No. 18-9838
CAPITAL CASE

In the
Supreme Court of the United States

CEDRIC FLOYD,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Cedric Floyd was convicted of murder, and a unanimous jury found beyond a reasonable doubt the existence of aggravating factors that made him eligible for the death penalty. At the sentencing phase before the trial judge, the prosecutor commented on Floyd's demeanor and actions during trial to argue that Floyd lacked remorse for his crime. The trial judge relied on the aggravating factors found by the jury and never mentioned the prosecutor's comments when the judge sentenced Floyd. Did the prosecutor's comments violate Floyd's constitutional rights?

2. Under Alabama law, before Floyd could become eligible for the death penalty, a jury had to unanimously find beyond a reasonable doubt both that he committed murder and that an aggravating factor existed. Should this case be held in abeyance pending the resolution of *Ramos v. Louisiana*, which concerns whether the Constitution permits defendants to be convicted of crimes by a non-unanimous jury?

RELATED CASES

Floyd v. State, No. CR-13-0623, Court of Criminal Appeals of Alabama. Judgment entered July 7, 2017.

Floyd v. State, No. CR-13-0623, Court of Criminal Appeals of Alabama. Judgment entered July 13, 2018.

Ex parte Floyd, No. 1171092, Supreme Court of Alabama. Judgment entered February 22, 2019.

Floyd v. Alabama, No. 18A1176, United States Supreme Court. Application granted May 15, 2019.

PARTIES

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE

A. Statement of the Facts

For two years, Cedric Floyd and Tina Jones, a single mother of four, had been involved in an on-again-off-again relationship.[1] The relationship was anything but smooth. In November 2009, Floyd bumped Jones's car when he saw her in the vehicle with another man. When she called the police, Floyd turned around and ran into the door of her car, knocked it off, and left the grill of his car at the scene.[2] A few months later, in the spring of 2010, police were called to Jones's house because she and Floyd were arguing. After an officer convinced Floyd to leave, Jones told the officer that although she was scared of Floyd, she was afraid to have him arrested because she feared what would happen when he was released from jail.[3] In November 2010, the police were called to Jones's home again, only to find Floyd with blood on his shirt and Jones with a busted lip. Jones explained that the two had argued, and Floyd had punched her in the mouth. While Floyd was arrested for domestic violence, Jones later dropped the charges against him.[4] Shortly thereafter, Jones finally broke up with Floyd and began dating another man.[5]

Jones lived with her daughter, her two sons, her uncle, James Jones, and his fiancée, Sarah Marshall. On the night of December 31, 2010, Jones stayed at her aunt's house because she was afraid of Floyd.[6] When James and Sarah awoke the

1. *Floyd*, 2017 WL 2889566, at *1; R. 2512–13. "R." citations refer to the trial record.
2. R. 3216–17.
3. R. 3186–87.
4. R. 2818–19.
5. *Floyd*, 2017 WL 2889566, at *1.
6. R. 2640–41, 2664, 3225–26.

next morning, they found Floyd sitting on in the den, smoking a cigarette.[7] James asked Floyd to leave the house, but Floyd was still there when he and Sarah left.[8]

That day, Jones reported to the Atmore Police Department that Floyd had gotten into her home and stolen her cell phone. She declined to press charges for theft and burglary because she was afraid of Floyd. An officer told Floyd not to return to Jones's home, warning him that if he did, he would be arrested on sight.[9]

Jones returned to the police department later that afternoon because Floyd had been sending threatening and sexual text messages to her daughter, Ky'Toria Lawson.[10] While the officers encouraged Ky'Toria to file a report, she declined because she thought Floyd would come after them.[11] Jones likewise declined to file a report because of her fear of Floyd.[12] Before the women left, an officer told them that the police would do a close patrol on their house that night. They explained that Jones should leave her porch light on, and if something was wrong, she should turn it off to alert the patrol officers.[13]

Floyd continued to send threatening text messages to Ky'Toria that day:

> I'll tell yo mama when she calls. I'm being as real as I can be right now. Call me or y'all are going to really hate you ever met me.[14]
>
> *
>
> K tell her to please pick up. I just got off da phone wit da dude Tim from Detroit that she f****d. I n-d some closure or I'm coming over there. Please don't make me send myself to prison cause it's not going to be

7. R. 2641–42.
8. R. 2641, 2653.
9. R. 3225–26, 3236–39.
10. R. 2515–16, 2844, 3240.
11. R. 2515–18
16. 2844.
13. R. 2844–45, 3241–42.
14. R. 3458.

