No. 17-775

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In the years after the Court announced its decision in *Ring* v. *Arizona*, 536 U.S. 584 (2002), two states took the position that the ruling had no practical effect on their capital punishment statutes: Alabama and Florida. In *Hurst* v. *Florida*, 136 S. Ct. 616 (2016), the Court clarified that *Ring* did apply to Florida's capital sentencing statute, and concluded that the statute violated the Sixth Amendment. *Id*. at 622. Alabama, whose statute was modeled after the Florida law struck down in *Hurst*, is now the only state still enforcing a capital punishment statute that allowed judicial factfinding during capital sentencing. For the same reasons the Court granted review in *Ring* and *Hurst*, the Court should grant review here.

First, *Hurst* proves that Lee's sentence is unconstitutional because the same flaws the Court identified in that case permeated Lee's sentencing. For decades, Alabama courts have emphasized that Alabama's death penalty statute was modeled after Florida's. As in *Hurst*, Alabama's statute required the trial court to independently find and weigh the facts necessary to impose the death penalty on Lee. But *Hurst* made clear that such a process is unconstitutional after *Ring*.

In fact, the Florida Supreme Court struck down the Florida legislature's attempt to "fix" its death penalty statute as inconsistent with *Hurst* because the "fix" did not require that the jury find and weigh the facts necessary to impose death. Similarly, the Delaware Supreme Court also struck down that state's death penalty statute in light of *Hurst*, for reasons that apply equally in Alabama. That leaves Alabama as the only state in the country still applying a flawed post-*Furman* death penalty statute. Notably, the Respondent does not address, much less rebut, any of this in its opposition brief.

Ignoring the statutory flaws with Alabama's statute, Respondent argues that in Lee's case the jury found the necessary aggravator to allow the court to sentence him to death. This ignores the facts. This notion of "double counting" an aggravator embedded in a jury finding during the conviction phase for the purpose of sentencing is not at issue here because the trial court expressly instructed the jury as follows: "The fact that Jeffery Lee has been convicted in this case in and of itself is not an aggravating circumstance." RE 1202; T19-R445. The trial court emphasized to the jurors that they had to determine anew whether any aggravating circumstance had been

established to sentence Lee to death. RE 1195-02, 1215; T19-438-58. That means a finding from the conviction phase *did not apply* to the sentencing phase.[1] Based on those instructions, the same jury that sat through trial voted 7-5 for life. Nevertheless, the trial court overrode the jury's recommendation based on its own factual findings, and sentenced Lee to death. Pet. App. 2a, 26a.

Finally, Respondent suggests that *Hurst* is irrelevant to this case because *Hurst* is not retroactive to Lee. But that argument misstates the question. *Hurst* applies to Lee's case because *Hurst* is an application of *Ring*. On this point the parties agree: Respondent concedes several times that *Hurst* "did not add anything of substance to *Ring*" (Br. in Opp. 8). There also is no dispute that *Ring* applies to Lee's case because *Ring* was decided while Lee's direct appeal was pending. In other words, *Hurst* applied an old rule to new facts. It is blackletter law that cases applying old rules to new facts are *automatically retroactive*. Retroactivity is no obstacle to accepting review and providing Lee

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[1] Moreover, during the conviction phase proceedings, the jury was not instructed that a finding at that phase would allow the court to sentence Lee to death without any additional finding by the jury. The conviction phase verdict cannot substitute for a sentencing phase verdict on whether there is an aggravator making Lee eligible for death sentence because "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell* v. *Mississippi*, 472 U.S. 320, 328-29 (1985). Again, during the sentencing phase, the jury was expressly instructed that the findings at the conviction phase *did not qualify* as an aggravating circumstances for purposes of sentencing. It is not surprising that Respondent ignores this fact.

prospective relief from a death sentence imposed unconstitutionally.

The only pre-*Ring* decision that remains is *Harris* v. *Alabama*, 513 U.S. 504 (1995). Respondent suggests that the Court shouldn't accept review to overrule *Harris* because Alabama recently changed its statute. But all that means is that there is even less reason to keep *Harris* on the books: even the Alabama legislature has now disavowed the law that *Harris* upheld. It is now time for this Court to finish the job by striking down *Harris* and finally resolving a glaring inconsistency in the Court's modern Sixth Amendment jurisprudence.

A. The Court Should Accept Review to Reconsider and Strike Down *Harris* v. *Alabama*.

Respondent largely ignores Lee's arguments on the merits. But in his opening brief, Lee presents a brick-by-brick analysis showing that *Hurst* not only vindicates the constitutional challenge he has maintained all these years, but creates an irreconcilable conflict with *Harris* v. *Alabama* 513 U.S. 504 (1995). The Sixth Amendment cannot be home to both.

Respondent points out that Alabama's statute was intended as a remedial response to unfettered jury discretion in sentencing (Br. in Opp. 7). That's only part of the story. For centuries juries had exclusive control over fact-finding in capital sentencing.[2] But in

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[2] See *Beck* v. *Alabama*, 447 U.S. 625, 633 (1980) ("At common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged.") (citations omitted); *ibid*. at 639-40 ("[A]s historical evidence indicated, juries faced with a mandatory death penalty statute often created their own sentencing discretion by distorting the

Furman v. *Georgia*, the Supreme Court struck down Georgia's capital punishment statute because jurors were not given standards to use when determining whether a defendant should be sentenced to death. 408 U.S. 238 (1972) (per curiam). *Furman* effectively invalidated every capital sentencing statute in the country.

