No.

IN THE
SUPREME COURT OF THE UNITED STATES

DEMETRIUS FRAZIER,
Petitioner,
v.

STATE OF ALABAMA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

Questions Presented

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court invalidated capital sentencing statutes that allowed a judge, not a jury, to make the ultimate fact-finding that led to the imposition of a death sentence. Florida and Delaware swiftly made changes to their capital statutes, and also applied this Court's reasoning to cases where death sentences were previously imposed. Alabama has steadfastly refused to apply this Court's opinion to cases where judges, not juries, made the ultimate fact-finding that led to death sentences. This state of affairs leads to the following questions:

> 1. Does Alabama's insistence that a judge, not a jury, can weigh the mitigating and aggravating factors and sentence a person to death directly conflict with this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016)?
>
> 2. In *Hurst v. Florida*, 136 S. Ct. 616 (2016), did this Court announce a new rule that applies retroactively to death row inmates who were sentenced based upon facts found by a judge and not a jury?

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Opinions Below

The decision of the Alabama Court of Criminal Appeals is the last reasoned opinion in this case. *Frazier v. State of Alabama*, No. CR-17-0372, unpublished slip op. (Ala. Crim. App. June 29, 2018). This decision is included in the Petitioner's Appendix. Pet. App. A-1 – A-13. The Alabama Supreme Court denied discretionary review in this case. *See* Certificate of Judgment, Pet. App. B-1.

Jurisdiction

This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1257(a). The opinion of the Alabama Court of Criminal Appeals was entered on June 29, 2018. A petition for rehearing was denied on July 20, 2018. Discretionary review by the Alabama Supreme Court was denied on November 16, 2018. On February 6, 2019, Justice Thomas extended the time within which to file a petition for a writ of certiorari to March 31, 2019.

Relevant Constitutional and Statutory Provisions Involved

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

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

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

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statues that governed capital sentencing in Alabama at the time of Mr. Frazier's conviction and sentence are set forth in the appendix and include:

Ala. Code § 13A-5-40 (1996); Pet. App. C-1.
Ala. Code § 13A-5-43 (1996); Pet. App. C-3.
Ala. Code § 13A-5-45 (1996); Pet. App. C-4.
Ala. Code § 13A-5-46 (1996); Pet. App. C-5.
Ala. Code § 13A-5-47 (1996); Pet. App. C-7.
Ala. Code § 13A-5-48 (1996); Pet. App. C-8.
Ala. Code § 13A-5-49 (1996); Pet. App. C-8.
Ala. Code § 13A-5-50 (1996); Pet. App. C-9.
Ala. Code § 13A-5-51 (1996); Pet. App. C-9.
Ala. Code § 13A-5-52 (1996); Pet. App. C-10.

These statutes will be referred to throughout this petition as "Alabama's capital sentencing scheme."[1]

Statement of the Case

A. Mr. Frazier was convicted and sentenced under Alabama's pre-2017 capital sentencing scheme.

At the time of Mr. Frazier's trial, a person could not be sentenced to death until (1) a finding was made that at least one aggravating circumstance existed, and (2) a finding was made that whatever mitigating circumstances existed did not

[1] These statutes were modified in 2017. All references to "Alabama's capital sentencing scheme" refer to the pre-2017 laws, which govern Mr. Frazier's case.

outweigh the aggravating circumstances. *See* Ala. Code § 13A-5-46(e)(1996); Ala. Code § 13A-5-48 (1996). Alabama's sentencing scheme placed the finding of these critical elements – the existence of both aggravators and mitigators and the relative weight of the sum of each in relation to the other – in the hands of the court, not the jury. Ala. Code § 13A-5-47(d) and (e) (1996). The jury played only an "advisory" role at sentencing. Ala. Code § 13A-5-46 (1996). The trial court was required to consider the jury's advisory verdict, but ultimately base the sentence on its own factual findings. Ala. Code § 13A-5-47(e) (1996).

