No. 17-775

In the
Supreme Court of the United States

JEFFERY LEE,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

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

BRIEF IN OPPOSITION

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

Counsel for State of Alabama

CAPITAL CASE

QUESTION PRESENTED (REPHRASED)

The petition presents two questions that misunderstand this Court's precedents and Alabama law. Because the instant petition arises from a successive state post-conviction petition, neither of these questions would warrant reversal, even if answered in the affirmative. First, the petition asks whether the Court should overrule *Harris v. Alabama*, 513 U.S. 504 (1995). But, even if the Court were to overrule *Harris*, the Court would have to make that overruling retroactive to have any impact on this case, an issue the petition does not even address. Second, the petition asks whether *Hurst v. Florida*, 136 S.Ct. 616 (2016) is retroactive. But *Hurst v. Florida* would not warrant reversal in this case even if it were retroactive. And the petition makes no real arguments on the retroactivity point in any event.

The actual questions presented by the petition are as follows:

1. Is the petitioner's sentence consistent with *Hurst v. Florida* and, if not, is *Hurst* retroactive such that it applies to convictions that were final ten years before it was issued?

2. Although the Court has consistently declined to consider overruling *Harris* in cases on direct appeal that actually presented the issue, should the Court consider overruling *Harris* in this case where any such overruling would be relevant only if the Court also made its decision retroactive?

PARTIES

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STATEMENT

In December 1998, Lee opened fire in a pawnshop with a sawed-off shotgun, killing two people and wounding another. He began firing as soon as he walked through the door and continued until his gun ran out of cartridges. The shootings were memorialized by the shop's surveillance camera, and he later confessed to them.

The State charged Lee with three counts of capital murder. The first two charges were for murdering the store owner and employee, respectively, during the course of a robbery or attempted robbery. *See* ALA. CODE §13A-5-40(a)(2). The third charge was for murdering two or more victims pursuant to a single scheme or course of conduct. *See id*. §13A-5-40(a)(10). Lee was also charged with attempted murder for the store employee who survived. The jury unanimously convicted Lee of these charges.

After a separate evidentiary hearing, the jury considered whether to recommend a sentence of death or life-without-parole on the capital murder charges. The jury recommended a sentence of life-without-parole by 7-5.

Under Alabama law, sentences are imposed by judges. The judge held a separate sentencing hearing at which he considered additional evidence, a probation report, and the jury's recommended sentence. The judge sentenced Lee to death. The judge explained:

> I have considered this case and this is the hardest one I've ever had to do. I've had many. I think it has been foremost in my mind since we were here two weeks ago. . . . With cold precision and premeditation using a weapon designed for the sole purpose of extinguishing human life [Lee] mercilessly gun[ned] down three people who were doing nothing more than trying to earn a living. As shown individually by surveillance video he opened fire upon entering the door. He emptied his weapon firing as quickly as he could, shot after shot. . . . it is the judg[ ]ment of the Court that the defendant be punished by death for the capital offenses for which he was convicted. He is further sentenced to life in prison for the attempted murder of [the surviving store employee].

The judge later entered a written sentencing order in which he explained that proportionality principles required the imposition of a capital sentence. The judge compared Lee's double-murder and attempted murder to similar crimes. He explained "the importance that the death penalty be administered with an even hand." He concluded that in light of other sentences imposed for "robbery capital murder convictions in this County, this Circuit, and this State," proportionality principles meant that this "case deserves the death penalty."

Lee challenged this procedure on direct appeal, state post-conviction review, and federal habeas re-

view. His conviction and sentence were affirmed by the state courts on direct appeal and post-conviction review and by the Eleventh Circuit on federal habeas review. *See Lee v. State*, 898 So.2d 790, 808 (Ala. Crim. App. 2003), *cert. denied*, 543 U.S. 924 (2004) (direct appeal); *Lee v. State*, 44 So.3d 1145 (Ala. Crim. App. 2009) (post-conviction); *Lee v. Commissioner*, 726 1172 (2013), *cert. denied*, 134 S.Ct. 1542 (2014). This Court denied certiorari at each step.

