No. 18-5837
CAPITAL CASE

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 Court of Criminal Appeals

BRIEF IN OPPOSITION

STEVE MARSHALL
Alabama Attorney General

Lauren A. Simpson
Assistant Attorney General
*Counsel of Record

OFFICE OF ALA. ATT'Y GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
lsimpson@ago.state.al.us

September 25, 2018

CAPITAL CASE

QUESTIONS PRESENTED
(Restated)

1. Whether the Court should overrule *Harris v. Alabama*, 513 U.S. 504 (1995), which held Alabama's recently repealed capital sentencing statute to be constitutional even though it did not require jury sentencing in capital cases, because of *Hurst v. Florida*, 136 S. Ct. 616 (2016).

2. Whether *Hurst* is retroactively applicable to cases that became final before that decision was announced.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

INTRODUCTION

In 1992, David Lee Roberts found Annetra Jones sleeping in her boyfriend's home, shot her three times in the head, stole money from her wallet, and set fire to Jones and the house to cover his tracks. He was subsequently convicted of two counts of capital murder. While the jury recommended 7–5 that Roberts be sentenced to life without parole for his crimes, the trial court overrode that recommendation and sentenced him to death. *Roberts v. State*, 735 So. 2d 1244, 1249 (Ala. Crim. App. 1997).

Since then, Roberts's death sentence has been contested in multiple courts. On direct appeal, the Alabama Court of Criminal Appeals ordered a new sentencing hearing before the trial judge so that Roberts could present additional mitigating information. Again, Roberts was sentenced to death, and the appellate court found that the penalty was appropriate. *Id.* at 1270 (on return to second remand). The Alabama Supreme Court affirmed, *Ex parte Roberts*, 735 So. 2d 1270 (Ala. 1999), and this Court denied certiorari, *Roberts v. Alabama*, 528 U.S. 939 (1999) (mem.). Roberts likewise received no relief during his federal habeas proceedings. *Roberts v. Comm'r, Ala. Dep't of Corrs.*, 677 F.3d 1086 (11th Cir. 2012). Indeed, this Court again denied certiorari in 2013 when Roberts contested the method by which his death sentence was rendered. *Roberts v. Thomas*, 568 U.S. 1131 (2013) (mem.).

Now, like many other Alabama death row inmates,[1] Roberts contends that his death sentence is unconstitutional because Alabama's former capital sentencing scheme is in conflict with *Hurst v. Florida*, 136 S. Ct. 616 (2016). This Court upheld Alabama's capital scheme in *Harris v. Alabama*, 513 U.S. 504 (1995), however, and has consistently declined to overrule *Harris*, even post-*Hurst*. Certiorari is thus unwarranted now.

Roberts also claims that certiorari is warranted to resolve a split with Delaware and Florida as to whether *Hurst* is due to be applied retroactively. This claim is similarly not cert-worthy. Delaware applies *Hurst* retroactively on state-law grounds, as does Florida, which limits its application to those cases decided between *Ring v. Arizona*, 536 U.S. 584, 613 (2002), and *Hurst*. That Alabama declines to apply *Hurst* retroactively on state-law grounds to Roberts's case is not a matter worthy of certiorari. And, in any event, even if *Hurst* applied retroactively, Alabama's previous capital sentencing scheme was perfectly considering with *Hurst*. Thus, this Court should deny review.

1. *See, e.g.*, *Russell v. Alabama*, 138 S. Ct. 1449 (2018) (mem.); *Lee v. Alabama*, 138 S. Ct. 1440 (2018) (mem.); *Carroll v. Alabama*, 137 S. Ct. 2093 (2017) (mem.); *Bohannon v. Alabama*, 137 S. Ct. 813 (2017) (mem.); Burton v. State, No. 18-5937; Rieber v. State, No. 18-5103; Johnson v. State, No. 17-9448.

