statute. See *Knotts* v. *State*, 686 So. 2d 431, 448 (Ala. Crim. App. 1995) ("[W]e find persuasive those cases interpreting the Florida statutes because Alabama's death penalty statute is based on Florida's sentencing scheme.").

As in Florida, Alabama employed a hybrid system. A capital murder conviction would not, on its own, authorize the imposition of the death penalty; rather, a defendant can be sentenced to death only after a separate sentencing hearing where "the trial court shall determine whether the aggravating circumstances *it finds* to exist outweigh the mitigating circumstances *it finds* to exist." Ala. Code § 13A-5-47

(emphasis added); see also *Ex parte Woodard*, 631 So. 2d 1065, 1071 (Ala. Crim. App. 1993) ("A greater punishment—death—*may* be imposed on a defendant convicted of a capital offense, but *only* if one or more of the aggravating circumstances enumerated in § 13A-5-49 is found to exist *and* that aggravating circumstance(s) outweighs any mitigating circumstance(s) that may exist." (emphasis in original)).

During this hearing the jury "renders an advisory verdict." *Harris* v. *Alabama*, 513 U.S. 504, 506 (1995). If the jury finds one or more aggravating factors, and that the aggravating factors outweigh the mitigating factors, then the jury recommends death; otherwise the verdict is life without parole. § 13A-5-46(e). The recommendation and vote tally are reported to the judge. *Ibid*. After the jury verdict, the judge can then hear and consider additional evidence not presented to the jury concerning the existence of any aggravating or mitigating circumstances. Then "the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance * * * [and] each mitigating circumstance, while imposing a sentence of life without parole or death." § 13A-5-47(d). "[I]n doing so, the trial court shall consider the recommendation of the jury contained in its advisory verdict," but as in Florida, the jury's advisory verdict "is not binding upon the court." § 13A-5-47(e).

In *Harris*, the defendant was convicted of capital murder, and the jury recommended life in prison. 513 U.S. at 507. But the trial judge overrode the jury's recommendation after independently finding the existence of a statutory aggravator, and further finding that this aggravator "far outweighs" the mitigating circumstances, and sentenced Harris to death. *Id*. at

507-08. Harris challenged the judge's override, arguing that the jury had sentenced her to life based on its findings. The Alabama Court of Criminal Appeals affirmed Harris's conviction and sentence, even noting that Alabama's death penalty statute was modeled after Florida's sentencing scheme, and citing the Supreme Court's decision in *Spaziano* as also affirming "the constitutionality of Alabama's statutory sentencing scheme." *Harris* v. *State*, 632 So. 2d 503, 538 (Ala. Crim. App. 1992).

This Court agreed that "Alabama's capital sentencing scheme is much like that of Florida. Both require jury participation in the sentencing process but give ultimate sentencing authority to the trial judge." *Harris*, 513 U.S. at 508-09. The only major difference the Court identified was that in Florida a trial judge was obligated to give "great weight" to a jury's sentencing recommendation, and had very little leeway to override a jury's recommendation. *Id*. at 509. "The Alabama capital sentencing statute, by contrast, requires only that the judge 'consider' the jury's recommendation." *Ibid*. Citing *Spaziano* and *Walton*, this Court upheld Alabama's sentencing scheme, concluding that it was "[c]onsistent with established constitutional law." *Id*. at 509-11.

* * *

The law has changed. The Court's decisions in *Spaziano*, *Hildwin*, *Walton*, and *Harris*, marked the apotheosis of judicial fact-finding in capital sentencing. Starting in 2000, the pendulum began to swing back towards the original interests animating the Sixth Amendment. One by one, the decisions upholding these sentencing schemes have been overruled or disavowed. This modern era of Sixth Amendment jurisprudence, most recently the *Hurst* decision last year,

confirms that the statute used to sentence Lee to death is unconstitutional.

B The Court strikes down the statutes in Arizona and Florida, overruling *Walton*, *Hildwin*, and *Spaziano*.

a. Timothy Ring was convicted of first-degree murder during the course of an armed robbery. *Ring* v. *Arizona*, 536 U.S. 584, 591 (2002). During sentencing the judge heard evidence not presented to the jury, proceeded to find two aggravating circumstances—that the murder was committed for pecuniary gain, and that it was especially "heinous"—and sentenced Ring to death. *Id*. at 594-95.

Relying on the Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), Ring appealed his sentence, arguing that the judge's findings violated the Sixth Amendment. *Ring*, 536 U.S. at 595. In response, Arizona pointed to the Court's decision in *Walton*, which upheld Arizona's method of distinguishing between "elements of an offense" and "sentencing factors." *Ibid*. Arizona also highlighted that Ring was convicted of first-degree murder, which provided for a sentence of life in prison *or* death; according to Arizona, that meant Ring "was therefore sentenced within the range of punishment authorized by the jury verdict." *Id*. at 603-04.

The Court rejected Arizona's argument that the death penalty fell within the range authorized by the jury verdict, because it "overlook[ed] *Apprendi*'s instruction that 'the relevant inquiry is not one of form, but of effect.'" *Id*. at 604 (quoting *Apprendi*, 530 U.S. at 494). The Court reasoned that *in effect*, Arizona law requiring an independent finding of an aggravating circumstance after a separate sentencing hearing

"exposed Ring to a greater punishment than that authorized by the jury's guilty verdict." *Ibid* (citation and brackets omitted). Ring's exposure to the death penalty was formalistic because the capital punishment statute "explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before the imposition of the death penalty." *Ibid* (citing Ariz. Rev. Stat. Ann. § 13–1105(C) ("First degree murder is a class 1 felony and is punishable by death or life imprisonment *as provided by* § 13–703." (emphasis added))).[3]

Finally, the Court flatly rejected "the distinction relied upon in *Walton* between elements of an offense and sentencing factors," pointing out that *Apprendi* made that distinction "untenable." *Id*. at 604-05. Concluding that "*Walton* and *Apprendi* are irreconcilable," and that the Court's "Sixth Amendment jurisprudence cannot be home to both," the Court sided with *Apprendi*, overruled *Walton*, and struck down Arizona's statute. *Id*. at 609.

Ring stands for the proposition that the Sixth Amendment guarantees a criminal defendant the right to have a jury (not a judge) make the "factfinding necessary to put him to death." *Ibid*.

b. Timothy Hurst was convicted of first-degree murder, a capital offense in Florida. *Hurst* v. *Florida*, 136 S. Ct. 616, 619-20 (2016). Under Florida's "hybrid"

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[3] The Court also stated that while "[e]ntrusting to a judge the finding of facts necessary to support a death sentence" might be an efficient scheme "for a society that is prepared to leave criminal justice to the State * * * * [t]he founders of the American Republic were not prepared to leave it to the State * * * which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights." *Ring*, 536 U.S. at 607 (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)).

system, the court conducted a sentencing hearing where it instructed the jury that it could recommend the death penalty "if it found at least one aggravating circumstance beyond a reasonable doubt." *Ibid*. The jury recommended death. *Ibid*. Pursuant to Florida's capital punishment statute, the court then conducted an "independent determination" of the existence and non-existence of aggravating and mitigating factors, and sentenced Hurst to death. *Ibid*. Hurst challenged his sentence under *Ring*, but Florida's courts rejected the challenge, citing the pre-*Ring* decisions in *Spaziano* and *Hildwin*. *Hurst* v. *State*, 147 So. 3d 435, 446-47 (Fla. 2014).

This Court disagreed, concluding that the "analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's." *Hurst*, 136 S. Ct. at 621-22. The Court then discussed (and rejected) two arguments Florida made for why its statute complies with *Ring*—each of which apply to Alabama generally, and to this case specifically.

First, Florida argued "that when Hurst's sentencing jury recommended a death sentence, it 'necessarily included a finding of an aggravating circumstance.'" *Id*. at 622. According to Florida, the "additional requirement that a judge *also* find an aggravator * * * only provides the defendant with additional protection." *Ibid*. The Court rejected this argument because it "fails to appreciate the central and singular role the judge plays under Florida law." *Ibid*. The Court emphasized that Florida law "does not make a defendant eligible for death until 'findings *by the court* that such person shall be punished by death.'" *Ibid*. (quoting Fla. Stat. § 775.082(1)). The Court rejected

Florida's attempt to "treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Ibid*.

Second, Florida pointed to the Court's decisions in *Spaziano* and *Hildwin* to argue that the Court had repeatedly reviewed and upheld Florida's capital sentencing statute. *Id*. at 623. The *Hurst* Court explained that "*Spaziano* and *Hildwin* summarized earlier precedent to conclude that 'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by a jury.'" *Ibid*. (quoting *Hildwin*, 490 U.S. at 640-41). But that "conclusion was wrong, and irreconcilable with *Apprendi*." *Ibid*. The Court explained that *Ring* overruled *Walton*, "another pre-*Apprendi* decision," because *Walton* "could not survive the reasoning of *Apprendi*." *Ibid* (citation omitted). Because *Walton* was a "mere application of *Hildwin*'s holding to Arizona's capital sentencing scheme," the cases upholding Florida's statute could not survive either. *Ibid*.

