No. 18-_____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID LEE ROBERTS,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE
NO EXECUTION DATE SET

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August 28, 2018

CAPITAL CASE

QUESTIONS PRESENTED

David Roberts was sentenced to death based solely on findings by a judge after his sentencing jury voted that he should live. In *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court invalidated Florida's capital sentencing scheme because it also was based on judicial findings rather than a jury verdict.

1. Did *Hurst* invalidate Alabama's capital sentencing scheme, which is virtually identical to Florida's?
2. As a matter of federal law, is *Hurst* retroactive to cases on collateral review?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Constitutional Provisions

Federal Statutes

State Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests that this Court grant his writ of *certiorari* to review the judgment of the Alabama Supreme Court, which concluded that this Court's opinion in *Hurst v. Florida*, finding Florida's death sentencing scheme unconstitutional was not applicable to Alabama's virtually identical scheme.

OPINIONS BELOW

The judgment of the Alabama Supreme Court denying Mr. Roberts' petition for a writ of certiorari to the Alabama Court of Criminal Appeals was entered on April 20, 2018. A copy of the judgment is attached as Appendix C. The last reasoned state court decision of the Alabama Court of Criminal Appeals was entered on December 8, 2017 and is attached as Appendix A.

JURISDICTION

The Alabama Court of Criminal Appeals issued its initial judgment on December 8, 2017. *See* App. A. That court overruled a timely application for rehearing on January 12, 2018. *See* App. B. Mr. Roberts timely petitioned the Alabama Supreme Court for a writ of certiorari, and that court affirmed the judgment of the Alabama Court of Criminal Appeals on April 20, 2018. *See* App. C. Petitioner applied for an extension of time to file a petition for writ of *certiorari* in this Court until August 28, 2018, which Justice Thomas

granted on July 19, 2018. *See* App. D. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

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 in pertinent part:

> No State shall . . . 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.

RELEVANT STATUTORY PROVISIONS

Alabama Code § 13A-5-47(d) and (e) provide:

> (d) Based upon the evidence presented at trial, the evidence presented during the sentencing hearing, and the presentence investigation report and any evidence submitted in connection with it, the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in Section 13A-5-49, each mitigating circumstance enumerated in Section 13A-5-51, and any additional mitigating circumstances offered pursuant to Section

> 13A-5-52. The trial court shall also enter written findings of facts summarizing the crime and the defendant's participation in it.
> (e) In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such verdict has been waived pursuant to Section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

STATEMENT OF THE CASE

An Alabama judge sentenced Mr. Roberts to death, after a jury found he should be sentenced to life without parole. For nearly two decades, Mr. Roberts has petitioned state and federal courts to overturn his judicially-imposed death sentence on the ground that it violates the Sixth and Eighth Amendments. On January 12, 2016, this Court decided *Hurst v. Florida.*[1] Because *Hurst* affirms what Mr. Roberts has argued all along – that his judge-imposed sentence overriding the jury's verdict for life is unconstitutional - he filed a second state post-conviction on petition on January 11, 2017 premised on *Hurst* error. Alabama courts affirmed the petition's summary dismissal. In doing so, the last reasoned decision opined that *Hurst* does not invalidate Alabama's sentencing scheme and is not retroactive in any event.[2]

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[1] 136 S. Ct. 616, 619 (2016).
[2] *Roberts v. State*, No. 16-0708, slip op. at 7 (Ala. Crim. App. Dec. 8, 2017) (hereinafter Slip Op.).

Alabama's Capital Sentencing Scheme

Alabama's capital sentencing system contains two prerequisites to imposing the death penalty. First, "one or more of the aggravating circumstances enumerated in [Ala. Code] § 13A-5-49 [must be] found to exist" and second, it must be determined that the "aggravating circumstance(s) [must] outweigh[] any mitigating circumstance(s) that may exist."[3] The jury plays only an "advisory" role at sentencing.[4] And, while the jury's advisory verdict must be considered, the trial court need not follow it in imposing sentence.[5] If the jury determines that no aggravating circumstances exist or that the aggravating circumstance(s) that it determines exist do not outweigh the mitigating circumstances, "it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole."[6]

Alabama's bifurcated capital sentencing procedure requires the trial judge to conclude whether aggravating circumstances exist and then consider and weigh aggravating and mitigating circumstances, independently from the jury's advisory verdict. Thus, it is the trial court, not the jury, who makes

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[3] *Ex parte Woodard*, 631 So. 2d 1065, 1071 (Ala. Crim. App. 1993) (citing Ala. Code §§ 13A-5-45 (f), -46(e), -47(e)).
[4] Ala. Code § 13A-5-46.
[5] Ala. Code § 13A-5-47(e) ("While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.").
[6] Ala. Code § 13A-5-46(e)(1), (2).

the determinations as to whether the defendant is sentenced to death.[7] In the absence of the trial court's fact-finding, including its separate weighing of aggravating and mitigating circumstances, a capital defendant cannot be sentenced to death.[8]

Relevant Procedural History

On June 16, 1992, Mr. Roberts was indicted for the murder of Annetra Jones in Marion County, Alabama.[9] Six months later, a jury convicted him of capital murder -- murder during the course of robbery and arson.[10] The jury portion of Mr. Roberts' sentencing began and ended within hours of his conviction.

At the sentencing phase of his trial, Mr. Roberts' jury was instructed that "just because the defendant has been convicted of a capital offense does not determine whether or not he should be sentenced to life imprisonment without parole or death."[11] While the jury was reminded that it had found Mr. Roberts guilty of robbery, it was also repeatedly told "[i]n making your decision concerning what the punishment should be, you must determine whether any aggravating circumstances exist."[12] In addition, the jury was

[7] Ala. Code §§ 13A-5-46, 47.
[8] *See Hurst*, 136 S. Ct. at 622.
[9] (C. 10-11).
[10] (C. 51-52); (R. 440-41).
[11] (R. 516).
[12] (R. 494-95).

instructed that it should sentence Mr. Roberts to life imprisonment without parole, if either it found "the State did not prove beyond a reasonable doubt the existence one or more of the two aggravating circumstances that [the court] instructed [them] on," or if it found that the proven aggravating circumstances did not outweigh the mitigating ones.[13]

After weighing all mitigating and aggravating circumstances presented to them, the sentencing jury returned a verdict of life imprisonment without parole by a vote of seven to five on the same day as the conviction.[14] Its verdict was based on the presentation of some mitigating evidence and two aggravating factors – that the capital offense was committed by a person under sentence of imprisonment and during a robbery.[15] However, because Alabama law provides for only generalized jury verdicts at the sentencing phase,[16] it is impossible to know if the jury's verdict is based on the jurors not finding there to be any aggravating circumstance proven beyond a reasonable doubt or that any such circumstance it may have found did not outweigh the mitigating factors.

