

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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March 29, 2019

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Notice: This unpublished memorandum should not be cited as precedent. See Rule 54, Ala. R. App. P. Rule 54(d), states, in part, that this memorandum "shall have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state, except for the purpose of establishing the application of the doctrine of law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar."

Court of Criminal Appeals

State of Alabama
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MEMORANDUM

CR-17-0372

Jefferson Circuit Court CC-95-2606.61

Demetrius Terrence Frazier v. State of Alabama

JOINER, Judge.

Demetrius Terrence Frazier,¹ an inmate on death row at Holman Correctional Facility, appeals the Jefferson Circuit Court's summary dismissal of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P.

Statement of Facts and Procedural History

In 1996, Frazier was convicted of murder made capital because it was committed during a robbery, see § 13A-5-

¹The record also lists Frazier as "Terrence Demetrius Frazier."

40(a)(2), Ala. Code 1975, for the murder of Pauline Brown and was sentenced to death.² The facts underlying Frazier's conviction are as follows:

"During the early morning of November 27, 1991, the defendant saw a light on in Pauline Brown's ground floor apartment. He removed a screen and entered through the window.

"In searching the apartment, he found \$5 or \$10 in a bedroom. Ms. Brown, who was asleep in her bedroom, was awakened by the defendant, who was armed, to demand more money. She gave him \$80 out of her purse. After forcing her at gunpoint to have sexual intercourse from the rear, she begged him not to kill her. He then put the pistol to her head and shot.

"The defendant then left the apartment to see if anyone [had] heard the shot and, satisfied they had not, returned to the apartment to search for more money and to make sure she was dead. He went to her kitchen and ate some bananas and left the apartment. The pistol was thrown in a ditch.

"Ms. Brown died as a result of the gunshot to the back of her head."

²We note that Frazier was initially charged with three counts of capital murder. Count I charged Frazier with murder made capital because it occurred during a robbery, see § 13A-5-40(a)(2), Ala. Code 1975. Count II charged Frazier with murder made capital because it occurred during a burglary, see § 13A-5-40(a)(4), Ala. Code 1975. Finally, Count III charged Frazier with murder made capital because it occurred during a rape, see § 13A-5-40(a)(3), Ala. Code 1975. On June 5, 1996, the jury found Frazier guilty of capital murder as charged in Count I of the indictment, and guilty of intentional murder, as a lesser offense to the capital-murder charge in Count III of the indictment. The trial court declared a mistrial on Count II of the indictment because the jury was unable to reach a verdict on that charge.

Frazier v. State, 758 So. 2d 577, 582 (Ala. Crim. App. 1999) (internal quotations and citations omitted).

On June 5, 1996, Frazier was convicted of murder made capital because it was committed during a robbery. On June 7, 1996, the jury recommended by a vote of 10-2 that Frazier be sentenced to death for his capital-murder conviction. The circuit court accepted the jury's recommendation and sentenced Frazier to death.

On January 15, 1999, this Court affirmed his capital murder conviction and death sentence. See Frazier v. State, 758 So. 2d 577, 584-85 (Ala. Crim. App. 1999).³ Frazier then petitioned the Alabama Supreme Court for certiorari review. The Alabama Supreme Court affirmed our decision on December 30, 1999, and a certificate of judgment was issued on January 20, 2000. See Ex parte Frazier, 758 So. 2d 611 (Ala. 1999). Thereafter, Frazier petitioned the United States Supreme Court for certiorari review, but that petition was denied on October 2, 2000. See Frazier v. Alabama, 531 U.S. 843 (2000).

On January 11, 2017, Frazier filed this, his second,⁴ Rule 32, Ala. R. Crim. P., petition. In his petition, Frazier alleged that Alabama's capital-sentencing scheme violated his right to a trial by jury under the Sixth and Eighth Amendments to the United States Constitution. He also alleged that Alabama's capital-sentencing scheme--which, he said, placed the final sentencing determination in the hands of the judge

³This Court also vacated Frazier's conviction for intentional murder. We take judicial notice of the record in that case. See, e.g., Nettles v. State, 731 So. 2d 626 (Ala. Crim. App. 1998).