The Court emphasized that "in the *Apprendi* context, we have found that *stare decisis* does not compel adherence to a decision whose underpinnings have been eroded by subsequent developments in constitutional law." *Ibid* (citation and quotation marks omitted). Because "subsequent cases"—namely, *Apprendi* and *Ring*—"have washed away the logic of *Spaziano* and *Hildwin*," the Court in *Hurst* expressly overruled them "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." *Id*. at 624.

* * *

With *Walton*, *Spaziano*, and *Hildwin* overruled, the only pre-*Apprendi* decision that remains is *Harris* v. *Alabama*, 513 U.S. 504 (1995). As outlined below, *Harris* cannot be reconciled with either *Ring* or *Hurst*, and should be overruled.

C. Alabama's capital punishment statute shares the same constitutional defects that were present in Florida and Arizona.

a. Like Timothy Ring and Timothy Hurst, Jeffery Lee was convicted of capital murder. *Lee* v. *State*, 898 So. 2d 790, 807 (Ala. Crim. App. 2001). The court then conducted a "hybrid" sentencing proceeding to determine whether Lee should be sentenced to life in prison, or death. Based on his independent findings, the judge concluded that "a greater sentence than life without parole is warranted in this case." *Lee*, 898 So.2d at 856-57.

The process used to sentence Lee to death cannot "survive the reasoning" of *Apprendi*, *Ring*, and *Hurst*. Like the defendants in *Ring* and *Hurst*, Lee could not be sentenced to death on the basis of the jury verdict alone—which is why the court explicitly instructed the jury that for purposes of the penalty phase, the conviction itself was *not* an aggravator. RE 1202; T19-R445 ("The fact that Jeffery Lee has been convicted in this case in and of itself is not an aggravating circumstance.").[4] See also *Ex parte Woodard*, 631 So. 2d 1065, 1071 (Ala. Crim. App. 1993) ("A greater punishment—death—*may* be imposed on a defendant

[4] The jury is presumed to have followed these instructions. *Francis* v. *Franklin*, 471 U.S. 307, 324 n.9 (1985) ("the crucial assumption underlying our constitutional system of trial by jury [is] that jurors carefully follow instructions").

convicted of a capital offense, but *only* if one or more of the aggravating circumstances enumerated in § 13A-5-49 is found to exist *and* that aggravating circumstance(s) outweighs any mitigating circumstance(s) that may exist." (emphasis in original)).

As in Florida, the Alabama jury's advisory verdict does not specify the factual basis for its recommendation. Additionally, like the constitutionally-defective system in Florida, the jury's recommendation was not binding. See *Harris*, 513 U.S. at 508-09 ("Alabama's capital sentencing scheme is much like that of Florida. Both require jury participation in the sentencing process but give ultimate sentencing authority to the trial judge."). Notwithstanding the jury's verdict, Alabama law required that "the trial court shall determine whether the aggravating circumstances *it finds* to exist outweigh the mitigating circumstances *it finds* to exist." Ala. Code § 13A-5-47 (emphasis added); compare *Blackwelder* v. *State*, 851 So.2d 650, 653 (Fla. 2003) (per curiam) (the sentencing order must "reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors"). Taken together, the sentencing judge in Alabama, just like a sentencing judge in Florida, plays a "central and singular role" in sentencing. *Hurst*, 136 S. Ct. at 622.

Alabama courts have defended its statute where the underlying conviction included the death penalty within the range of possible sentences. But that argument "overlooks *Apprendi*'s instruction that 'the relevant inquiry is not one of form, but of effect.'" *Ring*, 536 U.S. at 604 (quoting *Apprendi*, 530 U.S. at 494). *In effect*, the judge, not the jury, *independently found* the aggravating circumstance that "exposed [Lee] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid* (citation and brackets omitted).

Like the unconstitutional statutes in Arizona and Florida, Alabama's capital punishment statute "explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before the imposition of the death penalty." *Ibid*. (citing Ariz. Rev. Stat. Ann. § 13–1105(C); compare Ala. Code § 13A-5-47 ("Before imposing sentence the trial court shall permit the parties to present arguments concerning the existence of aggravating and mitigating circumstances and the proper sentence to be imposed in the case.").

b. *Apprendi* eroded the legal underpinnings for *Walton*, which *Ring* recognized in overruling that case and striking down Arizona's sentencing scheme. At the same time, *Ring* eroded the legal underpinnings for *Spaziano* and *Hildwin*, which *Hurst* recognized in overruling those cases and striking down Florida's sentencing scheme. The same reasoning that "washed away the logic" of *Walton*, *Hildwin*, and *Spaziano*, applies equally to *Harris*, Alabama's law, and Lee's conviction.

After *Hurst* struck down Florida's statute, Alabama and Delaware were the only remaining states with death penalty statutes that permitted judges to make independent findings to override a jury and sentence a defendant to death. But in August 2016, Delaware's state supreme court struck down that state's death penalty statute in light of *Hurst*. *Rauf* v. *State*, 145 A.3d 430 (Del. 2016) (per curiam).

Like Alabama, Delaware's "statute necessarily mandates a fact-intensive inquiry at the ultimate stage of sentencing, in which the factors that aggravate toward a death sentence and mitigate against it are considered and weighed." *Id*. at 435 (Strine, C.J., concurring). That judicial fact finding process "is what drives

the ultimate decision whether the defendant should live or die." *Ibid*. But because "the core reasoning of *Hurst* is that a jury, rather than a judge must make all the factual findings 'necessary' for a defendant to receive a death sentence," the Delaware Supreme Court concluded that "Delaware's statute cannot stand" in light of *Hurst*. *Id*. at 435-36.

The *Rauf* decision leaves Alabama as the only state still enforcing a statute that allows judges to make independent factual findings to override juries and sentence defendants to death.

c. For decades Alabama courts acknowledged that the state's capital punishment statute mirrors the scheme in Florida. *Ex parte Waldrop*, 859 So. 2d 1181, 1188-90 (Ala. 2002) (treating Florida's statute as analogous for purposes of *Ring* analysis); *Ex parte Harrell*, 470 So. 2d 1309, 1317 (Ala. 1985) ("Alabama's procedure permitting judicial override is almost identical to the scheme used in Florida."); *Knotts* v. *State*, 686 So. 2d 431, 448 (Ala. Crim. App. 1995) ("[W]e find persuasive those cases interpreting the Florida statutes because Alabama's death penalty statute is based on Florida's sentencing scheme.").

Yet, almost from the moment *Ring* was decided, Alabama courts have sought to distinguish the decision, so as to insulate the capital sentencing statute. In *Ex parte Waldrop*, 859 So.2d 1181 (Ala. 2002), the Alabama Supreme Court considered the constitutionality of Alabama's capital-sentencing scheme in light of *Apprendi* and *Ring*, and upheld the law. Notably, that relied on case law upholding Florida's statute, which was later struck down in *Hurst*. *Id*. at 1187-90.

Two years later, in *Ex parte McNabb*, 887 So.2d 998 (Ala. 2004), the Alabama Supreme Court further held

that the Sixth Amendment right to a trial by jury is satisfied and a death sentence may be imposed if, in the jury's advisory penalty phase verdict, it unanimously finds an aggravating circumstance. Indeed, Alabama courts have held that any jury recommendation *other than* 12-0 for death means that the jury found an aggravating circumstance during the penalty phase. But *Hurst* explicitly forecloses the argument that the jury's recommendation necessarily means it found an aggravator: "[t]he State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." 136 S. Ct. at 622. A "jury's mere recommendation is not enough." *Id*. at 619.

Most recently, in *Ex parte Bohannon*, the Alabama Supreme Court acknowledged that "in Alabama the judge, when imposing a sentence of death, makes a finding of the existence of an aggravating circumstance independent of the jury's fact-finding and makes an independent determination that the aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances found to exist." 222 So. 3d 525, 532 (Ala. 2016), cert. denied sub nom. *Bohannon* v. *Alabama*, 137 S. Ct. 831 (2017). And yet, the court still concluded "that Alabama's capital-sentencing scheme is consistent with the Sixth Amendment." *Ibid*. Each of those decisions relied in part on this Court's decision in *Harris* v. *Alabama*, 513 U.S. 504 (1995).

Until this Court expressly reconsiders *Harris*, Alabama courts will continue to treat *Ring* and *Hurst* as oddities that have no bearing on how Alabama administers the death penalty. Indeed, several Justices have observed that Alabama's capital punishment statute cannot survive *Hurst*, and that *Harris*

v. *Alabama* is no longer good law. See *Brooks* v. *Alabama*, 136 S. Ct. 708 (Jan. 21, 2016) (Sotomayor, J., joined by Ginsberg, J., concurring in denial of certiorari) (questioning the constitutionality of Alabama's sentencing scheme in light of *Hurst*, and noting that *Harris* was based on *Hildwin* and *Spaziano*, "two decisions we recently overruled in *Hurst*") (citations omitted); see also *ibid* (Breyer, J., dissenting from denial of application for stay of execution and denial of certiorari) (observing that *Hurst* declared "Florida's scheme is unconstitutional" and that "Alabama's sentencing scheme is 'much like' and 'based on Florida's sentencing scheme'") (citations omitted).

