No.

IN THE
SUPREME COURT OF THE UNITED STATES

DEMETRIUS FRAZIER,
Petitioner,
v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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October 31, 2019

CAPITAL CASE

Question Presented

Whether the Eleventh Circuit should have issued a certificate of appealability because reasonable jurists could disagree over the district court's resolution of the following three issues:

1) Whether Alabama's capital sentencing scheme, which relegated the jury to an advisory role and empowered the judge to make the findings necessary to impose a death sentence, violated Mr. Frazier's rights under the Sixth and Fourteenth Amendments?

2) Whether Mr. Frazier's petition constituted a second or successive petition under 28 U.S.C. § 2244 where the legality of Mr. Frazier's detention under the rule announced by the United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), had not been determined by a judge or court of the United States on a prior application for a writ of habeas corpus?

3) If, under the facts of this case, Mr. Frazier's petition did constitute a second or successive petition, whether 28 U.S.C. § 2244 unconstitutionally suspends the writ of habeas corpus as applied to the circumstances of this case?

List of Proceedings

Underlying Trial:

Circuit Court of Jefferson County, Alabama:
State of Alabama v. Demetrius Frazier, CC-95-2606
Judgement Entered: August 8, 1996

Direct Appeal:

Alabama Court of Criminal Appeals:
Frazier v. State, 758 So. 2d 577 (Ala. Crim. App. 1999)
Judgement Entered: January 15, 1999

Alabama Supreme Court:
Ex parte Frazier, 758 So. 2d 611 (Ala. 1999)
Judgement Entered: December 30, 1999

United States Supreme Court:
Frazier v. Alabama, 121 S. Ct. 109 (2000)
Judgement Entered: October 2, 2000

2001 Rule 32 and Appeal:

Circuit Court of Jefferson County, Alabama:
Frazier v. State, CC-95-2606.60
Judgement Entered: February 8, 2002
Remanded by Alabama Court of Criminal Appeals: February 23, 2003
Judgement Entered: May 7, 2003

Alabama Court of Criminal Appeals:
Frazier v. State, 884 So. 2d 908 (Ala. Crim. App. 2003)
Judgement Entered Remanding Case: February 23, 2003
Judgement Entered Affirming Dismissal: August 15, 2003

Alabama Supreme Court:
Ex Parte Demetrius Terrence Frazier, No. 1022171
Judgement Entered: January 30, 2004

2004 Federal Habeas (2254) and Appeal:

United States District Court for the Northern District of Alabama, Southern Division:
Frazier v. Bouchard, 2:04-CV-00211
Judgement Entered: September 28, 2007
Court Denied Rule 59(e) Motion: September 22, 2008

Eleventh Circuit Court of Appeals:
Frazier v. Bouchard, 661 F.3d 519 (11th Cir. 2011)
Judgement Entered: October 25, 2011

United States Supreme Court:
Frazier v. Thomas, 133 S. Ct. 410 (2012)
Judgement Entered: October 1, 2012

2017 R32 and Appeal:

Circuit Court of Jefferson County, Alabama:
Frazier v. State, CC-1995-2606.61
Judgement Entered: November 14, 2017

Alabama Court of Criminal Appeals:
Frazier v. State of Alabama, No. CR-17-0372
Judgement Entered: June 29, 2018

Alabama Supreme Court:
Frazier v. State of Alabama, No. 1171020
Judgement Entered: November 16, 2018

Unites States Supreme Court:
Frazier v. State of Alabama, No. 18-8670
Judgement Entered: October 7, 2019

2018 Federal Habeas (2254):

United States District Court for the Northern District of Alabama, Southern Division:
Frazier v. Dunn, 2:18-CV-01899
Judgement Entered: June 18, 2019

Eleventh Circuit Court of Appeals:
Frazier v. Commissioner, AL Dept. of Corrections, No. 19-12521-P
Certificate of Appealability Denied: August 2, 2019

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PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The Eleventh Circuit denied Mr. Frazier's motion for a certificate of appealability. *Frazier v. Commissioner, AL Dept. of Corrections*, No. 19-12521-P (11th Cir. August 2, 2019). This order is included in the Petitioner's Appendix. (Pet. App. A-1.) Prior to that, the District Court for the Northern District of Alabama, dismissed Mr. Frazier's petition for a writ of habeas corpus. *Frazier v. Dunn*, 2:18-CV-01899 (N.D. Ala. June 18, 2019). This order is also included in the Petitioner's Appendix. (Pet. App. A-2.)