⁴According to our records, on September 26, 2001, Frazier filed his first Rule 32 petition, which was summarily dismissed by the circuit court. Initially, this Court remanded that case and ordered the circuit court to conduct an evidentiary hearing and to make specific written findings with regard to some of Frazier's claims. See Frazier v. State, 884 So. 2d 908 (Ala. Crim. App. 2003). On return to remand, this Court reviewed the circuit court's order and, by unpublished memorandum, affirmed the denial of Frazier's postconviction petition.

rather than the jury--violated the United States Supreme Court's decision in Hurst v. Florida, ____ U.S. ____, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016).

On February 16, 2017, the State filed its joint answer and motion to summarily dismiss Frazier's petition. In its answer, the State alleged that Frazier's claim was without merit because the Alabama Supreme Court had rejected the merits of that exact claim in Ex parte Bohannon, 222 So. 3d 525 (Ala. 2016). It further alleged that Hurst--a 2016 United States Supreme Court decision--did not create a new rule and could not be applied retroactively to Frazier's 1996 conviction. Finally, the State alleged that Frazier's claim was procedurally barred under Rules 32.2(a)(3) and (a)(5), Ala. R. Crim. P., because it could have been, but was not, raised at trial or on direct appeal; was successive under Rule 32.2(b), Ala. R. Crim. P., because Frazier raised a similar claim in his first Rule 32 petition; and was untimely under Rule 32.2(c), Ala. R. Crim. P.

On March 10, 2017, Frazier filed an opposition to the State's motion to dismiss in which he addressed each of the State's claims. On November 14, 2017, the circuit court issued an order that summarily dismissed Frazier's petition. Thereafter, Frazier filed a timely notice of appeal.

On appeal, Frazier reasserts the same Hurst claim that he raised in his Rule 32 petition below. He further asserts that Hurst applies retroactively and that his petition is not procedurally barred because he could not have raised his Hurst claim until now. The State argues on appeal that the circuit court properly dismissed Frazier's petition because it was procedurally barred, meritless, and the principles in Hurst, supra, cannot be retroactively applied to Frazier's case. As discussed in more detail below, we agree with the State.

Standard of Review

"[Frazier] has the burden of pleading and proving his claims. As Rule 32.3, Ala. R. Crim. P., provides:

"'The petitioner shall have the burden of pleading and proving by a preponderance

of the evidence the facts necessary to entitle the petitioner to relief. The state shall have the burden of pleading any ground of preclusion, but once a ground of preclusion has been pleaded, the petitioner shall have the burden of disproving its existence by a preponderance of the evidence.'

"The standard of review this Court uses in evaluating the rulings made by the trial court [in a postconviction proceeding] is whether the trial court abused its discretion.' Hunt v. State, 940 So. 2d 1041, 1049 (Ala. Crim. App. 2005). However, 'when the facts are undisputed and an appellate court is presented with pure questions of law, [our] review in a Rule 32 proceeding is de novo.' Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001). '[W]e may affirm a circuit court's ruling on a postconviction petition if it is correct for any reason.' Smith v. State, [122] So. 3d [224], [227] (Ala. Crim. App. 2011).

"As stated above, ... the claim[] raised by [Frazier] [was] summarily dismissed based on [...] the application of the procedural bars in Rule 32.2, Ala. R. Crim. P. When discussing the pleading requirements for postconviction petitions, we have stated:

"The burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, a court cannot determine whether the petitioner is entitled to relief, the petitioner has not satisfied the burden of pleading under Rule 32.3 and Rule 32.6(b). See Bracknell v. State, 883 So. 2d 724 (Ala. Crim. App. 2003).'

"Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006).

"Rule 32.6(b) requires that the petition itself disclose the facts relied upon in seeking relief." Boyd v. State, 746 So. 2d 364, 406 (Ala. Crim. App. 1999). In other words, it is not the pleading of a conclusion "which, if true, entitle[s] the petitioner to relief." Lancaster v. State, 638 So. 2d 1370, 1373 (Ala. Crim. App. 1993). It is the allegation of facts in pleading which, if true, entitle a petitioner to relief. After facts are pleaded, which, if true, entitle the petitioner to relief, the petitioner is then entitled to an opportunity, as provided in Rule 32.9, Ala. R. Crim. P., to present evidence proving those alleged facts.'