STATEMENT OF THE CASE

A. The murder of Annetra Jones

As Roberts acknowledged in an earlier petition for certiorari, "There was no question that the prosecution could prove at trial that Mr. Roberts killed Ms. Jones."[2]

In April 1992, Roberts was staying at the home of Wendell Satterfield. Around noon on April 22, Roberts left work and returned to Satterfield's house, where he found Satterfield's girlfriend, Annetra Jones, sleeping on the couch. Without waking her, he packed his belongings, took money from Jones's wallet, and then shot her three times in the head with a .22 caliber rifle. Roberts proceeded to pour a flammable liquid over Jones's body and the floor, then placed a burning piece of paper under the couch to start a fire. He set a second fire in the basement room where he had been staying, causing major damage to the room and resulting in smoke damage throughout Satterfield's house. Roberts then fled, taking the murder weapon and other guns with him. *Roberts*, 735 So. 2d at 1249.

Over the following two days, Roberts gave the police multiple accounts of the murder, ranging from denying involvement to blaming Satterfield as

2. Petition for Writ of Certiorari at 3, Roberts v. Thomas, 568 U.S. 1131 (2013) (No. 12-7287).

the mastermind. (C. 130, 138–39.)[3] Finally, Roberts stated that Satterfield had made threats against his father for being a "snitch," and Roberts had set fire to Satterfield's house as a warning to leave Roberts's family alone. (C. 179). As for Jones, he explained, "I didn't know Ann Jones was going to be at [Satterfield's] house when I got there. I don't know why I shot Ann, she never did anything to me." (C. 179.) Roberts was subsequently indicted on two counts of capital murder. (C. 47.)[4]

B. The trial

Prior to his jury trial, Roberts was evaluated at a state psychiatric hospital. (C. 37.) Although his records indicated a history of substance abuse, he showed no sign or history of a major psychiatric disorder. (C. 39–40.) The forensic examiner found that although Roberts had a personality disorder and a history of substance abuse, "neither of these would substantially interfere with his understanding of right from wrong." (C. 42–43.) Moreover,

3. In accordance with the Alabama courts' format for records on appeal, citations are as follows:

Transcript on direct appeal:	R.
Clerk's record on direct appeal:	C.
Supplement to direct appeal record:	Supp.
Clerk's record concerning Rule 32 proceedings:	R32 C.

4. Count one alleged that Roberts killed Jones during a robbery, in violation of section 13A-5-40(a)(2) of the Code of Alabama (1975). Count two alleged that he killed her while committing arson, in violation of section 13A-5-40(a)(9).

she concluded that Roberts had "an excellent ability to assume the role of defendant." (C. 42.)

Roberts entered pleas of not guilty and not guilty by reason of insanity. (R. 9.) After a three-day trial and less than an hour of deliberation, the jury convicted him on both counts. (R. 438–40.)

The court then held a penalty-phase hearing before the same jury. (R. 444.) The State showed that Roberts had previously been convicted of second-degree burglary and first-degree theft, and that he had been on parole at the time that he killed Jones. (R. 455–56.) The defense offered the testimony of Roberts's brother and mother, who spoke of his emotional issues and drug use. (R. 459–60, 464, 469–70.) After deliberation, the jury recommended by a vote of 7–5 that the court sentence Roberts to life imprisonment without parole. (R. 520.) At the time of Roberts's trial, the jury's verdict as to penalty was advisory and not binding on the trial court, a scheme later upheld by this Court in *Harris v. Alabama*, 513 U.S. 504 (1995).

C. The first sentencing hearing

After the jury's penalty-phase recommendation, the trial court conducted a separate sentencing hearing. (C. 60–66.) Roberts testified that he had a drug problem and had been addicted to LSD. (R. 531.) He said that he was sorry about what had happened, and concluded, "I did what I thought at

the time I needed to do, and I was not mentally, I wasn't thinking. . . . I have knowed it was wrong from the minute I did it." (R. 532–34.)

The court independently considered and weighed the aggravating and mitigating circumstances, including the jury's recommendation, and determined that two statutory aggravating circumstances were present: Roberts was under a sentence of imprisonment when he killed Jones, and the offense was committed during the commission of a robbery in the first degree. (R. 556; C. 61) Finding that the aggravating circumstances outweighed the mitigating circumstances, the court overrode the jury's recommendation and sentenced Roberts to death. (C. 64–65.)

