No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

CEDRIC FLOYD, *Petitioner*,

v.

STATE OF ALABAMA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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June 24, 2019

CAPITAL CASE

QUESTIONS PRESENTED

1. In a capital case in which the defendant exercises his right not to testify, are the Fifth and Eighth Amendments violated when the State argues in favor of a death sentence based on the defendant's failure to express remorse?

2. Does the Constitution permit the imposition of death in a case where not all 12 jurors voted for a death sentence?

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at *76 (Ala. Crim. App. July 7, 2017);

APPENDIX B — Alabama Court of Criminal Appeals, Opinion affirming sentence, Floyd v. State, No. CR-13-0623, 2018 WL 3407966 (Ala. Crim. App. July 13, 2018);

APPENDIX C — Alabama Court of Criminal Appeals, order overruling application for rehearing, Floyd v. State, No. CR-13-0623 (Ala. Crim. App. Aug. 24, 2018).

APPENDIX D — Alabama Supreme Court, order denying petition for writ of certiorari, Ex parte Floyd, No. 1171092 (Ala. Feb. 22, 2019).

TABLE OF CITED AUTHORITIES

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Petitioner Cedric Floyd respectfully petitions for a writ of certiorari to review the judgement of the Alabama Court of Criminal Appeals in this case.

OPINIONS BELOW

The decision of the Alabama Court of Criminal Appeals affirming Mr. Floyd's conviction and remanding for additional factual findings as to sentencing is Floyd v. State, No. CR-13-0623, 2017 WL 2889566, at *76 (Ala. Crim. App. July 7, 2017), and is attached as Appendix A. The decision of that court affirming Mr. Floyd's

sentence on return to remand is Floyd v. State, No. CR-13-0623, 2018 WL 3407966 (Ala. Crim. App. July 13, 2018), and is attached as Appendix B. The order of the Alabama Court of Criminal Appeals denying rehearing is unreported and is attached as Appendix C. Floyd v. State, No. CR-13-0623 (Ala. Crim. App. Aug. 24, 2018). The order of the Alabama Supreme Court denying Mr. Floyd's petition for writ of certiorari is also unreported and is attached as Appendix D. Ex parte Floyd, No. 1171092 (Ala. Feb. 22, 2019).

JURISDICTION

The Alabama Court of Criminal Appeals affirmed Mr. Floyd's capital conviction on July 7, 2017, and affirmed his death sentence on return to remand on July 13, 2018. Floyd v. State, No. CR-13-0623, 2017 WL 2889566 (Ala. Crim. App. July 7, 2017); Floyd v. State, No. CR-13-0623, 2018 WL 3407966 (Ala. Crim. App. July 13, 2018). The Alabama Supreme Court denied Mr. Floyd's petition for a writ of certiorari on February 22, 2019. On May 15, 2019, Justice Thomas extended the time to file this petition for a writ of certiorari until June 24, 2019. Floyd v. Alabama, No. 18A1176 (U.S. May 15, 2019). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

The Sixth Amendment of the United States Constitution provides:

> 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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

> [N]or shall any State deprive any person of life, liberty, or property, wthout due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Relevant Facts.

Cedric Floyd and Tina Jones were involved in a serious, long-term romantic relationship, and at one point were engaged to be married.[1] (R. 2692, 3286.) At the time of the offense, Ms. Jones had begun to move on from the end of the engagement, but Mr. Floyd was experiencing extreme difficulty in accepting that the relationship was ending. Mr. Floyd had experienced significant trauma as a child that impacted his ability to cope with loss. He was raised by his grandmother after being abandoned by his mother and father as an infant. (R. 4223-26, 4364.) The abandonment created serious emotional conflict that impacted Mr. Floyd while he was growing up. (R. 4357-59, 4368.) Mr. Floyd's ability to form healthy relationships was further impacted when he was sexually assaulted by an older neighbor at the age of fourteen. (C. 2995; R. 4232, 4359.)

