No. 18-5837

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

REPLY TO BRIEF IN OPPOSITION

CAPITAL CASE
NO EXECUTION DATE SET

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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?

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I. There Is No Jurisdictional Defect.

Respondent first argues that the petition directing certiorari review to the Alabama Supreme Court ("ASC"), as opposed to the Alabama Court of Criminal Appeals ("ACCA"), is a defect of jurisdictional significance.[1] Not so. This Court's precedent is clear: "To be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.'"[2]

The ASC is the highest court in the state – it "is the *final* arbiter of Alabama law, with ultimate authority to oversee and rule upon the decisions of the lower State courts."[3] As a result, the certificate of judgment it issued, which denied certiorari review and affirmed the judgment of the ACCA is "the final word of a final court," for purposes of establishing jurisdiction. Because the ASC's summary decision is "a final judgment rendered by the highest court of the State in which decision may be had,"[4] there is no jurisdictional defect.

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[1] (Br. in Opp'n at 13).

[2] *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 81 (1997) (quoting *Market St. R. Co. v. R.R. Comm'n of Cal.,* 324 U.S. 548, 551 (1945)).

[3] *Ex parte James*, 836 So. 2d 813, 834 (Ala. 2002) (emphasis in original).

[4] *Flynt v. Ohio*, 451 U.S. 619, 620 (1981).

II. This Court's Precedent Does Not Foreclose Relief.

Respondent next urges this Court to deny the writ because *Harris v. Alabama*[5] has settled the constitutionality of Alabama capital sentencing scheme.[6] But *Harris*, which decided a different constitutional question (whether a judge must give a particular weight to a jury recommendation in a capital case) respecting a different constitutional amendment (the Eighth), cannot be dispositive of what *Hurst*[7] requires. Nonetheless, *Hurst* substantially undermines the analysis in *Harris* and confirms the unconstitutionality of judicial sentencing, which resulted in Mr. Roberts' death sentence.

Harris considered an Eighth Amendment challenge that Alabama's advisory jury scheme for capital punishment was "unconstitutional because it does not specify the weight the judge must give to the jury's recommendation and thus permits arbitrary imposition of the death penalty."[8] In upholding the scheme, this Court relied on *Spaziano v. Florida*,[9] which upheld Florida's advisory jury capital

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[5] *Harris v. Alabama*, 513 U.S. 405 (1995).

[6] (Br. in Opp'n at 14).

[7] *Hurst v. Florida*, 136 S. Ct. 616 (2016).

[8] *Harris*, 513 U.S. at 505.

[9] *Spaziano v. Florida*, 468 U.S. 447, 464 (1984), *overruled by Hurst v. Florida*, 136 S. Ct. 616 (2016)("In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.").

sentencing scheme—upon which "Alabama's death penalty statute is based"—as constitutional.[10] This Court described "Alabama's capital sentencing scheme" as "much like that of Florida."[11] Comparing the statutes, the *Harris* Court noted that, despite their great similarities, "[t]he two States differ in one important respect": Florida's statute has been interpreted as requiring the trial court to give "'great weight' to the jury's recommendation and may not override a life sentence recommendation unless 'the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.'"[12]

In contrast, Alabama's statute afforded no such protections. As one dissenting Justice noted, "Alabama's capital sentencing statute is unique. In Alabama, unlike any other State in the Union, the trial judge has unbridled discretion to sentence the defendant to death — even though a jury has determined that death is an inappropriate penalty, and even though no basis exists for believing that any other reasonable, properly instructed jury would impose a death sentence."[13] This Court upheld the override provision of Alabama's statute, reasoning that because it *was* constitutionally permissible for a trial judge "acting alone, to impose a capital sentence," it was also permissible to require the

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[10] *Harris*, 513 U.S. 508.

[11] *Id*.

[12] *Id*. at 509 (citing *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975)) (brackets in original).