D. Direct appeal and the second sentencing hearing

On direct appeal, the Alabama Court of Criminal Appeals reversed and remanded for a new sentencing hearing before the trial court because the court had excluded hearsay evidence necessary for Roberts to present his case in mitigation. *Roberts*, 735 So. 2d at 1264–66. The Court of Criminal Appeals noted that since the jury had recommended life without parole, "Roberts could not have received a more favorable sentence recommendation even if the testimony had not been limited." *Id.* at 1266. It reasoned, however, that the additional mitigation testimony "might have altered the trial court's mitigating circumstance findings and its decision to override the jury's

verdict, and so remanded for a new sentencing hearing to permit Roberts to attempt to change the trial court's mind. *Id.*

At the second sentencing hearing, Roberts called his mother and a psychologist to present evidence to show that in accordance with Roberts's earlier statements to the police, he had been "under the influence of extreme mental or emotional disturbance" when he killed Jones and set fire to Satterfield's house and "had acted under extreme duress or under the substantial domination" of Satterfield in doing so.[5] *Id.*

The trial court again sentenced Roberts to death. *Id.* After first noting the report of the forensic psychologist from Roberts's trial, the court rejected Roberts's psychologist's testimony, explaining that he had only examined Roberts five years after the fact and that he "[had] not given evidence, and neither has anyone else, that would support a finding that the defendant was under the influence of extreme mental or emotional disturbance at the time of the commission of the crime." (Supp. 210–11.) The court then rejected Roberts's duress argument, stating that "the only evidence that Wendell Satterfield had any connection with anything that happened during this crime was the statement by the defendant that Wendell Satterfield asked

5. Duress is not a defense to capital murder under Alabama law. *See, e.g.*, *Flowers v. State*, 922 So. 2d 938, 957 (Ala. Crim. App. 2005) Duress and extreme disturbance can, however, serve as mitigating circumstances in capital cases. ALA. CODE § 13A-5-51(2), (5) (1975).

him to burn his house," and noting that Roberts had later recanted this story. (Supp. 213.) The court also pointed out that Satterfield's home was uninsured, that Satterfield would have gained nothing by the arson, and that there was nothing to suggest that Roberts was under Satterfield's domination when he murdered Jones. (Supp. 213–14.) Finally, the court stated that it had once again "duly considered and has not taken lightly the jury's verdict of life without parole by a vote of seven to five majority." (Supp. 219–20.)

On return to remand, the Court of Criminal Appeals found no error, but again remanded the case "out of an abundance of caution" for an amended sentencing order, asking the trial court to specify what nonstatutory mitigating circumstance it considered. *Roberts*, 735 So. 2d at 1269. The trial court subsequently reported that it did not find any nonstatutory mitigating circumstances. *Id.* at 1270. When the Court of Criminal Appeals reviewed the case for the third time, it affirmed, determining that "death is the proper sentence in this case" after weighing the aggravating and mitigating circumstances. *Id.*

Roberts then filed a petition for certiorari in the Alabama Supreme Court, alleging among other matters that the Court of Criminal Appeals should have remanded his case for a new penalty-phase hearing before a jury. *Ex parte Roberts*, 735 So. 2d at 1279. That court affirmed the lower court's

judgment, *id.* at 1279–80, and this Court denied certiorari. *Roberts v. Alabama*, 528 U.S. 939 (1999).

E. State postconviction and federal habeas proceedings

Nearly one year later, Roberts filed a petition for postconviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. (R32 C. 4–19.) The circuit court ultimately denied the petition. *Roberts v. State*, 49-CC-1992-130.60 (Marion Cty. Cir. Ct. Mar. 11, 2002). The Court of Criminal Appeals affirmed, *Roberts v. State*, CR-01-1818 (Ala. Crim. App. Mar. 19, 2004), and the Alabama Supreme Court denied certiorari, *Ex parte Roberts*, No. 1031222 (Ala. Aug. 27, 2004).

Thereafter, Roberts filed an application for a writ of habeas corpus in the Northern District of Alabama. Among other claims, he again argued that the Court of Criminal Appeals should have instructed the trial court to empanel a new advisory sentencing jury and conduct a new penalty-phase hearing before that jury, not just a new sentencing hearing before the judge. Report and Recommendation at 29, Roberts v. Campbell, 6:04-cv-2661 (N.D. Ala. Feb. 23, 2007). The petition was denied. The Eleventh Circuit Court of Appeals affirmed, *Roberts v. Comm'r, Ala. Dep't of Corrs.*, 677 F.3d 1086 (11th Cir. 2012), and this Court again denied certiorari, *Roberts v. Thomas*, 568 U.S. 1131 (2013) (mem.).

