No. _____

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

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
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-3131
jcmartin@reedsmith.com

Counsel for Petitioner

April 10, 2019

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

CAPITAL CASE

QUESTIONS PRESENTED

Pursuant to Ala. C. § 13-A-5-47(e)(1975), Alabama previously allowed trial judges to override a jury's vote for a life sentence and, based on new evidence, impose the death penalty. Although Alabama's courts steadfastly have held otherwise, this judicial capital sentencing process conflicts with the reasoning and holding in *Hurst v. Florida*, 577 U.S. __, 136 S. Ct. 616 (2016). Now, Alabama's override statute has been repealed, but the state has elected not to apply its repealer retroactively. The death sentence imposed by judicial override in this case accordingly raises two dispositive questions:

1. Does the imposition of a death sentence through judicial override under a now-repealed statute violate the constitutional guarantees implemented by the Eighth and Fourteenth Amendments?

2. Does a trial judge's override of a jury's life sentence and imposition of a death sentence based on evidence not considered by the jury violate the constitutional guarantees implemented by the Sixth Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

OPINIONS BELOW

The Circuit Court of Montgomery County's order denying Petitioner's request for post-conviction relief from a sentence of death is attached as Appendix D. The Alabama Court of Criminal Appeals' opinion denying Petitioner's appeal of the denial of his request for post-conviction relief from a sentence of death is attached as Appendix C. The denial of Petitioner's motion for rehearing is attached as Appendix B. The denial of Petitioner's certiorari petition to the Alabama Supreme Court is attached as Appendix A.

STATEMENT OF JURISDICTION

Alabama's Court of Criminal Appeals issued its opinion denying post-conviction relief on April 27, 2018. Rehearing was denied on July 27, 2018. Petitioner filed his petition for certiorari with the Alabama Supreme Court on August 10, 2018, and certiorari was denied on November 16, 2018.[1]

This Court's jurisdiction is invoked under 28 U.S.C. § 1257. In imposing his death sentence, Mr. Woodward maintains that the State of Alabama has violated his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

---

[1] On January 24, 2019, this Court granted Mr. Woodward an extension of time, until April 15, 2019, within which to file a petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOKED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Eighth Amendment to the United States Constitution provides:

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

The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

PRELIMINARY STATEMENT

Petitioner Mario Dion Woodward's 2008 death sentence is the product of a capital sentencing process that fails the United States Constitution's most basic substantive guarantees. The judicial override procedure was an outlier when utilized in this case and has proven to be arbitrary, irrational and in conflict with basic notions of human decency as applied.[2]

Empirical data reflects that more than 90 percent of Alabama's judicial overrides involved a judge-imposed death sentence after a jury had voted for life in prison. The death overrides occurred in counties with significant black populations and disproportionately

---

[2] Before 2016, all but three states' death penalty schemes respected the jury's decision on whether to impose death or life imprisonment as final. *See* Equal Justice Initiative, *The Death Penalty in Alabama: Judicial Override* 11 (2011) ("Equal Justice Initiative"). Only Florida, Delaware, and Alabama permitted judicial override. In 2016, following this Court's decision in *Hurst v. Florida*, 577 U.S. ___, 136 S. Ct. 616 (2016), Florida's legislature abolished judicial override and revised the state's death penalty scheme. *See* 2016 Fla. Sess. L. Serv. Ch. 2016-13 (H.B. 7101) (West). Delaware also ended judicial override in 2016 by Supreme Court decision, *Rauf v. State*, 145 A.3d 430, 434 (Del. 2016) (per curiam), and then applied that decision retroactively to invalidate all death sentences. *See Powell v. State*, 153 A.3d 69, 75-76 (Del. 2016) (per curiam). Alabama has now ended the practice by statute as well. *See* Ala. Code § 13A-5-47 ("Where a sentence of death is not returned by the jury, the court shall sentence the defendant to life imprisonment without parole.").

involve black defendants and white victims.[3] *See* Equal Justice Initiative, at 4, 7, 17, 24-26. Here, Mr. Woodward's trial involved a white victim and a black defendant. And, his capital sentence was imposed by a judge who engaged in his own independent fact-finding based on evidence the jury did not hear to override the jury's findings of mitigation and imposition of a life sentence.