[13] *Id.* at 515 (Stevens, J., dissenting).

sentencing judge to consider the recommendation and to trust that the judge will assign the recommendation proper weight.[14] It was "[t]his distinction between the Alabama and Florida schemes" that "form[ed] the controversy in [*Harris*] – whether the Eighth Amendment to the Constitution requires the sentencing judge to ascribe any particular weight to the verdict of an advisory jury."[15]

Here, a judge resentenced Mr. Roberts to death after a jury recommended life without parole. Although Mr. Roberts argued that the failure to require his resentencing before a jury and instead permitting only the judge to conduct a new penalty phase hearing was an unreasonable application of *Harris*, *Harris* and *Spaziano* foreclosed relief.[16] Bound by precedent, the court held Mr. Roberts had "no constitutional right to jury sentencing in a capital case."[17]

But, after *Spaziano* and *Harris,* this Court's "Sixth Amendment jurisprudence ... developed significantly[.]"[18] The Court decided *Apprendi*[19] and *Ring*,[20] which emphasized the jury's critical importance in sentencing. "*Apprendi* jurisprudence, as it has evolved since *Harris* was decided, [signaled] a sentencing

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[14] *Id.* at 515.

[15] *Id*. at 509.

[16] *Roberts v. Comm'r, Ala. Dep't of Corr.*, 677 F.3d 1086, 1095-96 (11th Cir. 2012).

[17] *Id.* at 1095.

[18] *Woodward v. Alabama*, 134 S. Ct. 405, 411 (2013) (Sotomayor, J., dissenting from denial of cert.)

[19] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[20] *Ring v. Arizona*, 536 U.S. 584 (2002).

scheme that permits [trial judge to make the factual findings necessary by statute to impose the death penalty] is constitutionally suspect."[21] As one Justice has said, "[t]he very principles that animated [this Court's] decisions in *Apprendi* and *Ring* call into doubt the validity of Alabama's capital sentencing scheme."[22]

Consistent with those post-*Harris* decisions, *Hurst* held that Florida's capital sentencing scheme was unconstitutional. Applying *Ring*, this Court held that the Sixth Amendment "required Florida to base [the imposition of a] death sentence on a jury's verdict, not a judge's factfinding."[23] *Hurst* also overruled *Spaziano* and *Hildwin*,[24] the precedential underpinnings of *Harris*, which had previously concluded that, "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury."[25] In doing

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[21] *Woodward*, 134 S. Ct. at 411.

[22] *Id.* at 410.

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

[24] *Hildwin v. Florida,* 490 U.S. 638 (1989) (per curiam).

[25] *Hurst*, 136 S. Ct. at 623 (2016) (quoting *Hildwin,* 490 U.S., at 640–641). *See Brooks v. Alabama*, 136 S. Ct. 708 (2016) (mem.) (Sotomayor, J., concurring in denial of cert.) ("This Court's opinion upholding Alabama's capital sentencing scheme was based on *Hildwin*[] and *Spaziano*[], two decisions we recently overruled in *Hurst*[]"); *see also Rauf v. State*, 145 A.3d 430, 461 (Del. 2016)("Although these orders provide no extensive guidance on why or how *Hurst* affected the Alabama convictions, the obvious connection between these cases and *Hurst* is that they collectively involve two of the three capital sentencing schemes that permitted a judge to override a jury's recommendation of a life sentence before *Hurst*—those of Florida and Alabama.").

so, this Court recognized that "[t]heir conclusion was wrong, and irreconcilable with *Apprendi*."[26]

Thus, *Hurst* renders Alabama capital sentencing scheme, which Respondent conceded in *Harris* "is essentially the same as Florida's capital sentencing statute[,]"[27] equally as unconstitutional. Presumably, that is why this Court has since remanded several Alabama cases "for further consideration in light of *Hurst v. Florida*[.]"[28] Granted, this Court has not yet explicitly overturned *Harris*.[29] However, *Hurst*'s reasoning suggests it ought to because *Hurst* overruled *Spaziano* and *Hildwin*—the decisions on which *Harris* rests. While Respondent argues that *stare decisis* should foreclose review of Alabama's death penalty statute,[30] as this Court said in *Hurst*, "*stare decisis* does not compel adherence to a decision whose 'underpinnings' have been 'eroded' by subsequent developments of constitutional law."[31]

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[26] *Hurst*, 136 S. Ct. at 623.

[27] Br. of Resp't at 13, *Harris v. Alabama*, 513 U.S. 504 (1995) (No. 93-7659), 1994 WL 514669, at *13 n.5.

[28] *See, e.g.*, *Kirksey v. Alabama*, 136 S. Ct. 2409 (2016); *Wimbley v. Alabama*, 136 S. Ct. 2387 (2016).

[29] *Woodward*, 134 S. Ct. at 407 ("Eighteen years have passed since we decided *Harris,* and in my view, the time has come for us to reconsider that decision.").