> nice if I come. I ain't got shit to lose. Da only woman I let myself trust been f*****g da whole time.[15]

That night, Ky'Toria and a friend, Tramescka Peavy, arrived at Jones's house around 11:30 p.m.[16] Ky'Toria found Jones asleep in bed, then went to her own bedroom, where she fell asleep watching a movie.[17] She was awakened early on the morning of January 2 when Floyd came into her room and demanded her car keys. Ky'Toria asked Floyd why he was there, and he snatched Ky'Toria's and Tramescka's cell phones and ran out of the house.[18] Ky'Toria woke James and Sarah, then called 911.[19] When James discovered Jones lying face-down in a puddle of blood in the hallway outside her bedroom, Sarah called 911 again and requested an ambulance.[20] Unfortunately, Jones had suffered severe head trauma; paramedics found gray matter on the floor as well as blood.[21] She succumbed to the multiple gunshot wounds to her back, face, and head and was pronounced dead at the hospital.[22]

Back at Jones's house, investigators found a gun on her dresser, which was later matched to the bullets recovered from her body and the bullet found at the crime scene.[23] One of Jones's bedroom windows had been broken, and blood found on the

15. R. 3459–60.
16. R. 2548.
17. R. 2548–49, 2552, 2599, 2601.
18. R. 2553–54, 2603–05.
19. R. 2554–56, 2645–46, 2672.
20. R. 2556, 2607, 2646, 2673–74.
21. R. 2700, 2702, 2708–09, 2712.
22. R. 2890, 2917–39.
23. R. 2801, 3386–91, 3393.

glass belonged to Floyd.[24] Police also found Jones's and Ky'Toria's cell phones in Floyd's possession.[25]

At 1:11 a.m., Floyd called the Escambia County Sheriff's Department to turn himself in. He was taken into custody a few minutes later.[26] At 2:20 a.m., Floyd gave a voluntary statement in which he admitted to jumping over Jones's backyard fence and entering through her window.[27] He did not know how many times he shot Jones; he told the investigator that he also tried to shoot himself, but the gun would not work.[28] Floyd said that he sold his car the day before for $300 and the gun.[29] He explained that he was angry because he learned that Jones was seeing another man.[30] Floyd admitted that the jacket found at the scene belonged to him and stated that he left the gun in Jones's bedroom.[31] He concluded, "I f***** up—my baby gone for real—man."[32]

This was not Floyd's only statement to law enforcement. Later that morning, he told Glenn Carlee, the Director of Public Safety for the City of Atmore, "I messed up. I killed the woman I love. I shot her. . . . I wanted to be with her, but the gun wouldn't work."[33] Several months later, Floyd volunteered to Investigator Walden of the Atmore Police Department, "The bitch didn't get me a lawyer. She took me there

24. R. 3421–22.
25. R. 3297–98.
26. R. 2752, 2754–56, 2758, 2861, 2868.
27. R. 3269–73, 3280, 3285, 3288.
28. R. 3286, 3288, 3294.
29. R. 3288, 3299.
30. R. 3285, 3291–92.
31. R. 3294.
32. R. 3281, 3286, 3295.
33. R. 3476.

and brought me back."[34] On another date, Floyd told Walden, "I tried to talk to you the last time. The girl took me there and brought me back. I want to talk to you. If you could help me out and get a lower sentence."[35]

B. The Proceedings Below

A grand jury indicted Floyd for one count of burglary-murder, a capital offense.[36] On October 7, 2013, a jury unanimously found Floyd guilty as charged.