"Boyd v. State, 913 So. 2d 1113, 1125 (Ala. Crim. App. 2003). '[T]he procedural bars of Rule 32[.2, Ala. R. Crim. P.,] apply with equal force to all cases, including those in which the death penalty has been imposed.' Burgess v. State, 962 So. 2d 272, 277 (Ala. Crim. App. 2005).

"[Frazier's] claim[] [was] also dismissed based on his failure to comply with Rule 32.7(d), Ala. R. Crim. P. In discussing the application of this rule we have stated:

"[A] circuit court may, in some circumstances, summarily dismiss a postconviction petition based on the merits of the claims raised therein. Rule 32.7(d), Ala. R. Crim. P., provides:

"If the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue

of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition. Leave to amend shall be freely granted. Otherwise, the court shall direct that the proceedings continue and set a date for hearing."

"'"Where a simple reading of the petition for post-conviction relief shows that, assuming every allegation of the petition to be true, it is obviously without merit or is precluded, the circuit court [may] summarily dismiss that petition.'" Bishop v. State, 608 So. 2d 345, 347-48 (Ala. 1992) (emphasis added) (quoting Bishop v. State, 592 So. 2d 664, 667 (Ala. Crim. App. 1991) (Bowen, J., dissenting)). See also Hodges v. State, [Ms. CR-04-1226, March 23, 2007] ___ So. 3d ___, ___ (Ala. Crim. App. 2007) (a postconviction claim is 'due to be summarily dismissed [when] it is meritless on its face')[, rev'd on other grounds, ___ So. 3d ___ (Ala. 2011)].'

"Bryant v. State, [Ms. CR-08-0405, February 4, 2011] ___ So. 3d ___, ___ (Ala. Crim. App. 2011)."

Washington v. State, 95 So. 3d 26, 38-39 (Ala. Crim. App. 2012). With these principles in mind, we review the claims raised by Frazier on appeal.

Discussion

Frazier argues that the circuit court erred in summarily dismissing his petition because, he says, Alabama's capital-sentencing scheme violates his Sixth and Fourteenth Amendment rights under the United States Constitution and also violates the legal principles announced in the United States Supreme

Court's decision in Hurst v. Florida, supra. (Frazier's brief, pp. 9-29.) Frazier also argues that the circuit court erred in summarily dismissing his petition because, he says, Hurst announced a new rule that should have been applied retroactively to his case. (Frazier's brief, pp. 30-45.) Finally, Frazier contends that his claim is not subject to the procedural bars of Rule 32.2, Ala. R. Crim. P., because, he says, he could not have reasonably raised his Hurst claim at trial, on direct appeal, or in his first Rule 32 petition because Hurst was not decided until 2016. (Frazier's brief, pp. 45-52.)

First, Frazier's argument that Alabama's capital-sentencing scheme violates the United States Supreme Court's decision in Hurst is without merit. In Hurst, the defendant was convicted of first-degree murder and sentenced to death, but the United States Supreme Court vacated the death sentence after finding that Florida's capital-sentencing scheme violated the defendant's Sixth Amendment right to a jury trial. Hurst, ___ U.S. at ___, 136 S. Ct. at 622. According to Frazier, because Alabama's capital-sentencing scheme places the final sentencing determination in the hands of the judge and not the jury and because the scheme is almost identical to the scheme used in Florida, he is "entitled to a sentence of life without parole, or, alternatively, a new jury sentencing where the jury is the final arbiter of his fate." (Frazier's brief, p. 29.) We disagree.

In State v. Billups, 223 So. 3d 954 (Ala. Crim. App. 2016), this Court stated that Alabama's capital-sentencing scheme does not violate Hurst. See also Ex parte Bohannon, 222 So. 3d 525, 533 (Ala. 2016) (holding that Alabama's capital-sentencing scheme "is consistent with Apprendi, Ring, and Hurst and does not violate the Sixth Amendment"). In fact, contrary to Frazier's argument, we further held in Billups that Alabama's capital-sentencing scheme, unlike Florida's scheme in Hurst, allows the jury, not the trial court, to make the critical finding necessary for imposition of the death penalty and is, thus, constitutional and does not violate the United States Supreme Court's decision in Hurst. Billups, 223 So. 3d at 970. Additionally, shortly after this Court issued its decision in Billups, the Alabama Supreme Court addressed the effect of Hurst on Alabama's death-penalty statute in Ex parte Bohannon, 222 So. 3d 525 (Ala. 2016), and held that

Alabama's capital-sentencing scheme did not violate Hurst. Although on appeal Frazier challenges the reasoning underlining the Alabama Supreme Court's decision in Bohannon, he has done nothing that would cause us to question the Court's holding in that case or our holding in Billups. Thus, Frazier's Hurst claim is without merit.