Jurisdiction

This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254. The district court dismissed the petition and denied a certificate of appealability on June 18, 2019. The Eleventh Circuit Court of Appeals issued its order denying a certificate of appealability on August, 2, 2019. This petition is timely filed within 90 days of this denial. *See* Supreme Court Rule 13.

Relevant Constitutional and Statutory Provisions Involved

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

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

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

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

28 U.S.C. § 2253 dictates:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

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

Ala. Code § 13A-5-40 (1996); Pet. App. C-1.
Ala. Code § 13A-5-43 (1996); Pet. App. C-3.
Ala. Code § 13A-5-45 (1996); Pet. App. C-4.

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

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

Statement of the Case

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

At the time of Mr. Frazier's trial, a person could not be sentenced to death until (1) a finding was made that at least one aggravating circumstance existed, and (2) a finding was made that whatever mitigating circumstances existed did not outweigh the aggravating circumstances. *See* Ala. Code § 13A-5-46(e)(1996); Ala. Code § 13A-5-48 (1996). Alabama's sentencing scheme placed the finding of these critical elements – the existence of both aggravators and mitigators and the relative weight of the sum of each in relation to the other – in the hands of the court, not the jury. Ala. Code § 13A-5-47(d) and (e) (1996). The jury played only an "advisory" role at sentencing. Ala. Code § 13A-5-46 (1996). The trial court was required to consider the jury's advisory verdict, but ultimately base the sentence on its own factual findings. Ala. Code § 13A-5-47(e) (1996).

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

Under these laws, on June 5, 1996, a jury convicted Mr. Frazier of one count of capital murder. (Vol. 4, Tab. #R-18, TR. 510-512.)[2] On June 7, 1996, by a vote of 10-2, the jury recommended a death sentence. (Vol. 4, Tab. #R-24, TR. 577.) On August 8, 1996, a sentencing hearing was held before the trial court, without a jury, where the court independently made the factual findings necessary to sentence Mr. Frazier to death. (Vol. 4, Tab. #R-24-R-25, TR. 581-591.) The court found the existence of one aggravating circumstance: murder during the commission of a robbery. (Vol. 6, Tab. #R-28, TR. 13). The court found one statutory mitigating circumstance: that Mr. Frazier "was nineteen at the time of this offense." *Id.* at 15. With regard to non-statutory mitigating circumstances, the court found that "[n]othing from proceedings conducted before this court or the presentence report suggests a basis for § 13A-5-52 mitigation." *Id.* Next, the trial court weighed the aggravating and mitigating circumstances it found, determined that the aggravating circumstance outweighed the mitigating circumstance, and based on its independent findings, sentenced Mr. Frazier to death. *Id.* Mr. Frazier's capital murder conviction was affirmed on direct appeal. *Frazier v. State*, 758 So. 2d 577 (Ala. Crim. App. 1999); *Ex parte Frazier*, 758 So. 2d 611 (Ala. 1999). Mr. Frazier sought state post-conviction relief but was denied. *See Frazier v. State*, 884 So. 2d 908 (Ala. Crim. App. 2003). He then sought federal habeas corpus review, which was also denied. *See Frazier v. Bouchard*, 661 F.3d 519 (11th Cir. 2011).

[2] Cites in this format (Vol. #, Tab. #, TR. #) reference the Habeas Corpus Checklist, Doc. 13 in the district court record.

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

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

This Court expanded the principles articulated in *Apprendi v. New Jersey*, 530 U.S. 466 (2000)[3] and *Ring v. Arizona*, 536 U.S. 584 (2002). *Ring* had held that "[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring*, 536 U.S. at 589. *Hurst* went beyond *Ring* and held that a judge cannot make independent factual findings, even if a jury has rendered an advisory verdict. *Hurst*, 136 S. Ct. at 622. For the first time, it held that every finding that that is *necessary* for a sentence of death, must be found by a jury beyond a reasonable doubt. *Id.* (emphasis added).