Alabama's refusal to apply *Hurst* is especially striking because the Court has granted certiorari and remanded four cases involving *Ring* claims back to Alabama to reassess in light of the Court's decision in *Hurst*. *Russell* v. *Alabama*, 15-9918, 2016 WL 3486659 (U.S. Oct. 3, 2016) (vacating and remanding to Court of Criminal Appeals "for further consideration in light of *Hurst* v. *Florida*"); *Kirksey* v. *Alabama*, No. 15-7912, 136 S. Ct. 2409 (Jun. 6, 2016) (same); *Wimbley* v. *Alabama*, No. 15-7939,136 S. Ct. 2387 (May 31, 2016) (same); *Johnson* v. *Alabama*, No. 15-7091, 136 S. Ct. 1837 (May 2, 2016) (same). But in each of these cases, the Alabama courts have refused to apply *Ring* or *Hurst*, opting instead to rely on the Alabama Supreme Court's decision in *Bohannon* to insulate the death penalty statute from constitutional scrutiny. For instance, following this Court's remand in *Russell* to reconsider in light of *Hurst*, the Alabama Court of Criminal Appeals relied on *Bohannon* to simply reinstate its previous order, ruling as follows:

> Alabama has reviewed its capital-sentencing scheme in light of *Hurst* and has determined

> that its capital-sentencing scheme does not violate the United States Constitution and does not run afoul of *Apprendi*, *Ring*, or *Hurst*.

Russell v. *State*, CR-10-1910, 2016 WL 7322331, at *2 (Ala. Crim. App. Dec. 16, 2016) (citing *Ex Parte Bohannon*, 222 So.3d at 532-33).

The same thing happened in each of the three other cases this Court remanded for consideration in light of *Hurst*. *See Johnson* v. *State*, CR-10-1606, 2017 WL 4564253, at *2 (Ala. Crim. App. Oct. 13, 2017) ("*Bohannon* forecloses any argument that Alabama's capital-sentencing scheme is facially unconstitutional under Hurst."); *Kirksey* v. *State*, CR-09-1091, 2016 WL 7322330, at *3 (Ala. Crim. App. Dec. 16, 2016), cert. denied sub nom. *Ex parte Kirksey*, 1160522, 2017 WL 2705579 (Ala. June 23, 2017), and cert. denied, 17-6113, 2017 WL 4285197 (U.S. Nov. 6, 2017) (rejecting *Ring/Hurst* claim "for the reasons set forth in *Bohannon*); *Wimbley* v. *State*, CR-11-0076, 2016 WL 7322334, at *1 (Ala. Crim. App. Dec. 16, 2016), cert. denied, 17-5663, 2017 WL 3599014 (U.S. Oct. 30, 2017) (citing *Bohannon* to hold that "the decision in *Hurst* did not invalidate the procedure for imposing a sentence of death in Alabama").[5]

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[5] The Court recently denied certiorari in *Kirksey* and *Wimbley*, but neither of those decisions dealt with judicial factfinding to *override* a jury's sentencing recommendation during capital punishment. In *Kirksey* the jury unanimously voted for death. *Kirksey*, 2016 WL 7322330, at *1. Likewise, in *Wimbley*, the jury voted 11-1 that the defendant be sentenced to death on count one, and 10-2 for death on count two. *Wimbley* v. *State*, 191 So. 3d 176, 192 (Ala. Crim. App. 2014), cert. granted, judgment vacated, 136 S. Ct. 2387 (2016). By contrast, here the jury voted 7-5 in

The Alabama Supreme Court's decision in *Bohannon* was wrong, because it effectively holds that neither *Ring* nor *Hurst* have any legal effect on Alabama's death penalty statute. This is the only Court that can overrule *Bohannon*. If *Ring* and *Hurst* do not just have relevance to Alabama's capital punishment law but apply to it, it is now clear that this Court must act, because the Alabama Supreme Court will not.

II. THE ALABAMA COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT *HURST* IS INAPPLICABLE TO LEE'S COLLATERAL CHALLENGE.

In its decision below, the Alabama Court of Criminal Appeals agreed that *Hurst* applied the rule established in *Ring*, and that "*Ring* and *Apprendi* were decided before Lee's direct appeal became final." App., *infra*, 9a. Although *Hurst* applied *Ring*, and although Lee has maintained (and preserved) a *Ring* challenge to his sentence since before his direct appeal ended, the Alabama Court of Criminal Appeals ruled that Alabama's procedural rules barred Lee from asserting a claim under *Hurst*. This was error.

When the Supreme Court "appl[ies] a settled rule * * * a person [may] avail herself of the decision on collateral review." *Chaidez* v. *United States*, 568 U.S. 342, 347 (2013). Here, the "settled rule" Lee invokes applies to Lee's case: *Ring* was decided two years before Lee's direct appeal ended, and the decision below even emphasizes that Lee has maintained his *Ring* challenge in each of his direct and collateral challenges. The Alabama Court of Criminal Appeals did not dispute Lee's entitlement to avail himself of

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favor of life, but the judge overrode that recommendation based on his independent fact finding.

the decision in *Hurst* in the abstract. But it held that Lee's claim under *Hurst* was procedurally barred because Lee raised a *Ring* claim in his direct appeal and on a previous petition for post-conviction relief. App., *infra*, 9a-11a.

By characterizing its decision as an application of a procedural bar, the court below obscured the effect of its decision. Alabama cannot say what Lee could have or should have done differently to preserve his *Hurst* claim. If Lee had waited to raise his argument under *Ring* until *Hurst* was decided, the argument would have been waived (because *Ring* was decided while Lee's direct appeal was pending) and untimely (because *Hurst* was decided more than one year after Lee's conviction became final). Ala. R. Crim. P. 32.2(a)(5), (c). Because Lee did not wait to raise his *Ring* claim, the court below barred his petition as successive. That "heads-I-win, tails-you-lose" reasoning flatly precludes a petitioner in these circumstances from availing himself of a decision applying a settled rule, even if that decision makes clear that the petitioner's sentence violated the Constitution. The result is a tacit nullification of this Court's determination that decisions applying settled rules have retroactive effect.

For example, consider a defendant sentenced under the same statute, but whose direct appeal was ongoing when *Hurst* was decided. That defendant could argue that *Hurst* renders Alabama's capital sentencing statute unconstitutional. If that defendant were to prevail—in effect, prevailing on the same argument Lee has been advancing since 2002—Alabama courts would nevertheless hold that Lee is procedurally barred from obtaining the same relief. That makes no sense.

Or consider instead a capital defendant who was mentally incompetent at the time of his sentencing, and who argued that capital punishment under those circumstances violated the Eighth Amendment. Such arguments would have failed before this Court's decision in *Atkins* v. *Virginia*, 536 U.S. 304 (2002). If the mentally incompetent person had already litigated such claims and lost, under the reasoning used to blocked Lee's claim here, Alabama courts would hold that the litigant is procedurally barred from raising the same claim, in light of *Atkins*—even though *Atkins* is retroactive.

Here, even though, on the merits, *Hurst* vindicates Lee's claims, and even though *Hurst* is retroactive to Lee's case (because it applies a settled rule), Alabama courts are blocking him from taking advantage of this Court's decisions. Because *Hurst* applied a settled rule, it is automatically retroactive on collateral review, and a state's interpretation of its procedural bar rules cannot operate to nullify the judicial force of this Court's decisions

The Court should accept review, or summarily reverse, to make clear that *Hurst* applies to those defendants who have maintained (and preserved) valid *Ring* challenges to the statute used to sentence them to die, and that state procedural rules that are interpreted to effectively deny application of *Hurst* to petitioners like Lee are invalid. The Alabama Court of Criminal Appeals' erroneous conclusion that Lee's claim was procedurally barred should not insulate Alabama's constitutionally defective death sentencing procedure from review under *Hurst*.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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November 21, 2017

APPENDIX

APPENDIX A

Notice: This opinion is subject to formal revision court of appeals before publication in the advance sheets of *Southern Reporter*. Readers are requested to notify the Reporter of Decisions, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in *Southern Reporter*.

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2016-2017

CR-15-1415

JEFFREY LEE

v.

STATE OF ALABAMA

Appeal from Dallas Circuit Court
(CC-99-21.61)

WINDOM, Presiding Judge.

Jeffrey Lee appeals from the circuit court's summary dismissal of his second postconviction petition filed pursuant to Rule 32, Ala. R. Crim. P., in which he challenged his three capital-murder convictions and sentences of death.

Lee was convicted of two counts of capital murder for killing Jimmy Ellis and Elaine Thompson during the course of a robbery, *see* § 13A–5–40(a)(2), Ala. Code

1975, and one count of capital murder for killing two people, Ellis and Thompson, by one act or pursuant to one scheme or course of conduct, *see* § 13A-5-40(a)(10), Ala. Code 1975. He was also convicted of attempted murder for shooting Helen King during the robbery. At the conclusion of the penalty-phase of the trial, the jury recommended, by a vote of 7 to 5, that the circuit court sentence Lee to life in prison without the possibility of parole. The circuit court considered but rejected the jury's recommendation and sentenced Lee to death.