Next, Frazier argues that the circuit court erred in summarily dismissing his petition because, he says, Hurst announced a new rule that should have been applied retroactively to his case. (Frazier's brief, pp. 30-45.) Once again, we disagree.

In Billups we held that the United States Supreme Court's decision in "Hurst did nothing more than apply its previous holdings in Apprendi [v. New Jersey, 530 U.S. 466 (2000),] and Ring [v. Arizona, 536 U.S. 584 (2002),] to Florida's capital-sentencing scheme. The Court did not announce a new rule of constitutional law, nor did it expand its holdings in Apprendi and Ring." _____ So. 3d at _____. See also Ex parte Bohannon, 222 So. 3d 525, 533 (Ala. 2016) ("The United States Supreme Court's holding in Hurst was based on an application, not an expansion, of Apprendi and Ring") (emphasis added). Furthermore, this Court has previously held that Apprendi and Ring do not apply retroactively. See Boyd v. State, 913 So. 2d 1113, 1146 (Ala. Crim. App. 2003) ("[T]his court has held that Apprendi claims are not applied retroactively to postconviction proceedings. Sanders v. State, 815 So. 2d 590, 592 (Ala. Crim. App. 2001). Our retroactivity analysis of Apprendi applies equally to Ring. Accordingly, Ring claims are not applied retroactively to postconviction proceedings."). Likewise, Hurst, which merely applied Apprendi and Ring, was decided after Frazier's conviction became final, and does not apply retroactively to Frazier.

Finally, to the extent that Frazier contends that his claim is not subject to the procedural bars of Rule 32.2, Ala. R. Crim. P., because, he says, he could not have reasonably raised his Hurst prior to now since that case was not decided until 2016, that argument is also without merit. (Frazier's brief, pp. 45-52.) This Court has recently held that "the Court's decision in Hurst, which merely applied its decision in Ring to a new set of facts, does not implicate the circuit court's jurisdiction and thus does not excuse the application

of the procedural bars contained in Rule 32.2, Ala. R. Crim. P." Lee v. State, [Ms. CR-15-1415, Feb. 10, 2017] ____ So. 3d ____, ____ (Ala. Crim. App. 2017).

In the present case, Frazier is challenging the constitutionality of Alabama's capital-sentencing scheme. The State contends, and we agree, that this claim is procedurally barred because it could have been, but was not, raised at trial as required by Rule 32.2(a)(3), Ala. R. Crim. P. Likewise, this claim is also procedurally barred because it could have been, but was not, raised on direct appeal as required by Rule 32.2(a)(5), Ala. R. Crim. P.

The State further contends, and we agree, that Frazier's petition is untimely under Rule 32.2(c), Ala. R. Crim. P. Frazier's claim here challenges his 1996 capital murder conviction. The instant petition was filed about 22 years after that date and 18 years after the certificate of judgment was issued in his direct appeal of his conviction and sentence. As such, this claim is time-barred under Rule 32.2(c), Ala. R. Crim. P., because Frazier's petition was filed well beyond the limitations period.

Finally, the State argues that Frazier's petition was successive under Rule 32.2(b), Ala. R. Crim. P. According to the State, Frazier argued in this first Rule 32 petition that Alabama's capital-sentencing scheme ran afoul of Apprendi v. New Jersey, 530 U.S. 466 (2000), and violated his rights under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. (Record in CR-01-1317 C. 117.) Relying on the fact that this argument appeared in Frazier's first Rule 32 petition and is similar to the Hurst claim that Frazier raised in the present petition, the State contends that Frazier's current petition is successive. (State's brief, pp. 15-17.) We agree.

The law governing successive postconviction petitions is found in Rule 32.2(b), Ala. R. Crim. P., which provides:

"If a petitioner has previously filed a petition that challenges any judgment, all subsequent petitions by that petitioner challenging any judgment arising out of that same trial or guilty-plea proceeding shall be treated as

successive petitions under this rule. The court shall not grant relief on a successive petition on the same or similar grounds on behalf of the same petitioner. A successive petition on different grounds shall be denied unless (1) the petitioner is entitled to relief on the ground that the court was without jurisdiction to render a judgment or to impose sentence or (2) the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice."