The penalty phase of Floyd's trial began the next day. Floyd attempted to waive his right to the jury's participation, but the State objected, and the trial court sustained the State's objection. Floyd then moved to represent himself during the penalty phase. After consulting with his attorneys and after a colloquy with Floyd, the trial court granted Floyd's request. When the State rested, Floyd declined to call any witnesses. The jury unanimously found the existence of four aggravating circumstances, and the jury recommended that Floyd be sentenced to death by a vote of eleven-to-one.[37]

At the conclusion of the penalty phase, Floyd requested that his attorneys be reappointed to represent him at the sentencing hearing before the judge, and the court granted this request. But two months later, at the court's January 6, 2014, sentencing hearing, Floyd once again moved to represent himself. After consulting with his attorneys and after a colloquy with the court, however, Floyd withdrew his motion. Floyd called four witnesses to testify on his behalf. After a recess to consider

34. R. 3180.
35. R. 3184.
36. ALA. CODE § 13A-5-40(a)(4) (1975).
37. *Floyd*, 2017 WL 2889566, at *1.

the evidence, the trial court followed the jury's recommendation and sentenced Floyd to death on January 27, 2014.

The Alabama Court of Criminal Appeals affirmed Floyd's capital murder conviction but remanded the case for the trial court to correct its sentencing order and to make specific findings of fact as to why the "heinous, atrocious, or cruel" aggravating circumstance was applicable to Floyd's case.[38] The trial court complied and filed an amendment to its sentencing order on January 26, 2018. On remand, the Court of Criminal Appeals affirmed Floyd's death sentence.[39] The Alabama Supreme Court denied certiorari on February 2, 2019,[40] and the present petition for writ of certiorari followed.

REASONS FOR DENYING THE PETITION

During judicial sentencing, the prosecutor commented on Floyd's conduct during the trial as evidence that Floyd lacked remorse for his crime. The trial court never addressed that comment, but did expressly rely on four aggravating circumstances found by the jury before the court sentenced Floyd to death. Floyd asserts that his case presents the question whether the State violated his Fifth and Eighth Amendment rights when it argued in favor of a death sentence based on Floyd's apparent lack of remorse. But there is no clear split on this issue, especially in the context of judicial sentencing. Indeed, Floyd cites no case that considered a prosecutor's comments made to a sentencing judge. Moreover, there is no reason to

38. *Floyd v. State*, CR-13-0623, 2017 WL 2889566 (Ala. Crim. App. July 17, 2017).
39. *Floyd v. State*, CR-13-0623, 2018 WL 3407966 (Ala. Crim. App. July 13, 2018).
40. *Ex parte Floyd*, No. 1171092 (Ala. Feb. 22, 2019).

think the trial court relied on the prosecutor's comments at all. Thus, Floyd's case is a poor vehicle for considering a narrow, splitless question. His petition should be denied.

Floyd's second issue likewise lacks merit. He contends that Alabama's capital sentencing regime is unconstitutional because the jury's non-binding penalty recommendation to the sentencing judge need not be unanimous. But this Court upheld Alabama's sentencing regime just twenty-four years ago in *Harris v. Alabama*.[41] And that regime makes a defendant eligible for the death penalty only after a unanimous jury finds that the defendant is guilty of murder and that an aggravating circumstance exists. Thus, Floyd's sentence is constitutional, and nothing the Court will consider in *Ramos v. Louisiana* could cast doubt on that conclusion. The Court, therefore, should deny Floyd's petition.

I. The Court should decline to review Floyd's claim that his Fifth, Eight, and Fourteenth Amendment rights were violated when the State argued that Floyd lacked remorse at Floyd's judicial sentencing hearing.

After the jury found that Floyd committed murder and that four aggravating circumstances existed, the jury was dismissed, and the trial court conducted a sentencing hearing. During that hearing, the prosecutor argued among other things that Floyd's demeanor and actions throughout trial suggested he lacked remorse for his actions. The trial judge sentenced Floyd to death, never mentioning the

41. 513 U.S. 504 (1995).

prosecutor's comment about remorse, but instead relying on the four aggravating circumstances found by the jury.