In response to *Furman*, states like Alabama, Arizona, Delaware, and Florida, wrote new capital sentencing laws that concentrated fact-finding with the trial judge. These statutes allowed judges to independently find and weigh the facts necessary to impose death—breaking with centuries of common law tradition. *Compare* 1975 Ala. Acts 213 §§1-5 *and* Ala. Code § 13-11-2a (1975) *with* Ariz. Rev. Stat. § 13-703, -1105 (both statutes enumerating aggravating circumstances for sentencing judge to find). As Justice Scalia would later observe, these statutes were understandable responses to the *Furman* decision, but they were over-corrections and ultimately inconsistent with the Sixth Amendment's right to trial by jury. See *Ring*, 536 U.S. at 610-12 (Scalia, J., concurring).

These new statutes went too far in allowing *sentencing judges* to consider and find statutory aggravating circumstances independent of a jury's fact-finding. See Ala. Code §§ 13-11-3, -6 (1975) (enumerating aggravating and mitigating factors a sentencing court was to independently find and weigh before determining whether to impose the death penalty); see also American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Schemes: the Alabama Death Penalty Assessment Report*, at 8 (June

fact-finding process, acquitting even a clearly guilty defendant if they felt he did not deserve to die for his crime.").

2006) [hereinafter: "ABA Report on Ala. Death Penalty"].

In 1980, the Court found portions of Alabama's new statute unconstitutional because it precluded juries from considering lesser-included, non-capital offenses. *Beck* v. *Alabama*, 447 U.S. 625 (1980). In response, the Alabama legislature enacted a new scheme in 1981 that was largely similar to the 1975 version, except the death penalty was no longer automatic. See 1981 Ala. Acts 178 § 2(a). Under this revised scheme, before a defendant could be sentenced to death, a sentencing judge would have to independently find and weigh the statutory aggravating and mitigating factors. In other words, a jury's guilty verdict on a capital offense did not authorize a sentence of death; instead, upon conviction of a capital offense, the court would conduct a separate hearing to determine whether the defendant should receive life without parole or death. *Ibid*. The jury could provide an "advisory verdict" regarding the sentence, "but would not render the official sentence." ABA Report on Ala. Death Penalty, at 10. The "ultimate determination" regarding the existence of and weight for these factors rested with the sentencing judge, not the jury. *Ibid*. (citing 1981 Ala. Acts 178 §§ 8(f), 9(a), 9(e)).

The post-*Furman* schemes set up in states like Alabama, Arizona, and Florida, marked the first time in nearly seven centuries of jurisprudence that a judge, rather than a jury, could make the factual findings necessary to sentence a defendant to death.

It was only a matter of time before the Court would be asked to weigh in on the propriety of these new "judicial fact-finding" schemes. These statutes ini-

tially were upheld in a series of post-*Furman* decisions.[3] But the post-*Furman* era of judicial fact-finding was an aberration, and the pendulum began to swing back in 2000, starting with *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and later *Ring*, and continuing through the Court's latest decision in *Hurst*. This modern era of Sixth Amendment jurisprudence represents a return to the traditional rule that a jury—not a judge—is the fact finder during capital sentencing.

The Supreme Courts of Delaware and Florida recently applied these same legal principles to consider the constitutionality of capital punishment statutes very similar to Alabama's. In August 2016, the Delaware 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). As in Alabama, Delaware's statute called for a fact-intensive exercise at the time of sentencing, in which *the court*—rather than the jury—found, considered, and weighed the factors necessary to impose death. *Ibid*. (Strine, C.J., concurring). And as in Alabama, because this judicial fact-finding "is what drives the ultimate decision whether the defendant should live or die," *id*. at 435, Delaware's law failed under *Hurst*.

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[3] *Spaziano* v. *Florida*, 468 U.S. 447 (1984) (upholding Florida's death penalty statute against a Sixth Amendment challenge), overruled by *Hurst* v. *Florida*, 136 S. Ct. 616 (2016); *Hildwin* v. *Florida*, 490 U.S. 638, 638 (1989) (per curiam) (same), overruled by *Hurst*, 136 S. Ct. 616 (2016); *Walton* v. *Arizona*, 497 U.S. 639, 643 (1990) (upholding Arizona's death penalty statute against a Sixth Amendment challenge), overruled by *Ring* v. *Arizona*, 536 U.S. 584 (2002); *Harris* v. *Alabama*, 513 U.S. 504, 506 (1995) (upholding Alabama's death penalty statute in light of *Hildwin* and *Spaziano*).

