No. 18-1298

In the
Supreme Court of the United States

MARIO DION WOODWARD,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari to the Alabama Supreme Court

REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JEFFREY L. GLATZER
GEOFFREY G. YOUNG
JOHN P. KENNEDY
TALIA N. FIANO
REED SMITH LLP
599 Lexington Avenue
New York, NY 10022
(212) 521-5400
jglatzer@reedsmith.com
gyoung@reedsmith.com
jkennedy@reedsmith.com
tfiano@reedsmith.com

JAMES C. MARTIN
Counsel of Record
COLIN E. WRABLEY
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-3131
jcmartin@reedsmith.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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The State of Alabama's opposition to Mr. Woodward's petition is a carefully-crafted piece of deflection and misdirection that cannot hide what it is forced to concede: Mr. Woodward's death sentence is the product of a judicial fact-finding procedure, not a jury's determination, which gives rise to arbitrary and irrational results. This Court's precedents establish its unconstitutionality under the Sixth, Eighth, and Fourteenth Amendments, and the State has abandoned judicial override for that reason. For the benefit of Mr. Woodward and the many other affected inmates who were sentenced using this unconstitutional procedure and remain on death row, this Court should grant his petition to rectify this profound injustice.

I. THIS COURT HAS JURISDICTION TO DECLARE ALABAMA'S JUDICIAL OVERRIDE UNCONSTITUTIONAL

Mr. Woodward has challenged the constitutionality of his conviction by judicial override at every stage of this proceeding. The State nevertheless contends that Mr. Woodward's post-conviction constitutional challenge is procedurally barred because he (i) purportedly failed to raise it in his petition for post-conviction relief in the Alabama trial court, which triggers the waiver provision under Rule 32 of the Alabama Rules of Criminal Procedure, and (ii) already raised his federal constitutional challenge (unsuccessfully) in his direct appeal, which triggers the preclusion provision under Rule 32.2(a)(4). State's Br. At 7-8. Neither argument withstands scrutiny on this record.

First, the Alabama Court of Criminal Appeals explicitly reached and decided the merits of Mr. Woodward's federal constitutional challenge, *see Woodward v. State*, No. CR-15-0748, 2018 WL 1981390, at *54 (Ala. Crim. App. Apr. 27, 2018), which stops the State's alternative procedural defenses at their inception. "When a state court decides a [federal] constitutional question, even though it does not have to, the considerations of comity and federalism which would ordinarily preclude federal review of procedurally defaulted issues no longer apply." *Horsley v. Alabama*, 45 F.3d 1486, 1490 (11th Cir. 1995) (rejecting procedural default of federal constitutional issue where, "even though they did not have to," the Alabama courts "raised and answered the [federal constitutional] issue").

Second, as the petition took pains to show—and contrary to the State's claim—Mr. Woodward clearly ***did*** raise his federal constitutional challenge in the amendment to his Rule 32 petition, which incorporated Mr. Woodward's motion for recusal of the trial court judge and cited Justice Sotomayor's dissent from denial of certiorari in Mr. Woodward's previous petition to this Court. *See* Amended Rule 32 Petition at 109, *Woodward v. State*, CC No. 07-1388 (15th Jud. Cir., Montgomery Cty. Dec. 22, 2014). He then pursued that challenge on appeal. Petition for Writ of Certiorari at 15, *Woodward v. Alabama*, No. 18-1298 (U.S. Apr. 10, 2019).

Third, contrary to the State's contention (at 7-8) the Alabama appellate court did *not* announce a definitive holding that Mr. Woodward's Rule 32 amendment

failed to sufficiently raise his federal constitutional challenge. Rather, that court tentatively stated that "it does not appear that Woodward ever directly challenged in the circuit court the constitutionality of the trial court's override." *Woodward*, 2018 WL 1981390, at *53. But "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263 (1989) (citations and internal quotation marks omitted). Plainly, there is no such clear or express declaration here.