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[13] (R. 516-17).
[14] (C. 53); (R. 520).
[15] (R. 499-500).
[16] *See* Ala. Code § 13A-5-46(e); *Haney v. State*, 603 So. 2d 368, 388 (Ala. Crim. App. 1991), *aff'd*, 603 So. 2d 412 (Ala. 1992).

Several months later, the trial judge, as required, conducted its own, separate sentencing hearing.[17] There, it considered additional evidence, including Mr. Roberts' testimony, the pre-sentence report, records detailing his prior criminal history,[18] and a third aggravating circumstances not presented to the jury -- "the capital offense was committed during the course of arson and was committed for the purpose of avoiding or preventing a lawful arrest."[19] Although the jury was instructed that *its* recommended sentence had to be based on the evidence presented at the sentencing hearing and the trial,[20] the trial judge did not feel that his authority to sentence was limited by the jury's verdict, its fact finding, or even the evidence presented to the jury.[21]

The Alabama Court of Criminal Appeals (hereinafter "CCA") upheld Mr. Roberts' conviction, but remanded for a new sentencing hearing to include consideration of improperly excluded mitigation evidence.[22] The trial court held a second sentencing hearing, without a jury, on August 14, 1997.[23] After hearing the additional mitigation evidence, the court again imposed the

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[17] (R. 523). The delay was attributable to trial counsel's disbarment. (R. 546-47).
[18] (R. 539).
[19] (R. 525).
[20] (R. 507-508).
[21] Ala. Code § 13A-5-47(d).
[22] *Roberts v. State*, 735 So. 2d 1244, 1266 (Ala. Crim. App. 1997).
[23] (Supp. R. 1).

death penalty.[24] As before, the judge found no mitigating circumstances. The judge noted that he had "duly considered and [had] not taken lightly" the jury's 1992 advisory verdict of 7-5, but failed to assign that verdict any mitigating weight.[25]

On return to remand, the CCA found an ambiguity as to whether the sentencing court had found a non-statutory mitigating circumstance and remanded a second time for correction of the omission.[26] So, on March 6, 1998, the CCA sent the case back to the trial judge, with instructions that he clarify the existence of any non-statutory mitigating factors. After submission of a revised order, finding no mitigating circumstances, statutory or non-statutory, the CCA finally affirmed Mr. Roberts' death sentence on May 8, 1998.[27]

The Alabama Supreme Court affirmed Mr. Roberts' conviction and death sentence on February 26, 1999.[28] As to Mr. Roberts' claim that his judge-only resentencing violated the Constitution, relying on *Harris v. Alabama*,[29] the Court held the jury's life recommendation, no matter what the vote, was irrelevant because it was not binding on the trial court:

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[24] (C. 1038); (Supp. R. 221).
[25] (Re-sentencing R. 1027).
[26] *Roberts*, 735 So. 2d at 1269.
[27] *Id*. at 1270.
[28] *Ex parte Roberts*, 735 So. 2d 1270 (Ala. 1999).
[29] 513 U.S. 504 (1995).

> The jury in Roberts's case recommended the lesser sentence of life imprisonment, even without hearing the additional mitigating evidence Roberts sought to introduce. Even if Roberts's jury had voted 12–0 to recommend a sentence of life imprisonment after it heard Roberts's mitigating evidence, the trial judge remains under the duty to make a separate review of the evidence and to make his or her own decision. § 13A–5–47(e), Ala. Code 1975. The trial court must consider the jury's sentencing recommendation, but that recommendation is not binding.[30]

This Court denied Mr. Roberts' petition for writ of certiorari on October 12, 1999.[31]

Mr. Roberts' state post-conviction petition was denied after a hearing, and that denial was affirmed by the CCA on March 19, 2004.[32] The Alabama Supreme Court denied certiorari on August 27, 2004.[33]

After being denied relief in the state courts, on September 3, 2004, Mr. Roberts filed a habeas petition pursuant to 28 U.S.C. § 2254. There, he argued, among other things, that the Alabama appellate courts erred by failing to remand for a new jury sentencing.[34] On March 31, 2009, the district court denied Mr. Roberts' habeas petition. As to the resentencing claim, the district court held that "no purpose would be served by impaneling

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[30] *Ex parte Roberts*, 735 So. 2d at 1279.
[31] *Roberts v. Alabama*, 528 U.S. 939 (1999).
[32] *Roberts v. State*, No. CR-01-1818, slip op. at 3 (Ala. Crim. App. Mar. 19, 2004).
[33] *Ex parte Roberts*, No. 1031222 (Ala. Aug. 27, 2004).
[34] *See Roberts v. Comm'r,* Case 6:04-cv-02661-CLS-HGD (N.D. Ala. Sept. 3, 2004) (Doc. #1 at 60) (asserting that "[t]he sentence imposed by the trial court violated Mr. Roberts' rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.").

a second jury," and "[w]hile it is possible that a new sentencing jury could return a verdict even stronger in favor of life without parole, it also could return a recommendation that petitioner be sentenced to death, a verdict to which petitioner would undoubtably [sic] object to the trial court considering its recommendation."[35]

On appeal, an Eleventh Circuit panel majority concluded that neither *Harris* nor *Spaziano v. Florida*[36] requires a constitutionally valid jury sentencing in a death penalty case.[37] The panel also held that the jury's 7-5 life recommendation during Mr. Roberts' first sentencing foreclosed any assertion that a judge-only resentencing prejudiced him.[38] And the panel majority decided that a more heavily weighted jury recommendation for life is constitutionally insignificant under Alabama's sentencing scheme, which permits a sentencing judge to reject even a unanimous life recommendation.[39] Judge Barkett's concurring opinion acknowledged both the perversity and

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[35] *Roberts v. Comm'r,* Case 6:04-cv-02661-CLS-HGD (N.D. Ala. Feb. 23, 2007) (Doc. #24 at 110).
[36] 468 U.S. 447 (1984).
[37] *Roberts v. Comm'r, Ala. Dep't of Corr.*, 677 F.3d 1086, 1095 (11th Cir. 2012).
[38] *Id.*
[39] *Id.* ("[B]ecause Alabama law does not require the judge to follow the jury's recommendation no matter the number of jurors recommending life, we cannot state that the Alabama Supreme Court's affirmance of the appellate court's remand for judge-only resentencing was an unreasonable application of clearly established federal law.").

probable unconstitutionality of Alabama's capital sentencing scheme, explained:

> Even though the majority of jurors in Roberts' case recommended that he receive a life sentence, Alabama's capital sentencing regime permitted the judge to reject, without any guiding standard, that recommendation in favor of a sentence of death, which is what the judge in this case did.[40]

After this Court rendered its opinion in *Hurst*, Mr. Roberts filed a successor state post-conviction petition to exhaust his *Hurst* claim. Now that Alabama's courts have considered and rejected the claim, Mr. Roberts presents it to this Court.

GROUNDS SUPPORTING THE WRIT

I. This Court should grant the writ because Alabama Courts have interpreted – and will continue to interpret --Hurst in a manner inconsistent with this Courts' opinion and in conflict with the Florida and Delaware Supreme Courts.