Several months later, Florida's Supreme Court struck down the new death penalty statute that the Florida legislature adopted in response to *Hurst*. *Hurst* v. *State*, 202 So.3d 40 (Fla. 2016). In that case, Florida argued that *Hurst* requires only that the jury unanimously find the existence of one aggravating factor and nothing more—which is the same argument Respondent makes in its opposition brief. But the Florida Supreme Court rejected that argument as incompatible with *Hurst*. Like Alabama, Florida law has long required findings beyond the existence of a single aggravator before a death sentence may be recommended:

> Upon review of the decision in *Hurst* v. *Florida*, as well as the decisions in *Apprendi* and *Ring*, we conclude that the Sixth Amendment right to a trial by jury mandates that under Florida's capital sentencing scheme, the jury—not the judge—must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty . . . . Thus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances. . . .
>
> Thus, we hold that in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors

> *outweigh* the mitigation before a sentence of death may be considered by the judge.

Id. at 53-54. The Florida Supreme Court also held that after *Hurst*, "in order for a death sentence to be imposed, the jury's recommendation for death must be unanimous." *Ibid*.

For decades, Alabama courts have pointed out that Alabama death penalty statute is based on Florida's law, and relied on cases upholding Florida's law as proof that Alabama's law was constitutional, too.[4] But Florida's law was struck down twice in less than a year—once by this Court, and again by the Florida Supreme Court. The same logic likening Alabama's law to Florida's, which was embraced to uphold Alabama's statute, now demonstrates why Alabama's law is constitutionally deficient.

Before *Hurst*, Alabama was one of only three states that still allowed judges to find and weigh factors during the capital sentencing process. But now, after the Delaware and Florida decisions, Alabama is the *only state* enforcing a post-*Furman* statute allowing judges to independently find, consider, and weigh the factors necessary to sentence defendants to death.

For its part, Respondent does not even acknowledge Alabama's decades-long position that its statute was based on Florida's law. And notably, Respondent

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[4] *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.").

avoids quoting the actual text of the capital punishment statute at issue here. As in Florida and Delaware, a defendant cannot be sentenced to death in Alabama on the basis of a conviction alone. The Alabama law used to sentence Lee requires 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). Like the sentencing judge in Florida and Delaware, the sentencing judge in Alabama plays a "central and singular role" in sentencing. *Hurst*, 136 S. Ct. at 622. Because Alabama empowers the judge, not the jury, to make those findings, Alabama's law is unconstitutional under *Hurst*.

Collectively, *Apprendi*, *Ring*, and *Hurst* have removed all that was left to support *Harris* v. *Alabama*, which is all that was left to support Alabama's sentencing law. This Court should accept review and overrule *Harris*.

B. This Case Is an Excellent Vehicle to Reconsider *Harris* Because *Ring* and *Hurst* Both Apply Retroactively to Lee's Case.

Respondent repeatedly suggests that even if *Hurst* vindicates the *Ring* claim Lee has maintained all these years, it wouldn't matter because *Hurst* is not retroactive to Lee's case. But this argument misstates the law on retroactivity.

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). A case does not "announce a new rule, [when] it '[is] merely an application of the principle

that governed'" a prior decision to a different set of facts. *Teague* v. *Lane*, 489 U.S. 288, 307 (1989) (quoting *Yates* v. *Aiken*, 484 U.S. 211, 217 (1988)). In *Chaidez*, the Supreme Court explained that "'[w]here the beginning point' of our analysis is a rule of 'general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yield a result so novel that it forges a new rule[.]'" 568 U.S. at 348 (quoting *Wright* v. *West*, 505 U.S. 277, 309 (1992) (Kennedy, J., concurring in judgment)). Otherwise, when all the Court does is "apply a general standard to the kind of factual circumstances it was meant to address, [that decision] will rarely state a new rule for *Teague* purposes." *Ibid*. Stated differently, "garden-variety applications" of an already-established rule "do not produce new rules" that must be assessed under the *Teague* framework to determine whether they are retroactive on collateral review—they *automatically* apply to collateral challenges. *Ibid*.

By that standard, Lee can avail himself of the Court's decision in *Hurst* because, as Respondent acknowledges, "*Hurst* did not add anything of substance to *Ring*" (Br. in Opp. 8). See also Br. in Opp. 14 ("*Hurst* is merely an application or refinement of *Ring*[.]"). Alabama courts have agreed that *Hurst* merely applied the rule announced in *Ring*. In other words, Petitioner and Respondent both agree that *Hurst* did not announce a new rule. By its own admission, the Respondent's retroactivity objection fails because it is black letter law that decisions applying old rules to different factual predicates are applicable on collateral review.

That concession means that *Hurst* is applicable to Lee's case because when the Supreme Court "appl[ies]

a settled rule . . . a person [may] avail herself of the decision on collateral review." *Chaidez*, 568 U.S. at 347. There is no question that Lee can invoke *Ring* because Lee's direct appeal was pending when *Ring* was decided. And because Respondent agrees that *Hurst* was an application of *Ring*, Lee can "avail" himself of that decision on collateral review.

Having established that Lee can avail himself of the *Hurst* decision on collateral review, the central question becomes whether *Hurst*'s application of *Ring* to Florida's capital sentencing scheme vindicates Lee's ongoing challenge to his sentence in Alabama. The answer to that question is yes.

CONCLUSION

Petitioner respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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