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

C. Alabama denied Mr. Frazier relief and directly contradicted this Court's holding in *Hurst v. Florida*.

On January 11, 2017, Mr. Frazier filed a successive Rule 32 petition arguing that Alabama's capital sentencing scheme was unconstitutional based on this Court's decision in *Hurst*. The Circuit Court of Jefferson County dismissed this petition in a one-line order on November 14, 2017. The Alabama Court of Criminal Appeals (ACCA) affirmed that order in an unpublished memorandum opinion. *See* (Pet. App. B-1). The ACCA held that "Alabama's capital-sentencing scheme does not violate *Hurst*." *Frazier v. State of Alabama*, No. CR-17-0372, unpublished slip op. at 8 (Ala. Crim. App. June 29, 2018) (Pet. App. B-8). Despite the fact that a judge independently determined and weighed the aggravating and mitigating circumstances in Mr. Frazier's case, the ACCA held that the Alabama law "allows the jury, not the trial court, to make the critical finding necessary for imposition of the death penalty and is, thus, constitutional." *Id.* The ACCA went on to hold that *Hurst* did not announce a new rule but instead merely applied *Apprendi* and *Ring*. *Id.* at 9. It concluded by holding that because *Hurst* did not apply in Alabama and was not retroactive, this successive Rule 32 petition based on *Hurst* was subject to procedural bars. *Id.* Mr. Frazier's petition for certiorari to the Alabama Supreme Court was denied. *Frazier v. State of Alabama*, No. 1171020 (Ala. Nov. 16, 2018).

D. The district court denied relief and failed to issue a certificate of appealability.

On November 16, 2018, Mr. Frazier filed this action, pursuant to 28 U.S.C. § 2254. (Doc. 1; Pet. App. A-6) On May 14, 2019, the State filed its answer and motion

to dismiss. (Doc. 14; Pet. App. A-46) On June 14, 2019, Mr. Frazier filed his reply and objection to the motion to dismiss. (Doc. 15; Pet. App. A-64.)

The district court held that it did not have jurisdiction to consider the merits of Mr. Frazier's petition because "this court previously dismissed Frazier's first § 2245 [sic] petition with prejudice in a judgment on the merits [which means] his instant § 2254 petition is second or successive." (Doc. 16 at 2; Pet. App. A-3.) It concluded that it must dismiss this petition because Mr. Frazier "did not seek or obtain authorization from the Eleventh Circuit before filing his instant § 2254 petition." *Id.*

The court did not consider Mr. Frazier's argument that 28 U.S.C. § 2244(b)(3)(A) did not apply to the facts of this case because this claim could not have been raised in a prior petition. Additionally, citing *Felker v. Turpin*, 518 U.S. 651 (1996), the court rejected Mr. Frazier's alternative argument that under these specific circumstances, 28 U.S.C. § 2244(b)(3)(A) unconstitutionally suspends the writ of habeas corpus. *Id.*

The court dismissed the petition without prejudice[4] and denied a COA, concluding that Mr. Frazier had no made a substantial showing of the denial of a constitutional right. *Id.* at 4.

[4] "Frazier may refile his habeas petition if he obtains authorization from the Eleventh Circuit." (Doc. 16 at 3; Pet. App. A-4.)

E. The Eleventh Circuit erroneously denied Mr. Frazier's motion for a certificate of appealability.

Mr. Frazier timely filed a notice of appeal on June 27, 2019. He filed an application for certificate of appealability in the Eleventh Circuit on July 16, 2019 (Pet. App. A-69); in a one line order the Eleventh Circuit, Tjofalt, J., denied this application on August 2, 2019. (Pet. App. A-1.)

Reasons for Granting the Petition

A single judge on the Eleventh Circuit denied Mr. Frazier the opportunity to fully brief and present his claims. This decision was erroneous because Mr. Frazier made a substantial showing that Alabama violated his rights under the Sixth and Fourteenth Amendment to the United States Constitution. *See* 28 U.S.C. § 2253(c)(2)[5].

A COA should issue if the applicant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This is a "showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented [are] adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation marks and citation omitted). *See also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). This means that a COA must issue where the petitioner "demonstrate[s] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. ... [A]nd that jurists of

[5] Mr. Frazier would ask that, in the alternative, this Court consider this an application for certificate of appealability pursuant to § 2253(c)(1).

reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

The COA determination under § 2253(c) is a "threshold inquiry" and not "full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids [such a detailed inquiry]." *Miller-El*, 537 U.S. at 336.

> In requiring a ... substantial showing of the denial of [a] [constitutional] right, obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.

Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983) (internal quotations and citations omitted; first and third alterations in original). The severity of the penalty is an appropriate consideration to weigh when considering whether to grant appellate review. *Id.* at 893.

This Court must intervene to ensure that serious, debatable, violations of Constitutional rights do not go undetected because cases were denied appellate review. Because Mr. Frazier has made a substantial showing of the denial of a Constitutional right, this Court should grant certiorari and order the court below to grant a certificate of appealability on the following issues:

1) Whether Alabama's capital sentencing scheme, which relegated the jury to an advisory role and empowered the judge to make the findings necessary to impose a death sentence, violated Mr. Frazier's rights under the Sixth and Fourteenth Amendments?

2) Whether Mr. Frazier's petition constituted a second or successive petition under 28 U.S.C. § 2244 where the legality of Mr. Frazier's detention under the rule announced by the United States Supreme Court in *Hurst v. Florida*,

136 S. Ct. 616 (2016), had not been determined by a judge or court of the United States on a prior application for a writ of habeas corpus?

3) If, under the facts of this case, Mr. Frazier's petition did constitute a second or successive petition, whether 28 U.S.C. § 2244 unconstitutionally suspends the writ of habeas corpus as applied to the circumstances of this case?

I. The issues presented in Mr. Frazier's motion for a certificate of appealability were debatable among jurists of reason and constituted a substantial showing of the denial of Mr. Frazier's Constitutional rights.

A. Reasonable jurists could, and in fact have debated whether Alabama's pre-2017 capital sentencing scheme violated the Sixth and Fourteenth Amendments and the mandates of the United States Supreme Court set forth in *Hurst v. Florida*.

Alabama's pre-2017 system was virtually identical to the system found unconstitutional in *Hurst*. In *Hurst*, the Supreme Court held that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." 136 S. Ct. at 619. Alabama's system contained the same flaws as the system the Supreme Court found unconstitutional in *Hurst*:

1) "Florida does not require the jury to make the critical findings necessary to impose the death penalty"[6] – neither did Alabama, *see* Ala. Code 1975, § 13A-5-47(d) (1996);[7]

[6] *Id.* at 622.

[7] "After deliberation, the jury shall return an *advisory* verdict ...." (Emphasis added.)

2) "Florida requires a judge to find these facts" ("the critical findings necessary to impose the death penalty")[8] – so did Alabama, *see* Ala. Code, § 13A-5-46(e) (1996)[9] and § 13A-5-47(3) (1996);[10]

3) "Florida incorporates an advisory jury verdict"[11] – as did Alabama, *see* Ala. Code, § 13A-5-47(d) (1996);[12]

4) "in Florida the jury ... does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances"[13] – nor did Alabama juries, *cf.* Ala. Code 1975, § 13A-5-46(e) (1996) (requiring a jury verdict only), *with* § 13A-5-47(d) (1996) (requiring "specific written findings" by the court); and

5) "its [the jury's] recommendation is not binding on the trial judge"[14] – nor was it in Alabama, *see* Ala. Code, § 13A-5-47(e) (1996).[15]

The factual findings upon which an Alabama capital defendant's death sentences rested are the findings made by the court, not the jury. Ala. Code, § 13A-5-46(e) (1996). This is identical to the flaw in the Florida system which rendered it unconstitutional. *Hurst*, 136 S. Ct. at 622. Because Alabama's death penalty system operated in the same way as Florida's in all respects relevant to an analysis under

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[8] *Hurst*, 136 S. Ct. at 622.

[9] "Based upon the evidence presented at trial, the evidence presented during the sentence hearing, and the presentence 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." (Emphasis added.)

[10] "[T]he trial court shall consider the recommendation of the jury contained in its advisory verdict ...."

[11] *Hurst*, 136 S. Ct. at 622.

[12] "After deliberation, the jury shall return an advisory verdict ...."

[13] *Hurst*, 136 S. Ct. at 622.

[14] *Id.*

[15] "While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court."

Hurst, reasonable jurists could clearly debate the decision of the court below and conclude that Alabama's system was likewise unconstitutional.

Moreover, under Alabama law, a defendant could not be sentenced to death without a finding that the aggravators outweigh the mitigators; therefore, the Sixth Amendment right to trial by jury requires the jury to make this finding. Finding the existence of at least one aggravator is *necessary* to impose a death sentence, but it is not *sufficient*: rather, the law requires that the balance of aggravating and mitigating factors weighs against the defendant.