For their part, the lower courts explained that the jury's unanimous guilt-phase verdict had expressly found an aggravating factor—murder during the commission of a robbery—that made Lee eligible for the death penalty. For example, the Eleventh Circuit explained that "the Sixth Amendment's guarantee of jury trials requires that the finding of an aggravating circumstance that is necessary to imposition of the death penalty must be found by a jury." *Lee*, 726 F.3d at 1198. "That occurred in Lee's case by virtue of the jury's capital robbery-murder verdict." *Id*.

After Lee's conviction was final, after it was reviewed on state post-conviction review, and after this Court denied certiorari on the denial of his federal habeas petition, Lee filed a successive state petition for post-conviction review in 2016 on the theory that this Court's decision in *Hurst v. Florida* had announced a new rule of constitutional law that retroactively rendered his sentence unconstitutional. Pet. App. 25a.

The state court denied the petition for several substantive and procedure reasons. *See* Pet. App.

18a-23a. First, it relied on this Court's decision in *Harris v. Alabama*, which held judicial sentencing to be constitutional. Second, the court held that *Hurst* did not invalidate Lee's sentence because the jury unanimously found an aggravating factor at the guilt-phase of Lee's trial. Third, the court held that Lee could not meet the procedural requirements to file a successive post-conviction petition under Alabama Rule of Criminal Procedure 32.2(b). Fourth, the court held that Lee was merely seeking to relitigate the same constitutional claims that he had already litigated on direct appeal and state post-conviction review such that they are procedurally barred. The state appellate courts affirmed for the same reasons. *See* Pet. App. 1a-12a.

REASONS FOR DENYING THE WRIT

Instead of arguing the usual grounds for granting certiorari, the petition asks this Court to consider overruling *Harris v. Alabama*, 513 U.S. 504 (1995). *Harris* held Alabama's capital sentencing statute to be constitutional, even though it allowed for judicial sentencing. The Court has consistently denied certiorari on the question of whether to overrule *Harris* and has continued to deny certiorari on that question after deciding *Hurst v. Florida*, 136 S.Ct. 616 (2016).[1]

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[1] *See Kirksey v. State*, --- So. 3d ---, 2016 WL 7322330 (Ala. Crim. App. Dec. 16, 2016), *cert denied* 138 S.Ct. 430 (Nov. 6, 2017); *Wimbley v. State*, --- So. 3d ---, 2016 WL 7322334 (Ala. Crim. App. Dec. 16, 2016), *cert denied* 138 S.Ct. 385 (Oct. 30, 2017); *Ex parte Bohannon*, 222 So. 3d 525 (Ala. 2016), *cert. denied* 137 S.Ct. 831 (Jan 23, 2017); *Lockhart v. State*, 2013 WL

The Court has even denied certiorari on this question in cases, unlike this one, that the State conceded were appropriate vehicles to consider it.[2]

The Court should deny this petition for the same reasons it denied all the others. The Alabama Legislature has ended judicial sentencing going forward, making the issue presented by the petition much less important. But Alabama has also relied on *Harris* to sentence hundreds of murderers, including Lee. "[T]he States' settled expectations deserve our respect." *Ring v. Arizona*, 536 U.S. 584, 613 (2002) (Kennedy, J., concurring).

In any event, even if the Court wanted to reconsider *Harris*, this would not be the case in which to do it. This case comes to the Court in a uniquely problematic procedural posture, which would require the Court to consider issues of state post-conviction procedural law and the retroactivity of any potential decision. Moreover, the sentencing judge in this case imposed a death sentence based on the jury's unanimous finding of an aggravating factor at the guilt phase. And he did so based on considerations of consistency and proportionality that underscore why judges are the usual parties charged with imposing

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4710485 (Ala. Crim. App. 2013), *certiorari denied* 135 S. Ct. 1844 (2015); *Scott v. State*, 2012 WL 4757901 (Ala. Crim. App. 2012), *certiorari denied* 135 S. Ct. 1844 (2015);*Woodward v. State*, 123 So. 3d 989 (Ala. Crim. App. 2011), *certiorari denied* 134 S. Ct. 405 (2013); *Sharifi v. State*, 993 So. 2d 907 (Ala. Crim. App. 2008), *certiorari denied* 129 S. Ct. 491 (2008).

[2] *See Shanklin v. State,* 187 So.3d 734 (Ala. Crim. App. 2014), *cert. denied* 136 S.Ct. 1467 (March 21, 2016).

sentences in other areas of the law. Nothing about that process is inconsistent with the Constitution. The petition for writ of certiorari should be denied.

