No. 18-8670

In the
Supreme Court of the United States

DEMETRIUS TERRENCE FRAZIER,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari to the
Alabama Court of Criminal Appeals

BRIEF IN OPPOSITION

STEVE MARSHALL
Alabama Attorney General

Beth Jackson Hughes*
Assistant Attorney General

OFFICE OF ALA. ATT'Y GEN.
501 Washington Avenue
Montgomery, AL 36104
(334) 242-7300
bhughes@ago.state.al.us
*Counsel of Record

Counsel for State of Alabama

CAPITAL CASE
QUESTION PRESENTED (REPHRASED)

1. Whether this Court should refuse to consider Frazier's claim because the state courts below found the claim untimely and otherwise procedurally barred.

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 Whether the Court should overrule *Harris v. Alabama*, 513 U.S. 504 (1995), which held Alabama's recently repealed capital sentencing statute to be constitutional even though it did not require jury sentencing in capital cases, because of *Hurst v. Florida*, 136 S. Ct. 616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

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

PARTIES

The caption contains the names of all parties in the courts below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

United States Code

Code of Alabama 1975

Other Authorities

Rules

STATEMENT OF THE CASE

A. The murder of Pauline Brown

There is no doubt about Frazier's guilt or the seriousness of the crime. While under arrest on other charges in Michigan in 1992, Frazier confessed that he murdered Pauline Brown. In a later recorded statement, Frazier told the police that he broke into Brown's apartment in an effort to burglarize it. He came across Brown who was asleep in her bed. He robbed her at gunpoint and then raped her. Brown repeatedly begged him not to kill her, and when she refused to stop begging him to do so, he put the gun to the back of her head and fired. After leaving the apartment to make sure no one had heard the gunshot, he returned and searched the apartment for more money. He confirmed that Ms. Brown was dead and then went to the kitchen, ate two bananas, and left. He later threw the pistol in a ditch. *Ex parte Frazier*, 758 So. 2d 611, 611-612 (Ala. 1999).

B. Trial and direct appeal

On June 5, 1996, Frazier was convicted of one count of capital murder for the brutal murder of Pauline Brown. Specifically, Frazier was found guilty of murder during a robbery in violation of Ala. Code § 13A-5-40(a)(2). By convicting Frazier of that crime, the jury, at the guilt phase of the trial, unanimously found beyond a reasonable doubt that the capital offense was

committed while he was engaged in a robbery, pursuant to Ala. Code § 13A-5-49(4).

Following a sentencing hearing, the jury recommended that Frazier be sentenced to death by a ten-to-two vote. The trial court followed the jury's recommendation and sentenced Frazier to death.

The Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Frazier's conviction and death sentence. *Frazier v. State,* 758 So. 2d 577 (Ala. Crim. App.), *aff'd*, 758 So. 2d 611 (Ala. 1999). This Court denied Frazier's petition for writ of certiorari. *Frazier v. Alabama*, 531 U.S. 843 (2000) (mem).

C. Frazier raises his Sixth Amendment claim in his first round of postconviction proceedings

In 2001, Frazier filed a Rule 32 petition for postconviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. Frazier raised the following claim in this Rule 32 petition: "As applied in Alabama, and as imposed in this case, the provisions of the Alabama death penalty statutes providing for judicial sentencing in capital cases violates the Due Process Clause of the Fourteenth Amendment and Mr. Frazier's Sixth['s] Amendment right to a trial by jury." (Rule 32 Transcript 117) The circuit court summarily denied the post-conviction petition in a one-page docket entry. On appeal, the Court of Criminal Appeals remanded the case to the

circuit court with instructions that the circuit court correct numerous deficiencies in its judgment and ordered the circuit court to conduct an evidentiary hearing, if necessary. *Frazier v. State*, 884 So. 2d 908 (Ala. Crim. App. 2003).

The circuit court denied relief on the claims in the Rule 32 petition without holding an evidentiary hearing. The Court of Criminal Appeals affirmed the denial of the Rule 32 petition in an unpublished opinion. *Frazier v. State*, CR-01-1317, Memorandum Opinion (Ala. Crim. App. Aug. 15, 2003). The Alabama Supreme Court denied Frazier's petition for writ of certiorari.