Floyd did not object to the prosecutor's comments at trial, but now contends that they violated Floyd's Fifth, Eighth, and Fourteenth Amendment rights.[42] And Floyd further asserts that courts are divided on whether such statements are permissible. Floyd's petition, however, does not merit this Court's review for at least two reasons.

First, there is no division of authority regarding cases like Floyd's, in which a prosecutor comments on a defendant's actions to a sentencing judge.

Second, even if there was a split on Floyd's proposed question, this case is an exceedingly poor vehicle by which to consider it. Indeed, while Floyd contends that "the prosecution argued that [Floyd's] assertion of his rights to attend trial and not testify was evidence that he lacked remorse,"[43] the appellate court found the exact opposite, declaring it "abundantly clear that the prosecutor was not commenting, either directly or indirectly, on Floyd's failure to testify."[44] Moreover, the statement was made to a trial court, which is presumed to follow the law, and there is no indication that the court relied on the prosecutor's statement rather than the aggravating circumstances cited in the court's sentencing order. Floyd's claim is thus meritless, and this is not the proper case to resolve the alleged circuit split regarding the consideration of remorse during sentencing.

42. Pet. 9.
43. *Id.* at 10.
44. *Floyd*, 2017 WL 2889566 at *63.

A. Certiorari should be denied because the underlying issue is not cert-worthy.

First, this Court should deny certiorari on this question because Floyd seeks only fact-bound error correction.[45] Floyd has not alleged compelling grounds for this Court to grant certiorari review. The instant claim involves a specific set of circumstances unique to Alabama's capital sentencing protocol. The State's comments to the trial court regarding Floyd's lack of remorse occurred at the sentencing hearing, which occurred after the jury was released following their death recommendation. Therefore, a decision in this case would be of such narrow scope and limited precedential value that it is not worthy of certiorari.

Floyd attempts to argue that this case is the proper vehicle to resolve a circuit split regarding the consideration of lack of remorse as a violation of a defendant's Fifth Amendment right to remain silent.[46] This is not the proper case to resolve this purported split, for the State did not comment on Floyd's failure to testify, but instead on actions he took during a nearly four-week trial,[47] and those comments were made to a sentencing judge, not a jury.

The cases Floyd cites address instances in which the state commented on the lack of remorse exhibited by the defendant in front of a jury or comments from the trial judge before the jury,[48] and as such, are not analogous to the facts of Floyd's case. Moreover, Floyd is unable to demonstrate that a circuit split exists regarding

45. *See New York City Transit Authority v. Beazer*, 440 U.S. 568, 571 n.6 (1979).
46. *See* Pet. 10.
85. *Floyd*, 2017 WL 2889566 at *63
48. *See Griffin v. California*, 380 U.S. 609, 615 (1965); *Ex parte Wilson*, 571 So. 2d 1251, 1262 (Ala. 1990); *Windsor v. State*, 593 So. 2d 87, 91 (Ala. Crim. App. 1991).

how the courts treat comments from the prosecutor to the sentencing judge alone. Here, the federal cases that Floyd relies on involve either comments that the prosecutor made to the jury or comments from the court requesting that the defendant admit guilt and accept responsibility for his actions.[49] These cases are not analogous to the prosecutor's comments in Floyd's judicial sentencing hearing.

Floyd attempts to further develop this alleged circuit split by referencing several cases from other state courts. Like the federal cases he cites, those cases do not involve a prosecutor's comments to the sentencing judge, but rather comments from the trial court or the prosecutor making improper arguments to the jury.[50]

All that is alleged to have happened in this case is that the prosecutor argued to the sentencing judge that Floyd's conduct during trial evinced a lack of remorse. Floyd does not cite a single case in which a court considered whether such comments