Finally, Rule 32.2(a)(4) does not preclude Mr. Woodward's federal constitutional challenge on the grounds that he raised it in his direct appeal. For one thing, Alabama precedent is to the contrary. Where, as here, Mr. Woodward seeks relief based on a judicial decision that applies to cases on collateral review, "[he] is not excluded from relief by the grounds of preclusion set out in Rule 32.2[.]" *Acra v. State*, 105 So. 3d 460, 467 (Ala. Crim. App. 2012). And because Mr. Woodward's federal constitutional challenge is predicated in part on this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016)**,** which "appl[ied] a settled rule" of constitutional law set forth previously in *Ring v. Arizona*, 536 U.S. 584 (2002), that challenge can be made "on collateral review." *Chaidez v. United States*, 568 U.S. 342, 347 (2013) ("[W]hen we apply a settled rule . . . a person [may] avail herself of the decision on collateral review."); *see State v. Billups*, 223 So. 3d 954, 963 (Ala. Crim. App. 2016) ("The Court in *Hurst* did nothing more than apply its previous

holdings in *Apprendi* and *Ring* to Florida's capital-sentencing scheme"). For another, "[w]hen a state court refuses to re-adjudicate a claim on the ground that it has been previously determined"—which is what the State argues occurred here—"the court's decision does not indicate that the claim has been procedurally defaulted." *Cone v. Bell*, 556 U.S. 449, 467 (2009).

Under these circumstances, the State should not be permitted to benefit from a legal construct that defies the relevant record and case law. Here, because the challenge was raised in the state court proceedings, as well as on appeal, invoking waiver principles on the bases the State suggests creates a perverse "heads the State wins, tails Mr. Woodward loses" result. The State cannot invoke that sort of procedural sleight-of-hand to shield the its override procedure from this Court's scrutiny. The constitutional violations pressed in the Petition accordingly can and should be addressed by this Court.

II. ESTABLISHED CONSTITUTIONAL VIOLATIONS REQUIRE THE COURT'S INTERVENTION

A. Mr. Woodward's Death Sentence Violates the Eighth Amendment

The record demonstrates that judicial override is arbitrary and capricious both in conception and in practice, contravenes conventional societal norms, and therefore violates the prohibition against cruel and unusual punishment in the Eighth Amendment. The State's efforts to suppress that reality are more misdirection.

The State starts its Eighth Amendment avoidance strategy with an erroneous premise. Specifically, it suggests that *Harris v. Alabama*, 513 U.S. 504 (1995), is controlling and that this Court's own precedent thus uncritically endorses the State's use of judicial override. State's Br. at 9-10. But the 24-year old decision in *Harris* cannot fairly be read as a blanket endorsement of judicial override in perpetuity, particularly where it would require this Court to ignore the existing factual record and intervening precedent. On the contrary, the Eighth Amendment's command, as construed and applied, operates in the present. As societal norms evolve, this Court's Eighth Amendment jurisprudence accordingly evolves with them. *See Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) ("The standard itself [i.e. of cruel and unusual punishment prohibited by the Eighth Amendment] remains the same, but its applicability must change as the basic mores of society change.") (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting). Simply put, in a case like this one, the "objective indicia of consensus" among the states is the determinative factor on whether a capital sentencing practice comports with the Eighth Amendment's ban on cruel and unusual punishment. *See id.* at 422.

Sticking in the present, moreover, there is no doubt that the capital sentencing practice invoked here cannot survive Eight Amendment scrutiny. Societal consensus establishes, without contradiction, that judicial override is an outlier. No state, not even Alabama, utilizes the procedure any longer. The public and scholarly criticism of the practice is uniform and unflagging. *See*, *e.g.*, William W. Berry III,

Individualized Sentencing, 76 WASH. & LEE L. REV. 13, 92 (2019) ("Judges can no longer make such override decisions in light of recent Supreme Court decisions holding judicial factfinding in capital cases unconstitutional under the Sixth Amendment."); Anna Arceneaux, *Judges Still Free to Ignore Juries in Alabama*, AM. CIVIL LIBERTIES UNION (Nov. 19, 2013), https://www.aclu.org/blog/capital-punishment/judges-still-free-ignore-juries-alabama ("In recent years, Alabama judges have overridden the jury 95 times to impose death when the jury chose life without parole. This unfair and unique practice violates the constitution, and is one of the many ways that the death penalty is broken."). Objective evidence, drawn from judges' own words, academic studies, and case records, further demonstrates that the override process is arbitrarily applied and generates irrational results. *Woodward v. Alabama*, 571 U.S. 1045 (2013) (Sotomayor, J., dissenting from denial of certiorari). In short, "contemporary values," which are the "clearest and most reliable evidence" defining the scope of the prohibition on cruel and unusual punishment, *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)), establish that judicial override violates the Eighth Amendment.