Alabama courts have consistently misunderstood *Hurst*. They have applied it in a manner that is inconsistent with this Court's opinion, and in conflict with the highest courts of the only other states that *Hurst* impacted. Certiorari is appropriate to clarify this split between the Alabama Supreme Court and the Supreme Courts of Delaware and Florida.

[40] *Id.* at 1096 (Barkett, J., concurring).

A. *Hurst* applied *Ring* to require jury sentencing in hybrid sentencing schemes like Florida's and Alabama's.

Under *Ring v. Arizona*, capital defendants have a Sixth Amendment right to "a *jury determination* of any fact on which the legislature conditions an increase in their maximum punishment."[41] *Ring* held that if a "State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt."[42]

Under *Apprendi v. New Jersey*,[43] "the relevant inquiry [respecting factors which may be found by a judge rather than a jury] is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"[44] Any factor which increases the maximum penalty is "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an 'element' of the offense."[45] All such factors must be found by the jury[46] beyond a reasonable

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[41] 536 U.S. 584, 589 (2002).
[42] *Id.* at 602.
[43] 530 U.S. 466 (2000).
[44] *Id.* at 494. *See also Hurst*, 136 S. Ct. at 621.
[45] *Apprendi*, 530 U.S. at 494 n. 19 (citation omitted).
[46] *Hurst*, 136 U.S. at 622. Alabama's system does not prohibit the trial judge from finding additional aggravating circumstances beyond those presented to the jury. *See*, *e.g.*, *Ex parte Waldrop*, 859 So. 2d 1181, 1190 (Ala. 2002).

doubt[47] and must be binding on the court.[48] A court's parallel decision, based on its own findings and a lesser standard of proof, is not sufficient.[49]

In both Florida and Alabama, the capital sentencing procedure extant at the time of Mr. Roberts' sentencing allowed the trial judge to conclude whether aggravating circumstances existed and then consider and weigh aggravating and mitigating circumstances, independently from the jury's advisory verdict. In both jurisdictions, it was the trial court, not the jury, who made the determination as to whether the defendant would be sentenced to death. And, as happened to Mr. Roberts, because of the judge's "central and singular role"[50] in sentencing, "the jury's recommendation [could] be overridden based upon information known only to the trial court and not to the jury . . . ."[51]

In *Hurst*, this Court granted certiorari, applied *Ring* to Florida's capital sentencing statute, and concluded that Florida's law violated the Sixth Amendment.[52] The Court reasoned that the "analysis the *Ring* Court applied

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[47] *Hurst*, 136 S. Ct. at 621 ("This right [to trial by jury under the Sixth Amendment], in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt.") (citing *Alleyne v. United States*, 133 S. Ct. 2151, 2156 (2013)).
[48] *Hurst*, 136 S. Ct. at 622.
[49] *Id.*
[50] *Id.*
[51] *Ex parte Carroll*, 852 So. 2d 833, 836 (Ala. 2002).
[52] *Hurst*, 136 S. Ct. at 622.

to Arizona's sentencing scheme applies equally to Florida's." [53] In striking down the statute, the Court rejected Florida's attempt to "treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires."[54] After applying *Ring*, the Court concluded that it would overrule the two decisions that had upheld Florida's capital sentencing statute: *Spaziano* and *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam). The Court explained that *Ring* had "washed away the logic of *Spaziano* and *Hildwin*."[55]

Before *Hurst*, the Florida Supreme Court (hereafter, "FSC") had repeatedly held that *Ring* did not have any effect in its jurisdiction, because Florida's system included a jury verdict on punishment,[56] albeit non-binding on the sentencing court,[57] and because this Court had upheld the Florida system prior to *Ring* and did not explicitly overrule those prior cases in *Ring*.[58]

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[53] *Id.*
[54] *Id.*
[55] *Id.* at 624.
[56] *See*, *e.g.*, *Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003) ("[T]he Supreme Court [in *Ring*] found unconstitutional a death penalty scheme where the jury did not participate in the penalty phase of a capital trial. That, of course, is not the situation in Florida where the trial court and the jury are cosentencers under our capital scheme.") (citation omitted).
[57] *Hurst*, 136 S. Ct. at 622 ("'It is true that in Florida the jury recommends a sentence, but ... its recommendation is not binding on the trial judge.'") (quoting *Walton v. Arizona*, 497 U.S. 639, 648 (1990)).
[58] *See*, *e.g.*, *Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla. 2002) ("Significantly, the United States Supreme Court repeatedly has reviewed and upheld Florida's capital

Like the Florida Supreme Court before it, the Alabama Supreme Court (hereafter, "ASC") has continued to hold that *Ring* does not impact Alabama's death penalty system, because of jury participation in finding an aggravating circumstance.[59] The Alabama Supreme Court also holds that because this Court has not explicitly overruled its pre-*Ring* decision in *Harris*, Alabama's system remains valid.[60]

Before *Hurst*, courts, including this one,[61] consistently recognized "Alabama's procedure permitting judicial override is almost identical to the scheme used in Florida."[62] Alabama also equated the two systems. In *Harris*, the State argued that "the Alabama statute is essentially the same as Florida's capital sentencing statute which has been found by this Court to be

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sentencing statute over the past quarter of a century, and although Bottoson contends that there now are areas of 'irreconcilable conflict' in that precedent, the Court in *Ring* did not address this issue.") (footnote omitted); *King v. Moore*, 831 So. 2d 143, 144 (Fla. 2002) (same).

[59] *Waldrop*, 859 So. 2d at 1188.

[60] *Waldrop*, 859 So. 2d at 1189; *Ex parte Bohannon*, 222 So. 3d 525, 531 (Ala. 2016) *cert. denied sub nom*. *Bohannon v. Alabama*, 137 S. Ct. 831, 197 L. Ed. 2d 72 (2017) (quoting *Waldrop*, 859 So. 2d at 1189).

[61] *See Ring*, 536 U.S. at 608 n.6 (both Florida and Alabama have "hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations"); *Harris*, 513 U.S. at 508-09 (Alabama's death penalty statute "much like that of Florida" because "[b]oth require jury participation in the sentencing process but give ultimate sentencing authority to the trial judge").