Frazier next filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Alabama. In his amended habeas petition, Frazier raised a claim challenging the constitutionality of Alabama's capital sentencing scheme relying on the Supreme Court's opinions in *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In September 2007, the district court entered a memorandum opinion and final judgment denying and dismissing the habeas petition. The district court denied relief on Frazier's *Ring/Apprendi* claim holding as follows:

> Respondent argues the state court's decision was primarily based upon independent and adequate state procedural rules, thus

> precluding federal review of this claim. In any event, Frazier cannot take advantage of *Ring v. Arizona*, 536 U.S. 584 (2002), because it is not retroactive to cases on collateral review. (Doc. 16, pp. 33-34 and Doc. 18, pp. 88-89, respectively. Frazier admits that *Ring* is not retroactive to his case. (Doc. 18, pp. 80-81).
>
> New procedural rules are only applicable to cases on direct review at the time the Supreme Court's decision is made. *Schiro v. Summerlin*, 542 U.S. 348, 351-52 (2004) (*"Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review.")). Because Frazier's case became final on direct review in 1999, he cannot benefit from the Supreme Court's 2002 decision in *Ring*. This claim is procedurally defaulted and due to be dismissed.

(District Court Op. 180-181)

The Eleventh Circuit Court of Appeals affirmed the district court's judgment. *Frazier v. Bouchard*, 661 F.3d 519 (11th Cir. 2011). This Court denied Frazier's petition for writ of certiorari. *Frazier v. Thomas*, 568 U.S. 833 (2012) (mem).

D. Frazier again raises his Sixth Amendment claim in a second Rule 32 petition

On January 11, 2017, Frazier filed a successive Rule 32 petition for post-conviction relief in the Jefferson County Circuit Court and raised one ground for relief. In particular, Frazier argued that Alabama's death-penalty statute violates the right to trial by jury under the Sixth and Eighth Amendments to the United States Constitution. Frazier relied on this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), to support his argument.

On February 16, 2017, the State filed its joint answer and motion to summarily dismiss Frazier's successive Rule 32 petition. Frazier filed an opposition to the State's answer and motion to dismiss. In November of 2017, Frazier filed a motion for final order with the circuit court and acknowledged that the circuit court was bound by the decisions of the Court of Criminal Appeals, *see Wimbley v. State*, 2016 WL 7322334 (Ala. Crim. App. 2016), and the Alabama Supreme Court, *see Ex parte Bohannon*, 222 So. 3d 525 (Ala. 2016), holding that Alabama's death penalty statute is consistent with *Hurst*. Because of the precedent in the Court of Criminal Appeals and in the Alabama Supreme Court, Frazier requested that the circuit court issue a final order in this matter. On November 14, 2017, the circuit court issued the following one-sentence order dismissing the successive petition: "SUCCESSIVE PETITION FOR RELIEF FROM JUDGMENT filed by FRAZIER DEMETRIUS TERRENCE is hereby DISMISSED."

Frazier appealed the denial of his successive petition to the Court of Criminal Appeals. That Court affirmed the denial of the successive Rule 32 petition in a memorandum opinion that set forth several substantive and procedural grounds. (Pet. App. A1-A13.) First, the court held that *Hurst* did not invalidate Frazier's sentence because the jury, not the trial court makes the critical finding necessary for imposition of the death penalty. (Pet. App.

A7-A9.) Second, the court found that *Hurst* did not apply retroactively to Frazier's case. (Pet. App. A9.) Third, the court found that Frazier was merely seeking to relitigate claims that could have been raised at trial and on direct appeal such that they are procedurally barred. (Pet. App. A9-A10.) Fourth, the court held that Frazier's claim was untimely and barred by Alabama's successive petition rule because he had presented a similar claim in his first postconviction petition. (Pet. App. A10-A13.) The Alabama Supreme Court then denied Frazier's cert petition and the present petition for writ of certiorari followed.

REASONS FOR DENYING THE WRIT

Frazier's petition does not present an issue meriting this Court's review. And even if it did, this Court should refuse to consider it because the state courts denied Frazier's petition on adequate and independent state law procedural grounds. The petition, therefore, should be denied.

First, this Court should decline to review this claim because the state courts found the claim untimely, successive, and otherwise procedurally barred from review. Alabama's procedural bars are adequate and independent state law grounds. This Court, therefore, should refuse to grant cert to consider the merits of this claim.

In addition, neither issue Frazier presents merits review. First, Frazier—like many defendants before him—seeks to convince this Court to invalidate Alabama's capital sentencing scheme after *Hurst*. But 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*. Frazier 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.