The State points to *Graham v. Florida*, 560 U.S. 48, 59 (2010), to justify a contrary conclusion, but this argument collapses under scrutiny. State's Br. at 11. *Graham* itself is clear that the categorical analysis relied on by the State relates to "[t]he proportionality of sentences," *id.*, but Mr. Woodward is not challenging his death sentence on that basis. Rather, his argument rests on the distinct and independent Eighth

Amendment analysis of whether a death sentence has been imposed arbitrarily and capriciously. The record leaves no doubt on this point, bringing this case squarely within the Eighth Amendment's prohibition. *See Stringer v. Black*, 503 U.S. 222, 228 (1992) (citations omitted) (discussing the Court's invalidation of death sentences based upon aggravating circumstances that are "vague and imprecise, inviting arbitrary and capricious application of the death penalty in violation of the Eighth Amendment"); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion) (describing holding of *Furman v. Georgia* that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.").

Graham gives no indication, nor does any other case of which Mr. Woodward is aware, that its categorical analysis is intended to displace and supersede the principle that a death sentence that is imposed arbitrarily and capriciously is unconstitutional. Nor does the categorical approach discussed in *Graham* purport to undermine in any respect the principle that evolving standards of decency animate the Eighth Amendment's core guarantee against cruel and unusual punishment. These, however, are the central principles that control here.

Finally, the State's insistence that statistics showing how override has been used arbitrarily and discriminatorily in practice are irrelevant to the Eighth Amendment analysis is contrary to accepted precedent as well. State's Br. at 12-13 (citing *Harris*, 513 U.S. at 513-14). In fact, empirical evidence about capital

sentencing's operation in practice always has been considered highly relevant to the constitutionality issues implicated under the Eighth Amendment. *See, e.g.*, *Atkins*, 536 U.S. at 316 (noting as significant that, of the states that permitted execution of the mentally disabled, only five had actually done so since *Penry* had been decided); *Furman*, 408 U.S. at 291-93, 298 (1972) (Brennan, J., concurring) (reviewing statistics on use of the death penalty in support of conclusion that the death penalty violates the Eighth Amendment). Even *Graham* reflects as much. *See Graham*, 560 U.S. at 62 (citations omitted) ("Actual sentencing practices are an important part of the Court's inquiry into consensus.").

B. Mr. Woodward's Death Sentence Violates the Sixth Amendment

As the petition also shows, Mr. Woodward's death sentence is the product of independent judicial fact-finding, which, in turn, was conducted on a record not considered by the jury that recommended his life sentence. The State dismisses this independent fact-finding as unimportant because "these factors did not increase [Mr.] Woodward's statutory range of punishment." State's Br. at 18. However, the State's dispositive observation finds support only in a single 2002 Alabama state-court decision, pre-dating *Ring*. No post-*Ring* case is cited, and with good reason: after *Ring*, the imposition of a death sentence based on judicial, not jury, fact-finding is indisputably unconstitutional.

Moreover, as the petition explains, the Alabama appellate court's decision below affirmed Mr. Woodward's override death sentence precisely because

the Alabama trial court engaged in its own fact-finding on a record that went beyond what the jury considered. Pet. at 8. That opinion also makes clear that the trial court made its own independent findings on the import of the record the jury did consider. *Woodward v. State*, 123 So. 3d 989, 1040 (Ala. Crim. App. 2011), *as modified on denial of reh'g* (Aug. 24, 2012). Left with that reality, the State relabels the trial court's two-part fact-finding mission as simply "a moral or legal judgment that takes into account a theoretically limitless set of facts." State's Br. at 18 (quoting *Ex parte Bohannon*, 222 So.3d 525, 530 (Ala. 2016)). That sort of linguistic manipulation cannot supplant a constitutional imperative. Here, the independent fact-finding that the trial judge engaged in when imposing a "greater punishment" than what had been determined by the jury is *exactly* the result that *Apprendi*, *Ring* and *Hurst* have held violates a defendant's Sixth Amendment rights. *See Apprendi v. New Jersey*, 530 U.S. 466, 490-92 (2000); *Ring*, 536 U.S. at 584; *Hurst*, 136 S. Ct. at 622.