(Emphasis added). With regard to Rule 32.2(b), Ala. R. Crim. P., this Court has explained:

"Rule 32.2(b) is composed of two parts, and each part is a single sentence the applicability of which is determined by whether or not a particular claim has been presented in a previous petition. The first part of Rule 32.2(b), which pertains to claims that have been raised in a previous petition, states: 'The court shall not grant relief on a second or successive petition on the same or similar grounds on behalf of the same petitioner.' The second part of Rule 32.2(b), which pertains to claims that were not raised in a previous petition, states: 'A second or successive petition on different grounds shall be denied unless the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice.'

"A relatively recent Alabama Supreme Court case, Ex parte Walker, 800 So. 2d 135 (Ala. 2000), makes it clear that, for purposes of applying the procedural bar in Rule 32.2(b), the claims in a Rule 32 petition should be considered separately, and not collectively. The separate consideration of claims in a 'successive petition' necessarily entails a determination of which part of Rule 32.2(b) applies

to a particular claim.

"It is well settled under Alabama caselaw that where a particular claim in a Rule 32 petition has been raised in a previous petition (i.e., the claim falls under the first part of Rule 32.2(b)), for that claim to be precluded as successive under Rule 32.2(b), the claim must have been decided on the merits in the previous petition. See Ex parte Walker, citing Blount v. State, 572 So. 2d 498 (Ala. Crim. App. 1990). However, where a particular claim in a petition is new and was not raised in a previous petition (i.e., the claim falls under the second part of Rule 32.2(b)), the 'decided-on-the-merits' requirement is obviously inapplicable, because the claim is being raised for the first time. Under the second part of Rule 32.2(b), any new claim in a 'second or successive petition' is precluded as successive unless the petitioner can 'show[] both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice.'"

Whitt v. State, 827 So. 2d 869, 875 (Ala. Crim. App. 2001).

Thus, Rule 32.2(b) creates a two-pronged approach to addressing successive petitions. Under the first prong, the court must determine whether the petitioner has raised the "same or similar grounds" in a prior Rule 32 petition. See Ex parte Trawick, at 783. Under the second prong, the circuit court must determine if the successive petition raises a different ground and, if so, must deny that petition "unless one of two exceptions apply"--first, that the petitioner is entitled to relief on the ground that the court was without jurisdiction to render a judgment or to impose sentence or, second, that the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice. Id.

In applying the Rule 32.2(b), Ala. R. Crim. P., analysis to Frazier's present Rule 32 petition, it is clear that the present petition is successive. The claim raised in Frazier's first Rule 32 petition is very similar to the claim he raised in the present petition. Additionally, the circuit court considered the merits of this claim in Frazier's first Rule 32 petition and determined that it should have been, but was not, raised at trial or on direct appeal pursuant to Rules 32.2(a)(3) and (a)(5), Ala. R. Crim. P. (Record in CR-01-1317, C. 635.) Thus, under these circumstances, the circuit court did not err by summarily dismissing Frazier's successive Rule 32 petition.

Conclusion

For the foregoing reasons, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and Welch, Kellum, and Burke, JJ., concur.

IN THE SUPREME COURT OF ALABAMA



November 16, 2018

1171020

Ex parte Demetrius Terrence Frazier. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Demetrius Terrence Frazier v. State of Alabama) (Jefferson Circuit Court: CC-95-2606.61; Criminal Appeals : CR-17-0372).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on November 16, 2018:

Writ Denied. No Opinion. Shaw, J. - Stuart, C.J., and Bolin, Parker, Main, Wise, Bryan, Sellers, and Mendheim, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 16th day of November, 2018.

A handwritten signature in cursive script that reads "Julia Jordan Weller".

Clerk, Supreme Court of Alabama

Relevant Statutory Provisions Involved

Ala. Code § 13A-5-40 (1996) Capital offenses.