I. Lee's sentence does not violate the Sixth Amendment.

Lee argues that his sentence violates the Sixth Amendment because the judge was allowed to determine whether to sentence him to either death or life-without parole. He relies on two decisions to support this argument: *Ring v. Arizona*, 536 U.S. 584 (2002) and *Hurst v. Florida*, 136 S. Ct. 616 (2016). Lee misunderstands *Ring*, *Hurst*, and the way that Alabama's capital sentencing statute works.

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

This Court has clearly distinguished two separate determinations to be made in capital sentencing: "the eligibility decision and the selection decision." *Tuilaepa v. California*, 512 U.S. 967, 970–971 (1994). "To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment." *Id.* (citing *Coker v. Georgia*, 433 U.S. 584 (1977)). That includes a finding of an "'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase." *Tuilaepa*, 512 U.S. at 972. But the Court has recognized "a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact

receive that sentence." *Id.* That question involves whether the aggravating factors outweigh any mitigating factors.

Before it was changed last year to eliminate judicial sentencing, Alabama's death penalty statute was a remedial response to the problem of the arbitrariness of unfettered jury discretion that this Court identified in *Furman v. Georgia*, 408 U.S. 238 (1972). Under Alabama's system, the jury would continue to make certain fact-findings to establish "eligibility." But, as to "selection," the jury would merely render an advisory sentencing recommendation that the judge could consider in making the ultimate decision. *See* Nathan A. Forrester, *Judge Versus Jury: The Continuing Validity of Alabama's Capital Sentencing Regime After* Ring v. Arizona, 54 ALA. L. REV. 1157, 1164–78 (2003) (describing this history).

The Court revisited the issue of capital sentencing in *Ring v. Arizona*, 536 U.S. 584 (2002), and applied the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to death penalty cases. In *Ring*, the Court held that, although a judge can make the "selection decision," the jury must find the existence of any fact that makes the defendant "eligible" for the death penalty by increasing the range of punishment to include the imposition of the death penalty. The Court held that Arizona's death penalty statute violated the Sixth Amendment right to a jury trial "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 585. Thus, the trial judge cannot make a

finding of "any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589. Only the jury can.

Hurst did not add anything of substance to *Ring*. In *Hurst*, the State of Florida prosecuted a defendant for first-degree murder, which carried a maximum sentence of life without parole. *Hurst*, 136 S. Ct. at 620. Florida did not ask a jury to find the existence of any aggravating circumstance at the guilt phase. *Id.* At the sentencing phase, the jury also did not find the existence of any particular aggravating circumstance. The jury merely returned a non-unanimous advisory sentencing recommendation of seven to five in favor of death. *Id.* Because the jury found no aggravating factor at the guilt or sentencing phase, the judge should have imposed a life without parole sentence. Instead, the judge found an aggravating circumstance herself and imposed a death sentence, making both the eligibility and selection determinations. *Id.* Applying *Ring*, the Court held the resulting death sentence unconstitutional because "the judge alone [found] the existence of an aggravating circumstance" that expanded the range of punishment to include the death penalty. *Id.* at 624.

B. The jury found the aggravating factor that made Lee eligible for the death penalty.

Alabama's sentencing practices, and what happened in Lee's case, differ from the procedures that Florida followed in *Hurst*. As Justice Scalia explained in his concurrence in *Ring*, "[w]hat today's

decision says is that the jury must find the existence of the fact that an aggravating factor existed." *Ring*, 536 U.S. at 612. "Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase." *Id.* at 612–13 (Scalia, J., concurring).

For most cases, Alabama has chosen the second and most "logical" option—to secure a jury determination of aggravating circumstances at the guilt phase. Alabama law provides that "any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing." ALA. CODE § 13A-5-45 (e). The elements of capital murder in Alabama largely track aggravating circumstances. For example, committing an intentional murder "during a robbery in the first degree or an attempt thereof" is a capital offense. ALA. CODE § 13A-5-40(a)(2). This same finding is an aggravating factor at sentencing. See ALA. CODE § 13A-5-49(4) ("[t]he capital offense was committed while the defendant was engaged [in] . . . robbery").