Finally, contrary to the State's argument (at 16-17), the mere fact that the jury found the presence of two aggravating factors does not change the constitutional calculus in any respect. Specifically, in *Ring*, this Court stated that capital defendants "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. In this case, it is evident that the trial judge's independent fact-finding, which included reliance on facts that were not provided to the jury, is what underlies the trial court's override decision. That reality is precisely what brings *Ring* and *Hurst* to bear.

Juries, not judges, must be the ones to impose a death sentence. *Hurst*, 136 S. Ct. at 622 ("The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires."). The State's judicial override, as employed in this case and others, fails this basic requirement.

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO ADDRESS THE CONSTITUTIONAL VIOLATIONS

There is no procedural bar that would prevent this Court from hearing the merits of Mr. Woodward's constitutional claims, and the record supporting those claims is not materially in dispute. Accordingly, this case is an entirely appropriate vehicle to address the unconstitutionality of judicial override as applied in this case and others. The State's effort to show otherwise continues its strategy of deflection and misdirection.

First, contrary to the State's argument (at 21), no theory of retroactivity is needed to substantiate any legal principle applicable here, and Mr. Woodward has never argued otherwise. At the time Mr. Woodward was sentenced, *Ring* established the relevant principle under the Sixth Amendment, *see* 536 U.S. at 609, and as the State itself recognizes, "*Hurst* did not add anything of substance to *Ring*" and "*Hurst* is merely an application or refinement of *Ring*[.]" State's Br. at 15, 21; *see Hurst*, 136 S. Ct. at 621-22 ("The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's. . . . In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment."). This Court's Eighth Amendment

jurisprudence likewise is settled and the State's suggestion that retroactivity has a role to play is the proverbial "red herring."

Second, the same goes for the State's observation that Mr. Woodward's petition would require consideration of whether *Harris* should be overruled and create a supposed procedural sea change by "address[ing] a legal issue that has never been addressed before by any lower court." State's Br. at 21. *Harris* did not purport to resolve the issues raised by Mr. Woodward's petition here, however, and his petition can and should be resolved by applying *Apprendi*, *Ring*, and *Hurst*, which establish the constitutional framework for resolving the Sixth Amendment question. Mr. Woodward's claim requires no special treatment or doctrinal overhaul. Quite the contrary, he simply wants existing precedent applied – which the State repeatedly has failed to do.

Finally, the State's assertion that Alabama's prospective repeal of its judicial override capital sentencing scheme militates against hearing Mr. Woodward's case because it "resolves the issue going forward" is hard to fathom. State's Br. at 22. This argument urges callous indifference to a paramount reason this case must be heard. There are dozens of inmates facing execution on the State's death row as the result of an unconstitutional judicial override of a jury-recommended life sentence. The State's statutory repeal is relevant but only as a further testament to the profound disparities in treatment that provide additional impetus to stop this unconstitutional practice now. The State's efforts to

avoid review and defend its sentencing process also make it clear that the apparent constitutional infirmities will persist unless this Court intervenes. Review is called for in these circumstances and this Court should say so.

Respectfully submitted,

JAMES C. MARTIN
Counsel of Record
COLIN E. WRABLEY
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
Phone: (412) 288-3131
jcmartin@reedsmith.com

JEFFREY L. GLATZER
GEOFFREY G. YOUNG
JOHN P. KENNEDY
TALIA N. FIANO
REED SMITH LLP
599 Lexington Avenue
New York, NY 10022
Phone: (212) 521-5400
jglatzer@reedsmith.com
gyoung@reedsmith.com
jkennedy@reedsmith.com
tfiano@reedsmith.com

Counsel for Petitioner
Mario Dion Woodward