[62] *Ex parte Harrell*, 470 So. 2d 1309, 1317 (Ala. 1985); *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.").

constitutional."[63] More recently, the State has reiterated the equation: "States like Florida and Alabama responded to *Furman*[64] by creating hybrid systems under which the jury recommends an advisory sentence, but the judge makes the final sentencing decision."[65] Given the similarities between Florida's and Alabama's schemes, the State of Alabama, through its Solicitor General, filed an amicus brief in *Hurst*, in which it recognized that a decision in favor of the petitioner in *Hurst* would upset precedents applicable to Alabama's scheme.[66]

It is beyond dispute that Alabama's death penalty sentencing scheme has the same defect that *Hurst* found unconstitutional in Florida: in Alabama, the trial court, not the jury, makes every finding necessary to impose the death penalty while the jury's sentencing verdict remains, by statute, merely an "advisory" recommendation that "is not binding upon the court."[67]

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[63] Br. of Resp't, 1994 WL 514669, at *13 n.5, *Harris* (No. 93-7659).
[64] *Furman v. Georgia*, 408 U.S. 238 (1972).
[65] Br. of *Amici Curiae* Ala. and Mont. in Support of Resp't at *4, *Hurst v. Florida*, No. 14-7505, 136 S. Ct. 616 (2016), 2015 WL 4747983. *See also id.* at *7 ("Three states – Delaware, Florida, and Alabama – allow a judge to impose a sentence regardless of a jury's recommendation. *See* Ala. Code § 13A-5-47; Fla. Stat. § 921.141; Del. Code tit. 11, § 4209(d).").
[66] *Id.* at *9 (2015) ("Florida and Alabama have relied on this Court's decisions in *Spaziano* and *Harris* to sentence hundreds of murderers").
[67] Ala. Code §§ 13A-5-46, -47; *see also Ring*, 536 U.S. at 608 n.6.

"The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough."[68] Because Alabama's death penalty system operates in the same way as Florida's in all respects relevant to an analysis under *Hurst*, that system is equally unconstitutional and should be overturned. As Justice Breyer recognized previously, there is no principled reason to distinguish between Alabama and Florida "which used similarly unconstitutional procedures."[69] These Sixth Amendment concerns are especially acute here, where an Alabama judge converted a jury's life recommendation into a death verdict.[70]

B. Absent this Court's intervention, Alabama will continue to ignore the obvious implications of *Ring* and *Hurst* to Alabama's capital sentencing scheme.

In *Waldrop*, the ASC considered the constitutionality of Alabama's capital-sentencing scheme in light of *Apprendi* and *Ring*. In upholding the law, it held the weighing of aggravating and mitigating circumstances "is not a factual determination" and thus need not be by the jury.[71] But *Hurst*

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[68] *Hurst*, 136 S. Ct. at 619.
[69] *Brooks v. Alabama*, 136 S. Ct. 708 (2016) (Breyer, J., dissenting from denial of application for stay of execution and petition for certiorari) ("The unfairness inherent in treating this case differently from others which used similarly unconstitutional procedures only underscores the need to reconsider the validity of capital punishment under the Eighth Amendment.").
[70] *Woodward v. Alabama*, 134 S. Ct. 405, 405 (2013) (Sotomayor, J., dissenting from denial of cert.).
[71] *Waldrop*, 859 So. 2d at 1189.

rejects the reasoning of *Waldrop*. In explaining why Florida's effort to defend the role of the jury failed, this Court clearly stated:

> The State fails to appreciate the central and singular role the judge plays under Florida law . . . the Florida sentencing statute does not make a defendant eligible for the death penalty until "findings *by the court* that such person shall be punished to death." The trial court *alone* must find "the facts ... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." "[T]he jury's function under the Florida death penalty statute is advisory only." The State cannot now treat the advisory recommendation by the jury as the necessary finding that *Ring* requires.[72]

This outcome is consistent with the reality that, in order to weigh aggravating and mitigating factors, the decision-maker must first evaluate the factual intensity of each.[73]

A judge sentenced Mr. Roberts to death, after declining to follow an advisory jury verdict for life that did not specify what aggravating or mitigating circumstances, if any, the jury found and weighed in deciding whether to recommend that sentence. At a later proceeding, the trial court decided what aggravating and mitigating circumstances existed and did not exist based, in part, on evidence not presented to a jury. Further, in order to

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[72] *Hurst*, 136 S. Ct. at 622 (italics and brackets in original) (internal citations omitted) (underlining added).

[73] *Cf.* Ala. Code § 13A-5-48 (weighing shall not "mean a mere tallying of aggravating and mitigating circumstances for the purpose of numerical comparison"); *Carroll*, 852 So. 2d at 836 (weight to be given jury's recommendation depends in part "upon the strength of the factual basis for such a recommendation") (emphasis added).

impose a death sentence, the trial court was required to "determine" that the aggravating circumstances *it found* outweighed the mitigating circumstances *it found*.[74]

A death sentence violates the Sixth and Fourteenth Amendments where the judge, rather than the jury, finds the fact necessary to impose the death penalty that an aggravating circumstance exists. And because Alabama's capital sentencing scheme requires a judge to make this finding, which is necessary to sentence a defendant to death, the scheme itself is unconstitutional. Just as Florida's capital sentencing scheme is unconstitutional because it "required the judge alone to find the existence of an aggravating circumstance,"[75] so too is Alabama's scheme, which is identical to Florida's in this regard. Therefore, Mr. Roberts' judicial override death sentence constitutes a violation of his right to trial by jury.

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[74] The Florida Supreme Court, citing *Hurst*, *Apprendi*, and *Ring*, recently concluded, "[T]he 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," including "that the aggravating factors outweigh the mitigating circumstances." *Hurst v. State*, 202 So. 3d 40, 53 (Fla. 2016); *see also Rauf v. State*, 145 A.3d 430, 433 (Del. 2016) (finding Delaware's capital punishment statute unconstitutional under the Sixth Amendment because it does not require that a jury find that the aggravating circumstances outweigh the mitigating circumstances). Alabama is now the only state that does not require a jury to make all findings necessary to impose a death sentence.

[75] *Hurst*, 136 S. Ct. at 624.

C. Alabama's precedent applying *Hurst* in this case.

Relying on its own faulty precedent in *Bohannon*, the CCA declined to recognize that *Hurst* rendered Alabama's capital sentencing scheme facially unconstitutional.[76] And it held that *Hurst* is not retroactive in any event.[77]

In *Bohannon*, the ASC acknowledged that "in Alabama the judge, when imposing a sentence of death, makes a finding of the existence of an aggravating circumstance independent of the jury's fact-finding and makes an independent determination that the aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances found to exist."[78] As *Hurst* described, that was also true of Florida's system.[79]

While *Hurst* forbids "a judge [to] increase[] … authorized punishment based on her own fact-finding,"[80] *Bohannon* denies that judicial weighing is the analytical equivalent of the judicial factual finding that *Hurst* denounced.[81] But the constitutional importance of a finding depends on its

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[76] *Roberts v. State*, No. 16-0708, slip op. at 7 (Ala. Crim. App. Dec. 8, 2017).
[77] *Id.*
[78] 222 So. 3d at 532.
[79] *See Hurst*, 136 S. Ct. at 622 ("The trial court alone must find '*the facts* . . . [t]hat sufficient aggravating circumstances exist' *and* '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.' '[T]he jury's function under the Florida death penalty statute is advisory only.'") (emphases added).
[80] *Id.*
[81] *Bohannon*, 222 So. 3d at 532-33 ("rather than being 'a factual determination,' the weighing process is 'a moral or legal judgment that takes into account a theoretically limitless set of facts.'").

role in the sentencing process, not what courts call it.[82] Both state and federal courts have held that weighing determinations, in the capital sentencing context, are factual findings that must be made by a jury.[83] Justice Sotomayor has agreed.[84] Alabama's system, which allowed a judge to sentence Mr. Roberts to death despite a jury's life verdict, cannot be reconciled with *Hurst*.