Mr. Floyd's capacity to effectively manage the stress he was experiencing from the end of the relationship was also impacted by potential frontal lobe damage. (C. 2853-54, 2995, 3000; R. 4299, 4358.) Forensic testing revealed Mr. Floyd had experienced a "clinically significant drop in IQ." (C. 2997; R. 4298.) The drop in Mr. Floyd's IQ, combined with his history of substance abuse and head trauma, led two

[1] "C." refers to the clerk's record. "RC." refers to the clerk's record on remand. "R." refers to the reporter's transcript.

doctors to conclude that there was a high probability that Mr. Floyd had brain damage. (R. 4298-99.) In the years leading up to the offense, Mr. Floyd twice experienced significant head trauma. (C. 2853-54, 2995; R. 4299, 4358.) In one incident, Mr. Floyd was knocked unconscious after being beaten in the skull with a pistol. (C. 2995.) Additionally, around 6 months before the offense, Mr. Floyd injured his head after losing control of his vehicle and crashing into a ditch. (C. 2853-54, 2995; R. 4358.) Medical testimony established that prefrontal lobe damage can be caused by head trauma, or through atrophy caused by "an individual that was consistently using illicit drugs, primarily cocaine, methamphetamines and drugs of that nature." (R. 4299.) Such damage leads to a variety of consequences, including "a decrease in the ability to recognize future consequences resulting from current actions." (C. 3000.)

As Mr. Floyd's relationship with Ms. Jones deteriorated, he was also experiencing increasing struggles with substance addiction. During that period, as a condition of Mr. Floyd's probation, he attended an "intensive outpatient" drug treatment program that included substance abuse testing and counseling. (R. 4278-79.) While in that program, Mr. Floyd tested positive for cocaine 14 times in the three months leading up to the offense (R. 803-05), including a positive test for cocaine three days before the offense. (R. 804-05.) Robert Brewer, Mr. Floyd's substance

abuse counselor in the program, concluded Mr. Floyd had a diagnostic impression of cocaine dependence. (R. 4278, 4281.) The addiction issues were corroborated by two separate doctors. (C. 2993, 2996, 2999.)

Mr. Floyd was subsequently indicted for capital murder in the course of a burglary. (C. 39.) At trial, police testimony indicated that officers effectively ceased conducting a thorough investigation of the offense at the point when Mr. Floyd made an inculpatory statement. (R. 3169-70, 3349, 3858.) Investigators failed to collect fingerprints or DNA from key evidence (R. 3148-49, 3150-56, 3200-06, 3159, 3313-14), failed to conduct gunshot residue tests (R. 3201, 3313), and failed to conduct bloodstain analysis of the scene (R. 3154, 3201-02, 3320). Defense counsel sought to undermine the investigation through expert testimony, but the trial court refused to qualify their witness as an expert and blocked their efforts to offer expert opinions. (R. 3537, 3589, 3602, 3620, 3648.)

The prosecution's theory at trial was that Mr. Floyd committed the offense because Ms. Jones ended the relationship, arguing in opening and again in closing that Mr. Floyd had a "need to control Tina Jones." (R. 2482; 3831-31.) In support of this theory, the State introduced extensive evidence of prior bad acts that were collateral to the offense, including a series of allegations of past instances of domestic violence. (R. 2816-19, 3186-89, 3216-17.) Defense counsel objected to the admission

of the past allegations, arguing that the incidents were highly prejudicial and were supported solely by improper hearsay testimony. (C. 1682-85; R. 2689, 2816-17, 3187-88.) The trial court repeatedly denied defense counsel's objections and allowed the prosecution to introduce the past allegations of violence. (R. 2691, 2817, 3188.)

Mr. Floyd's primary defense at trial was to demonstrate that he was intoxicated to the point where he could not form the requisite intent to commit the offense. In support of this theory, defense counsel introduced evidence that Mr. Floyd was intoxicated on the night of the offense, including testimony that Mr. Floyd abused cocaine, methamphetamine, and alcohol throughout the entire day leading up to the incident. (R. 2504, 2621, 3690, 3693, 3699, 3708-09, 3860; C. 2784-85.) Despite this evidence, the trial court denied defense counsel's requests for an intoxication instruction and a related manslaughter instruction. (R. 3809, 3813, 3816, 3819-20, 3821; C. 2104-07.) The jury was not charged on any lesser included offenses, inhibiting their ability to credit defense evidence regarding Mr. Floyd's intent, and, limited to a choice between acquittal and conviction, found Mr. Floyd guilty of capital murder. (R. 3889-92, 3898; C. 2109).

At the penalty phase, Mr. Floyd waived counsel and the presentation of evidence in front of the jury. (R. 4042, 4052, 4075, 4145.) The State alleged four aggravating circumstances, that the murder was committed during a burglary, that the

defendant was previously convicted of a felony involving the use or threat of violence, the offense was committed while Mr. Floyd was under sentence of imprisonment, and the offense was especially heinous, atrocious, or cruel. (C. 2177-79.)