On October 26, 2001, on direct appeal, this Court remanded Lee's case with instructions for the circuit court to amend its sentencing order.[1] *Lee v. State*, 898 So. 2d 790 (Ala. Crim. App. 2001). While the cause was on remand to the circuit court, the Supreme Court of the United States issued its opinion in *Ring v. Arizona*, 536 U.S. 584, 589 (2002), which applied its earlier decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to capital cases and held that defendants facing a sentence of death are "entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment," e.g., a jury finding regarding the existence of an aggravating circumstance. Thereafter, the circuit court filed its return to remand. At that point, this Court ordered "the parties to file supplemental briefs addressing the applicability of *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), to [Lee's] case." *Lee*, 898 So. 2d at 858. After the parties filed their supplemental briefs, this Court affirmed Lee's capital-

[1] This Court remanded this case to the circuit court with instructions that the trial court amend its sentencing order to comply with the requirements of *Ex parte Taylor*, 808 So. 2d 1215 (Ala. 2001).

murder convictions and sentences of death. Regarding *Ring*, this Court held:

> "In this case, the trial court found that one aggravating circumstance existed – the appellant committed the capital offenses while he was engaged in the commission of a robbery or an attempted robbery. *See* § 13A-5-49(4), Ala. Code 1975. Because the jury convicted [Lee] of the capital offense of robbery-murder, that statutory aggravating circumstance was proven beyond a reasonable doubt. Therefore, in this case, the jury, and not the judge, determined the existence of the 'aggravating circumstance necessary for imposition of the death penalty.' *Ring*, 536 U.S. at 609, 122 S. Ct. at 2443. Furthermore, '*Ring* and *Apprendi* do not require that a jury weigh the aggravating circumstances and the mitigating circumstances.' *Ex parte Waldrop*, 859 So. 2d 1181, 1190 (Ala. 2002). Therefore, there was not a *Ring* violation in this case."

Lee, 898 So. 2d at 858. On February 6, 2004, the Alabama Supreme Court denied Lee's petition for a writ of certiorari. On October 12, 2004, the Supreme Court of the United States also denied Lee's petition for a writ of certiorari.

In 2005, Lee filed his first Rule 32 petition in which he argued, among numerous other things, that his death sentences were imposed in violation of the Supreme Court's decision in *Ring*. In April of that year, Lee filed an amended Rule 32 petition. In August of 2007, the circuit court issued an order summarily dismissing Lee's Rule 32 petition. On October 9, 2009, this Court affirmed the circuit court's summary dismissal of Lee's Rule 32 petition. Thereafter, on

February 19, 2010, the Alabama Supreme Court denied Lee's petition for a writ of certiorari seeking review of this Court's affirmance.

According to Lee, on October 21, 2010, he filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 (2012) in the Federal District Court for the Southern District of Alabama. In his petition, Lee reasserted his *Ring* claim. On May 30, 2012, the district court denied Lee's petition. On August 1, 2013, the United States Court of Appeals for the Eleventh Circuit affirmed the district court's decision. The Supreme Court of the United States denied Lee's petition for a writ of certiorari.

On January 12, 2016, after the Supreme Court of the United States had denied Lee's petition for a writ of certiorari, it issued its decision in *Hurst v. Florida*, ___ U.S. ___, 136 S. Ct. 616 (2016). "[I]n *Hurst[*, the Court] applied its holding in *Ring* to Florida's capital-sentencing scheme and held that Florida's capital-sentencing scheme was unconstitutional because, under that scheme, the trial judge, not the jury, made the 'findings necessary to impose the death penalty.'" *Ex parte Bohannon*, [Ms. 1150640, Sept. 30, 2016] ___ So. 3d ___, ___ (Ala. 2016) (quoting *Hurst*, ___ U.S. at ___, 136 S. Ct. at 622).

On April 28, 2016, Lee filed a second Rule 32 petition in the circuit court. In his petition, Lee argued that Alabama's capital-sentencing scheme is unconstitutional under *Hurst*. On June 16, 2016, the State filed a motion to dismiss Lee's petition. In its motion, the State argued that Lee's petition was procedurally barred under Rule 32.2(b), Ala. R. Crim. P., because it was successive, and under Rule 32.2(a)(4), Ala. Crim. App., because Lee's claim was raised and addressed on direct appeal. The State also argued that *Hurst* did not

apply retroactively to a collateral challenge to a death sentence. Finally, the State argued that Lee's *Hurst* claim was facially without merit. On July 29, 2016, Lee filed an opposition to the State's motion to dismiss. On August 5, 2016, the circuit court granted the State's motion and dismissed Lee's petition. Lee appealed.

I.

On appeal, Lee first argues that the circuit court's order dismissing his Rule 32 petition did not reflect that court's independent judgment; therefore, the order must be reversed. Specifically, Lee argues that the circuit court adopted as its order a proposed order filed by the State. According to Lee, the order prepared by the State did not address all the arguments he had raised in his brief opposing dismissal. He also argues that the court's order incorrectly characterizes one of his arguments. Thus, Lee concludes the circuit court's order was not the product of the circuit court's independent judgment and must be reversed. This Cour disagrees.

Recently, this Court explained:

> "'Alabama courts have consistently held that even when a trial court adopts verbatim a party's proposed order, the findings of fact and conclusions of law are those of the trial court and they may be reversed only if they are clearly erroneous.' *McGahee v. State*, 885 So. 2d 191, 229–30 (Ala. Crim. App. 2003). 'While the practice of adopting the state's proposed findings and conclusions is subject to criticism, the general rule is that even when the court adopts proposed findings verbatim, the findings are those of the court

and may be reversed only if clearly erroneous.' *Bell v. State*, 593 So. 2d 123, 126 (Ala. Crim. App. 1991). '[T]he general rule is that, where a trial court does in fact adopt the proposed order as its own, deference is owed to that order in the same measure as any other order of the trial court.' *Ex parte Ingram*, 51 So. 3d 1119, 1122 (Ala. 2010). Only 'when the record before this Court clearly establishes that the order signed by the trial court denying postconviction relief is not the product of the trial court's independent judgment' will the circuit court's adoption of the State's proposed order be held erroneous. *Ex parte Jenkins*, 105 So. 3d 1250, 1260 (Ala. 2012).

"For example, in *Ex parte Ingram*, supra, the circuit court adopted verbatim the State's proposed order summarily dismissing Robert Shawn Ingram's Rule 32 petition. In the order, the court stated that it had considered "'the events within the personal knowledge of the Court'" and that it had "'presided over Ingram's capital murder trial and personally observed the performance of both lawyers throughout Ingram's trial and sentencing.'" *Ex parte Ingram*, 51 So. 3d at 1123 (citation and emphasis omitted). However, the judge who had summarily dismissed the petition had not, in fact, presided over Ingram's trial and had no personal knowledge of the trial. The Alabama Supreme Court described these errors in the court's adopted order as 'the most material and obvious of errors,' 51 So. 3d at 1123, and 'patently erroneous,' 51 So. 3d at 1125, and concluded that the errors

> 'undermine[d] any confidence that the trial court's findings of fact and conclusions of law [we]re the product of the trial judge's independent judgment.' 51 So. 2d at 1125.
>
> "In *Ex parte Scott*, [Ms. 1091275, March 18, 2011] ___ So. 3d ___ (Ala. 2011), the circuit court adopted verbatim as its order the State's *answer* to Willie Earl Scott's Rule 32 petition. The Alabama Supreme Court stated:
>
> > "[A]n answer, by its very nature, is adversarial and sets forth one party's position in the litigation. It makes no claim of being an impartial consideration of the facts and law; rather it is a work of advocacy that exhorts one party's perception of the law as it pertains to the relevant facts."
>
> "*Ex parte Scott*, ___ So. 3d at ___. The Court then held that "'[t]he trial court's verbatim adoption of the State's answer to Scott's Rule 32 petition as its order, by its nature, violates this Court's holding in *Ex parte Ingram*' that the findings and conclusions in a court's order must be those of the court itself. *Ex parte Scott*, ___ So. 3d at ___."

Reeves v. State, [Ms. CR-13-1504, June 10, 2016] ___ So. 3d ___, ___ (Ala. Crim. App. 2016).

Unlike in *Ex parte Ingram* and *Ex parte Scott*, the record in this case does not clearly establish that the circuit court's order dismissing Lee's petition was anything but the court's own independent judgment. The circuit court's order contains no patently erroneous statements as was the case in *Ex parte Ingram*, and the circuit court adopted a proposed order as

opposed to an answer. Further, after reviewing the record, this Court concludes that the circuit court's order reflects that court's independent judgment. Therefore, this Court holds that the circuit court did not err by adopting the State's proposed order dismissing Lee's Rule 32 petition.