Under these laws, on June 5, 1996, a jury convicted Mr. Frazier of one count of capital murder. (R. 510-512.) On June 7, 1996, by a vote of 10-2, the jury recommended a death sentence. (R. 577.) On August 8, 1996, a sentencing hearing was held before the trial court, without a jury, where the court independently made the factual findings necessary to sentence Mr. Frazier to death. (R. 581-591.) The court found the existence of one aggravating circumstance: murder during the commission of a robbery. (Supp. C. 13). The court found one statutory mitigating circumstance: that Mr. Frazier "was nineteen at the time of this offense." *Id.* at 15. With regard to non-statutory mitigating circumstances, the court found that "[n]othing from proceedings conducted before this court or the presentence report suggests a basis for § 13A-5-52 mitigation." *Id.* Next, the trial court weighed the aggravating and mitigating circumstances it found, determined that the aggravating circumstance outweighed the mitigating circumstance, and based on its independent findings sentenced Mr. Frazier to death. *Id.* Mr. Frazier's capital

murder conviction was affirmed on direct appeal. *Frazier v. State*, 758 So. 2d 577 (Ala. Crim. App. 1999). Mr. Frazier sought state post-conviction relief but was denied. *See Frazier v. State*, 884 So. 2d 908 (Ala. Crim. App. 2003). He then sought federal habeas corpus review, which was also denied. *See Frazier v. Bouchard*, 661 F.3d 519 (11th Cir. 2011).

B. This Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016) rendered Alabama's capital sentencing scheme unconstitutional.

On January 12, 2016, this Court issued its decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). This Court held that Florida's death penalty sentencing scheme that "required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty" violated the Sixth Amendment. *Id.* at 619. This Court expressly overruled *Spaziano v. Florida*, 468 U.S. 447 (1984) and *Hildwin v. Florida*, 490 U.S. 638 (1989), which had held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S. at 640-641; *Hurst*, 136 S. Ct. at 623.

This Court expanded the principles articulated in *Apprendi v. New Jersey*, 530 U.S. 466 (2000)[2] and *Ring v. Arizona*, 536 U.S. 584 (2002). *Ring* had held that "[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring*, 536

[2] Holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000).

U.S. at 589. *Hurst* went beyond *Ring* and held that a judge cannot make independent factual findings, even if a jury has rendered an advisory verdict. *Hurst*, 136 S. Ct. at 622. For the first time, it held that every finding that that is *necessary* for a sentence of death, must be found by a jury beyond a reasonable doubt. *Id.* (emphasis added).

C. The decision of the Court below directly contradicts this Court's holding in *Hurst v. Florida*.

On January 11, 2017, Mr. Frazier filed a successive Rule 32 petition arguing that Alabama's capital sentencing scheme was unconstitutional based on this Court's decision in *Hurst*. The Circuit Court of Jefferson County, Todd, J., dismissed this petition in a one-line order on November 14, 2017. Doc. 28 (R32 C. 11). The Alabama Court of Criminal Appeals (ACCA) affirmed in an unpublished memorandum opinion. *See* Pet. App. A-1 – A-13.

The ACCA held that "Alabama's capital-sentencing scheme does not violate *Hurst*." Slip Op. at 8, Pet. App. A-8. Despite the fact that under the law a judge independently determined and weighed the aggravating and mitigating circumstances, it held that the Alabama law "allows the jury, not the trial court, to make the critical finding necessary for imposition of the death penalty and is, thus, constitutional." *Id.* The ACCA went on to hold that *Hurst* did not announce a new rule but instead merely applied *Apprendi* and *Ring*. *Id.* at 9. It concluded by holding that because *Hurst* did not apply in Alabama and was not retroactive, this successive Rule 32 petition based on *Hurst* was subject to procedural bars. *Id.* Mr.

Frazier's application for rehearing and petition for certiorari to the Alabama Supreme Court were denied. *See* Pet. App. B-1.