Despite solely hearing evidence from the State, the jury's verdict for death was not unanimous, with 1 juror returning a life vote. (C. 2180.) During the judge's sentencing proceeding, in addition to the statutory aggravating circumstances, the State also argued Mr. Floyd should be sentenced to death because he "never once displayed any remorse for his deadly acts." (R. 4401.) At that stage Mr. Floyd elected to introduce mitigating evidence (R. 4206-11, 4220-56, 4276-81, 4294-303, 4342-46, 4353-69), but, in sentencing Mr. Floyd to death, the trial court rejected all mitigating circumstances (C. 2251-55). The trial court ignored evidence of several major categories of mitigation that were introduced, including that Mr. Floyd had been sexually assaulted, that Mr. Floyd had a clinically significant drop in IQ, and that multiple head traumas contributed to potential frontal lobe damage. (C. 2244-56; R. 4418-34.) The trial court also rejected uncontroverted mitigation concerning Mr. Floyd's childhood and substance addiction. (C. 2244-56; R. 4418-34.)

B. How the Federal Question Was Presented and Decided Below.

In his brief to the Alabama Court of Criminal Appeals, Mr. Floyd argued that, because he did not testify at trial, the invocation of his failure to express remorse violated the Fifth, Sixth, Eighth, and Fourteenth Amendments. The court found no reversible error holding that "the prosecutor's remarks were proper argument that Floyd's demeanor and behavior throughout the trial reflected no remorse." Floyd, 2017 WL 2889566 at *63.

REASONS FOR GRANTING THE WRIT

I. REVIEW SHOULD BE GRANTED TO DECIDE WHETHER, IN A CAPITAL CASE IN WHICH A DEFENDANT EXERCISES HIS RIGHT NOT TO TESTIFY, ARE THE FIFTH AND EIGHTH AMENDMENTS VIOLATED WHEN THE STATE ARGUES IN FAVOR OF A DEATH SENTENCE BASED ON THE DEFENDANT'S FAILURE TO EXPRESS REMORSE.

The Constitution protects criminal defendants from self-incrimination at both the guilt and penalty phases of a capital trial. Estelle v. Smith, 451 U.S. 454, 462-63 (1981); Griffin v. California, 380 U.S. 609, 614 (1965). There was no evidence submitted by either party at either phase of trial concerning Mr. Floyd's remorse about the offense. Although Mr. Floyd never testified at trial, the prosecution argued that his assertion of his rights to attend trial and not testify was evidence that he lacked remorse, claiming he did not "appreciate the seriousness of his crime," and "never once displayed any remorse for his deadly acts." (R. 4401.) The Alabama

Court of Criminal Appeals approved of the prosecution's argument, holding it was a "proper argument that Floyd's demeanor and behavior throughout the trial reflected no remorse." Floyd, 2017 WL 2889566 at *63. The lower court failed to address Mr. Floyd's argument that the only way for him to rebut the prosecution's comments would have been for him to testify and state that he felt remorse.

Whether a sentencer can rely on a defendant's silence at trial to reach a determination that the defendant had no remorse for the offense remains an open question. This Court explicitly declined to resolve this issue in Mitchell v. United States, 526 U.S. 314 (1999), stating that whether "silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of [sentencing] is a separate question. It is not before us, and we express no view on it." Id. at 330. More recently, this Court acknowledged that lower courts are divided on the issue, noting that there are "diverging approaches to the question" of whether a court can conclude a nontestifying defendant lacked remorse merely from their silence. White v. Woodall, 134 S. Ct. 1697, 1703 n. 3 (2014).

The Fourth Circuit, for example, has determined that reading Estelle and Mitchell together "suggest that the Fifth Amendment may well prohibit considering a defendant's silence regarding the nonstatutory aggravating factor of lack of remorse." United States v. Caro, 597 F.3d 608, 630 (4th Cir. 2010). The Third Circuit

has also held that the prosecution's criticism of a criminal defendant's failure to express remorse during the penalty phase of a capital trial violated the Fifth Amendment's privilege against self-incrimination. Lesko v. Lehman, 925 F.2d 1527, 1544-45 (3d Cir. 1991); see also United States v. Rodriguez, 959 F.2d 193, 197 n.3 (11th Cir. 1992) ("The Fifth Amendment privilege against self-incrimination applies at sentencing just as it does during any other stage of the prosecution."); Thomas v. United States, 368 F.2d 941, 942-46 (5th Cir. 1966) (enhanced penalty violated defendant's rights where court relied on defendant's silence to find lack of remorse).