After this judge-imposed capital sentence, Mr. Woodward sought relief in Alabama's appellate courts. He relied on this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), and urged that the judicial fact-finding that led to his sentence violated the Sixth and Eighth Amendment guarantees that this Court articulated and invoked in that case. But Alabama's courts turned a deaf ear, and his certiorari petition to this Court also was rejected, with two justices issuing a dissent highlighting the illegitimacy of Alabama's death sentencing process. *Woodward v. Alabama*, 571 U.S. 1045, 134 S. Ct. 405 (2013) (Sotomayor, J., with Breyer, J., dissenting from denial of certiorari).

Now, Alabama's courts have denied Mr. Woodward's petitions for post-conviction relief, even though the constitutional infirmities embedded in Alabama's capital sentencing process persist. This Court's post-

[3] There is also evidence that the elected judges that have imposed death sentences over a jury's recommended life sentence frequently succumb to political pressures and override more verdicts during election years than non-election years. *See* Equal Justice Initiative, at 8, 14-16 ("The percentage of death sentences imposed by override fluctuates dramatically from year to year. In 2008, an election year, 30% of death sentences were imposed by override, in contrast with just 7% in 1997, a non-election year.").

Ring decision in *Hurst v. Florida*, 577 U.S. ___, 136 S. Ct. 616 (2016), confirms that the independent judicial fact-finding that led to Mr. Woodward's sentence is a violation of the Sixth Amendment's command that all findings necessary for the imposition of a death sentence must be made by a jury, rather than a judge. Moreover, in 2017, Alabama repealed its override statute [see fn.2], such that Alabama is seeking to execute Mr. Woodward under a sentencing process that no state subscribes to, and that could not be invoked for any person presently charged with a crime in Alabama. His death sentence therefore conflicts with established societal norms and is arbitrary and capricious to say the very least. The Eighth and Fourteenth Amendments likewise do not permit the imposition of the death penalty in these circumstances.

While the abridgement of Mr. Woodward's fundamental constitutional rights is apparent, Alabama has rejected *Hurst's* unambiguous message in a manner that defies logic and does not withstand reasoned scrutiny. The judicial fact-finding undertaken to impose Mr. Woodward's death sentence cannot be recharacterized, as Alabama would have it, as an exercise of judicial discretion based on moral judgment to avoid the result *Hurst* so plainly requires. But that is the exact position Alabama has taken. *See Ex parte Bohannon*, 222 So.3d 525 (Ala. 2016); *Woodward v. State*, _ So.3d _, 2018 WL 1981390 (Apr. 27, 2018). And, as noted, by refusing to make the abolition of judicial override retroactive, Alabama has entrenched the discriminatory effects of its capital sentencing process. For Mr. Woodward, and several

dozen other inmates on its death row,[4] save for an accident of timing, the life sentence imposed by a jury of their peers would have been dispositive. Nevertheless, Alabama has made clear its intent to uphold its now-discarded capital sentencing process as applied to defendants who, like Mr. Woodward, received their convictions before its repeal. This result is as indefensible as it is unjust.

As an irreducible constitutional minimum, there must be a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Furman v. Georgia*, 408 U.S. 238, 313 (1972). This Court thus has barred "sentencing procedures that created [] a substantial risk that [a death sentence] would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion); *see also Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) (recognizing the heightened "need for reliability in the determination that death is the appropriate punishment in a specific case").

---

[4] There are 35 inmates on Alabama's death row whose capital sentences were imposed by judicial override. Of those, 65.7% are black. *Alabama Overrides from Life to Death*, EQUAL JUSTICE INITIATIVE (Jan. 12, 2016), available at https://eji.org/reports/death-penalty-alabama-judge-override; *Alabama Inmates Currently on Death Row*, ALABAMA DEPARTMENT OF CORRECTIONS (Mar. 21, 2019), available at http://www.doc.state.al.us/DeathRow.

Here, there is a distinct lack of reason and rationality underlying the death sentence imposed on Mr. Woodward, reaching a level the Constitution does not tolerate. As long as judicial override is enforced and upheld, Alabama's death sentencing scheme will be an instrument of injustice in circumstances where the outcome is the most severe punishment the justice system can impose. This has to stop. This Court has jurisdiction to intercede at this post-conviction stage, the constitutional violations under the Sixth, Eighth, and Fourteenth Amendments are apparent, and there are compelling reasons to vacate a sentence that violates basic principles of human decency and fair treatment. This petition should be granted.