Unlike in *Hurst*, the jury found all that it needed to find to allow the judge to sentence Lee to death. In *Hurst*, Florida argued that the jury's non-unanimous and non-specific advisory sentencing recommendation was a fact-finding that satisfied *Ring*. *Hurst*, 136 S. Ct. at 622. The Court rejected that argument

and held that "the advisory recommendation by the jury" is not "the necessary factual finding that *Ring* requires." *Id.*

But, in this case, the State is relying on a unanimous jury finding at the guilt phase to satisfy *Ring*, not an advisory sentencing recommendation. To convict Lee of committing capital murder during a robbery, the jury had to find unanimously that he intended to rob his victim. That is precisely what the jury did when it convicted him. When the jury convicted Lee of capital murder during the course of a robbery (Ala. Code § 13A-5-40 (a)(2)), the jury necessarily found beyond a reasonable doubt the existence of the corresponding aggravating circumstance specified in Alabama Code § 13A-5-49(4). This jury finding is an aggravating factor that made Lee eligible for a death sentence, and it is the only aggravating circumstance that the judge considered in determining whether to impose a death sentence.

Under Alabama law, this jury finding—not the judge's later sentencing decision—exposed Lee to a range of punishment that had as its maximum the death penalty. The Alabama Supreme Court has held that, under Alabama law, "[o]nly one aggravating circumstance must exist in order to impose a sentence of death." *Ex parte Bohannon*, 222 So. 3d 525, 528 (Ala. 2016) (quoting *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002)).

In addition to these jury-found factors, the sentencing judge also considered the nature of Lee's crime and the need to treat similar cases the same. But these considerations are not the kinds of facts

that must be found by a jury. *See* 18 U.S.C. § 3553 (sentencing judge must consider "the nature and circumstances of the offense and the history and characteristics of the defendant"). And, in any event, these factors did not increase Lee's statutory range of punishment because that range was already set by the jury's finding at the guilt phase. *See Waldrop*, 859 So. 2d at 1187.

C. Neither *Ring* nor *Hurst* suggest that judicial sentencing is unconstitutional.

Lee erroneously argues that the judge's sentencing decision violated the Sixth Amendment. Lee's petition confuses two separate issues: (1) whether an aggravating circumstance exists and (2) whether the aggravating circumstances outweigh the mitigating circumstances. The first issue is a fact-finding that may be submitted to a jury. The second, as the Alabama Supreme Court has held, is not a fact-finding. Instead, it is "a moral or legal judgment that takes into account a theoretically limitless set of facts." *Ex parte Bohannon*, 222 So.3d at 530 (quoting *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002)). For example, there is no factual answer to the question of whether a defendant's difficult childhood "outweighs" the heinousness of his crime. Instead, that analysis reflects the kind of prudential sentencing determination that judges make every day in non-capital sentencing.

The Alabama Supreme Court's reasoning on this point is in harmony with this Court's case law. Just a few weeks after deciding *Hurst*, this Court wrote that whether aggravating factors outweigh mitigat-

ing circumstances is *not* a factual question. The Court explained that "the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy." *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016). Because this is not a factual question, the Court reasoned that "[i]t would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it." *Id*. Lower courts have almost uniformly held that a judge may perform the "weighing" of factors and arrive at an appropriate sentence without violating the Sixth Amendment.[3] Indeed, the Eleventh Circuit

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[3] *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); *United States v. Purkey*, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); *Higgs v. United States*, 711 F. Supp. 2d 479, 540 (D. Md. 2010) ("Whether the aggravating factors presented by the prosecution outweigh the mitigating factors presented by the defense is a *normative* question rather than a *factual* one."); *State v. Fry*, 126 P.3d 516, 534 (N.M. 2005) ("[T]he weighing of aggravating and mitigating circumstances is thus not a 'fact that increases the penalty for a crime beyond the prescribed statutory maximum.'"); *Commonwealth v. Roney*, 866 A.2d 351, 360 (Pa. 2005) ("[B]ecause the weighing of the evidence is a function distinct from fact-finding, *Apprendi* does not apply here."); *Ritchie v. State*, 809 N.E.2d 258, 266 (Ind. 2004) ("In *Bivins v. State*, 642 N.E.2d 928, 946 (Ind. 1994), we concluded, as a matter of state law, that '[t]he determination of the weight to be accorded the aggravating and mitigating circumstances is not a 'fact' which must be proved beyond a reasonable doubt but is a balancing process.' *Apprendi* and its progeny do not change this conclusion."); *Brice v. State*, 815 A.2d 314, 322 (Del. 2003) (*Ring* does

explained this point when this case was before it on federal habeas review. *See Lee*, 726 F.3d at 1197–98.