[30] (Br. in Opp'n at 14).

[31] *Hurst*, 136 S. Ct. at 623–24.

Nor does this Court's denial of certiorari in *Bohannon v. Alabama*,[32] have precedential value. Despite what Respondent implies, "denial of certiorari normally carries no implication or inference[,]"[33] and does not "foreclose [this Court] from now granting appropriate relief."[34]

III. Respondent's Defense of ASC Precedent is Premised upon a Misreading of *Hurst*.

In *Bohannon*, a post-*Hurst* decision, the ASC candidly outlined an unconstitutional feature of Alabama's capital sentencing scheme—that "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."[35] *Hurst* renders this practice constitutionally insufficient.[36] Nonetheless, *Bohannon* opined "that Alabama's capital-sentencing scheme is consistent with the Sixth Amendment."[37]

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[32] *Ex parte Bohannon*, 222 So. 3d 525, 532 (Ala. 2016), *cert. denied sub nom. Bohannon v. Alabama*, 137 S. Ct. 831, 197 L. Ed. 2d 72 (2017).

[33] *United States v. Kras*, 409 U.S. 434, 443 (1973); *Darr v. Burford*, 339 U.S. 200, 226 n.7 (1950), *overruled in part by Fay v. Noia*, 372 U.S. 391 (1963) ("a denial has no legal significance whatever bearing on the merits of the claim. The denial means that this Court has refused to take the case. It means nothing else.").

[34] *Chessman v. Teets*, 354 U.S. 156, 165 (1957).

[35] *Bohannon*, 222 So. 3d at 532.

[36] *Hurst*, 136 S. Ct. at 622.

[37] *Bohannon*, 222 So. 3d at 532.

Citing *Bohannon*, Respondent argues that "*Hurst* did not add anything of substance to *Ring*,"[38] while relying on the ASC's conclusion 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."[39] In doing so, it concedes that the ASC has defied *Hurst* and purported to uphold the constitutionality of Alabama's capital sentencing scheme based on irrelevant distinctions between its law and Florida's.[40]

But, as Mr. Roberts' petition explained, in its consideration of the application of *Ring* in Alabama, the ASC has made the same distinctions as those made by the State of Florida and rejected by this Court in *Hurst*.[41] For example, in the most relevant point addressed to the system itself,

> Florida argues that when Hurst's sentencing jury recommended a death sentence, it "necessarily included a finding of an aggravating circumstance.". . . The State contends that this finding qualified Hurst for the death penalty under Florida law, thus satisfying *Ring*. "[T]he additional requirement that a judge *also* find an aggravator," Florida concludes, "only provides the defendant additional protection."[42]

In *Bohannon* and elsewhere, the ASC has also held that the fact that any jurors voted for death necessarily implied that the jury unanimously found the existence of at least one aggravating circumstance beyond a reasonable doubt, thereby

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[38] (Br. in Opp'n at 15).

[39] *Id.* (citing *Bohannon*, 222 So. 3d at 532).

[40] *Id.* at 16.

[41] (Pet. at 15, 20-22).

[42] *Id.*

satisfying *Ring*.[43] *Hurst* shows that this analysis is likewise flawed: "The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires."[44]

Despite what *Bohannon* opined, *Hurst* also forbids judicial weighing. A judge can no longer increase a capital sentence based on his own fact-finding.[45] As some state supreme court jurists have recognized, "[t]he logical extension of that broader statement in *Hurst* is that a jury must determine the relative weight of aggravating and mitigating circumstances."[46] Thus, *Bohannon* is patently incompatible with *Hurst*.

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[43] 222 So. 3d at 532. *See also Bryant v. State*, 951 So. 2d 732, 751 (Ala. Crim. App. 2003) ("[I]n *Ex parte McNabb*, 887 So. 2d 998 (Ala. 2004), the Supreme Court held that even a nonunanimous recommendation of death by the jury proved that the jury, including the jurors who voted against the recommendation of death, had unanimously found the existence of a proffered aggravating circumstance, even though the circumstance was not included within the definition of the particular capital-murder offense charged in the indictment, because the trial court had specifically instructed the jury that it could not proceed to a vote on whether to impose the death penalty unless it had already unanimously agreed that the aggravating circumstance existed.").

[44] 136 S. Ct. at 622.