STATEMENT OF THE CASE

On September 29, 2006, Mr. Woodward was arrested and charged with the murder of Montgomery Police Officer Keith Houts. T.C.[5] 1075-82. Relying solely on circumstantial evidence, a jury convicted him of capital murder in the Circuit Court of Montgomery County, Alabama on August 25, 2008. T.C. 1351. During the penalty phase, based on mitigating evidence, the same jury recommended a sentence of life without parole by a vote of eight to four. T.R. 1702.

Following the jury's recommendation for a life sentence, the trial court held a sentencing hearing and the state introduced evidence that had not been

[5] "T.C." refers to the clerk's record from the 2008 trial. "T.R." refers to the reporter's transcript from the 2008 trial. "C." refers to the certified clerk's record from the Rule 32 proceedings. "R." refers to the reporter's transcript from the Rule 32 proceedings.

presented during the guilt or penalty phase to the jury. T.C. 1002- 03, 1214-67. This evidence included recordings and transcripts of Mr. Woodward's jailhouse telephone calls and a mental evaluation that had been prepared before trial. T.C. 1002- 03, 1214-67, 1277-82. Based on this evidence and the state's arguments, including lobbying by the Montgomery Police Department and an overview of similar cases in which a defendant was sentenced to death, the court overrode the jury's recommendation and sentenced Mr. Woodward to death. T.R. 1792; T.C. 998-1004.

The Alabama Court of Criminal Appeals affirmed the conviction and death sentence on direct appeal. *Woodward v. State*, 123 So.3d 989 (Ala. Crim. App. 2011); *Woodward v. State*, ____ So.3d ___, 2011 WL 6278294 (Ala. Crim. App. Aug. 24, 2012). The Court of Criminal Appeals' affirmance makes it clear that Mr. Woodward's death sentence was the product of independent fact-finding by the trial court — indeed, that is how the sentence was justified. *Woodward v. State*, 123 So.3d 989, 1030, 1035, 1037-41 (describing in detail the trial court's "fact-finding" process and its reliance on evidence "the jury did not hear" to affirm the sentencing order).

Mr. Woodward petitioned the Alabama Supreme Court for certiorari and, relying on this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), established that Alabama's judicial override death sentencing process, in concept and by application, violated the Sixth and Eighth Amendments. Nevertheless, the Alabama Supreme Court denied certiorari and on

petition, this Court did the same. *Woodward v. Alabama*, 571 U.S. 1045, 134 S. Ct. 405 (2013).

Justice Sotomayor, joined by Justice Breyer, dissented from this Court's denial. They expressed their "deep concerns" about the constitutionality of Alabama's capital sentencing process, noting that Alabama's override practice was an outlier, clouded by illegitimate and arbitrary outcomes. 134 S. Ct. at 406-09. Relying on *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), but without the benefit of this Court's unanimous opinion in *Hurst*, 136 S. Ct. 616, these Justices also declared that the trial court's imposition of a death sentence based on its own assessment of the facts was constitutionally suspect given the "sanctity of the jury's role in our system of criminal justice." 134 S. Ct. at 411. Particularly with the evolution of the Court's own jurisprudence, they maintained that the validity of Alabama's death sentencing process deserved a "fresh look." *Id*. at 411-12.

Left to his post-conviction remedies, Mr. Woodward continued to press his constitutional objections to the override death sentencing process, now-armed with this Court's opinion in *Hurst*. In particular, Mr. Woodward pointed out that the trial court made its decision to override his life sentence based on evidence the jury never had the opportunity to consider. Relying on that same newly-admitted evidence, the court made its own independent assessment and rejected the jury's views on mitigation. Mr. Woodward thus highlighted the differences between his case — where the trial judge had considered new evidence in finding aggravation and rejecting the jury's conclusions on

mitigation — and the Alabama Supreme Court's decision in *Bohannon*, 222 So.3d 525, where *Hurst* was distinguished because that sort of fact-finding did not occur. Mr. Woodward supported his constitutional arguments under the Sixth and Eighth Amendments by further noting that Alabama now had passed a statute banning judicial override, indicating the state's desire to abandon it.