Moreover, even if the circuit court erred in adopting the State's proposed order, that error, if any, would be harmless beyond a reasonable doubt. *See* Rule 45, Ala. R. App. P. As discussed below, the claim raised in Lee's Rule 32 petition was procedurally barred under Rule 32.2(a)(4), and under Rule 32.2(b), Ala. R. Crim. P. *Cf. Peraita v. State*, 897 So. 2d 1161, 1185 (Ala. Crim. App. 2003) (holding that the circuit court's erroneous determination was harmless when there was a valid alternative reason for the circuit court's action); *United States v. Abbas*, 560 F.3d 660, 666–67 (7th Cir. 2009) (holding that a trial court's error is harmless when it had a valid alternative holding); *Shedden v. Principi*, 381 F.3d 1163, 1168 (Fed. Cir. 2004) (same); *Barton v. Gammell*, 143 Ga. App. 291, 238 S.E.2d 445, 448 (1977) (holding that an erroneous finding is harmless when the trial court's decision is supported by other grounds). Because Lee's claim in his Rule 32 petition was procedurally barred under Rule 32.2(a)(4) and under Rule 32.2(b), Ala. R. Crim. P., the error, if any, in the adoption of the State's proposed order was harmless. *Jenkins v. State*, 105 So. 3d 1234, 1242 (Ala. Crim. App. 2011). Therefore, Lee is not entitled to any relief on this issue.

II.

Lee next argues that the circuit court erred in finding that *Hurst* does not apply retroactively to his case. According to Lee, *Hurst* did not announce a new rule, but instead, applied the Rule established in *Ring*

v. Arizona, 536 U.S. 584, 589 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to new facts. Therefore, the holding in *Hurst* is applicable and can be raised in his collateral proceedings. The State, not surprisingly, agrees that *Hurst* merely applied the rule of law established in *Ring* and *Apprendi* but argues that, because *Ring* and *Apprendi* were decided before Lee's direct appeal became final, his claim is procedurally barred. *See* Rule 32.2(a)(4) and 32.2(b), Ala. R. Crim. P. This Court agrees with the State.

It is well settled that a new case applying an old rule will not operate to exempt a petitioner from the application of the procedural bars established in Rule 32.2, Ala. R. Crim. P. *Clemons v. State*, 123 So. 3d 1, 12 (Ala. Crim. App. 2012) ("Because the Supreme Court did not establish new law . . . but rather applied law that was established long before Clemons's trial and before his first Rule 32 petition, Clemons's claim was procedurally barred because he could have raised it at trial, on appeal, Rules 32.2(a)(3) and (a)(5), Ala. R. Crim. P., or in his first Rule 32 proceedings, 32.2(b), Ala. R. Crim. P."); *Fitts v. Eberlin*, 626 F. Supp. 2d 724, 733 (N.D. Ohio 2009) ("Given that no new rule exists that applies to [the petitioner's] case, [his] plea for equitable tolling . . . must fail.").

Here, the parties agree that the Supreme Court did not establish a new rule in *Hurst;* rather, "'[t]he Court in *Hurst* did nothing more than apply its previous holdings in *Apprendi* and *Ring* to Florida's capital-sentencing scheme.'" (Lee's brief, at 18 (quoting *State v. Billups*, [Ms. CR–15–0619, June 17, 2016] ___ So. 3d ___, ___ (Ala. Crim. App. 2016)). Both this Court and the Alabama Supreme Court have recognized that *Hurst* merely applied the rule established in *Apprendi* and *Ring* to new facts: the State of Florida's death-

penalty scheme. *See State v. Billups*, ___ So. 3d at ___; *Phillips v. State*, [Ms. CR-12-0197, Oct. 21, 2016] ___ So. 3d ___, ___ (Ala. Crim. App. 2016); *Ex parte Bohannon*, ___ So. 3d at ___ *("Hurst* applies *Ring* and reiterates that a jury, not a judge, must find the existence of an aggravating factor to make a defendant death-eligible."). Because the decision in *Hurst* did not create a new rule, Lee's *Ring*/*Hurst* claim was subject to the procedural bars contained in Rule 32.2, Ala. R. Crim. P. *Clemons*, 123 So. 3d at 12. Specifically, Lee's *Ring*/*Hurst* claim was procedurally barred under Rule 32.2(a)(4), Ala. R. Crim. P., because it was raised on direct appeal and in a previous Rule 32 petition. *Lee v. State*, 898 So. 2d 790, 858 (Ala. Crim. App. 2001). Further, because Lee raised a *Ring* claim in his previous Rule 32 petition, his current *Ring*/*Hurst* claim is successive and, thus, procedurally barred under Rule 32.2(b), Ala. R. Crim. P.

Lee, however, argues that his *Ring*/*Hurst* claim is not subject to the procedural bars contained in Rule 32.2, Ala. R. Crim. P., because his claim implicates the circuit court's jurisdiction. Lee is incorrect. In *Hunt v. State*, 940 So. 2d 1041, 1057 (Ala. Crim. App. 2005), the petitioner "argue[d] that the procedural default rules in Rule 32, Ala. R. Crim. P., do not exclude claims that raise a jurisdictional defect and that the *Apprendi*[/*Ring*], claim, he . . . raise[d] [was] a jurisdictional issue"; therefore, the circuit court erroneously denied relief. This Court disagreed and held that the decisions in *Apprendi* and *Ring* do not apply retroactively and that the circuit court properly denied relief. *Hunt*, 940 So. 2d at 1057. Similarly, the Court's decision in *Hurst*, which merely applied its decision in *Ring* to a new set of facts, does not implicate the circuit court's jurisdiction and thus does

not excuse the application of the procedural bars contained in Rule 32.2, Ala. R. Crim. P.

"Because the Supreme Court did not establish new law in *[Hurst]* but rather applied law that was established . . . before [Lee's appeal became final] and before his first Rule 32 petition, [Lee's] claim was procedurally barred because [it was raised] on appeal, Rules 32.2(a)([4]) and [because it was raised] in his first Rule 32 proceedings, 32.2(b), Ala. R. Crim. P." *Clemons*, 123 So. 3d at 12. Therefore, the circuit court did not err by summarily dismissing Lee's successive Rule 32 petition.

Further, even if the *Hurst* decision did announce a new rule, the circuit court correctly dismissed Lee's petition because that rule would not apply retroactively and, thus, would not be applicable in Lee's postconviction proceedings. In *Reeves v. State*, [Ms. CR-13-1504, June 10, 2016] ___ So. 3d ___, ___ (Ala. Crim. App. 2016), this Court explained:

> "The United States Supreme Court's opinion in *Hurst* was based solely on its previous opinion in *Ring*, an opinion the United States Supreme Court held did not apply retroactively on collateral review to cases that were already final when the decision was announced. *See Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). Because *Ring* does not apply retroactively on collateral review, it follows that *Hurst* also does not apply retroactively on collateral review. Rather, *Hurst* applies only to cases not yet final when that opinion was released, such as Johnson, supra, a case that was still on direct appeal (specifically, pending certiorari review in the United

> States Supreme Court) when *Hurst* was released. Reeves's case, however, was final in 2001, 15 years before the opinion in *Hurst* was released. Therefore, *Hurst* is not applicable here."

For the forgoing reasons, the circuit court correctly dismissed Lee's Rule 32 petition, and its judgment is affirmed.

AFFIRMED.

Welch, Kellum, Burke, and Joiner, JJ., concur.

APPENDIX B

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
[SEAL]

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk

P.O. Box 301555
Montgomery, AL 36130-1555
(334) 229-0751
Fax (334) 229-0521

CR-15-141
Death Penalty

JEFFREY LEE

v.

STATE OF ALABAMA

April 21, 2017

(Appeal from Dallas Circuit Court:
CC99-21.61)

NOTICE

You are hereby notified that on April 21, 2017, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

/s/ D. Scott Mitchell
D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Donald L. McMillan, Circuit Judge
Hon. Cheryl Strong Ratcliff, Circuit Clerk
Bill Blanchard, Attorney
David Burman, Attorney - Pro Hac
Nicholas Gellert, Attorney - Pro Hac
David A. Perez, Attorney - Pro Hac
Lauren A. Simpson, Asst. Attorney General

APPENDIX C

IN THE SUPREME COURT OF ALABAMA
[SEAL]

August 25, 2017

1160675

Ex parte Jeffery Lee. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Jeffery Lee v. State of Alabama) (Dallas Circuit Court: CC-99-21.61; Criminal Appeals: CR-15-1415).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on August 25, 2017:

Writ Denied. No Opinion. Sellers, J. - Stuart, C.J., and Bolin, Parker, Main, and Bryan, JJ., concur. Shaw and Wise, JJ., recuse themselves.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

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

Witness my hand this 25th day of August, 2017.

/s/ Julia Jordan Weller
Clerk, Supreme Court of Alabama

APPENDIX D

THE STATE OF ALABAMA –
JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS

CR-15-1415

JEFFREY LEE

v.

STATE OF ALABAMA

(Appeal from Dallas Circuit Court:
CC99-21.61)

CERTIFICATE OF JUDGMENT

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Court of Criminal Appeals; and

WHEREAS, the judgment indicated below was entered in this cause on February 10th 2017:

Affirmed.

NOW, THEREFORE, pursuant to Rule 41 of the Alabama Rules of Appellate Procedure, it is hereby certified that the aforesaid judgment is final.

Witness. D. Scott Mitchell, Clerk Court of Criminal Appeals, on this the 25th day of August, 2017.