Reasons for Granting the Petition

Alabama is flouting this Court's decision in *Hurst v. Florida*. Alabama's disregard for the Constitution and this Court's authority must be rectified. This case is the proper vehicle for this Court to address the effect of its decision in *Hurst* on Alabama's capital sentencing scheme because this Court can address two outstanding issues concerning *Hurst* through this single case. Namely: (1) does *Hurst* render Alabama's capital sentencing scheme unconstitutional; and (2) does the rule announced in *Hurst* apply retroactively? Both of these questions were directly addressed by the ACCA below and are ripe for review by this Court.

A. Only this Court can correct Alabama's refusal to comply with *Hurst v. Florida*, 136 S. Ct. 616 (2016).

The Court of Criminal Appeals held that *Hurst* did not govern in Alabama because Alabama's capital sentencing scheme allowed the jury "to make the critical finding necessary for imposition of the death penalty." Slip Op. at 8, Pet. App. A-8. The court followed its decision in *State v. Billups*, 223 So. 3d 954 (Ala. Crim. App. 2016) and the Alabama Supreme Court's decision in *Ex parte Bohannon*, 222 So. 3d 525 (Ala. 2016).

The decisions of the Alabama Court of Criminal Appeals and Alabama Supreme Court repeatedly ignore that it is unconstitutional for a statute to require "[t]he trial court alone [to] find 'the facts . . . [t]hat sufficient aggravating circumstances exist' **and** '[t]hat there are insufficient mitigating circumstances to

outweigh the aggravating circumstances.'" *Hurst*, 136 S. Ct. at 622 (emphasis added) (quoting Fla. Stat. § 921.141(3)). The Alabama courts pervert the holding of *Hurst* and ignore this second clause. Alabama maintains that *Hurst* does not invalidate its capital sentencing scheme even though a finding that the aggravating circumstances outweigh the mitigating circumstances is "necessary to impose a sentence of death" and the judge, not the jury, made this finding. *Hurst*, 136 S. Ct. at 619.

Alabama is the only state that still used an advisory jury that failed to recognize the unconstitutionality of its statute post-*Hurst*.[3] At the time *Hurst* was decided "[t]hree states - Delaware, Florida, and Alabama – allow[ed] a judge to impose a sentence regardless of a jury's recommendation. *See* Ala. Code § 13A-5-47; Fla. Stat. § 921.141; Del. Code tit. 11, § 4209(d)." Brief of *Amici Curiae* Alabama and Montana in Support of Respondent, *Hurst v. Florida*, 136 S. Ct. 616 (2016), 2015 WL 4747983 at 7. Both Florida and Delaware have followed this Court's mandate in *Hurst* and recognized that their capital sentencing schemes were unconstitutional. On remand in *Hurst,* the Florida Supreme Court held that "the Supreme Court's decision . . . 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." *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016). The "specific findings required to be made by the jury include the existence of each aggravating

[3] Although Alabama Courts refuse to recognize *Hurst's* applicability in Alabama, the Alabama legislature recognized problems with its statute that allowed the judge, not a jury, to independently weigh the aggravating and mitigating circumstances. In 2017, the legislature changed the statute and required a judge to follow the jury verdict for a capital sentencing. *See* Ala. Code § 13A-5-47.

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." *Id.* After *Hurst*, in *Rauf v. State*, 145 A.3d 430, 433-434 (Del. 2016), the Delaware Supreme Court held that its capital sentencing scheme was unconstitutional for four reasons: (1) because the judge found the existence of an aggravating circumstance independent of the jury; (2) because the statute did not require juror unanimity for finding the existence of an aggravating circumstance; (3) because the sentencing judge independently found whether the aggravating circumstances outweighed the mitigating circumstances; and (4) because the jury did not have to find that the aggravating circumstances outweighed the mitigating circumstances unanimously and beyond a reasonable doubt.