Many state courts have similarly held it is unconstitutional for trial courts to rely on a defendant's exercise of the right against self-incrimination at trial to conclude that a defendant lacked remorse for the charged offense. See People v. Young, 987 P.2d 889, 894–95 (Colo. Ct. App. 1999) (when defendant invokes right to silence at trial and sentencing, he has "no opportunity to express remorse"); Jones v. State, 569 So. 2d 1234, 1240 (Fla. 1990) ("This Court has repeatedly stated that lack of remorse has no place in the consideration of aggravating circumstances."); Brake v. State, 939 P.2d 1029, 1033 (Nev. 1997) (sentencing court violated defendant's Fifth Amendment rights when defendant "maintained his innocence of the crime for which he was ultimately convicted and was unable to express remorse and admit guilt . . . without foregoing his right to not incriminate himself"); State v.

Willey, 44 A.3d 431, 441 (N.H. 2012) ("[U]nconstitutional for a court to draw an adverse inference of lack of remorse from a defendant's silence at sentencing."); State v. McClure, 537 S.E.2d 273, 275-76 (S.C. 2000) (comments on alleged lack of remorse violated defendant's right against self-incrimination); Hall v. State, 13 S.W.3d 115, 117 (Tex. App. 2000) ("[C]omment that directly focuses the jury's attention on the defendant's personal feelings of remorse, which can only be supplied through the defendant's own testimony, necessarily implicates the defendant's failure to testify.").

In contrast, the Seventh Circuit recently held that "silence can be consistent not only with exercising one's constitutional right, but also with a lack of remorse" and was properly considered by the sentencing court. Burr v. Pollard, 546 F.3d 828, 832 (7th Cir. 2008); see also United States v. Mikos, 539 F.3d 706, 718-19 (7th Cir. 2008) (defendant's silence may be considered regarding lack of remorse). The Tenth Circuit has also approved of a trial court drawing an adverse inference concerning a defendant's amenability to rehabilitation where the defendant asserted his right not to testify, explaining that "the circuit courts have readily confined Mitchell to its stated holding, and have allowed sentencing courts to rely on, or draw inferences from, a defendant's exercise of his Fifth Amendment rights for purposes other than determining the facts of the offense of conviction." Lee v. Crouse, 451 F.3d 598, 605,

n. 3 (10th Cir. 2006); see also United States v. Kennedy, 499 F.3d 547, 552 (6th Cir. 2007) (approving of adverse inferences drawn from defendant's silence at trial unrelated to facts about substantive offense).

Additionally, it is important to note that attempting to discern meaning from a defendant's silence at trial is in itself an entirely arbitrary and unreliable process. Silence is simply ambiguous and, as one recent study makes clear, "has no probative value in establishing a character trait or condition of remorselessness." Jules Epstein, Silence: Insolubly Ambiguous and Deadly: The Constitutional, Evidentiary and Moral Reasons for Excluding "Lack of Remorse" Testimony and Argument in Capital Sentencing Proceedings, 14 Temp. Pol. & Civ. Rts. L. Rev. 45, 47 (2004). Silence is a particularly poor "surrogate for remorselessness" considering the extraordinarily stressful environment inherent to a capital trial. Id. at 78. At the penalty phase of a capital trial, "silence may be a result of 'inherent pressures'-- abject fright or shock (having just received a verdict that, at a minimum, will result in confinement in jail for life)." Id.

Other factors may also explain a defendant's silence at trial, such as a vulnerability in the presence of authority or the impact of mental health issues. See James M. Doyle, The Lawyers' Art: "Representation" in Capital Cases, 8 Yale J.L. & Human. 417, 430-31 (1996) ("[t]he illiterate, the mentally ill, the retarded, the