- (a) The following are capital offenses:
- (1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant.
 - (2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant.
 - (3) Murder by the defendant during a rape in the first or second degree or an attempt thereof committed by the defendant; or murder by the defendant during sodomy in the first or second degree or an attempt thereof committed by the defendant.
 - (4) Murder by the defendant during a burglary in the first or second degree or an attempt thereof committed by the defendant.
 - (5) Murder of any police officer, sheriff, deputy, state trooper, federal law enforcement officer, or any other state or federal peace officer of any kind, or prison or jail guard, while such officer or guard is on duty, regardless of whether the defendant knew or should have known the victim was an officer or guard on duty, or because of some official or job-related act or performance of such officer or guard.
 - (6) Murder committed while the defendant is under sentence of life imprisonment.
 - (7) Murder done for a pecuniary or other valuable consideration or pursuant to a contract or for hire.
 - (8) Murder by the defendant during sexual abuse in the first or second degree or an attempt thereof committed by the defendant.
 - (9) Murder by the defendant during arson in the first or second degree committed by the defendant; or murder by the defendant by means of explosives or explosion.
 - (10) Murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct.

- (11) Murder by the defendant when the victim is a state or federal public official or former public official and the murder stems from or is caused by or is related to his official position, act, or capacity.
- (12) Murder by the defendant during the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewmen thereon or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft.
- (13) Murder by a defendant who has been convicted of any other murder in the 20 years preceding the crime; provided that the murder which constitutes the capital crime shall be murder as defined in subsection (b) of this section; and provided further that the prior murder conviction referred to shall include murder in any degree as defined at the time and place of the prior conviction.
- (14) Murder when the victim is subpoenaed, or has been subpoenaed, to testify, or the victim had testified, in any preliminary hearing, grand jury proceeding, criminal trial or criminal proceeding of whatever nature, or civil trial or civil proceeding of whatever nature, in any municipal, state, or federal court, when the murder stems from, is caused by, or is related to the capacity or role of the victim as a witness.
- (15) Murder when the victim is less than fourteen years of age.
- (16) Murder committed by or through the use of a deadly weapon fired or otherwise used from outside a dwelling while the victim is in a dwelling.
- (17) Murder committed by or through the use of a deadly weapon while the victim is in a vehicle.
- (18) Murder committed by or through the use of a deadly weapon fired or otherwise used within or from a vehicle.
- (b) Except as specifically provided to the contrary in the last part of subdivision (a)(13) of this section, the terms “murder” and “murder by the defendant” as used in this section to define capital offenses mean murder as defined in Section 13A-6-2(a)(1), but not as defined in Section 13A-6-2(a)(2) and (3). Subject to the provisions of Section 13A-

5-41, murder as defined in Section 13A-6-2(a)(2) and (3), as well as murder as defined in Section 13A-6-2(a)(1), may be a lesser included offense of the capital offenses defined in subsection (a) of this section.

(c) A defendant who does not personally commit the act of killing which constitutes the murder is not guilty of a capital offense defined in subsection (a) of this section unless that defendant is legally accountable for the murder because of complicity in the murder itself under the provisions of Section 13A-2-23, in addition to being guilty of the other elements of the capital offense as defined in subsection (a) of this section.

(d) To the extent that a crime other than murder is an element of a capital offense defined in subsection (a) of this section, a defendant's guilt of that other crime may also be established under Section 13A-2-23. When the defendant's guilt of that other crime is established under Section 13A-2-23, that crime shall be deemed to have been "committed by the defendant" within the meaning of that phrase as it is used in subsection (a) of this section.

Ala. Code § 13A-5-43 (1996) Trial of capital offenses; discharge of defendant; lesser included offenses; sentencing.

(a) In the trial of a capital offense the jury shall first hear all the admissible evidence offered on the charge or charges against the defendant. It shall then determine whether the defendant is guilty of the capital offense or offenses with which he is charged or of any lesser included offense or offenses considered pursuant to Section 13A-5-41.

(b) If the defendant is found not guilty of the capital offense or offenses with which he is charged, and not guilty of any lesser included offense or offenses considered pursuant to Section 13A-5-41, the defendant shall be discharged.

(c) If the defendant is found not guilty of the capital offense or offenses with which he is charged, and is found guilty of a lesser included offense or offenses considered pursuant to Section 13A-5-41, sentence shall be determined and imposed as provided by law.

(d) If the defendant is found guilty of a capital offense or offenses with which he is charged, the sentence shall be determined as provided in Sections 13A-5-45 through 13A-5-53.