Despite these holdings, Alabama continues to insist that its system, which allowed a judge to independently find the aggravating circumstances, independently weigh the aggravating circumstances against the mitigating circumstances, and ultimately independently sentence a person to death, is permissible. Alabama is taking this position because it does not want to recognize the authority of this Court. This is evidenced by the fact that prior to *Hurst*, Alabama argued that its capital sentencing scheme was nearly identical to Florida's scheme. In *Harris v. Alabama*, a pre-*Hurst* case, Alabama argued that "the Alabama statute is essentially the same as Florida's capital sentencing statute which has been found by this Court to be constitutional." Br. of Resp't, 1994 WL 514669, at *13 n.5, *Harris v.*

Alabama, 513 U.S. 504 (1995) (No. 93-7659). More recently, in an amicus brief supporting the State of Florida in *Hurst*, Alabama argued that: "States like Florida and Alabama responded to *Furman*[4] by creating hybrid systems under which the jury recommends an advisory sentence, but the judge makes the final sentencing decision." Brief of *Amici Curiae* Alabama and Montana in Support of Respondent at 4, *Hurst v. Florida*, No. 14-7505, 136 S. Ct. 616 (2016), 2015 WL 4747983. Alabama should not be able to repudiate this position and now hold that *Hurst* did not invalidate its nearly identical statute.

Alabama has repeatedly rejected this Court's reasoning in *Hurst*. *Billups*, 223 So. 3d at 963; *Bohannon*, 222 So. 3d at 532; *Henderson v. State*, 248 So. 3d 992, 1047 (Ala. Crim. App. 2017), *cert. denied*, 138 S. Ct. 1330 (2018); *Kirksey v. State*, 243 So. 3d 849, 853 (Ala. Crim. App. 2016), *cert. denied*, 243 So. 3d 854 (Ala. 2017) and 138 S. Ct. 430 (2017); *Ex parte Phillips*, --- So. 3d ---, No. 1160403, 2018 WL 5095002, at *35 (Ala. 2018); *Knight v. State*, --- So. 3d ---, No. CR-16-0182, 2018 WL 3805735, at *37 (Ala. Crim. App. 2018); *Creque v. State*, --- So. 3d. ---, No. CR-13-0780, 2018 WL 798160, at *49 (Ala. Crim. App. 2018); *Wimbley v. State*, 238 So. 3d 1268, 1276 (Ala. Crim. App. 2016), *cert. denied*, 138 S. Ct. 385 (2017); *Russell v. State*, 261 So. 3d 454, 456 (Ala. Crim. App. 2016), *cert. denied*, 138 S. Ct. 1449 (2018); *Thompson v. State*, --- So. 3d. ---, No. CR-16-1311, 2018 WL 6011190, at *26 (Ala. Crim. App. 2018); *DeBlase v. State*, --- So. 3d. ---, No. CR-14-0482, 2018 WL

[4] *Furman v. Georgia*, 408 U.S. 238 (1972).

6011199, at *68 (Ala. Crim. App. 2018); *Woodward v. State*, --- So. 3d. ---, No. CR-15-0748, 2018 WL 1981390, at *54 (Ala. Crim. App. 2018); *Collins v. State*, --- So. 3d. ---, No. CR-14-0753, 2017 WL 4564447, at *39 (Ala. Crim. App. 2017); *Floyd v. State*, --- So. 3d. ---, No. CR-13-0623, 2017 WL 2889566, at *75 (Ala. Crim. App. 2017); *Callen v. State*, --- So. 3d. ---, No. CR-13-0099, 2017 WL 1534453, at *53 (Ala. Crim. App. 2017). The only way death sentences under this unconstitutional statute will be reviewed is if this Court intervenes.

B. This case is an ideal vehicle to resolve the split over *Hurst's* retroactive effect.

The opinions cited above show that this Court will need to force Alabama to follow its directive in *Hurst* – Alabama will not do it on its own. This case is the perfect vehicle for this Court to address this issue because this Court can also resolve whether *Hurst* applies retroactively.