abused, the poor, all the members of all of the outcast and stigmatized groups learn to depend on concealment, dissimulation, [and] noncooperation" in the face of authority); Rocksheng Zhong et al., So You're Sorry? The Role of Remorse in Criminal Law, 42 J. Am. Acad. Psychiatry L. 39, 39 (2014) ("Psychiatric symptoms can influence both the experience and expression of remorse."). Moreover, while many judges find remorse relevant at sentencing and "knowledge that a defendant has mental illness may color observers' interpretations of that person's behavior,"a recent study indicated that judges typically take a "categorical view" when considering the impact of a defendant's mental health on their expression of remorse: "that is, defendants are either mentally ill or not." Id., at 46. This is particularly harmful to defendants like Mr. Floyd, where evidence from trial indicated a "clinically significant drop in IQ," and repeated head trauma that suggested potential frontal lobe damage that was significantly impacting his mental processes. (C. 2853-54, 2995, 2997, 3000; R. 4298-9, 4358.) Mr. Floyd did not receive follow-up testing concerning the potential frontal lobe damage, raising an additional risk that the judge and jury misinterpreted his behavior without fully appreciating the context of his mental status. Zhong, supra *13, at 46. Given the ambiguous nature of silence, the risk that it will be misinterpreted is simply too great in a capital trial where heightened reliability is required. See Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

This Court has consistently held that the death penalty requires a "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson, 428 U.S. at 303; see also Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). The individualized sentencing process seeks to "replac[e] arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." Woodson, 428 U.S. at 303. This Court has also explained that "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." Roper v. Simmons, 543 U.S. 551, 568 (2005) (citing Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980) (plurality opinion)); see Espinosa v. Florida, 505 U.S. 1079, 1081 (1992) ("[I]n a State where the sentencer weighs aggravating and mitigating circumstances, the weighing of an invalid aggravating circumstance violates the Eighth Amendment."); Maynard v. Cartwright, 486 U.S. 356, 362 (1988) (overly vague aggravating circumstances fail to constitutionally limit sentencer's discretion).

Absent any relationship to Mr. Floyd's mitigation or to the State's aggravating factors, the consideration of remorse functioned as an independent aggravating

circumstance.[2] Allowing sentencing authorities to rely on vague, undefined aggravating circumstances is precisely the type of unguided, arbitrary sentencing process that this Court has continued to reject. Roper, 543 U.S. at 568; Maynard, 486 U.S. at 362. Because lack of remorse is not a valid aggravating factor in Alabama, the prosecution should not have been permitted to argue an alleged lack of remorse in favor of sentencing Mr. Floyd to death.[3] Espinosa, 505 U.S. at 1081. Allowing the trial court to rely on any factor the judge imagines relevant to render an offender

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[2]A number of studies have noted that a defendant's remorselessness is a persuasive consideration in capital trials, influencing sentencers to return death verdicts. See Scott E. Sundby, The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty, 83 Cornell L. Rev. 1557, 1570 (1998) (juror study identified defendant's perceived lack of remorse as most discussed factor in capital sentencing; nearly 70% of polled jurors indicated lack of remorse was leading factor in vote for death sentence); cf. Mark W. Bennett & Ira P. Robbins, Last Words: A Survey and Analysis of Federal Judges' Views on Allocution in Sentencing, 65 Ala. L. Rev. 735 (2014) (survey of federal district judges indicated "most important thing a defendant can do in an allocution is to demonstrate remorse"). Given that remorselessness is both an improper consideration under Alabama's enumerated aggravating circumstances and a powerful factor in capital sentencing, the consideration of Mr. Floyd's purported lack of remorse improperly interjected arbitrary considerations into the sentencing process.

[3]Alabama does not recognize a capital defendant's lack of remorse as an aggravating circumstance and makes no provision for non-statutory aggravating circumstances. See Ala. Code § 13A-5-49 (outlining Alabama's aggravating circumstances). In Mr. Floyd's case, the prosecution sought to prove four aggravating circumstances: that the murder was committed during a burglary, that the defendant was previously convicted of a felony involving the use or threat of violence, the offense was committed while Mr. Floyd was under sentence of imprisonment, and the offense was especially heinous, atrocious, or cruel. (C. 2177-79.)

eligible for death fails to "adequately channel[] the sentencer's discretion so as to prevent arbitrary results." Harris v. Alabama, 513 U.S. 504, 511 (1995). Moreover, reliance on a vague, undefined aggravating circumstance is acutely problematic given the role the judge plays in Alabama's capital sentencing process. See Woodward v. Alabama, 134 S. Ct. 405, 408 (2013) (Sotomayor, J., dissenting from denial of certiorari) ("Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures" that have "cast[] a cloud of illegitimacy over the criminal justice system").

This Court should grant certiorari review in this case to address whether the use of a nontestifying defendant's silence as evidence of lack of remorse is constitutionally permissible under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

II. THIS COURT SHOULD HOLD THIS PETITION IN LIGHT OF RAMOS V. LOUSIANA IN ORDER TO CLARIFY WHETHER A DEATH SENTENCE MAY BE CONSTITUTIONALLY IMPOSED IN THE ABSENCE OF A UNANIMOUS JURY VERDICT IN FAVOR OF DEATH.