Even so, the Alabama courts misread *Hurst* and *Ring* to "require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty—the plain language in those cases

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[82] *Ring*, 536 U.S. at 602 (considering and dismissing distinction between "elements" and "sentencing considerations").

[83] *See McLaughlin v. Steele*, No. 4:12CV1464 CDP, 2016 WL 1106884, at *27-30 (E.D.Mo. Mar. 22, 2016) (finding violation of *Ring* and *Hurst* because death sentence imposed after finding by court, not jury, that "evidence in mitigation [was not] sufficient to outweigh the evidence in aggravation"); *State v. Whitfield*, 107 S.W.3d 253, 259-61 (Mo. 2003) (en banc) (finding Missouri requirement that capital jurors determine whether "evidence in mitigation" was "sufficient to outweigh the evidence in aggravation" before sentencing defendant to death was "factual finding" properly made by jury); *State v. Ring*, 65 P.3d 915, 942-43 (Ariz. 2003) (en banc) (on remand from U.S. Supreme Court, finding Sixth Amendment required that jury "find[] mitigating circumstances and balanc[e] them against the aggravator").

[84] Justice Sotomayor, dissenting from the denial of certiorari in *Woodward* observed:

> A defendant is eligible for the death penalty in Alabama only upon a specific factual finding that any aggravating factors outweigh the mitigating factors he has presented. The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is therefore necessary to impose the death penalty. It is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole. Under *Apprendi* and *Ring*, a finding that has such an effect must be made by a jury.

134 S. Ct. at 410.

requires nothing more and nothing less."[85] According to the ASC, "*Hurst* focuses on the jury's factual finding of the existence of an aggravating circumstance to make the defendant death-eligible; it does not mention the jury's weighing of aggravating and mitigating circumstances."[86]

But, the *Hurst* Court explicitly addressed the issue of weighing aggravating circumstances against mitigating circumstances as a factual finding. Discussing Florida's statute, the Court explained, "The State fails to appreciate the central and singular role the judge plays under Florida law," namely that "[t]he trial court *alone* must find 'the *facts* . . . [t]hat sufficient aggravating circumstances exist' *and* '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'"[87]

Alabama is no different. Like Florida, Alabama's scheme requires the trial court to independently weigh aggravating and mitigating circumstances to arrive at a sentence, no matter what the jury has recommended.[88] In *Hurst,* the Court stated "the State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires."[89] Thus, the Alabama courts' interpretation of *Hurst* is at tension with

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[85] *Bohannon*, 222 So. 3d at 532.
[86] *Id.*
[87] *Hurst*, 136 S. Ct. at 622 (first emphasis in original) (first brackets added).
[88] *Id.* ("The trial court alone must find 'the facts … [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'").
[89] *Id.*

what *Hurst* requires.

As Mr. Roberts' judicially-imposed death sentence shows, Alabama judges are not required to consider the same facts in sentencing as the jury finds during the guilt phase of the trial. Nor are Alabama judges required to assign any particular weight to a jury's life verdict. Under Alabama's scheme, the judge "determines ... the critical finding that an aggravating circumstance exists,"[90] not the jury. Second, even where a jury has found an aggravating factor in the guilt phase, the judge in the sentencing phase may find additional facts related to mitigation or aggravation that were not addressed by the jury.

That is precisely what happened here. Mr. Roberts' jury evaluated the guilt-phase evidence and decided none of it warranted his death. Mr. Roberts was sentenced by a judge who considered, but rejected, the import of the jury's life verdict. That judge also heard new mitigating evidence, but rejected all of it to impose a death sentence. In Mr. Roberts' case, then, the ultimate "findings necessary to impose the death penalty,"[91] were made by the trial judge and based in part on evidence and information not even shown to his jury.[92] That sentence can't be sustained under *Hurst*.

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[90] *Id.*. *See also* Ala. Code § 13A-5-47(d).
[91] *Hurst*, 136 S. Ct. at 622.
[92] *See* Ala. Code § 13A-5-47 (b) to (d) (judge must consider presentence investigation report, arguments by counsel, and new evidence presented at sentencing hearing).

As members of this Court have observed, *Hurst* imperiled Alabama's death penalty statute.[93] Perhaps for that reason, this Court remanded several Alabama cases for reconsideration in *Hurst*'s immediate aftermath.[94] But, despite these clear signals respecting *Hurst*'s impact on this state's administration of the death penalty, Alabama courts have refused to apply *Hurst,* deferring instead to *Bohannon* and *Waldrop*, ASC cases that predate *Hurst*. For instance, following this Court's remand in *Russell* to reconsider in light of *Hurst*, the CCA relied on *Bohannon* to simply reinstate its previous order, ruling as follows:

> Alabama has reviewed its capital-sentencing scheme in light of *Hurst* and has determined that its capital-sentencing scheme does not violate the United States Constitution and does not run afoul of *Apprendi*, *Ring*, or *Hurst*.[95]

Alabama courts followed the same logic in subsequent decisions.[96]

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[93] *See Brooks* (Sotomayor, J., joined by Ginsberg, J., concurring in denial of certiorari) (questioning the constitutionality of Alabama's sentencing scheme in light of *Hurst*, and noting that *Harris* was based on *Hildwin* and *Spaziano*, "two decisions we recently overruled in *Hurst*") (citations omitted); *see also ibid* (Breyer, J., dissenting from denial of application for stay of execution and denial of certiorari) (observing that *Hurst* declared "Florida's scheme is unconstitutional" and that "Alabama's sentencing scheme is 'much like' and 'based on Florida's sentencing scheme'") (citations omitted).

[94] *Russell v. Alabama*, 15-9918, 2016 WL 3486659 (U.S. Oct. 3, 2016) (vacating and remanding to Court of Criminal Appeals "for further consideration in light of *Hurst v. Florida*"); *Kirksey v. Alabama*, No. 15-7912, 136 S. Ct. 2409 (Jun. 6, 2016) (same); *Wimbley v. Alabama*, No. 15-7939, 136 S. Ct. 2387 (May 31, 2016) (same); *Johnson v. Alabama*, No. 15-7091, 136 S. Ct. 1837 (May 2, 2016) (same).

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

[96] *See Johnson v. State*, CR-10-1606, 2017 WL 4564253, at *2 (Ala. Crim. App. Oct.