But Mr. Woodward did not get a fresh look and Alabama's Court of Criminal Appeals was unmoved. Despite Mr. Woodward's briefing, it questioned whether he had challenged the constitutionality of the trial court's override, questioned whether *Hurst* would be applied retroactively, and then determined, addressing the merits, that the trial court could consider evidence not presented to the jury in making its own capital sentence. *Woodward*, 2018 WL 1981390 at *54. The court did not consider the effect of the repeal because the statute did not apply retroactively. *Id*. at *1, n.1.

Mr. Woodward pressed his Sixth and Eighth Amendment arguments to Alabama's Supreme Court, noting specifically that *Hurst* was relied on by the Delaware Supreme Court in holding its override capital sentencing process unconstitutional [*Rauf*, 145 A.3d 430], and that this Court had vacated three Alabama override convictions in light of *Hurst*.[6] Mr. Woodward again singled out the override statute's repealer and the differences between the judicial fact-finding that

[6] *Johnson v. Alabama*, 136 S. Ct. 1837 (2016); *Wimbley v. Alabama*, 136 S. Ct. 2387 (2016); and *Kirksey v. Alabama*, 136 S. Ct. 2409 (2016).

occurred in his case and the record in the Alabama Supreme Court's prior precedent in *Bohannon*. Like the Court of Criminal Appeals, however, Alabama's Supreme Court was unmoved. Mr. Woodward's certiorari petition was summarily denied and he brings his constitutional arguments to this Court. Since these constitutional issues were pressed in Mr. Woodward's post-conviction appellate briefing and addressed by the state court of appeals on the merits, this Court accordingly can and should consider them on this petition. *Verizon Comm. Inc. v. FCC*, 535 U.S. 467, 530 (2002); *United States v. Williams*, 504 U.S. 36, 41 (1992).

REASONS TO GRANT THIS WRIT

In Alabama, this Court's rulings explaining the most basic tenets of the Sixth and Eighth Amendments have gone unheeded.

First, there is no plausible reason to defend, and no rational ground on which to defend, a capital sentencing system that is universally rejected in practice, particularly when it is constitutionally suspect in its underpinnings and illegitimate in its application. Yet Alabama is doing just that. Those with override death sentences on Alabama's death row are being singled out for punishment that would not and could not be administered to anyone else. The Eighth and Fourteenth Amendments do not permit that result.

Second, and just as fundamentally, this Court has made it clear that every finding of fact that raises a life sentence to death must be made by a jury. Alabama,

by transforming fact-finding into an exercise of discretionary judgment, disagrees. That sleight-of-hand is unconstitutional under the Sixth Amendment's mandate as well. And nowhere is the Sixth Amendment's mandate more compellingly applied than when a jury has found — as a matter of fact — that a life sentence should be imposed and a judge has found — as a matter of fact — that the jury got it wrong and the defendant must die.

I. MR. WOODWARD'S DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE IT OFFENDS UNIFORM NOTIONS OF DECENCY AND HAS BEEN ARBITRARILY AND DISCRIMINATORILY IMPOSED

Arbitrariness in capital sentencing is constitutionally impermissible. It is a violation of the Eighth Amendment's ban on cruel and unusual punishment.[7] Former Chief Justice Warren described

---

[7] *See*, *e.g.*, *Walker v. Georgia*, 555 U.S. 979, ___, 129 S. Ct. 453, 457 (Mem.) (2008) ("The Georgia Supreme Court . . . must take seriously its obligation to safeguard against the imposition of death sentences that are arbitrary . . . .") (Stevens, J., dissenting from denial of certiorari); *Stringer v. Black*, 503 U.S. 222, 228 (1992) (describing the invalidation of state formulations of aggravating circumstances as "vague and imprecise, inviting arbitrary and capricious application of the death penalty in violation of the Eighth Amendment."); *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion) ("It is of vital importance to the defendant and to the community that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion."); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion) (reaffirming the unconstitutionality of "sentencing procedures that create[] a substantial risk that [the

the guiding principle of the Eighth Amendment's proscription of cruel and unusual punishment as "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The Court has since elaborated that the laws enacted by the states provide a sound basis for discerning this decency standard, being the "clearest and most reliable objective evidence of contemporary values . . . ." *Atkins v. Virginia*, 536 U.S. 304, 213 (2002) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). Apart from that, to effectuate the Eighth Amendment's mandate, this Court also has made clear that the constitutionality of death sentences will be measured by "consistent application and fairness to the accused." *Clemons v. Mississippi*, 494 U.S. 738, 748 (1990).