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49. *See United States v. Caro*, 597 F.3d 608 (4th Cir. 2010) (government referred to Caro's silence in closing arguments to jury); *Burr v. Pollard*, 546 F.3d 828 (7th Cir. 2008) (sentencing judge commented on defendant's lack of remorse); *United States v. Mikos*, 539 F.3d 706 (7th Cir. 2008) (jury found defendant demonstrated lack of remorse); *United States v. Kennedy*, 499 F.3d 547 (6th Cir. 2007) (approving trial court's decision to hold defendant's refusal to complete psychological exam against defendant); *Lee v. Crouse*, 451 F.3d 598, 605 n.3 (10th Cir. 2006) (noting that Supreme Court has not answered question as to whether court can hold defendant's silence against him); *United States v. Rodriguez*, 959 F.2d 193 (11th Cir. 1992) (court balanced defendant's acceptance of responsibility for crime against his intent to appeal); *Lesko v. Lehman*, 925 F.2d 1527 (3d Cir. 1991) (prosecutor referred to defendant's lack of remorse in closing arguments to jury during penalty phase); *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966) (remanding for resentencing after district court imposed maximum possible sentence when defendant refused to admit involvement).

50. *See People v. Young*, 987 P.2d 889 (Colo. Ct. App. 1999) (trial court commented on defendant's lack of remorse); *Jones v. State*, 569 So. 2d 1234 (Fla. 1990) (prosecutor asked jury if they saw any remorse in defendant during closing argument of guilt phase); *Brake v. State*, 939 P.2d 1029 (Nev. 1997) (trial court noted that defendant refused to admit guilt and show remorse when it imposed sentence); *State v. Willey*, 44 A.3d 431 (N.H. 2012) (trial court admonished defendant for lack of remorse during sentencing and imposed a harsh sentence); *State v. McClure*, 537 S.E. 2d 273 (S.C. 2000) (prosecutor argued defendant's lack of remorse to jury during penalty-phase closing argument); *Hall v. State*, 13 S.W. 3d 115 (Tex. App. 2000) (prosecutor argued defendant showed no remorse during closing argument to jury).

made to a sentencing judge run afoul of the Fifth, Eighth, or Fourteenth Amendments. There is no split of authority on that issue and no reason for the Court to consider that issue here. Floyd's petition should be denied.

B. The trial court is presumed to understand the law, and there is no indication that the trial court failed to render an appropriate sentence.

Floyd's petition lacks merit for the independent reason that there is no indication in the record that the trial court based its sentencing determination upon improper evidence or argument of counsel.

At Floyd's judicial sentencing hearing in January 2014—after the jury had unanimously found the existence of four aggravating circumstances and recommended death eleven-to-one—Floyd's counsel presented mitigation evidence to the trial court. During closing arguments, the State contended that Floyd's demeanor and actions during trial indicated a lack of remorse for his actions:

> He was cold and uncaring. His behavior was more about whether he was comfortable, whether he had a pen to write with, whether the handcuffs were too tight or the leg brace was too tight or constricting or whether the stun vest or belt was too tight. He appeared to behave in a manner that would suggest that this was all a game to him of whether he could out-best the sheriff's department rather than conduct himself in a manner that showed remorse or that he appreciated the seriousness of his crime.[51]

Of note, this argument was made solely to the trial judge, not to the jury. Moreover, the State was not commenting on Floyd's failure to testify, but rather on his demeanor and actions at trial. The Court of Criminal Appeals thus correctly found no error:

> It is abundantly clear that the prosecutor was not commenting, either directly or indirectly on Floyd's failure to testify. Rather, the

51. R. 4401.

> prosecutor's remarks were proper argument that Floyd's demeanor and behavior throughout the trial reflect no remorse. "[A] prosecutor may properly comment on a capital defendant's lack of remorse." *Smith v. State*, 112 So. 3d 1108, 1145 (Ala. Crim. App. 2012) Moreover, "'[t]he conduct of the accused or the accused demeanor during the trial is a proper subject of comment.'" *Thompson v. State*, 153 So. 3d 84, 175 (Ala. Crim. App. 2012) (quoting *Wherry v. State*, 402 So. 2d 1130, 1133 (Ala. Crim. App. 1981)). There was no error, much less plain error, in the complained-of remark by the prosecutor.[52]

Floyd's claim that the trial court's "consideration of remorse functioned as an independent aggravating factor"[53] is meritless. First, "[t]rial judges are presumed to know the law and to apply it in making their decisions."[54] Any similarities between this case and those cited by Floyd regarding the comment about Floyd's lack of remorse are tenuous at best, considering the fact that this comment was presented to a trial judge, not a jury.