F. Second Rule 32 petition

On January 11, 2017, Roberts filed a successive Rule 32 petition alleging that Alabama's capital sentencing scheme is unconstitutional after *Hurst v. Florida*, 136 S. Ct. 616 (2016). Less than two months later, the circuit court granted the State's motion to dismiss, finding that Roberts's petition was procedurally barred as successive and time-barred under the one-year statute of limitations, and that *Hurst* did not entitle Roberts to relief. *Roberts v. State*, 49-CC-1992-130.61 (Marion Cty. Cir. Ct. Feb. 27, 2017).

The Court of Criminal Appeals affirmed in December 2017. (Pet. App'x A.) That court noted that *Hurst* had no bearing upon Alabama's capital sentencing scheme, and that even if it had, *Hurst* has no retroactive application. (*Id.* at 5–10.)

The Alabama Supreme Court denied certiorari without opinion on January 12, 2018 (Pet. App'x B), and the present petition for writ of certiorari followed.

REASONS THE PETITION SHOULD BE DENIED

No issue in Roberts's petition is worthy of certiorari.

The first issue is yet another attempt by a death-sentenced defendant to convince this Court to invalidate Alabama's capital sentencing scheme after *Hurst*. This Court held Alabama's capital punishment statute to be constitutional in *Harris v. Alabama*, 513 U.S. 504 (1995), despite the fact that it allowed judicial sentencing, and the Court has consistently declined to consider petitions seeking to overrule or limit *Harris* in light of *Hurst*. For example, in *Bohannon v. Alabama*, 137 S. Ct. 831 (2017) (mem.), the Court denied certiorari when the Alabama Supreme Court held in *Ex parte Bohannon*, 222 So. 3d 525 (Ala. 2016), that Alabama's capital scheme remained constitutional after *Hurst*. Roberts has presented no compelling argument for this Court to reverse that case or to grant relief in his. Moreover, Alabama has changed its capital sentencing statute to provide for jury sentencing going forward. The Court should not grant certiorari to consider overruling a longstanding precedent, *Harris*, when such overruling would have no prospective effect on any future cases because of a change in state law.

The second issue—whether the *Hurst* rule should be given retroactive application in Alabama—is similarly familiar to this Court, and similarly meritless. *See, e.g.*, *Lee v. Alabama*, 138 S. Ct. 1440 (2018) (mem.) (denying

certiorari). *Hurst* is merely an application of *Ring* to the particular circumstances of Florida's capital sentencing scheme, and this Court has already held that *Ring* is not retroactive. *Schriro v. Summerlin*, 542 U.S. 348 (2004). As *Hurst* is neither a new substantive rule nor a watershed rule of criminal procedure, *see Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), there is no reason that it must be given retroactive application. That Florida and Delaware have chosen to apply it retroactively on state-law grounds does not obligate Alabama to do so.[6] For the reasons that follow, Roberts's petition is not cert-worthy.

I. The petition is directed to the wrong state appellate court.

Before this Court can consider the merits of Roberts's petition, it needs to resolve a procedural problem: the petition is directed to the wrong state appellate court.

Roberts appealed the summary dismissal of his second Rule 32 petition to the Alabama Court of Criminal Appeals, an intermediate appellate court

6. As discussed below, Florida retroactively applies *Hurst* only to those cases decided between *Ring* and *Hurst*—i.e., the period in which Florida's capital sentencing scheme was unconstitutional—a decision based on Florida law. *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016). Delaware held that its capital scheme was unconstitutional after *Hurst* for several reasons, including the failure to require a unanimous jury finding of an aggravating circumstance beyond a reasonable doubt. *Rauf v. State*, 145 A.3d 430 (Del. 2016). In *Powell v. Delaware*, 153 A.3d 69 (Del. 2016), the Supreme Court of Delaware found that the *Rauf* rule fit Delaware's "watershed procedural rule" retroactivity exception.

with statewide jurisdiction. That court affirmed in a thirteen-page opinion. (Pet. App'x A.) Roberts then petitioned the Alabama Supreme Court for certiorari review, but that court denied review. (Pet. App'x B.) When a state supreme court denies discretionary review, this Court reviews "the judgment of the intermediate court rather than the order of refusal by the higher court." *See* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 179 (9th ed. 2008) (citing *Sullivan v. Texas*, 207 U.S. 416 (1908), and *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n.1 (1968)).