Here, the Court of Criminal Appeals held that *Hurst* did not announce a new rule and the decision was merely an application of this Court's decisions in *Apprendi* and *Ring*. Slip Op. at 9, Pet. App. A-9. The court performed no analysis in reaching this conclusion and did not even cite the standard governing retroactivity that this Court set forth in *Teague v. Lane*, 489 U.S. 288, 301 (1989). The opinion of the court below directly conflicts with this Court's decisions in *Teague*, *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013), and *Montgomery v. Louisiana*, 136 S. Ct. 718, 734-735 (2016).

Under *Teague*, courts must give retroactive effect to new substantive rules of constitutional law. *Teague*, 489 U.S. at 310-311. Substantive rules are "rules

forbidding criminal punishment of certain primary conduct," and "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989). *See also Teague*, 489 U.S. at 307. Courts also must give retroactive effect to new "'watershed rules of criminal procedure.'" *Id.* at 352; *see also Teague*, 489 U.S. at 312–313. To fall under *Teague*'s exception for watershed rules, a procedural ruling must "implicate the fundamental fairness of the trial" and "significantly improve . . . pre-existing fact-finding procedures." *Id.* at 312-13.

The court below did not even ask if the rule announced in *Hurst* is a new rule. By failing to consider this question, it ignored the directive of this Court in *Chaidez* that requires a court to analyze whether an application of an old principle created a new rule. *Chaidez*, 133 S. Ct. at 1111. The court below did not even acknowledge that *Hurst* expressly overruled two cases and that this Court has clearly held that "[a] new decision that explicitly overrules an earlier holding obviously 'breaks new ground' or 'imposes a new obligation.'" *Butler v. McKellar*, 494 U.S. 407, 412 (1990).

When *Teague* is applied, it is clear that the rule announced in *Hurst* is a new rule with both substantive and procedural components. *Hurst* announced a watershed rule of criminal procedure because "[w]ithout [the process dictated by *Hurst*] the likelihood of an accurate [sentence] is seriously diminished." *Teague*, 489 U.S. at 313. The rule announced in *Hurst* is also a substantive rule of constitutional law as applied to Mr. Frazier because Mr. Frazier is part of a "class of defendants"

for whom the death penalty is prohibited: defendants whose jury did not find every "fact necessary to impose a sentence of death" beyond a reasonable doubt. *Hurst*, 136 S. Ct. at 619.

This Court's decision in *Montgomery v. Louisiana* changed the landscape of retroactivity analysis by acknowledging that new rules can have both substantive and procedural components. Like the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012), the rule announced in *Hurst* is substantive and procedural. This is the perfect opportunity for this Court to clarify how lower courts should address retroactivity when a new rule is both substantive and procedural. *See Montgomery*, 136 S. Ct. at 734-735.

Finally, there is a split over *Hurst*'s retroactive effect. Alabama continues to hold that *Hurst* is not retroactive, while Delaware has held that *Hurst* announced a retroactive new watershed rule of criminal procedure. *Powell v. State of Delaware*, 153 A.3d 69 (Del. 2016). Florida has concluded, based on state law grounds, that *Hurst* does not apply to cases where the person's conviction was final prior to this Court's decision in *Ring*. *Asay v. State*, 210 So. 3d 1, 15-22 (Fla. 2016). Because only three states were affected by the decision in *Hurst*, no other state will weigh in and the split is fully mature and settled.

This case is ripe for review[5] and the appropriate case for this court to resolve (1) whether Alabama's holding that a judge, not a jury, can weigh the mitigating

[5] Although the ACCA also held that this claim was precluded by procedural bars, it only reached this decision based on its erroneous holding that the rule announced in *Hurst* was not a new rule. *See* Slip Op. 9-13; Pet. App. A-9 – A-13. Had the court held that *Hurst* was a retroactive new rule, these procedural bars would not have applied.

and aggravating factors and sentence a person to death directly conflicts with this Court's decision in *Hurst*, and (2) whether, in *Hurst*, this Court announced a new rule that applies retroactively to the death row inmates who were sentenced based upon facts found by a judge and not a jury.

Conclusion

For the above reasons, this Court should grant this petition for writ of *certiorari*.

Respectfully submitted,

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