[45] *Id.*

[46] *Rauf*, 145 A.3d at 487; *Ex parte Kirksey*, 243 So. 3d 854 (Ala. 2017) (Murdock, J., dissenting from denial of certiorari) ("I am concerned that the issue whether the aggravating circumstances outweigh the mitigating circumstances in a capital case, as required for the imposition of the death penalty under Alabama law, sufficiently partakes of the nature of a factual inquiry so as to trigger the principles articulated in *Hurst*.").

IV. This Court Should Resolve the Split Respecting *Hurst*'s Retroactivity.

Before *Hurst*, the death penalty statutes in Alabama, Delaware, and Florida permitted judges to make independent findings to override a jury and sentence a defendant to death. Since *Hurst*, Florida and Delaware have applied its reasoning to require a jury must make the critical findings necessary to impose the death penalty. Each state has also determined that *Hurst* is retroactive, based, in whole or in part, on federal retroactivity standards.

Alabama is an outlier in that it has refused to apply *Hurst* or to deem it retroactive to collateral petitioners under any circumstance. In defending Alabama's stance, Respondent asks this Court to ignore Delaware and Florida's determinations regarding *Hurst*'s retroactivity, because they relied on state law.[47] Respondent is mistaken about the existence of an important conflict premised on *Hurst* and ignores the constitutional imperative to resolve it now. Because all three jurisdictions involved in deciding this issue have weighed-in, the split is as developed as it can be.

After *Hurst*, the Florida Supreme Court "cobbled together an arbitrary form of partial retroactivity that *granted* retroactive relief under the *Hurst* decisions to many death-sentenced inmates with long-final convictions and sentences, while at the same time *denying* retroactive relief to many other death-sentenced inmates

[47] (Br. in Opp'n at 12).

who also have long-final convictions and sentences."[48] The Florida Supreme Court "held that, under state law, *Hurst* did not apply retroactively to capital convictions where the death sentence became final prior to the issuance of *Ring*."[49] "Since *Asay*, the Florida Supreme Court has consistently applied *Hurst* retroactively to all post-*Ring* cases and declined to apply *Hurst* retroactively to all pre-*Ring* cases."[50] In doing so, it relied on *Witt,*[51] which "provides *more expansive retroactivity standards* than those adopted in *Teague*."[52] *Witt* incorporates this Court's *Stovall/Linkletter* test, a precursor to *Teague*.[53] *Asay* relied on *Witt* in resolving a federal question – whether *Hurst* deserved retroactive application. Thus, while the sentences of both pre- and post-*Ring* petitioners are equally unconstitutional, the Florida Supreme

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[48] Pet. for Writ of Cert. at 19, *Kelley v. State of Florida*, No. 17-1603 (U.S. May 25, 2018), 2018 WL 2412330, at *19 (emphases in original).

[49] *Lambrix v. Sec'y, DOC*, 872 F.3d 1170, 1175 (11th Cir.), *cert. denied sub nom. Lambrix v. Jones*, 138 S. Ct. 312, 199 L. Ed. 2d 202 (2017) (quoting *Asay v. State*, 210 So.3d 1, 22 (Fla. 2016), *cert. denied*, —— U.S. ——, 138 S. Ct. 41, 198 L.Ed.2d 769, 2017 WL 1807588 (2017)).

[50] Florida's Br. in Opp'n to Writ of Cert. at 11, *Puiatti v. State of Florida*, 135 S. Ct. 68 (2018) (No. 13–1349), 2018 WL 3619302.

[51] *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980) (per curiam).

[52] *Asay,* 210 So. 3d at 15 (emphasis in original) (quoting *Johnson v. State*, 904 So. 2d 400, 409 (Fla. 2005)).

[53] *Witt*, 387 So. 2d at 926 (citing *Stovall v. Denno*, 388 U.S. 293, 297 (1967); *Linkletter v. Walker*, 381 U.S. 618 (1965)); *Teague v. Lane*, 489 U.S. 288, 302 (1989)("The *Linkletter* retroactivity standard has not led to consistent results. Instead, it has been used to limit application of certain new rules to cases on direct review, other new rules only to the defendants in the cases announcing such rules, and still other new rules to cases in which trials have not yet commenced.").

Court's decision at least allows some petitioners to obtain what *Hurst* requires – a jury sentencing.