Roberts's petition erroneously seeks a writ of certiorari "to the Alabama Supreme Court." Pet. cover, 1. The Court has already recaptioned the case so that it reflects the correct lower court. *E.g.*, *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012) (reversing Alabama Court of Criminal Appeals). It must also decide whether the petitioner's failure to identify the proper lower court is a defect of jurisdictional significance.

II. Certiorari is unwarranted because Roberts's death sentence was constitutionally imposed and remains constitutional post-*Hurst*.

In Roberts's first claim, he contends that the Alabama Supreme Court erred in *Ex parte Bohannon*, 222 So. 3d 525 (Ala. 2016), when it held that *Hurst* did not invalidate Alabama's capital sentencing statutes, including

Alabama's provision permitting judicial sentencing in capital cases. (Pet. 11–26.) This claim is utterly meritless.

A. Alabama's former capital sentencing scheme was constitutional, and *Hurst* did not overrule *Harris*.

In *Harris*, this Court rejected the argument that Alabama's capital sentencing scheme was unconstitutional because it allowed judges instead of juries to impose a capital sentence. Alabama has relied on *Harris* to sentence hundreds of murderers since 1995. "[T]he States' settled expectations deserve our respect." *Ring*, 536 U.S. at 613 (Kennedy, J., concurring).

The Court has consistently declined to grant a petition to address whether to overrule *Harris* in light of *Hurst*. For the same reasons that the Court declined to grant cert in *Bohannon v. Alabama*, 137 S. Ct. 831 (2017) (mem.)—an appeal from the Alabama Supreme Court's decision finding that Alabama's capital scheme was constitutional after *Ring* and remained so post-*Hurst*—and has continued to decline to consider the issue in every subsequent certiorari petition raising it, the Court should not grant certiorari in Roberts's case.

Alabama's capital punishment system is constitutional under *Hurst*. In *Ring*, the Court applied the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to death penalty cases, holding that although a judge can make the "selection decision," the jury must find the existence of any fact that makes

the defendant "eligible" for the death penalty by increasing the range of punishment to include the imposition of the death penalty. There, the Court held that Arizona's death penalty statute violated the Sixth Amendment right to a jury trial "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 585. Thus, a trial court cannot make a finding of "any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589. Only the jury can.

Hurst did not add anything of substance to *Ring*. In *Hurst*, Florida prosecuted a defendant for first-degree murder. *Hurst*, 136 S. Ct. at 620. The jury did not unanimously find the existence of an aggravating circumstance at either the guilt or penalty phase of trial, but it returned an advisory recommendation of 7–5 in favor of death. *Id.* Because the jury found no aggravating circumstance, the trial court should have imposed a life-without-parole sentence. Instead, the judge found an aggravating circumstance herself and imposed a death sentence, making both the eligibility and selection determinations. *Id.* Applying *Ring*, the Court held the death sentence unconstitutional because "the judge alone [found] the existence of an aggravating circumstance" that expanded the range of punishment to include the death penalty. *Id.* at 624.

In *Ex parte Bohannon*, the Alabama Supreme Court considered *Ring*, *Hurst*, and its prior decision in *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002), then found that Alabama's capital scheme remained constitutional. First, the court noted that "*Ring* and *Hurst* 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 requires nothing more and nothing less." 222 So. 3d at 532. "Accordingly, because in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment." *Id.* As for the claim that *Hurst* requires that the jury weigh the aggravating and mitigating circumstances, the court explained that "*Hurst* does not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment." *Id.* Finally, the court concluded that *Hurst* does not hold that "the Sixth Amendment requires that a jury **impose** a capital sentence." *Id.* at 533. Indeed, Alabama's capital sentencing scheme at the time of Bohannon's trial—and Roberts's—was in line with Justice Scalia's concurrence in *Ring*:

> What today's decision says is that the jury must find the existence of the **fact** that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge

> may continue to do so—by requiring a prior jury finding or aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.