In ignoring *Hurst's* applicability to its capital sentencing scheme, Alabama stands in stark contrast to Florida and Delaware. Both the Florida and Delaware Supreme Courts have read *Hurst* to hold that weighing of aggravators and mitigators is a jury function. On remand, in *Hurst*, the Florida Supreme Court concluded:

> [W]e hold that the Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. . . . In capital cases in Florida, these specific findings required to be made by the jury include . . . the finding that the aggravating factors outweigh the mitigating circumstances.[97]

Likewise, in *Rauf*, the Delaware Supreme Court asked and answered: "Does the Sixth Amendment to the United States Constitution require a jury, not a sentencing judge, to find that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist . . . ? Yes."[98] Alabama has consistently responded "no" to questions about whether *Hurst* has any impact on its sentencing scheme. And, absent this Court's intervention,

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

[97] *Hurst*, 202 So. 3d at 44.

[98] *Rauf*, 145 A.3d at 434.

Alabama will continue to resist the constitutional imperative that *Hurst* represents.

II. Alabama's decision not to apply *Hurst* retroactively in all cases is in direct conflict with the Florida and Delaware Courts, and this Court should grant the writ to conclusively determine whether *Hurst* applies retroactively to prisoners who have illegal death sentences.

A. Every *Hurst*-impacted state, except Alabama, has decided that *Hurst* is retroactive.

Before *Hurst,* only three capital sentencing schemes allowed a judge to override a jury's recommendation of a life sentence — Alabama, Florida, and Delaware. Applying *Hurst*, Florida and Delaware have substantially modified their sentencing schemes to comply with the Sixth Amendment. And, relying on state retroactivity analyses, *Florida* and *Delaware* have applied *Hurst* to broad swaths of petitioners. Post-*Hurst*, Alabama is an outlier not only in ignoring *Hurst*'s relevance, but also in refusing to deem *Hurst* retroactively applicable to any case on collateral review. This Court should settle this matter and decide that *Hurst* is retroactive as a matter of federal law, to prevent burgeoning inequities in how these jurisdictions decide *Hurst* claims.[99]

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[99] *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016), *as revised* (Jan. 27, 2016) (holding "that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule."); *Teague v. Lane,* 489 U.S. 288, 315 (1989)("[T]he harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment hardly comports with the ideal of administration of justice with an even hand." (internal quotation marks omitted)).

In Alabama's restrictive view, *Hurst* is an old rule under *Teague*, because it "merely applied the rule established in *Apprendi* and *Ring* to new facts: the State of Florida's death-penalty scheme."[100] So if a petitioner has asserted a timely *Ring* claim previously, he could not also pursue post-conviction relief under *Hurst*.[101] This conclusion ignores that the state of Florida's death penalty scheme was not a "new fact," it existed at the time *Ring* and *Apprendi* were decided.

Contrary to traditional notion of retroactivity as a binary concept — *i.e.*, a new constitutional rule is either retroactive to all cases or to none — post-*Hurst* decisions in Florida establish that determining retroactivity in *Hurst* cases requires individualized assessment. Post-*Hurst* Florida Supreme Court decisions have recognized that an important inquiry is whether the defendant unsuccessfully attempted to raise a challenge to Florida's capital sentencing scheme before *Hurst* was decided.[102] Where a petitioner has raised such a challenge, the Florida Supreme Court reasoned, it would be fundamentally unfair to prohibit him from seeking post-conviction relief under *Hurst*, given that he had accurately anticipated the fatal defects in

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[100] *Lee v. State*, 244 So. 3d 998, 1003 (Ala. Crim. App. 2017).
[101] *Id.*
[102] *Mosley v. State*, 209 So. 3d 1248, 1274 (Fla. 2016), *reh'g denied*, No. SC14-2108, 2017 WL 510491 (Fla. Feb. 8, 2017).

Florida's capital sentencing scheme even before *Hurst* recognized them.[103] *Mosley* also emphasized that ensuring fundamental fairness in assessing retroactivity outweighed any State's interest in finality of death sentences.[104]

Delaware went even further. In *Powell v. Delaware*,[105] "[t]he Delaware Supreme Court applied *Hurst* retroactively to all death-sentenced prisoners under its *Teague*-like retroactivity test and automatically imposed life sentences."[106] It opined that, "[b]ased upon *Hurst*, *Rauf* overruled [its] prior decision *Brice v. State* and announced a new watershed procedural rule for capital proceedings that contributed to the reliability of the fact-finding process."[107] In doing so, that Court noted that its decision was consistent with two prior opinions when it "held that the extant death penalty statutes were unconstitutional and vacated all death sentences."[108] Thus, Florida and

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[103] There the Florida Supreme Court's fundamental fairness analysis made no distinction between pre-*Ring* and post-*Ring* sentences. *Mosley*, 209 So. 3d at 1274. That separate analysis focused on whether it would be unfair to bar Mr. Mosley from seeking *Hurst* relief, regardless of when his sentence became final, by virtue of the fact that he had previously attempted to challenge Florida's unconstitutional capital sentencing scheme and was "rejected at every turn" under the Florida Supreme Court's flawed pre-*Hurst* law. *Id.* at 1275.

[104] *Id.* ("In this instance . . . the interests of finality must yield to fundamental fairness.").

[105] 153 A.3d 69, 74 (Del. 2016).

[106] Angela J. Rollins & Billy H. Nolas, *The Retroactivity of Hurst v. Florida, 136 S. Ct. 616 (2016) to Death-Sentenced Prisoners on Collateral Review*, 41 S. Ill. U. L.J. 181, 190 (2017).

[107] *Powell*, 153 A.3d at 74.

[108] *Id.* at 76.

Delaware have already done what Alabama should — they have applied *Hurst* retroactively.

The Constitution requires every State to provide certain minimum constitutional guarantees to prisoners. Partial retroactivity, where similarly situated prisoners are arbitrarily granted or denied the ability to seek *Hurst* relief based on where they are incarcerated or when their sentences were finalized, is constitutionally intolerable. The Equal Protection Clause and Eighth Amendment forbid such results.[109] "With faithfulness to the constitutional union of the States, [this Court] cannot leave [entirely] to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights."[110]

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[109] *See Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (Equal Protection Clause guarantees that the state treat similarly situated persons similarly and restrains arbitrary governmental classifications); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (prohibiting the imposition of the death penalty under "procedures that create[] a substantial risk that it would be inflicted in an arbitrary and capricious manner.").

[110] *Chapman v. California*, 386 U.S. 18, 21 (1967).

B. *Ring* does not foreclose the retroactivity of *Hurst*.

Although it was free to do otherwise,[111] Alabama has also decided that because this Court has held that *Ring* does not apply retroactively,[112] that *Hurst* cannot be retroactive either.[113] Whether *Ring* is retroactive does not govern whether *Hurst* is, because precedent which declared *Ring* non-retroactive is materially distinguishable.