/s/ D. Scott Mitchell
Clerk
Court of Criminal Appeals State of Alabama

cc: Hon. Donald L. McMillan, Circuit Judge
Hon. Cheryl Strong Ratcliff, Circuit Clerk
Bill Blanchard, Attorney
David Burman, Attorney - Pro Hac
Nicholas Gellert, Attorney - Pro Hac
David A. Perez, Attorney - Pro Hac
Lauren A. Simpson, Asst. Attorney General

APPENDIX E

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT CRIMINAL COURT OF
DALLAS COUNTY, ALABAMA
[SEAL]

27-CC-1999-000021.61

STATE OF ALABAMA,

v.

LEE JEFFREY #00Z674,

Defendant.

Filed: 8/5/2016

Judge: Donald L. McMillan Jr

Cheryl Strong Ratcliff
Circuit Court Clerk

Dallas County, Alabama
Dallas County Courthouse
P.O. Box 1148
Selma, AL 36702
334-874-2523
cheryl.ratcliff@alacourt.gov

ORDER DISMISSING LEE'S RULE 32 PETITION

This matter comes before this Court on the State's Motion to Dismiss the Rule 32 petition of Jeffrey Lee. Having considered the petition presented to the Court and the pleadings filed in this matter, the Court makes the following findings and hereby summarily DISMISSES Lee's Rule 32 petition.

I. Procedural History

The record establishes that on April 12, 2000, Lee was convicted of three counts of capital murder and one count of attempted murder after he robbed a pawn shop in Orrville and shot three people, two fatally. The capital crimes charged were two counts of robbery-murder, a violation of section 13A-5-40(a)(2) of the Code of Alabama (1975), and one count of murder of two or more persons pursuant to one scheme or course of conduct, a violation of section 13A-5-40(a)(10). The trial court overrode the jury's recommendation and sentenced Lee to death.

On direct appeal, the Alabama Court of Criminal Appeals first remanded the case for a new sentencing order, then allowed the parties to file supplemental briefs concerning the effect of Ring v. Arizona, 536 U.S. 584 (2002), on Lee's case. That court affirmed Lee's convictions and death sentence on June 27, 2003. Lee v. State, 898 So. 2d 790 (Ala. Crim. App. 2003). Both the Alabama Supreme Court and the United States Supreme Court denied certiorari.

Lee filed his first Rule 32 petition in 2005, arguing, among other claims, that Alabama's capital sentencing scheme was unconstitutional after Ring. The circuit court dismissed this petition in 2007, and the Court of Criminal Appeals affirmed. Lee v. State, 44 So. 3d 1145 (Ala. Crim. App. 2009). The Alabama Supreme Court denied certiorari.

Following his state proceedings, Lee filed a federal petition for writ of habeas corpus in 2010, again raising Ring claims. The district court denied the petition, and the Eleventh Circuit Court of Appeals affirmed that court's decision.

Lee's present Rule 32 petition, his second, contains a single claim based on Hurst v. Florida, 136 S. Ct. 616 (2016), in which the United States Supreme Court held that Florida's capital sentencing scheme fell afoul of Ring's mandate that a jury find every fact necessary to expose a defendant to the death penalty. Lee filed this petition on April 20, 2016, arguing that his sentence is illegal after Hurst because the trial court, not the jury, made the findings necessary to sentence him to death.

II. Lee's Hurst Claim

Lee alleges that his sentence is illegal for several reasons. Because the jury returned only a generalized verdict at sentencing and did not unanimously recommend death, Lee argues that it is impossible to determine whether the jury found the existence of an aggravating circumstance beyond a reasonable doubt. He also claims that the trial court erred in overriding the jury's recommendation. Pet. 4–7. Further, Lee contends that Hurst overturned Harris v. Alabama, 513 U.S. 504 (1995), and Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002). Pet. 9–10. For the reasons that follow, this Court summarily dismisses Lee's petition.

First, two recent decisions from the Court of Criminal Appeals invalidate Lee's Hurst claim. In Reeves v. State, CR- 13-1504, 2016 WL 3247447, at *37 (Ala. Crim. App. June 10, 2016), the court held that Hurst is not retroactively applicable to cases on collateral review. One week later, in Ex parte State, CR-15-0619, 2016 WL 3364689, at *11 (Ala. Crim. App. June 17, 2016), the court went further, holding that "Alabama's capital-sentencing scheme is constitutional under Apprendi, Ring, and Hurst." Thus, Hurst offers Lee no relief, and his claim is meritless.

Second, Lee's current petition is a successive Rule 32 petition. Pursuant to Rule 32.2(b) of the Alabama Rules of Criminal Procedure, all successive petitions raising grounds not previously raised on appeal shall be denied unless the petitioner shows either that (1) he is entitled to relief because the court was without jurisdiction to render a judgment or impose sentence, or (2) good cause exists why the new grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and failure to entertain the petition will result in a miscarriage of justice. Lee has not made this showing.

The first exception to Rule 32.2(b) is inapplicable. The trial court had jurisdiction to render judgment and sentence Lee, and he has provided this Court with nothing to the contrary.

The second exception to Rule 32.2(b) is also inapplicable. Hurst is nothing but an examination of Florida's capital sentencing scheme after Ring — it did not create a new rule of constitutional law, and as the Court of Criminal Appeals has found, it has no effect on Alabama's capital statutes. Moreover, Lee has raised Ring claims on several occasions since 2002, including in his first Rule 32 petition. These Ring claims have been consistently denied, and failure to entertain the current claim will not result in a miscarriage of justice. As Lee has failed to show that his claim falls into either of Rule 32.2(b)'s exceptions, his successive petition is procedurally barred.

Third, even if Lee's claim were not barred by Rule 32.2(b), it would be precluded by Rule 32.2(a)(4) of the Alabama Rules of Criminal Procedure. Lee's Hurst claim is little more than a restatement of his prior Ring claims, and so this claim is barred by Rule 32.2(a)(4) because it was raised and address on direct

review and in the previous Rule 32 petition. See Lee, 898 So. 2d at 858; Lee v. State, CC-1999-21.60, at 126–30 (Dallas County Cir. Ct. Aug. 28, 2007).1 His current claim provides nothing new, and as Hurst did not invalidate Alabama's capital statutes, this claim is barred.

Finally, it is beyond question that the jury unanimously found an aggravating circumstance in Lee's case by virtue of his two convictions of robbery-murder. A conviction under section 13A-5-40(a)(2) necessarily means the jury has found the existence of the corresponding aggravator in section 13A-5-49(4) — that the capital murder was committed during a robbery. This finding is all that was required to expose Lee to the death penalty.2 As Lee has not presented a material issue of fact or law entitling him to relief, his petition is summarily dismissed.

Conclusion

For the reasons stated above, it is hereby ORDERED, ADJUDGED, and DECREED that Lee's Rule 32 petition is DISMISSED. It is further ORDERED that Lee shall have forty-two days from this filing of this Order in the Dallas County Circuit Clerk's Office to file his notice of appeal.

In light of the foregoing, the August 23, 2016, hearing on Lee's petition and affidavit of substantial hardship is CANCELLED.

DONE this 5th day of August, 2016.

/s/ DONALD L MCMILLAN JR
CIRCUIT JUDGE

1. Lee did not pursue the Rule 32 claim in the Court of Criminal Appeals.

2. At the time of Lee's crime, the murder of two or more persons was not an aggravating circumstance. See 1999 Ala. Laws Act 99-403 (approved June 9, 1999).

APPENDIX F

COURTESY NOTICE

IN THE CIRCUIT CRIMINAL COURT OF
DALLAS COUNTY, ALABAMA
[SEAL]

27-CC-1999-000021.61

STATE OF ALABAMA,

v.

LEE JEFFREY # 00Z674

The following matter was
Filed on 4/28/2016 11:43:34 AM

Judge: Donald L. McMillan Jr

PETITION FOR RELIEF FROM UNLAWFUL SENTENCE PURSUANT TO RULE 32 OF THE ALABAMA RULES OF CRIMINAL PROCEDURE

[Filer: BLANCHARD WILLIAM RIVES J]

This copy is being provided as a courtesy copy only. Providing this copy is not required by law and is not intended to constitute service,

Cheryl Strong Ratcliff
Circuit Court Clerk

Dallas County, Alabama
Dallas County Courthouse
P.O. Box 1148
Selma, AL 36702
334-874-2523
cheryl.ratcliff@alacourt.gov

IN THE CIRCUIT COURT OF
DALLAS COUNTY, ALABAMA

Case No. CC-1999-21.61

JEFFERY LEE,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

PETITION FOR RELIEF FROM UNLAWFUL SENTENCE PURSUANT TO RULE 32 OF THE ALABAMA RULES OF CRIMINAL PROCEDURE

Petitioner Jeffery Lee, now incarcerated at Holman Correctional Facility in Atmore, Alabama, inmate number Z674, petitions this Court pursuant to Rule 32 of the Alabama Rules of Criminal Procedure tor relief from his unlawful sentence to death.

STATEMENT OF THE CASE

The trial court, not the jury, made findings necessary to impose a death sentence on Mr. Lee. On January 12, 2016, overruling prior precedents, the United States Supreme Court held in *Hurst v. Florida,* 577 U.S. __, 136 S. Ct. 616 (2016), that Florida's capital sentencing procedure is unconstitutional under the mandate in *Ring v. Arizona,* 536 U.S. 584 (2002), which requires that the jury, not the judge, make every finding that allows for imposition of the death

penalty. Because the capital sentencing procedure applied in Mr. Lee's case is materially identical to that ruled to violate the Sixth Amendment in Florida, under *Hurst,* Mr. Lee's death sentence is illegal — *see Ex parte Batey,* 958 So.2d 339, 343 (Ala. 2006) — and must be vacated.