Ring, 536 U.S. at 612–13 (Scalia, J., concurring).

Roberts's case does not bear the infirmity present in *Hurst*. Roberts's jury unanimously found the existence of an aggravating circumstance when it convicted him of robbery-murder, as the fact that a murder was committed during a robbery is an "overlapping" statutory aggravator. ALA. CODE § 13A-5-49(4) (1975). This is all that *Ring* and *Hurst* required to make a capital defendant death-eligible. That the trial judge conducted his own weighing of the aggravating and mitigating evidence and ultimately disagreed with the jury's recommendation does not offend *Hurst* (nor *Ring*), and this Court's decision in *Harris* remains untouched—as it should. Moreover, the Court should not call into question a longstanding precedent like *Harris* because its decision on the question would have no prospective effect, given that Alabama amended its sentencing procedure in 2017 to end judicial sentencing. *See* Ala. Laws Act 2017-131.

B. There is no conflict for this Court to resolve.

Roberts makes much out of this meritless claim by trying to create a split among the state courts of last resort for this Court to resolve. (Pet. 25–26.) His claim is baseless. While Roberts is correct that the Florida and

Delaware Supreme Courts have found that *Hurst* applies to their capital sentencing statutes, both have done so on state-law grounds.

As the Florida Supreme Court wrote in *Hurst v. State*:

> As we will explain, we 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. **We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense.** In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances. **We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.**
>
> ***
>
> We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty—are also elements that must be found unanimously by the jury. Thus, we hold that in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge. **This holding is founded upon the Florida Constitution and Florida's long history of requiring jury unanimity in finding all the elements of the offense to be proven**; and it gives effect to our precedent that the "final

> decision in the weighing process must be supported by 'sufficient competent evidence in the record.'"
>
> ***
>
> We are mindful that a plurality of the United States Supreme Court, in a non-capital case, decided that unanimous jury verdicts are not required in all cases under the Sixth Amendment to the United States Constitution. *See Apodaca v. Oregon*, 406 U.S. 404 (1972) (plurality opinion). **However, this Court, in interpreting the Florida Constitution and the rights afforded to persons within this State, may require more protection be afforded criminal defendants than that mandated by the federal Constitution.** This is especially true, we believe, in cases where, as here, Florida has a longstanding history requiring unanimous jury verdicts as to the elements of a crime.

202 So. 3d 40, 44, 53–54, 57 (Fla. 2016) (citation edited, footnotes omitted, emphasis added).

The Delaware Supreme Court also found fault with its capital statutes post-*Hurst*. In *Rauf v. State*, 145 A.3d 430, 434 (Del. 2016), that court held that a jury, not a judge, must weigh the aggravating and mitigating circumstances "because, under 11 DEL. C. § 4209, this is the critical finding upon which the sentencing judge 'shall impose a sentence of death.'"

As noted above, Alabama amended its capital sentencing scheme by legislation in April 2017. *See* Ala. Laws Act 2017-131. The current capital sentencing scheme is found in ALA. CODE §§ 13A-5-45, -46, -47 (1975) and provides that the jury will make the ultimate determination as to sentence in capital cases. Thus, Roberts's alleged "conflict" is a non-issue.

III. Certiorari is unwarranted because *Hurst* has no retroactive application.

In his second claim, Roberts contends that *Hurst* should have retroactive application to his case. (Pet. 26–39.) For the reasons that follow, this claim is meritless.

As an initial matter, even if *Hurst* had retroactive application, we have already explained above that Roberts's sentence is consistent with *Hurst*. Accordingly, the second question can give Roberts no independent relief.

Moreover, the Alabama courts have correctly held that Hurst is not retroactive. *Hurst* did not announce a new rule of constitutional law. Rather, the decision was an application of *Ring v. Arizona*, 536 U.S. 584, 613 (2002), to the unique circumstances in Florida. As this Court has explicitly held that *Ring* is not retroactively applicable to cases on postconviction review, *Schriro v. Summerlin*, 542 U.S. 348 (2004), *Hurst* must also have no retroactive effect.