While there can be room for debate in some cases on whether the Eighth Amendment's proscription against cruel and unusual punishment should be brought to bear, this is not one of them. Whether one looks to societal standards of decency or consistency or fairness, Mr. Woodward's sentence flunks all constitutional benchmarks.

To begin with, the imposition of a death sentence through a judicial override of a jury's life sentence offends established societal values. And, given the manner in which the override process historically has

---

death penalty] would be inflicted in an arbitrary and capricious manner."). The Eighth Amendment's ban of cruel and unusual punishment applies to the states under the Fourteenth Amendment. *State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947).

been implemented, it is an instrument of whim and discrimination, not consistency and fairness. Finally, given the Alabama's repealer, the continued attempts to defend and uphold the override process, as applied to the inmates on Alabama's death now, invokes the arbitrary and unequal treatment that the Eighth Amendment prohibits.

Societal Values. Thirty states permit a defendant to be sentenced to death for capital offenses. Of those, ***not a single one*** permits a defendant to be sentenced to death by judicial override. The complete rejection of this capital sentencing process makes it plain that it does not comport with established societal values. *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (thirty states rejecting death sentences for juvenile offenders suffices for a national consensus); *Atkins*, 536 U.S. at 313-315 (similar reasoning for mentally-retarded defendants); *see also Coker v. Georgia*, 433 U.S. 584, 593-94 (1977) (noting that the fact that only one state permitted the death penalty for rape of an adult, with two more permitting the death penalty where the victim was a minor, "weighs very heavily" towards rejection of the death penalty for rape of an adult). Mr. Woodward's judicially-imposed sentence of death under this universally abandoned process violates this core Eighth Amendment principle.

Arbitrary Imposition. Empirical evidence also establishes that the judicial override process by which Mr. Woodward was sentenced is arbitrary and capricious, in practice and effect.

The data reflects, for example, that Alabama judges were disproportionately likely to impose override in

cases where the victim was white: cases with white victims constitute approximately 35% of overall murders, but 75% of capital cases where judicial override was used. Equal Justice Initiative, at 5.

This Court has previously warned that such racial disparities present a heightened risk of arbitrary outcomes. *See Walker*, 129 S. Ct. at 455 (Stevens, J., dissenting from denial of certiorari) (citing *McClesky v. Kemp*, 481 U.S. 279 (1987), and *Turner v. Murray*, 476 U.S. 28, 33-37 (1986)). Indeed, at least one Alabama judge openly remarked that he sentenced a defendant to death over a jury's verdict on the basis of his race. *See Woodward v. Alabama*, 134 S. Ct. at 409 (Sotomayor, J., dissenting from denial of certiorari) (quoting Alabama judge who explained his sentence of a 19-year-old defendant via override, in an election year, by saying: "[i]f I had not imposed the death sentence [on that defendant], I would have sentenced three black people to death and no white people.").

Empirical evidence further demonstrates that Alabama's use of judicial override was influenced by improper considerations of political self-interest. Alabama trial judges are elected in partisan proceedings, and statistical evidence indicated that judges tend to impose death sentences by judicial override more frequently in election years, to appear "tough on crime." *See id.*, 134 S. Ct. at 408-09 (Sotomayor, J., dissenting from denial of certiorari) (citing Symposium, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 FORDHAM URBAN L.J. 239, 256 (1994) (comments of Bryan Stevenson)

(concluding that "there is a statistically significant correlation between judicial override and election years in most of the counties where these overrides take place"); Equal Justice Initiative at 16 (noting that the use of judicial override increases in election years)).[8]

Finally, the data reflects that Alabama's use of judicial override had a heavy geographical variance. Three of Alabama's sixty-seven counties accounted for almost half of the state's judicially-imposed death sentences. Equal Justice Initiative at 17. For example, in 2008, Houston County issued sixteen times more capital sentences than Lee County, despite having approximately three-quarters of the population. *See* Petition for Writ of Certiorari, *Madison v. Alabama*, 139 S. Ct. 718 (2019) (No. 17-7505), at 15. Similarly, only a handful of the state's judges have overridden more than three jury verdicts for life, indicating that a very small number of judges make disproportionate use of judicial override. *Id.*

On analysis, therefore, there is no consistency in Alabama's capital sentencing system, particularly