In any event, this would not be the case to consider the application of *Hurst* to Alabama's capital sentencing statute. This case comes to the Court in a uniquely problematic procedural posture, which would require the Court to consider issues of state postconviction procedural 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.[1] For the reasons that follow, Frazier's petition is not cert-worthy.

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

[1]. 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.

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

Frazier appealed the summary dismissal of his second Rule 32 petition to the Alabama Court of Criminal Appeals, an intermediate appellate court with statewide jurisdiction. That court affirmed in a thirteen-page opinion. Frazier then petitioned the Alabama Supreme Court for certiorari review, but that court denied review. 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)).

Frazier's petition erroneously seeks a writ of certiorari "to the Alabama Supreme Court." Pet. cover, 1. This Court must decide whether the petitioner's failure to identify the proper lower court is a defect of jurisdictional significance.

II. This Court lacks jurisdiction to consider Frazier's claim because the state courts found the claim untimely and otherwise procedurally barred.

This Court should decline to review Frazier's claim because the claim is procedurally defaulted. A habeas petitioner is required to first present his federal claim to the state courts and to exhaust all of the procedures available in the state-court system before seeking relief in federal court. 28 U.S.C. § 2254 (b)(1); *Medellin v. Dretke*, 544 U.S. 660, 666 (2005) (holding that a petitioner "can seek federal habeas relief only on claims that have been exhausted in state court"); *O'Sullivan v. Boerckel,* 526 U.S. 838, 842–45 (1999) (a petitioner must give the state courts a full and fair opportunity to decide any federal constitutional claims presented in the federal habeas petition, which includes giving the "state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate process"). As this Court has explained, "[t]he role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983).

> "The procedural default doctrine, like the abuse of writ doctrine, 'refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.' *McCleskey v. Zant,* 499 U.S. 467, 489, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). A corollary to the habeas statute's exhaustion requirement, the doctrine has its roots in the general principle that federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds. *Wainwright v. Sykes,* 433 U.S. 72, 81, 97 S. Ct. 2497, 53 L.Ed.2d 594

> (1977); *Brown v. Allen,* 344 U.S. 443, 486-487, 73 S. Ct. 397, 97 L.Ed. 469 (1953). But, while an adequate and independent state procedural disposition strips this Court of certiorari jurisdiction to review a state court's judgment, it provides only a strong prudential reason, grounded in 'considerations of comity and concerns for the orderly administration of criminal justice," not to pass upon a defaulted constitutional claim presented for federal habeas review.' *Francis v. Henderson,* 425 U.S. 536, 538-539, 96 S. Ct. 1708, 48 L.Ed.2d 149 (1976); see also *Fay v. Noia,* 372 U.S. 391, 399, 83 S. Ct. 822, 9 L.Ed.2d 837 (1963) ('[T]he doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute").'"

Dretke v. Haley, 541 U.S. 386, 392–93, 124 S. Ct. 1847, 1851–52, 158 L. Ed. 2d 659 (2004).

Frazier's claim was procedurally barred from review in the state courts for a myriad of reasons. As the Court of Criminal Appeals found, Frazier's petition was untimely because it was filed well beyond the limitations period found in Rule 32.2(c), Ala. R. Crim. P. In addition, Frazier's claim was procedurally barred because it could have been, but was not, raised at trial and on direct appeal. Ala. R. Crim. P. 32.2(a)(3) and (5). Ala. R. Crim. P. Finally, as the Court of Criminal Appeals found, Frazier's claim was barred by Alabama's successive petition rule because the claim is very similar to the claim he raised in his first postconviction petition. Ala. R. Crim. P. 32.2(b). The Court of Criminal Appeals correctly concluded that state law precluded

Frazier from raising his claim in the state courts. These are independent and adequate state law procedural bars. Because the state courts found the claim procedurally defaulted, this Court should decline to grant cert to review the claim.

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

In Frazier'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. 6–10.) This claim is 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 Frazier'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 Frazier'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).

Frazier's case does not bear the infirmity present in *Hurst*. Frazier'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 agreed 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.

Frazier's purported split of authority is illusory. (Pet. 7–8.) While Frazier 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, Frazier's alleged "conflict" is a non-issue.

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

In his second claim, Frazier contends that *Hurst* should have retroactive application to his case. (Pet. 10–13.) 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 Frazier's sentence is consistent with *Hurst*. Accordingly, the second question can give Frazier 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, Frazier 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/ Beth Jackson Hughes
Beth Jackson Hughes
Assistant Attorney General
*Counsel of Record

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