As support for retroactive application, Roberts again points to Florida and Delaware. While those states decided to apply *Hurst* retroactively, they did so on state-law grounds.

Florida retroactively applies *Hurst* only to those cases decided between *Ring* and *Hurst*—in other words, to those defendants sentenced during the period in which Florida's capital sentencing scheme was not in compliance

with *Ring*. *Mosley*, 209 So. 3d at 1283. This decision was based on Florida law:

> We now turn to the issue of whether *Hurst* should apply retroactively to Mosley. We approach our retroactivity analysis based on the United States Supreme Court's holding in *Hurst v. Florida* under the United States Constitution's Sixth Amendment right to trial by jury and our opinion in *Hurst*, interpreting the meaning of *Hurst v. Florida* as applied to Florida's capital sentencing scheme and considering Florida's independent right to trial by jury in article I, section 22, of the Florida Constitution. We first review our precedent holding that certain decisions should be given retroactive effect on the basis of fundamental fairness, such as *James v. State*, 615 So. 2d 668 (Fla. 1993). We then review the factors in the *Witt v. State*, 387 So. 2d 922 (1980), retroactivity framework, explaining the unique jurisprudential conundrum caused by the United States Supreme Court's delay in reviewing the constitutionality of Florida's capital sentencing scheme in light of *Ring*. After reviewing these considerations, we conclude that *Hurst* should apply retroactively to Mosley.

Id. at 1274.

Turning then to Delaware, in *Rauf*, the Delaware Supreme Court held that its capital scheme was unconstitutional after *Hurst* for several reasons, including the failure to require a unanimous jury finding of an aggravating circumstance beyond a reasonable doubt. 145 A.3d at 433–34. Four months later, that court determined that under **Delaware's** retroactivity rules, *Rauf* had announced a watershed rule of criminal procedure:

> In *Danforth v. Minnesota*, 552 US. 264 (2008), the United States Supreme Court explained that "*Teague*'s general rule of nonretroactivity was an exercise of [its] power to interpret the federal habeas statute" and "cannot be read as imposing a binding obligation on state courts." Nevertheless, more than twenty-five years ago this Court recognized the *Teague* general

> rule of non-retroactivity and its two exceptions as persuasive authority for deciding whether new state and federal precedents are to be applied retroactively in Delaware postconviction proceedings. In doing so, we noted that the federal *Teague* "new rule" doctrine was evolving and that State courts may grant postconviction "relief to a broader class of individuals than is required by *Teague*." Therefore, we declined to adopt a formal static test for determining the meaning of a "new rule" for the purposes of deciding a Delaware postconviction proceeding. . . . Accordingly, the retroactivity issue that is presented by Powell's motion is a matter of Delaware law. In analyzing that issue we look to *Teague* and its progeny for guidance. However, as the United States Supreme Court held in *Danforth*, the postconviction retroactivity remedy that a state court provides for "violations of the Federal Constitution is primarily a question of state law."
>
> ***
>
> *Ring* only implicated the Sixth Amendment right to a jury. The same was true in *Hurst* because Florida also already required proof beyond a reasonable doubt. . . . Thus, unlike *Rauf*, neither *Ring* nor *Hurst* involved a Due Process Clause violation caused by the unconstitutional use of a lower burden of proof. This significant distinction in *Ring* and *Hurst* is fatal to the State's reliance upon *Summerlin* and is dispositive of why the *Rauf* holding fits within *Teague*'s second exception to nonretroactivity.

Powell, 153 A.3d at 72–74 (citation added, footnotes omitted).

While Florida and Delaware are free to give *Hurst* retroactive application based on their unique state laws, no federal law or decision from this Court obligates Alabama to do likewise. Therefore, certiorari should be denied.

CONCLUSION

This Court should deny certiorari.

Respectfully submitted,

STEVE MARSHALL
Alabama Attorney General

s/ Lauren A. Simpson
Lauren A. Simpson
Assistant Attorney General
*Counsel of Record

OFFICE OF ALA. ATT'Y GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
lsimpson@ago.state.al.us