---

[8] Empirical evidence of Alabama judges' acquiescence to political incentives to appear "tough on crime" in criminal sentencing is particularly salient in Mr. Woodward's case, given the Montgomery Police Department's expressed wish to see Mr. Woodward sentenced to death and the state's reliance, at sentencing, upon other capital murder cases involving law enforcement officers. *See* T.R. 1751-54 (discussing the Montgomery Police Department's letter to the Court at the sentencing phase, including the Court's statement that "I'm sure we all know what the feelings of the Montgomery Police Department are on this."); 1776-78 (the state's reference to 23 comparable cases, of which 21 resulted in a death sentence, 10 of which were imposed by judicial override).

when it comes to the use of judicial override. Yet, as this Court repeatedly has recognized, the Eighth Amendment requires capital sentencing procedures to be consistent, in concept and effect. *Hopper v. Evans*, 456 U.S. 605, 611 (1982) ("Our holding in *Beck* [*v. Alabama*, 447 U.S. 625 (1980)], like our other Eighth Amendment decisions in the past decade, was concerned with insuring that sentencing discretion in capital cases is channeled so that arbitrary and capricious results are avoided.") (citing cases); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (stating that "capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all."). Mr. Woodward's sentencing process here does not — and cannot — meet this standard.

The arbitrary nature of Mr. Woodward's sentencing process has been exacerbated by more recent events. Alabama banned the use of judicial override in 2017, but only prospectively. The judicially-imposed sentences of inmates on death row at the time of repeal were left untouched. Consequently, Mr. Woodward remains under capital sentence, yet if his trial were held today, and proceeded under the exact same charges, in the exact same manner, with the exact same jury verdict, Mr. Woodward could not be sentenced to death. This is a stark change of circumstances dependent ***solely*** on the timing of Mr. Woodward's conviction.

In *Furman*, this Court imposed a moratorium on the death penalty nationwide because "there was no principled means provided to distinguish those that received the penalty from those that did not." *Maynard*

v. Cartwright, 486 U.S. 356, 362 (1988). The same problem now infects Alabama's capital punishment system. A capital defendant tried in 2016 — or, as in Mr. Woodward's case, 2008 — who was given a verdict of life imprisonment could be subjected to judicial override if the trial judge deemed it appropriate, while an ***identically situated*** defendant from 2017 onward will not be, and will remain sentenced to life. The only distinguishing factor is the timing of the crime. There is no constitutionally-defensible rationale supporting such profoundly disparate outcomes.

For much the same reasons that Mr. Woodward's death sentence violates Eighth Amendment guarantees, his sentence is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The essence of the Eighth Amendment's constitutional command, as applied to the state's through the Fourteenth Amendment, is that states must treat similarly situated persons in a like manner. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *see also* Robert F. Schopp, *Justifying Capital Punishment in Principle & in Practice: Empirical Evidence of Distortion in Application*, 81 NEB. L. REV. 805, 826-27 (2002) ("Comparative justice requires comparable treatment for members of a class where that class is defined by some criteria of justice for a particular purpose. . . . Dissimilar treatment of those who do not differ in a corresponding manner on the applicable criteria constitutes comparative injustice."). Alabama's prospective-only repeal of judicial override has drawn

an arbitrary line dividing defendants convicted of capital crimes, taking the lives of some and preserving those of others, based solely on the accident of timing.

The principles that this Court has set forth establish that a death sentence transgresses constitutional bounds when it violates established standards of decency as reflected by societal norms. Mr. Woodward's death sentence is the most severe our society can administer and it went beyond the judgment recommended by those charged with representing society — a jury of Mr. Woodward's peers. Empirical data also indicates that Alabama's sentencing process is illegitimate, arbitrary and now rejected in every state. Under these circumstances, Mr. Woodward's death sentence crosses the line and equates with the cruel and unusual punishment our Constitution prohibits. This Court should grant this petition and so hold.

II. MR. WOODWARD'S DEATH SENTENCE VIOLATES THE SIXTH AMENDMENT BECAUSE IT IS THE RESULT OF JUDICIAL, NOT JURY, FACT-FINDING

The findings necessary for the imposition of a death sentence in this case were not made by the jury, but instead were made independently and after-the-fact by a judge. What is more, those findings were (i) based on evidence the capital jury never heard, (ii) used to reject the jury's findings of mitigation, and (iii) applied to justify a sentence of death.