This Court should also hold Mr. Floyd's petition in light of this Court's consideration of Ramos v. Louisiana, No. 18-5924, where this Court will determine whether the Fourteenth Amendment ensures the Sixth Amendment's guarantee of a unanimous verdict protects criminal defendants in State court proceedings. Mr. Floyd

was sentenced to death after his jury returned a non-unanimous eleven-to-one recommendation of death. Floyd, No. CR-13-0623, 2017 WL 2889566, at *1; see also Ala. Code § 13A-5-46(f) ("The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors."). On appeal, Mr. Floyd argued that the imposition of a death sentence after the jury returned a non-unanimous verdict violated the Fifth, Sixth, Eighth, and Fourteenth Amendments. In its decision, the Alabama Court of Criminal Appeals failed to directly address that claim, and instead cited Alabama precedent rejecting the application of this Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016) to Alabama's capital sentencing scheme. Floyd, No. CR-13-0623, 2017 WL 2889566, at *75 (citing Ex parte Bohannon, 222 So. 3d 525 (Ala. 2016)).

In State v.Ramos, 231 So. 3d 44 (La. Ct. App. 2017), the Louisiana Fourth Circuit Court of Appeals held, consistent with this Court's precedent, that a non-unanimous jury verdict was constitutional. See id. at 53-54 (citing Apodaca v. Oregon, 406 U.S. 404 (1972).) Although this Court has long recognized that "the jury's decision upon both guilt and whether the punishment of death should be imposed must be unanimous," Andres v. United States, 333 U.S. 740, 749 (1948), this Court has not previously applied the unanimity requirement to criminal defendants in state criminal trials. See Apodaca, 406 U.S. at 406; Johnson v. Louisiana, 406 U.S.

366, 369-71 (1972) (Powell, J., concurring in judgment).

Mr. Floyd's non-unanimous death sentence is directly implicated by the possibility of relief to the petitioner in Ramos. Alabama is the only remaining state that allows a defendant to be sentenced to death on the basis of a non-unanimous jury verdict. Hurst v. State, 202 So. 3d 40, 59 (Fla. 2016) (non-unanimous jury recommendations of death violate Sixth and Eighth Amendments); Rauf v. State, 145 A.3d 430 (Del. 2016) (capital sentencing law unconstitutional in part because authorizes non-unanimous verdict); see also Lockett v. Ohio, 438U.S.586, 604(1978) ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.").

Mr. Floyd's ability to challenge the constitutionality of his death sentence on the basis of Ramos is directly connected to the timing of this Court's decision. If this Court refuses to hold Mr. Floyd's petition pending the decision in Ramos, Mr. Floyd will face significant procedural obstacles to challenging the constitutionality of the non-unanimous jury verdict in his case based on that decision. See Green v. Fisher, 565 U.S. 34, 38 (2011) ("clearly established Federal law" limited to this Court's precedents at time of state court's decision on direct appeal); see also id. at 41 (petitioner missed "obvious means of asserting his claim,"including filing petition for writ of certiorari requesting remand in light of intervening decision). Accordingly,

this Court should hold Mr. Floyd's petition in light of the possibility that Ramos will have a significant impact on the question of whether the Constitution prohibits imposition of a death sentence in a case where the jury has not returned a unanimous verdict in favor of death.

CONCLUSION

Mr. Floyd was sentenced to death although the jury did not unanimously conclude that he should be executed. The trial court sentenced Mr. Floyd following an argument by the prosecution that alleged he lacked any remorse for the offense, even though lack of remorse is not an aggravating factor in Alabama and Mr. Floyd did not offer his remorse as a mitigating circumstance. The state courts below rejected Mr. Floyd's argument that the prosecution improperly commented on his purported lack of remorse where he exercised his right not to testify, but there is a split among jurisdictions on whether what the prosecution did in this case is constitutional. Mr. Floyd prays this Court will grant a writ of certiorari to review whether the State's argument in favor of a death sentence based on the defendant's failure to express remorse offends the Fifth, Eighth, and Fourteenth Amendments. Mr. Floyd also prays this Court will hold the petition pending the decision in Ramos and then grant, vacate, and remand for consideration of that decision by the Alabama courts.

Respectfully submitted,

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