PROCEDURAL HISTORY

I. TRIAL AND DIRECT APPEAL

1. On January 19, 1999, Mr. Lee was indicted by a grand jury in Dallas County on two counts of homicide during the commission of robbery in the 1st degree (Counts 1 and 2); one count of homicide of two or more persons (Count 3); and one count of attempt to commit murder (Count 4).

2. On March 15, 1999, Mr. Lee was arraigned and pled not guilty and not guilty by reason of mental defect or disease.

3. The trial commenced on April 10, 2000, and on April 12, 2000, the empaneled jury convicted Mr. Lee on all of the charges in the indictment.

4. Later on April 12, 2000, the same jury returned a verdict recommending, by a vote of seven to five, that Mr. Lee receive a sentence of life without parole. The jury was then excused.

5. On September 22, 2000, the trial court held a sentencing hearing, at which evidence was introduced as to what penalty the trial judge should impose.

6. On October 11, 2000, the court reconvened and the trial judge imposed a sentence of death for Counts 1, 2, and 3, and a life imprisonment sentence on the attempted murder conviction—overriding the jury's recommendation of life without parole. The trial court's findings in support of the sentence were

announced verbally on the record and then in a written order of the same date.

7. On October 26, 2001, the Court of Criminal Appeals remanded the case to the trial court. The appellate court concluded that the trial court's sentencing decision did not, as required by *Ex parte Taylor,* 808 So.2d 1215 (Ala. 2001), state the reason that the court did not follow the jury's recommendation of a life sentence. On October 31, 2001, the trial court entered a new sentencing order.

8. On June 27, 2003, on return from remand, the Court of Criminal Appeals issued a decision affirming Mr. Lee's conviction and sentence of death. On August 22, 2003, the Court of Criminal Appeals denied Mr. Lee's timely petition for rehearing. On February 6, 2004, the Alabama Supreme Court denied Mr. Lee's timely petition for writ of certiorari. On October 12, 2004, the United States Supreme Court denied Mr. Lee's timely petition for writ of certiorari.

II. PRIOR RULE 32 PETITION

9. On February 3, 2005, Mr. Lee filed a timely Petition for Relief from Judgment Pursuant to Rule 32 with this Court.

10. On September 7, 2007, the Court denied Mr. Lee's Rule 32 Petition.

11. On October 9, 2009, the Court of Criminal Appeals denied Mr. Lee's timely appeal. On December 4, 2009, the Court of Criminal Appeals denied Mr. Lee's timely application for reconsideration. February 19, 2010, the Alabama Supreme Court denied Mr. Lee's timely petition for writ of certiorari.

III. FEDERAL HABEAS CORPUS PETITION

12. On October 21, 2010, Mr. Lee filed a timely Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by Person in State Custody Under Death Sentence with the United States District Court, Southern District of Alabama.

13. On May 30, 2012, the United States District Court denied Mr. Lee's federal habeas petition, and on August 1, 2012, denied Mr. Lee's timely request for reconsideration,

14. On August 1, 2013, the United States Court of Appeals for the Eleventh Circuit denied Mr. Lee's timely appeal, and on September 24, 2013, denied Mr. Lee's timely request for reconsideration. On March 24, 2014, the United States Supreme Court denied Mr. Lee's timely petition for writ of certiorari

GROUNDS SUPPORTING THE PETITION FOR RELIEF

I. THE TRIAL COURT, NOT THE JURY, MADE FINDINGS REQUIRED TO SENTENCE MR. LEE TO DEATH, VIOLATING MR. LEE'S RIGHTS UNDER THE SIXTH AMENDMENT.

15. Alabama's capital sentencing system contains two prerequisites to imposing the death penalty. First, "one or more of the aggravating circumstances enumerated in [Ala. Code] § 13A-5-49 [must be] found to exist" and second, it must be determined that the "aggravating circumstances) [must] outweigh[] any mitigating circumstance(s) that may exist." *Ex parte Woodard,* 631 So. 2d 1065, 1071 (Ala. Crim. App, 1993) (citing Ala, Code §§ 13A-5-45(f), -46(e), -47(e)).

16. The jury plays only an "advisory" role at sentencing. Ala. Code § 13A-5-46. The jury's advisory

verdict must be considered, but need not be followed, by the trial court in imposing sentence, Ala. Code § 13A-5-47(e) ("While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.").

17. If the jury determines that no aggravating circumstances exist or that the aggravating circumstance(s) that it determines exist do not outweigh the mitigating circumstances, "it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole," Ala. Code § 13A-5-46(e)(1), (2).

18. At the sentencing phase of his trial, Mr. Lee's jury was instructed that "[t]he fact that Jeffery Lee has been convicted in this case in and of itself is not an aggravating circumstance," and that "only if the State demonstrated beyond a reasonable doubt to each of you that the alleged aggravating circumstance exists may you consider the imposition of the respondent sentence of death," Tab P-19, R. 445. In addition, the jury was instructed that if it "determine[d] that the mitigating circumstances outweigh the aggravating circumstance that might exist, or if you're not convinced beyond a reasonable doubt at least one aggravating circumstance does exist . . . , the form of your verdict would be, 'We, the jury, recommend that the defendant be punished with life imprisonment without parole.' Tab P-19, R. 458. The jury is presumed to have followed these instructions, *See Francis v. Franklin,* 471 U.S. 307, 324 n.9 (1985) ("the crucial assumption underlying our constitutional system of trial by jury [is] that jurors carefully follow instructions"); *United States v. Lopez,* 649 F.3d 1222, 1237 (11th Cir. 2011) ("We presume that juries follow the instructions given to them.").

19. Mr. Lee's jury entered an advisory verdict recommending life by seven to five. Tab P-21, R. 460. However, because Alabama law provides for only generalized jury verdicts at the sentencing phase, *see* Ala. Code § 13A-5-46(e); *Haney v. State,* 603 So. 2d 368, 388 (Ala. Crim. App. 1991), *aff'd,* 603 So. 2d 412 (Ala. 1992), it is impossible to know if the jury's verdict is based on the jurors not finding there to be any aggravating circumstance proven beyond a reasonable doubt or whether they found that any such circumstance did not outweigh the mitigating factors. In the face of the jury instructions, it would be improper to assume that the jury found an aggravating circumstance.

20. The State erroneously has maintained that the jury in fact found the aggravating circumstance of murder in the course of robbery when it found Mr. Lee guilty under Ala. Code § 13A-5-40(a)(2) (murder during a robbery). *See, e.g.,* Corrected Brief of Appellee at 56, *Lee v. Thomas,* U.S. Court of Appeals for the 11th Circuit, No. 12-14421-P (February 11, 2013) (arguing that "[a]s a matter of text and logic" that the jury's verdict convicting Mr. Lee of murder during a robbery "necessarily equated to a finding of the aggravating circumstance"). If this argument is accepted, then the jury's advisory verdict necessarily was based on the determination that that aggravating circumstance was outweighed by the mitigating factors,

21. After the jury returned its life sentence recommendation, the trial court took additional evidence, including hearing from four witnesses for the State. Tab P-22, R. 464-472. The trial judge stated that he needed time to "review all the evidence . . . and get the pre-sentence report." Tab P-22, R. 487, *see* Tab P-22, R. 487 ("I'm required by statute to consider a pre-

sentence investigation."). Although the jury was instructed that its recommended sentence had to be based on the evidence presented at the sentence hearing and at the trial, Tab P-19, R. 440, R. 441-442, R. 451-452, the trial judge made clear that he understood his authority to sentence did not derive from the jury's verdict, its fact finding, or even the evidence presented to the jury. See Ala, Code § 13A-5-47(d) (trial court to consider "evidence presented at trial, the evidence presented during the sentence hearing, and the presentence investigation report and any evidence submitted in connection with it" in deciding whether or not aggravating circumstances exist). And, in addition, the judge did not recuse himself even though he knew the victims, had heard inadmissible evidence, and had stood for election against the attorney representing Lee. Tab P-43, at 2; *see also* Tab P-44, at 1-2. In addition, the presentence report presented to and considered by the judge (but not the jury) included the purported results of an interview of the defendant and "character references," both of which were inconsistent with the mitigation evidence both presented and available but not presented. Tab P-23, at 4-7. The report also improperly included the officer's opinions that the weapon was fired intentionally, that the offense was "heinous," and that the death penalty was appropriate. Tab P-23, at 7.