Alabama's courts, in a deliberate effort to nullify what *Ring* and *Hurst* plainly demand, have elected to

call the kind of fact-finding that went on here an exercise of judicial discretion because the jury made the requisite findings of aggravation. But as the Court of Criminal Appeals' opinion on direct appeal makes clear, this discretionary label is nonsense. The override decision was upheld precisely because the trial court engaged in an independent analysis, based on new evidence, in imposing the death sentence. That sentencing process, as this Court has taken pains to make clear, does not conform to the Sixth Amendment's requirements.

To start with, 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. There, the relevant Arizona capital sentencing statute directed the trial court judge to conduct a separate sentencing hearing to determine the existence or nonexistence of certain circumstances for the purpose of determining whether the defendant could receive the death penalty. *Id.* at 592-93. Accordingly, the judge conducted such a hearing and determined that two aggravating factors and one mitigating factor were present. *Id.* at 592-95. In the trial court's judgment, the one mitigating factor did not "call for leniency" and the judge sentenced the defendant to death. *Id.*

In reversing the sentence, this Court overruled *Walton v. Arizona*, 497 U.S. 639 (1990), to the extent that it allowed a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposing the death penalty. *Id.* at 609. This Court reasoned that because Arizona's enumerated

aggravating factors operated as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury.

Turning to *Hurst*, this Court underscored its reasoning in *Ring*, and made it clear that capital sentences must be imposed by juries to withstand constitutional scrutiny. There, the relevant Florida capital sentencing statute provided that the jury's sentence was advisory, and the trial judge was required to weigh certain aggravating and mitigating circumstances before determining the defendant's ultimate sentence. *Hurst*, 136 S. Ct. at 620. Following this procedure, the trial judge sentenced the defendant to death. *Id.* On post-conviction review, the Florida Supreme Court vacated the defendant's sentence. *Id.* Upon resentencing, the defendant offered mitigating evidence that he was not a major participant in the murder. *Id.* Nonetheless, the jury again recommended a death sentence by a vote of 7-5. *Id.* The sentencing judge agreed, imposing the death penalty in light of her independent determination that two aggravating factors were present. *Id.*

This Court found the state's sentencing process in *Hurst* still violated the Sixth Amendment, reasoning that Florida's capital sentencing scheme was unconstitutional as it "required the judge alone to find the existence of an aggravating circumstance[.]" *Id.* at 624. The Court further reasoned that since the Florida capital sentencing scheme allowed "a judge [to] increase [the defendant's] authorized punishment based on her own factfinding[,]" it violated the Sixth Amendment. *Id.* at 622. "The Florida sentencing

statute does not make a defendant eligible for death until findings by the court that such person shall be punished by death … [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 factual finding that *Ring* requires." *Id.*

Simply put, the sentencing process that resulted in Mr. Woodward's capital conviction cannot survive Sixth Amendment scrutiny if *Hurst*'s holding is properly carried into effect. Mr. Woodward's sentence undisputedly is the product of the very kind of independent fact-finding, based on newly-admitted evidence, that *Hurst* and *Ring* establish is prohibited by the Sixth Amendment. *See, e.g.*, Jeffrey Wermer, *The Jury Requirement in Death Sentencing After Hurst v. Florida*, 94 DENV. L. REV. 385, 409 (2017) ("*Ring* and *Hurst* make it clear that the Alabama capital sentencing scheme violates the Sixth Amendment because it allows a judge to make an independent fact-finding necessary to make a defendant eligible for the death penalty."); Emad H. Atiq, *Legal vs. Factual Normative Questions & the True Scope of Ring*, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 47, 105 (2018) ("Alabama's override scheme is inconsistent with *Hurst* because it empowers the judge, alone, to rule on a convention-independent normative question, or a question of fundamental moral fact.").

In the face of this Court's unequivocal decisions, Alabama cannot relabel a judge's specific fact-finding on aggravation and lack of mitigation as an exercise of discretion and avoid these precedents. This Court has

the jurisdiction to rectify this constitutional injustice and should grant this petition and do so.

CONCLUSION

Mr. Woodward's petition for certiorari should be granted and his death sentence declared unconstitutional.

Respectfully submitted,

JAMES C. MARTIN
Counsel of Record
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