In *Summerlin*, this Court applied the federal retroactivity test in *Teague*, to determine that *Ring* was not retroactive on federal habeas review because the requirement that the jury, rather than the judge, make findings as to whether the defendant had a prior violent felony aggravator was a procedural rule. But *Summerlin* did not review statutes like Alabama's that required the jury not only to conduct the fact-finding regarding the aggravators, but also required the jury to find whether the aggravators were sufficient to impose the death penalty.[114]

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[111] While Alabama has adopted the *Teague* framework to determine when decisions should apply retroactively in its own courts, it is free "to give broader effect to new rules of criminal procedure than is required by [*Teague*]." *Danforth v. Minnesota*, 552 U.S. 264, 266 (2008).

[112] *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004).

[113] *Reeves v. State*, 226 So. 3d 711, 757 (Ala. Crim. App. 2016), *reh'g denied* (Oct. 24, 2016), *cert. denied* (Jan. 20, 2017), *cert. denied*, 138 S. Ct. 22, 199 L. Ed. 2d 341 (2017) ("Because *Ring* does not apply retroactively on collateral review, it follows that *Hurst* also does not apply retroactively on collateral review. Rather, *Hurst* applies only to cases not yet final when that opinion was released, such as *Johnson*, *supra*, a case that was still on direct appeal (specifically, pending certiorari review in the United States Supreme Court) when *Hurst* was released.")

[114] *Summerlin*, 542 U.S. at 351, n.1.

And there are material distinctions between the Arizona capital sentencing scheme at issue in *Ring* and Florida's which was at issue in *Hurst*. In *Ring*, Arizona's statute required "the [judicial] finding of an aggravating circumstance before imposition of the death penalty."[115] In contrast, in *Hurst*, Florida required that "[t]he trial court alone must find 'the facts ... [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'"[116]

Moreover, *Hurst*, unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and this Court has always regarded such decisions as substantive.[117] *Ring* was about the Sixth Amendment right to a jury trial in capital cases.[118] As S*ummerlin* recited, "[b]ecause Arizona law already required aggravating factors to be

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[115] *Id.* (citing *Ring,* 536 U.S. at 604).
[116] *Hurst*, 136 S. Ct. at 622.
[117] *See Powell*, 153 A.3d at 74 (holding that *Hurst* is retroactively applicable under the state's *Teague*-like retroactivity doctrine and distinguishing *Summerlin* because it "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not ... the applicable burden of proof."); *see also Guardado v. Jones*, No. 4:15-cv-256 (N.D. Fla. May 27, 2016) (federal judge explaining that *Hurst* federal retroactivity is possible despite *Summerlin* because *Summerlin* unlike *Hurst* "did not address the requirement for proof beyond a reasonable doubt," and "[t]he Supreme Court has held a proof-beyond-a-reasonable-doubt decision retroactive. *See Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972).").
[118] *Ring*, 536 U.S. at 588 ("This case concerns the Sixth Amendment right to a jury in capital prosecutions.").

proved beyond a reasonable doubt, that aspect of *Apprendi* was not at issue."[119]

If *Hurst* announced a new rule altogether, then *Summerlin* cannot be dispositive. Under *Teague*, a new constitutional rule of criminal procedure generally does not apply to convictions that were final when the new rule was announced. However, there are two categories of rules that are not subject to *Teague's* general bar – substantive rules[120] and "watershed" rules.[121] As explained below, *Hurst* implicates both *Teague* exceptions.

1. *Hurst* is a substantive rule.

Because *Hurst* addressed not only a capital defendant's jury trial right, but also the right to have his capital sentence rest upon proof beyond a reasonable doubt,[122] "*Hurst* provides a stronger case than *Ring* for the retroactive application of a procedural rule."[123] This Court has already decided that the proof beyond reasonable doubt standard *is* retroactive. In *Winship*, [124] the Court "expressly held that the reasonable-doubt standard is a prime instrument for reducing the risk of convictions resting on factual

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[119] *Summerlin*, 542 U.S. at 351 n.1.
[120] *Teague*, 489 U.S. at 307.
[121] *Id.* at 312-13.
[122] *See*, *e.g.*, *Ring*, 536 U.S. at 618 (Breyer, J., concurring) ("[T]he danger of unwarranted imposition of the [death] penalty cannot be avoided unless the decision to impose the death penalty is made by a jury rather than by a single government official.") (internal quotations and citation omitted).
[123] Rollins & Nolas, *The Retroactivity of Hurst*, *supra*, at 202.
[124] *In re Winship*, 397 U.S. 358, 360 (1970).

error."[125] As Delaware has decided, it follows that "[t]he change in the burden of proof in *Winship* that was ruled retroactive in *Ivan V.* is no different from the change in the burden of proof that occurred in *Rauf* [applying *Hurst*]."[126]

Hurst substantively redefined Florida's capital sentencing scheme (as well as Alabama's).[127] Where a constitutional rule is substantive, as here, the Supremacy Clause of the United States Constitution requires a state post-conviction court to apply it retroactively.[128] For example, in *Montgomery*, the defendant initiated a state post-conviction proceeding seeking retroactive application of *Miller v. Alabama*,[129] which held that imposition of mandatory sentences of life without parole on juveniles violates Eighth Amendment. The Louisiana Supreme Court held that *Miller* was not retroactive under its state retroactivity tests.[130] But this Court reasoned that "[w]hether a new

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[125] *Ivan V.*, 407 U.S. at 205 ("Plainly, then, the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect.").
[126] *Powell*, 153 A.3d at 76.
[127] Both the majority and dissent in *Summerlin* agreed that *Ring* met the first criterion, that its holding was "implicit in the concept of ordered liberty." *Summerlin*, 542 U.S. at 359 (Breyer, J., dissenting) ("The majority does not deny that *Ring* meets the first criterion[.]"). Which means that *Hurst* does, too.
[128] *Montgomery*, 136 S. Ct. at 731-21 ("Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.").
[129] 132 S. Ct. 2455 (2012).
[130] *Montgomery*, 136 S. Ct. at 727.

rule bars States from proscribing certain conduct or from inflicting a certain punishment, '[i]n both cases, the Constitution itself deprives the State of the power to impose a certain penalty."[131] Having done so, it reversed, holding that Louisiana could not bar retroactivity under its state doctrines because the *Miller* rule was substantive and therefore Louisiana was obligated under the federal Constitution to apply it retroactively on state post-conviction review.[132]

Similarly, *Hurst* announced substantive rules that under the federal Constitution may not be denied to Alabama petitioners on state retroactivity grounds. Substantive rules are "rules forbidding criminal punishment of certain primary conduct," and "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."[133] Here, the jury recommended a life sentence with a seven to five vote. After considering limited mitigating evidence, the judge overrode that recommendation to impose a death sentence. Thus, there was no finding by the jury of any facts necessary to impose a sentence of death, which, under *Hurst*, the Sixth Amendment mandates.[134] Based on the life recommendation

[131] *Id.* at 729 (citation omitted).
[132] *Id.* at 736.
[133] *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989); *see also Teague*, 489 U.S at 307.
[134] *Hurst*, 136 S. Ct. at 619.