22. When proceedings reconvened a few months later, the prosecution argued an uncharged aggravating circumstance: that "[t]his case itself showed aggravation of an extreme measure far beyond any normal robbery killing," Tab P-22, R. 490. Although the trial judge rejected the new aggravating circumstance, he overrode the jury's conclusion with no mention of what burden of proof he was applying, only that he had given "due consideration to the jury's

recommendation." Tab P-22, R. 491-492. *See* Ala. Code §§ 13A-5-46(e), -47. The judge made written findings as to seven statutory mitigating circumstances, including Mr. Lee's lack of any prior criminal history[1] but not all the factors as to which it had instructed the jury. And of course, he could not even know what unenumerated factors the jurors had found from the evidence. The court rejected the "extreme mental or emotional disturbance" and impaired-capacity mitigating circumstances. Tab P-24. The court did find that the evidence supported what it deemed a non-statutory mitigating circumstance of "low to borderline range of intellect," especially once "he reached the age of about 14 or 15 and then began acting out in strange ways." Tab P-24, 4-5.

23. Based on an intervening Alabama. Supreme Court ruling, the Alabama Court of Criminal Appeals remanded the matter to the trial court to "state specific reasons for giving the jury's recommendation the consideration he gave it." Tab P-25, at 1 (internal quotation marks omitted). The judge then reaffirmed the death sentence with a brief explanation that he "considered the fact that the vote was seven for life without parole and five for the death penalty, the minimum vote for a life without parole recommendation" and that "it appeared clearly to the Court that

---

[1] This was the only mitigating factor accepted by the judge. He rejected six other statutory mitigating factors including: (1) "extreme mental or emotional disturbance"; (2) whether the victim was a participant in the crime; (3) whether the defendant was merely an accomplice or with minimal participation in the crime; (4) whether the defendant acted under extreme duress; (5) diminished capacity or substantial impairment and (6) defendant's age at the crime (here the court determined that Mr. Lee's young age at the time of the crime "was a mitigating circumstance but . . . a weak one." Tab P-24, 3-5.

the aggravating circumstance outweighed the mitigating circumstances beyond a reasonable doubt." Tab P-25, at 1, But this was no more specific than the prior ruling, and it is not logically possible for the Alabama system to reach the conclusion that it is beyond a reasonable doubt that death is appropriate where seven qualified and in fact death-qualified jurors have reached the opposite conclusion.

24. The court did identify one new consideration that supported its decision to override the jury recommendation for life: the fact that a death sentence would be proportionate to the "sentences given in other murder during robbery capital murder convictions in this County, this Circuit and this State." Tab P-25, at 3. But in doing so, the court impermissibly considered and then effectively gave diapositive weight to a non-statutory aggravating factor: proportionality. And it did so without any assessment or analysis of any record of the circumstances in the other cases, and was precisely contrary to the court's instructions to the jury that the law imposes "a presumption that he should not be put to death as punishment for the offense," that "[t]he law imposes no burden upon Jeffrey Lee to prove or demonstrate the existence of mitigating circumstances," and that "[t]he sentence of death is never mandatory and the jury retains the power to return a verdict of life in the penitentiary without possibility of parole." Tab P-19, R. 442, 447, 450.

25. In *Ring,* the Supreme Court held that if a "State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring,* 536 U.S. at 602. In both Florida and Alabama, the capital sentencing procedure allows the trial judge to conclude

whether aggravating circumstances exist and then consider and weigh aggravating and mitigating circumstances, independently from the jury's advisory verdict. In both jurisdictions, it is the trial court, not the jury, that makes the determinations as to whether the defendant is to be sentenced to death. In *Hurst,* the Supreme Court examined the specific question of whether such a scheme violates the Sixth Amendment.

26. Given the similarities between Florida's and Alabama's schemes, the State of Alabama, through its Solicitor General, filed an amicus brief in *Hurst.* Alabama's brief recognized that the Supreme Court's decision in favor of the petitioner in *Hurst* would upset precedents applicable to Alabama's scheme. Brief of Amici Curiae Alabama and Montana in Support of Respondent, *Hurst v. Florida*, 2015 WL 4747983 at *9 (2015) ("Florida and Alabama have relied on this Court's decisions in *Spaziano* [*v. Florida,* 468 U.S. 447 (1984)] and *Harris* [*v. Alabama,* 513 U.S. 504 (1995)] to sentence hundreds of murderers").

27. The Supreme Court in *Hurst* held that capital sentencing schemes like those in Florida and Alabama violate the Sixth Amendment in light of *Ring.* First, the Court reaffirmed the central holding of Ring: "The Sixth Amendment requires the 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.

28. The Supreme Court in *Hurst* then examined the Florida capital sentencing scheme in depth. That examination demonstrates that the aspects of the Florida scheme being challenged are materially identical to Alabama's scheme. Both states employ juries to render only advisory verdicts, thereby leaving the trial

judge responsible for the ultimate sentencing decision. *Hurst,* 136 S. Ct. at 620; Ala. Code § 13A-5-47(e). In both states, the trial court makes its own decision, notwithstanding the recommendation of the jury. *Hurst,* 136 S. Ct. at 620; Ala. Code § 13A-5-47(a). The jury's recommendation is not binding on the court in either jurisdiction. *Hurst,* 136 S. Ct. at 620; Ala Code § 13A-5-47(e).

29. Unlike in Mr. Lee's case, Mr. Hurst's jury recommended a death sentence. Even in that situation, the Court held that the trial court's subsequent judgment of death violated Mr. Hurst's Sixth Amendment rights because the jury's verdict was only advisory and it was the trial court's independent determination that subjected Mr. Hurst to the death sentence. *Hurst,* 136 S. Ct. at 622. In reaching this conclusion, the Court explicitly overruled its decisions in *Hildwin v. Florida,* 490 U.S. 638 (1989), and *Spaziano v. Florida,* 468 U.S. 447 (1984), because those decisions had improperly concluded that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hurst,* 136. S. Ct. at 623. Thus the concern of the State of Alabama, as set forth in its amicus brief in Hurst, was realized — the decisions that formed the basis for previous rulings upholding Alabama's capital sentencing scheme had been overturned.

30. In *Spaziano,* the Supreme Court had held that Florida's death penalty statute was constitutional even though it allowed the trial court to override the jury's recommended sentence. The Court's reasoning relied on the fact that the jury recommendations were accorded "great weight" by the sentencing judge, which the Court concluded ensured that death sen-

tences were not arbitrarily given. *Spaziano,* 468 U.S. at 465.

31. In *Harris v. Alabama,* 513 U.S. 504 (1995), the Supreme Court considered whether Alabama' override system was unconstitutional. In so doing, the Court observed that Alabama's system was based off the Florida system at issue in *Spaziano. Harris,* 513 U.S. at 508. The only difference was that the Alabama system had not been interpreted, as had the Florida Supreme Court, to require that the trial court afford the jury's recommendation "great weight." The Court held that this one difference did not make the Alabama system constitutionally infirm: "The constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight." *Id*. at 515. This aspect of *Harris* has not been good law for many years, see *Ring,* 536 U.S. at 589 (2002), and the overall holding of *Harris* does not survive *Hurst,* because the Supreme Court was correct when, in *Harris,* it described Alabama's sentencing scheme to be "much like that of Florida." *Harris,* 513 U.S. at 508.

32. In *Ex Parte Waldrop,* the Alabama Supreme Court held that the weighing of aggravating and mitigating circumstances "is not a factual determination" and thus it need not be by the jury. *Waldrop,* 859 So.2d 1181, 1189 (Ala. 2002). *Hurst* also rejects the holding of *Waldrop.* In explaining why Florida's effort to defend the role of the jury made its scheme constitutional, the Supreme Court clearly stated as follows:

> The State fails to appreciate the central and singular role the judge plays under Florida law . . . the Florida sentencing statute does

> not make a defendant eligible for the death penalty until "findings *by the court* that such person shall be punished to death." The trial court *alone* must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances:" "[T]he jury's function under the Florida death penalty statute is advisory only." The State cannot now treat the advisory recommendation by the jury as the necessary finding that Ring requires.

Hurst, 136 S. Ct. at 622 (italics and brackets in original) (internal citations omitted) (underlining added). This outcome is consistent with the reality that in order to weigh aggravating and mitigating factors, the decision-maker must first evaluate the factual intensity of each. *Cf.* Ala. Code § 13A-5-48 (weighing shall not "mean a mere tallying of aggravating and mitigating circumstances for the purpose of numerical comparison"); *Carroll v. Alabama,* 852 So.2d 833, 836 (Ala. 2002) (weight to be given jury's recommendation depends in part "upon the strength of the *factual* basis for such a recommendation") (emphasis added).

33. Alabama and Florida are materially identical in this respect too. In both schemes, the trial court alone, not the jury, makes the weighing of aggravating and mitigating factors that matters – the weighing that allows for entry of the death sentence. The only difference is that, in Alabama, the jury's recommendation is not accorded "great weight" as the court alone decides the balancing. This difference is immaterial to whether Alabama's capital sentencing scheme is

constitutionally infirm for the same reasons as Florida's.

34. Under the newly decided *Hurst* precedent, Mr. Lee's death sentence is illegal and must be vacated.

PRAYER FOR RELIEF

For all the above stated reasons, petitioner Mr. Lee respectfully asks this Honorable Court grant the Petition and vacate his sentence of death,

DATED: April 14, 2016

Respectfully submitted,

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ATTORNEY'S VERIFICATION

I affirm under penalty of perjury that, upon information and belief, the foregoing is true and correct.

Signed on April 14, 2016.

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