NO. 18-8670

In The
Supreme Court of the United States

DEMETRIUS FRAZIER,
Petitioner,
v.

ALABAMA,
Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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Two points merit discussion in this reply. First, Alabama's suggestion that this Court does not have jurisdiction because Mr. Frazier's petition is directed toward the wrong lower court is misplaced. Second, Mr. Frazier welcomes Alabama's restating of his questions presented and urges this Court to grant certiorari on these questions.

I. Mr. Frazier's petition for writ of certiorari is directed to the right court.

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] It is not. 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,

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[1] Br. in Opp'n at 8.

[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).

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.

II. This Court should grant certiorari on Alabama's rephrased questions presented.

In its brief in opposition, Alabama rephrased Mr. Frazier's questions to include the following:

> Whether the Court should overrule *Harris v. Alabama*, 513 U.S. 504 (1995), which held Alabama's recently repealed capital sentencing statute to be constitutional even though it did not require Jury sentencing in capital cases, because of *Hurst v. Florida*, 136 S. Ct. 616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).
>
> Whether *Hurst* is retroactively applicable to cases that became final before that decision was announced.

Although phrased differently, these questions present important issues for this Court to decide.

a. *Hurst* implicitly overruled *Harris*; this Court should now explicitly overrule *Harris*.

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

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

and thus permits arbitrary imposition of the death penalty."[5] In upholding the scheme, this Court relied on *Spaziano v. Florida*,[6] which upheld Florida's advisory jury capital sentencing scheme—upon which "Alabama's death penalty statute is based"—as constitutional.[7] This Court described "Alabama's capital sentencing scheme" as "much like that of Florida."[8] 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.'"[9]

In contrast, Alabama's statute afforded no such protections. As one dissenting Justice noted,

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

[6] **Error! Main Document Only.** *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.").

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

[8] *Id.*

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

> 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.[10]

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 sentencing judge to consider the recommendation and to trust that the judge will assign the recommendation proper weight.[11] 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."[12]

But, after *Spaziano* and *Harris,* this Court's "Sixth Amendment jurisprudence . . . developed significantly[.]"[13] The Court decided *Apprendi*[14] and *Ring*,[15] which emphasized the jury's critical importance in sentencing.

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

[11] *Id.* at 515.

[12] *Id.* at 509.

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

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

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

"*Apprendi* jurisprudence, as it has evolved since *Harris* was decided, [signaled] a sentencing scheme that permits [a trial judge to make the factual findings necessary by statute to impose the death penalty] is constitutionally suspect."[16] 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."[17]

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."[18] *Hurst* also overruled *Spaziano* and *Hildwin*,[19] 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

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[16] *Woodward*, 134 S. Ct. at 411 (Sotomayor, J., dissenting from denial of cert.)

[17] *Id.* at 410.

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

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

be made by the jury."[20] In doing so, this Court recognized that "[t]heir conclusion was wrong, and irreconcilable with *Apprendi*."[21]

Thus, *Hurst* renders Alabama capital sentencing scheme, which Respondent conceded in *Harris* "is essentially the same as Florida's capital sentencing statute[,]"[22] equally as unconstitutional. Presumably, that is why this Court has since remanded several Alabama cases "for further consideration in light of *Hurst v. Florida*[.]"[23] Granted, this Court has not yet explicitly overturned *Harris*.[24] However, *Hurst*'s reasoning suggests it ought to because *Hurst* overruled *Spaziano* and *Hildwin*—the decisions on which

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[20] *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.").

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

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

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

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

Harris rests. While Respondent argues that *stare decisis* should foreclose review of Alabama's death penalty statute,[25] 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."[26]

Nor does this Court's denial of certiorari in *Bohannon v. Alabama*,[27] (or any other case) have precedential value. Despite what Respondent implies, "denial of certiorari normally carries no implication or inference[,]"[28] and does not "foreclose [this Court] from now granting appropriate relief."[29]

b. This Court should resolve the question of *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.[30] Delaware and Florida have also

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[25] Br. in Opp'n at 12.

[26] *Hurst*, 136 S. Ct. at 623–24.

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

[28] *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.").

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

[30] *Hurst v. State*, 202 So. 3d 40, 44, 53 (Fla. 2016); *Rauf*, 145 A.3d at 433-34.

determined that *Hurst* is retroactive, based, in whole or in part, on federal retroactivity standards.[31]

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.[32] 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 who also have long-final convictions and sentences."[33] The Florida Supreme Court "held that, under state law, *Hurst* did not apply retroactively to capital convictions where the death sentence

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[31] *Mosley v. State*, 209 So. 3d 1248, 1274 (Fla. 2016); *Powell v. State*, 153 A.3d 69, 73, 74-76 (Del. 2016).

[32] Br. in Opp'n at 16.

[33] 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).

became final prior to the issuance of *Ring*."[34] "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."[35] In doing so, it relied on *Witt,*[36] which "provides *more expansive retroactivity standards* than those adopted in *Teague*."[37] *Witt* incorporates this Court's *Stovall/Linkletter* test, a precursor to *Teague.*[38] *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 Court's decision at least allows some petitioners to obtain what *Hurst* requires – a jury sentencing.

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[34] *Lambrix v. Sec'y, DOC*, 872 F.3d 1170, 1175 (11th Cir.), *cert. denied sub nom. Lambrix v. Jones*, 138 S. Ct. 312 (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)).

[35] 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.

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

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

[38] *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.").

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.[39] In deciding whether that rule was retroactive, the Delaware Supreme Court relied on *Teague*, and[40] 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."[41]

Thus, Delaware applied *Hurst* retroactively.[42] Following *Powell*, all of Delaware's death-sentenced inmates were resentenced to life without parole.[43]

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[39] *Rauf v. State*, 145 A.3d 430, 433-34 (Del. 2016).

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

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

[42] *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.").

[43] *See, e.g.*, *Ploof v. State*, No. 47, 2018, 2018 WL 4610767, at *1 (Del. Sept. 18, 2018) (footnotes omitted) ("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

In analyzing whether *Hurst* is retroactive, Alabama has opined that because *Ring* has no retroactive effect, *Hurst* has no retroactive effect.[44] Though Respondent defends this argument premised on *Schriro v. Summerlin*,[45] it is wrong because *Summerlin* is distinguishable. *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."[46] 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."[47] While Alabama rightly changed its

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without parole—§ 4209's alternative sentence for first-degree murder."); *Cooke v. State*, 181 A.3d 152 (Del. 2018) (footnotes omitted) ("On April 4, 2017, after this Court declared the death penalty unconstitutional in *Rauf v. State* and applied it retroactively in *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."), *cert. denied*, 138 S. Ct. 2695 (2018); *Norcross v. State*, 177 A.3d 1226 (Del. 2018) (footnotes omitted) ("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."), *as corrected* (Jan. 11, 2018), *as corrected* (Jan. 18, 2018).

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

[45] Br. in Opp'n at 19 (citing *Schriro v. Summerlin,* 542 U.S. 348, 364 (2004)).

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

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

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. 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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