Unless there is something materially different about capital sentencing for the purposes of the Sixth Amendment, then a jury's advisory sentencing recommendation is a constitutional non-event. Weighing aggravating and mitigating circumstances in a death penalty case is no different in kind than weighing "the nature and circumstances of the offense and the history and characteristics of the defendant" in a non-capital case. 18 U.S.C. § 3553. The Constitution provides the right to a trial by jury, not a sentencing by jury.

II. Retroactivity and other issues make this case a uniquely bad vehicle.

In addition to the reasons listed above, there are many other reasons that the Court should not grant certiorari in this case.

First, as noted in Lee's petition, this case begins and ends with questions about retroactivity, not substance. Although the questions presented in the petition ask "whether *Hurst* is retroactive," Pet. at i, the body of the petition includes no real argument on

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not apply to the weighing phase because weighing "does not increase the punishment."); *State v. Gales*, 658 N.W.2d 604, 628–29 (Neb. 2003) ("[W]e do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review be undertaken by a jury"); *Oken v. State*, 835 A.2d 1105, 1158 (Md. 2003) ("the weighing process never was intended to be a component of a 'fact finding' process").

that point. Likewise, although the petition asks the Court to consider overruling *Harris*, the petition fails to address whether such a decision would be retroactive. In any event, *Hurst* is merely an application or refinement of *Ring* and this Court has already held that *Ring* is not retroactive. *See Schriro v. Summerlin*, 542 U.S. 348 (2004). It would be passing strange if the Court were to hold that *Hurst* is retroactive, even though *Ring* was not.

Second, Lee was clearly precluded by state law from raising these claims in a successive state post-conviction petition. Under Alabama law, prisoners cannot keep raising the same constitutional claim over and over in successive post-conviction petitions. Instead, Alabama law expressly provides that a "petitioner will not be given relief under this rule based upon any ground . . . [w]hich was raised or addressed on appeal or in any previous collateral proceeding." Ala. R. Crim. P. 32.2(a)(4). As the state court explained in denying Lee's post-conviction petition here, "[i]t 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 establishes in Rule 32.2, Ala. R. Crim. P." Pet. App. 9a. Lee has raised these claims on direct appeal, state post-conviction review, and federal habeas. The state court correctly concluded that state law precludes him from raising them again.

Third, no lower court has ever addressed the retroactivity questions that would be central to this petition. If the Court were going to consider overruling *Harris*, it should do so on direct appeal. Then, if it

did overrule *Harris*, it could allow the lower courts to evaluate in the first instance whether its decision should be applied retroactively. It is very rare for this Court to address a legal issue that has never been addressed before by any lower court. But that is what it would have to do if it took this case.

Fourth, the most frequent argument petitioners make in favor of overruling *Harris* is that judicial sentencing in the death penalty context violates the Eighth Amendment. That argument has persuaded Justice Breyer that he was wrong to join the Court's opinion in *Harris*. *See Ring*, 536 U.S. at 615-16 (Breyer, J., concurring). But it is not included in Lee's petition. *See, e.g.*, Pet. at 2 (listing Sixth Amendment as the only constitutional provision involved in the case). And Lee never raised an Eighth Amendment argument in the state courts. *See* Pet. App. 25a-39a. Accordingly, Lee has waived the argument.

Fifth, as the petitioner admits in a footnote, the Alabama Legislature has modified Alabama law so that state judges no longer have the authority to sentence defendants to death without a jury vote in support of that sentence. Pet. at 5 n1. This new law does not "apply retroactively to any defendant who has previously been convicted of capital murder and sentenced to death." Ala. Code § 13A-5-47.1. But it nonetheless resolves this issue going forward. The Court should not expend its resources on evaluating whether to overrule an existing precedent when, even if it did so, its decision would not have any prospective effect.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

STEVE MARSHALL
Alabama Attorney General
Andrew L. Brasher*
Solicitor General
OFFICE OF ALA. ATT'Y GEN.
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
abrasher@ago.state.al.us

Counsel for State of Alabama

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*Counsel of Record