Ala. Code § 13A-5-45 (1996) Sentence hearing — Delay; statements and arguments; admissibility of evidence; burden of proof; mitigating and aggravating circumstances.

(a) Upon conviction of a defendant for a capital offense, the trial court shall conduct a separate sentence hearing to determine whether the defendant shall be sentenced to life imprisonment without parole or to death. The sentence hearing shall be conducted as soon as practicable after the defendant is convicted. Provided, however, if the sentence hearing is to be conducted before the trial judge without a jury or before the trial judge and a jury other than the trial jury, as provided elsewhere in this article, the trial court with the consent of both parties may delay the sentence hearing until it has received the pre-sentence investigation report specified in Section 13A-5-47(b). Otherwise, the sentence hearing shall not be delayed pending receipt of the pre-sentence investigation report.

(b) The state and the defendant shall be allowed to make opening statements and closing arguments at the sentence hearing. The order of those statements and arguments and the order of presentation of the evidence shall be the same as at trial.

(c) At the sentence hearing evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to the aggravating and mitigating circumstances referred to in Sections 13A-5-49, 13A-5-51 and 13A-5-52. Evidence presented at the trial of the case may be considered insofar as it is relevant to the aggravating and mitigating circumstances without the necessity of re-introducing that evidence at the sentence hearing, unless the sentence hearing is conducted before a jury other than the one before which the defendant was tried.

(d) Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Alabama.

(e) At the sentence hearing the state shall have the burden of proving beyond a reasonable doubt the existence of any aggravating circumstances. Provided, however, any aggravating circumstance which the verdict convicting the defendant establishes was proven

beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing.

(f) Unless at least one aggravating circumstance as defined in Section 13A-5-49 exists, the sentence shall be life imprisonment without parole.

(g) The defendant shall be allowed to offer any mitigating circumstance defined in Sections 13A-5-51 and 13A-5-52. When the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence.

Ala. Code § 13A-5-46 (1996) Sentence hearing — Conducted before jury unless waived; trial jury to sit unless impossible or impracticable; separation of jury; instructions to jury; advisory verdicts; vote required; mistrial; waiver of right to advisory verdict.

(a) Unless both parties with the consent of the court waive the right to have the sentence hearing conducted before a jury as provided in Section 13A-5-44(c), it shall be conducted before a jury which shall return an advisory verdict as provided by subsection (e) of this section. If both parties with the consent of the court waive the right to have the hearing conducted before a jury, the trial judge shall proceed to determine sentence without an advisory verdict from a jury. Otherwise, the hearing shall be conducted before a jury as provided in the remaining subsections of this section.

(b) If the defendant was tried and convicted by a jury, the sentence hearing shall be conducted before that same jury unless it is impossible or impracticable to do so. If it is impossible or impracticable for the trial jury to sit at the sentence hearing, or if the case on appeal is remanded for a new sentence hearing before a jury, a new jury shall be impanelled to sit at the sentence hearing. The selection of that jury shall be according to the laws and rules governing the selection of a jury for the trial of a capital case.

(c) The separation of the jury during the pendency of the sentence hearing, and if the sentence hearing is before the same jury which convicted the defendant, the separation of the jury during the time between the guilty verdict and the beginning of the sentence hearing, shall be governed by the law and court rules applicable to the separation of the jury during the trial of a capital case.

(d) After hearing the evidence and the arguments of both parties at the sentence hearing, the jury shall be instructed on its function and on the relevant law by the trial judge. The jury shall then retire to deliberate concerning the advisory verdict it is to return.

(e) After deliberation, the jury shall return an advisory verdict as follows:

(1) If the jury determines that no aggravating circumstances as defined in Section 13A-5-49 exist, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole;

(2) If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exist but do not outweigh the mitigating circumstances, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole;

(3) If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exist and that they outweigh the mitigating circumstances, if any, it shall return an advisory verdict recommending to the trial court that the penalty be death.

(f) The decision of the jury to return an advisory verdict recommending a sentence of life imprisonment without parole must be based on a vote of a majority of the jurors. The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors. The verdict of the jury must be in writing and must specify the vote.