Second, there is no indication in the record that Floyd's lack of remorse served as an aggravating factor. Here, the jury recommended death prior to the State making the comment regarding Floyd's lack of remorse. In so doing, the jury unanimously found that the State proved four aggravating circumstances beyond a reasonable doubt: (1) the murder was committed during the course of a burglary, (2) the murder was committed while Floyd was under a sentence of imprisonment, (3) the murder was committed after Floyd had previously been convicted of a felony involving the use or threat of violence, and (4) the murder was especially heinous,

52. *Floyd*, 2017 WL 2889566, at *63.
53. Pet. 15.
54. *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2014).

atrocious, or cruel when compared to other capital offenses.[55] The trial court found precisely these aggravating factors,[56] then concluded that these factors outweighed the mitigating circumstances:

> The law required this Court to weigh the aggravating circumstances against the mitigating circumstances and to consider the jury's recommended sentence.
>
> The Court has weighed the aggravating circumstances against the mitigating circumstances. Heavy weight is placed on the jury's recommendation.
>
> The Court is a great believer in the jury system and following the jury when at all possible. Aside from the jury's recommendation, this Court is convinced that the aggravating factors clearly outweigh the mitigating factors. The Defendant cruelly terrorized the victim before killing her. Justice must be served. The only way justice can be served in this case is by a sentence of death.[57]

In sum, the prosecution did not err in Floyd's case, but even if it had, any improper argument was before the trial court alone and was not relied on by the court. Instead, the court found only the aggravating circumstances found by the jury and accepted the jury's recommendation that Floyd receive the death penalty. Floyd's claim is meritless.

II. This Court should not hold Floyd's petition in abeyance pending the outcome of *Ramos v. Louisiana*.

Floyd argues that this Court should hold his petition in abeyance pending the outcome of *Ramos v. Louisiana*[58] because after the jury unanimously found that he was guilty of murder and that four aggravating circumstances existed, the jury voted

55. *Floyd*, 2017 WL 2889566, at *1.
56. C. 2249–51. "C." citations refer to the clerk's record on direct appeal.
57. C. 2255.
58. No. 18-5924.

eleven-to-one to issue a non-binding death penalty recommendation to the trial court. Floyd's contention is meritless.

Ramos asks whether the rule of *Apodaca v. Oregon*[59] and *Johnson v. Louisiana*[60] permitting non-unanimous jury verdicts should remain constitutional. Both *Apodaca* and *Johnson* were concerned with convictions, not with questions of penalty-phase unanimity, much less penalty-phase unanimity in cases in which the *court* is the ultimate sentencer. This Court has never held that a defendant sentenced to death must be so sentenced by a unanimous jury—indeed, this Court has upheld sentencing schemes in which the jury's penalty-phase vote is a mere recommendation to the trial court, such as Alabama's former sentencing scheme, which the Court approved in *Harris v. Alabama*.[61] Alabama relied on *Harris* to sentence hundreds of murderers, including Floyd, before amending its capital sentencing scheme in 2017. As Justice Kennedy noted, "the States' settled expectations deserve our respect."[62] Thus, Floyd's potential claim would hinge on this Court first finding that non-unanimous guilt verdicts are unconstitutional in *Ramos*, then extending that holding to penalty-phase verdicts, and finally overturning *Harris*. This chain of events is simply too tenuous to provide cause for Floyd's petition to be held in abeyance pending a decision in *Ramos*.

59. 406 U.S. 404 (1972).
60. 406 U.S. 356 (1972).
61. 513 U.S. 504 (1995).
62. *Ring*, 536 U.S. at 613 (Kennedy, J., concurring).

CONCLUSION

For the foregoing reasons, this Court should deny Floyd's petition for writ of certiorari.

Respectfully submitted,

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