from the jury and this Court's decision in *Hurst*, Mr. Roberts is part of a "class of defendants" for whom the death penalty is prohibited.[135]

As *Hurst* made clear, its rule rejecting judge-made fact finding to impose death sentences is intended to ensure that Florida's overall capital system complies with the Sixth and Eighth Amendments.[136] In applying *Hurst*, Florida's Supreme Court has found that it imposes substantive corrections to its death penalty procedure.[137] And it has applied *Hurst* retroactively to post-*Ring* petitioners.[138] This also suggests that the rule is substantive,[139] even though its subject concerns the method by which a jury makes decisions.[140]

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[135] *Montgomery*, 136 S. Ct. at 732.
[136] *Hurst*, 136 S. Ct. at 624.
[137] In *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), the Florida Supreme Court held that, in addition to the principles articulated in *Hurst*, the Eighth Amendment also requires unanimous jury fact-finding as to (1) which aggravating factors were proven, (2) whether those aggravators were "sufficient" to impose the death penalty, and (3) whether those aggravators outweighed the mitigation. 202 So. 3d at 53-59. The Court made clear that each of those determinations are "elements" that must be found by a unanimous jury beyond a reasonable doubt. *Id.* at 57; *see also Jones v. State*, No. SC14-990, 2017 WL 823600, at *16 (Fla. Mar. 2, 2017).
[138] *Mosley*, 209 So. 3d at 1274–75 (emphasis added); *see also id.* ("Defendants who were sentenced to death... after *Ring* should not suffer due to the United States Supreme Court's fourteen-year delay in applying *Ring* to Florida...").
[139] *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule").
[140] *See Montgomery*, 136 S. Ct. at 735 (noting that existence of state flexibility in determining method by which to enforce constitutional rule does not convert substantive rule to procedural one).

2. *Hurst* is a watershed rule.

In striking down Florida's death penalty law as unconstitutional, the Supreme Court also implied that *Hurst* is a watershed rule because it is "central to an accurate determination" that death is a legally appropriate punishment.[141] *Hurst*'s conclusion that a jury recommendation is insufficient to impose a death sentence is based on the Sixth Amendment's guarantee of a right to a jury trial.[142] This right is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure."[143] *Hurst*'s holding, reaffirming that the Sixth Amendment requires that the jury find all facts necessary to impose a defendant's punishment, thus protects the fundamental reservation of power in the Constitution and the fundamental fairness of a capital defendant's trial.[144]

It is well-established that juries generally are more accurate fact finders than are judges, particularly when it comes to the imposition of the

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[141] *Teague,* 489 U.S. at 313.

[142] *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) ("The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.").

[143] *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

[144] *See Hurst*, 136 S. Ct. at 621-22; *Ring*, 536 U.S. at 610 (Scalia, J., concurring) ("I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives — whether the statute calls them elements of the offense, sentencing factors, or Mary Jane — must be found by the jury beyond a reasonable doubt.").

death penalty.[145] That Alabama's capital sentencing scheme implicates the fundamental fairness of the trial is all the more stark because this life-and-death decision is being made by judges facing intense electoral pressure.[146] Alabama's capital sentencing scheme — particularly with respect to life-to-death overrides — produces unreliable results, as Justice Sotomayor has

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[145] *See, e.g.*, *Ring*, 536 U.S. at 618 (Breyer, J., concurring) ("[T]he danger of unwarranted imposition of the [death] penalty cannot be avoided unless the decision to impose the death penalty is made by a jury rather than by a single government official." (internal quotations and citation omitted)); *Gregg*, 428 U.S. at 181 ("The Court has said that 'one of the most important functions any jury can perform in making . . . a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system.'" (citation omitted)); Stephen Gillers, *Deciding Who Dies*, 129 U. Pa. L. Rev. 1, 60-69 (1980) ("The jury is substantially more likely than the judge to reliably reflect community feelings on the need for a retributive response to the offender and the offense.").

[146] *See* Equal Justice Initiative, *The Death Penalty in Alabama: Judge Override* 4, 8, 16 (July 2011), *available at* http://eji.org/files/Override_Report.pdf (last visited March 16, 2016); Paul Brace & Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 Am. J. Pol. Sci. 360, 370 (2008) ("[E]lections and strong public opinion [in support of capital punishment] exert a notable and significant direct influence on judge decision making in [capital] cases . . . ."); Karin E. Garvey, *Eighth Amendment—the Constitutionality of the Alabama Capital Sentencing Scheme*, 86 J. Crim. L. & Criminology 1411, 1434-35 (1996) (observing the political pressure on elected judges to support the death penalty "simply increases the arbitrariness of the sentences imposed by Alabama judges"); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 759, 792-93 (1995) (observing "[t]he political liability facing judges who enforce the Bill of Rights in capital cases undermines the independence, integrity, and impartiality of the state judiciary," including in deciding whether to exercise judicial override in capital cases.

recognized.[147] Significantly, life-to-death overrides in Alabama are more frequent in election years.[148]

In addition, as of late 2013, Alabama judges were responsible for 26 of the 27 instances since 2000 in which a judge in any state has overridden a jury's advisory sentencing verdict of life without parole.[149] It is apparent that Alabama is a "clear outlier" among states administering the death penalty — even among those few states that permit judicial override.[150]

Summerlin's conclusion that the evidence before it was "simply too equivocal to support" the conclusion that *Ring* significantly improved fact-finding procedures by requiring juries, rather than judges, to find the facts necessary to impose a death sentence,[151] does not apply here. Instead, the fact-finding procedures used by elected Alabama judges to impose a death sentence are unquestionably less reliable than the fact-finding procedures used by juries. Indeed, 26 of the 27 life-to-death overrides since 2000 were by Alabama judges despite the fact that, as Justice Sotomayor has observed, "[t]here is no evidence that criminal activity is more heinous in Alabama than

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[147] *Woodward*, 134 S. Ct. at 408-09.
[148] *See* Michael L. Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011 Mich. St. L. Rev. 793, 804 (2011).
[149] *Woodward*, 134 S. Ct. at 407.
[150] *Id.*
[151] 542 U.S. at 356.

in other States, or that Alabama juries are particularly lenient."[152] And Justice Sotomayor's observation that Alabama judges "appear to have succumbed to electoral pressures"[153] speaks directly to the reliability of their fact-finding. Thus, by requiring the jury, rather than the judge, to find the facts needed to impose death sentences, *Hurst* significantly improves the fact-finding procedures underlying Alabama's capital sentencing scheme. Therefore, *Hurst* is a watershed rule of criminal procedure that must apply retroactively to cases on collateral review.

[152] *Woodward*, 134 S. Ct. at 408.
[153] *Id.*

CONCLUSION

For the forgoing reasons, this Petition for Writ of Certiorari should be granted, the judgment of the Alabama Supreme Court vacated, and the cause remanded for further proceedings.

Respectfully submitted,

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