(g) If the jury is unable to reach an advisory verdict recommending a sentence, or for other manifest necessity, the trial court may declare a mistrial of the sentence hearing. Such a mistrial shall not affect the conviction. After such a mistrial or mistrials another sentence hearing shall be conducted before another jury, selected according to the laws and rules governing the selection of a jury for the trial of a capital case. Provided, however, that, subject to the provisions of Section 13A-5-44(c), after one or more mistrials both parties with the consent of the court may waive the right to have an advisory verdict from a jury, in which event the issue of sentence shall be submitted to the trial court without a recommendation from a jury.

Ala. Code § 13A-5-47 (1996) Determination of sentence by court; pre-sentence investigation report; presentation of arguments on aggravating and mitigating circumstances; court to enter written findings; court not bound by sentence recommended by jury.

(a) After the sentence hearing has been conducted, and after the jury has returned an advisory verdict, or after such a verdict has been waived as provided in Section 13A-5-46(a) or Section 13A-5-46(g), the trial court shall proceed to determine the sentence.

(b) Before making the sentence determination, the trial court shall order and receive a written pre-sentence investigation report. The report shall contain the information prescribed by law or court rule for felony cases generally and any additional information specified by the trial court. No part of the report shall be kept confidential, and the parties shall have the right to respond to it and to present evidence to the court about any part of the report which is the subject of factual dispute. The report and any evidence submitted in connection with it shall be made part of the record in the case.

(c) Before imposing sentence the trial court shall permit the parties to present arguments concerning the existence of aggravating and mitigating circumstances and the proper sentence to be imposed in the case. The order of the arguments shall be the same as at the trial of a case.

(d) Based upon the evidence presented at trial, the evidence presented during the sentence hearing, and the pre-sentence investigation report and any evidence submitted in connection with it, the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in Section 13A-5-49, each mitigating circumstance enumerated in Section 13A-5-51, and any additional mitigating circumstances offered pursuant to Section 13A-5-52. The trial court shall also enter written findings of facts summarizing the crime and the defendant's participation in it.

(e) In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to Section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

Ala. Code § 13A-5-48 (1996) Process of weighing aggravating and mitigating circumstances defined.

The process described in Sections 13A-5-46(e)(2), 13A-5-46(e)(3) and Section 13A-5-47(e) of weighing the aggravating and mitigating circumstances to determine the sentence shall not be defined to mean a mere tallying of aggravating and mitigating circumstances for the purpose of numerical comparison. Instead, it shall be defined to mean a process by which circumstances relevant to sentence are marshalled and considered in an organized fashion for the purpose of determining whether the proper sentence in view of all the relevant circumstances in an individual case is life imprisonment without parole or death.

Ala. Code § 13A-5-49 (1996) Aggravating circumstances.

Aggravating circumstances shall be the following:

- (1) The capital offense was committed by a person under sentence of imprisonment;
- (2) The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person;
- (3) The defendant knowingly created a great risk of death to many persons;
- (4) The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping;
- (5) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
- (6) The capital offense was committed for pecuniary gain;
- (7) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or
- (8) The capital offense was especially heinous, atrocious or cruel compared to other capital offenses.

Ala. Code § 13A-5-50 (1996) Consideration of aggravating circumstances in sentence determination.

The fact that a particular capital offense as defined in Section 13A-5-40(a) necessarily includes one or more aggravating circumstances as specified in Section 13A-5-49 shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence. By way of illustration and not limitation, the aggravating circumstance specified in Section 13A-5-49(4) shall be found and considered in determining sentence in every case in which a defendant is convicted of the capital offenses defined in subdivisions (1) through (4) of subsection (a) of Section 13A-5-40.

Ala. Code § 13A-5-51 (1996) Mitigating circumstances — Generally.

Mitigating circumstances shall include, but not be limited to, the following:

- (1) The defendant has no significant history of prior criminal activity;
- (2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;
- (3) The victim was a participant in the defendant's conduct or consented to it;
- (4) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor;
- (5) The defendant acted under extreme duress or under the substantial domination of another person;
- (6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and
- (7) The age of the defendant at the time of the crime.

Ala. Code § 13A-5-52 (1996) Mitigating circumstances — Inclusion of defendant's character, record, etc.

In addition to the mitigating circumstances specified in Section 13A-5-51, mitigating circumstances shall include any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, and any other relevant mitigating circumstance which the defendant offers as a basis for a sentence of life imprisonment without parole instead of death.

Respectfully submitted,

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