Following *Hurst*, the Delaware Supreme Court held that because Delaware's capital sentencing scheme allowed a judge to find aggravating circumstances, independent of a jury, it was unconstitutional under the Sixth Amendment.[54] In deciding whether that rule was retroactive, the Delaware Supreme Court relied on *Teague*, and[55] held that *Rauf* "announced a new watershed procedural rule for capital proceedings that contributed to the reliability of the fact-finding process:"

> Thus, *Rauf* falls squarely within the second exception set forth in *Teague* requiring retroactive application of 'new rules' of criminal procedure "without which the likelihood of an accurate [sentence] is seriously diminished." We also note that *Teague's* holding on the retroactivity of new rules of criminal procedure was based upon the opinion of Justice Harlan, who acknowledged that "some rules may have both procedural and substantive ramifications."[56]

Thus, Delaware applied *Hurst* retroactively.[57] Following *Powell*, all of Delaware's death-sentenced inmates were resentenced to life without parole.[58]

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[54] *Rauf*, 145 A.3d at 433.

[55] *Powell v. Delaware*, 153 A.3d 69, 72 (Del. 2016).

[56] *Id.* at 74 (footnotes omitted).

[57] *Id.* at 76. ("The decision in *Rauf* constitutes a new watershed procedural rule of criminal procedure that must be applied retroactively in Delaware, pursuant to our interpretation of *Teague*'s second exception to non-retroactivity.").

[58] *See, e.g.*, *Ploof v. State*, No. 47, 2018, 2018 WL 4610767, at *1 (Del. Sept. 18, 2018) ("After this Court held, in *Rauf v. State*, that § 4209's implementation of the death penalty is unconstitutional and later held, in *Powell v. State*, that *Rauf* has retroactive effect, Ploof's death sentence was vacated. The Superior Court resentenced him to life in prison without parole—§ 4209's alternative sentence for first-degree murder.") (footnotes omitted); *Cooke v. State*, 181 A.3d 152 (Del. 2018), *cert. denied*, 138 S. Ct. 2695 (2018) ("On April 4, 2017, after this Court declared the death penalty unconstitutional in *Rauf v. State* and applied it retroactively in

In analyzing whether *Hurst* is retroactive, Alabama has opined that "[b]ecause *Ring* does not apply retroactively on collateral review, it follows that *Hurst* also does not apply retroactively on collateral review."[59] Though Respondent defends this argument premised on *Schriro v. Summerlin*,[60] it is wrong because *Summerlin* is distinguishable. As the petition explains,[61] *Hurst* must be declared retroactive because it announced a substantive rule respecting proof beyond a reasonable doubt.

CONCLUSION

As this Court has said, "state courts have the solemn responsibility *equally with the federal courts* to safeguard constitutional rights."[62] In regards to *Hurst*, Alabama has shirked that responsibility. By its own admission, Alabama has used its (unconstitutional) statute to sentence "hundreds of murderers since 1995."[63] Mr. Roberts is but one of those hundreds who was sentenced to death by judicial

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Powell v. Delaware, Cooke filed a motion to vacate his death sentence. The Superior Court granted the motion and resentenced Cooke to life without parole or reduction.") (footnotes omitted); *Norcross v. State*, 177 A.3d 1226 (Del. 2018), *as corrected* (Jan. 11, 2018), *as corrected* (Jan. 18, 2018) ("The appellant, Adam Norcross, was convicted of murder in the first degree in 2001 and sentenced to death. After this Court's decisions in *Rauf v. State* and *Powell v. State* the appellant appeared in the Superior Court for resentencing.") (footnotes omitted).

[59] *Lee v. State*, 244 So. 3d 998, 1004 (Ala. Crim. App. 2017).

[60] (Br. in Opp'n at 20) (citing *Schriro v. Summerlin,* 542 U.S. 348, 364 (2004)).

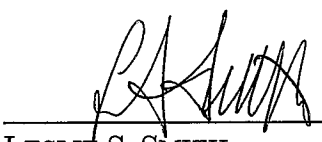
[61] (Pet. at 32-33).

[62] *Burt v. Titlow,* 571 U.S. 12, 19 (2013) (emphasis added).

[63] (Br. in Opp'n at 14).

override. While Alabama rightly changed its unconstitutional capital sentencing scheme post-*Hurst*, that change only grants prospective relief. Alabama stands alone in refusing to apply *Hurst* to any petitioner on collateral review. Absent this Court's intervention, Alabama will continue to execute petitioners, like Mr. Roberts, who were unquestionably sentenced in violation of the federal constitution. For the foregoing reasons, and those outlined in the original petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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