In *Hurst*, the Supreme Court explained that

> [t]he State fails to appreciate the central and singular role the judge plays under Florida law ... the Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person shall be punished by death." The trial court alone must find "the facts ... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." "[T]he jury's function under the Florida death penalty statute is advisory only." The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

136 S. Ct. at 622.

Notably, even before *Hurst*, reasonable jurists were debating the constitutionality of Alabama's capital sentencing scheme. For example, in her dissent from a denial of certiorari in *Woodward v. Alabama*, Justice Sotomayor observed that

> a defendant is eligible for the death penalty in Alabama only upon a specific factual finding that any aggravating factors outweigh the mitigating factors he has presented. *See* Ala. Code §§ 13A–5–46(e), 13A–5–47(e). The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is

> therefore necessary to impose the death penalty. It is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole. Under *Apprendi* and *Ring*, a finding that has such an effect must be made by a jury.

134 S. Ct. 405, 410-411 (2013) (Sotomayor, J., dissenting from denial of certiorari). She concluded that "[t]he very principles that animated our decisions in *Apprendi* and *Ring* call into doubt the validity of Alabama's capital sentencing scheme." *Id.* at 410.

When *Hurst* was decided, Alabama, Florida, and Delaware all had comparable capital sentencing schemes. The State of Alabama recognized these similarities when it filed an amicus brief in *Hurst*, arguing that a decision in favor of Mr. Hurst could invalidate Alabama's statute and call into question numerous death sentences: "Moreover, Florida and Alabama have relied on this Court's decisions in *Spaziano*[16] and *Harris*[17] to sentence hundreds of murderers in the intervening decades." Brief of Amici Curiae Alabama and Montana in Support of Respondent at 9, *Hurst v. Florida*, No. 14-7505, 136 S. Ct. 616 (2016), 2015 WL 4747983.

After *Hurst*, Florida and Delaware acknowledged that the procedures they used to sentence defendants to death were unconstitutional. *Rauf v. Delaware*, 145 A.3d 430 (Del. 2016); *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Yet, Alabama has

[16] *Spaziano v. Florida*, 468 U.S. 447 (1984).

[17] *Harris v. Alabama*, 513 U.S. 504 (1995).

refused to recognize that its similar sentencing scheme is unconstitutional. *Ex parte Bohannon*, 222 So. 3d 525 (Ala. 2016).

In *Rauf*, the Delaware Supreme Court held that the Sixth Amendment requires a jury, not a judge "to find that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist." 145 A.3d at 434. Because their statute did not require the jury to make this finding, the court held it was unconstitutional. *Id.* Likewise, on remand, in *Hurst v. State*, the Florida Supreme Court held that the Sixth Amendment and Florida law require

> that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

202 So. 3d at 57. Conversely, the Alabama Supreme Court continues to hold that the jury needed make only the finding that a single aggravator exists. *Ex parte Bohannon*, 222 So. 3d at 528, 533. The contrast between Alabama's response to *Hurst* and Florida's and Delaware's responses confirms that reasonable jurists disagree about *Hurst*'s application.

The rights to trial by jury, to due process, and to be free from cruel and unusual punishment are fundamental constitutional rights and reasonable jurists could debate whether Alabama's pre-2017 capital sentencing scheme stripped Mr. Frazier of these rights. Reasonable jurists could conclude that Alabama's scheme as a whole is unconstitutional under *Hurst*; that *Hurst* requires the jury to determine

whether the aggravators outweigh the mitigators; and that the Supreme Court's decision in *Hurst* applies retroactively to Mr. Frazier's case. This history and complexity of this issue proves "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner [and] that the issues presented [are] adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484 (quotation marks and citation omitted). Therefore, this Court should grant certiorari and order the Court below to grant a certificate of appealability.

B. Jurists of reason could debate whether Mr. Frazier's petition, which was based entirely on the 2016 Supreme Court decision in *Hurst*, constituted a second or successive petition under 28 U.S.C. § 2244.

The district court concluded that "[b]ecause this court previously dismissed Frazier's first § 2245 [sic] petition with prejudice in a judgment on the merits, his instant § 2254 petition is second or successive." (Doc. 16 at 2; Pet. App. A-3.) Notably, the court failed to address Mr. Frazier's assertion that this petition, although second in time, was not "second or successive" under the meaning of 28 U.S.C. § 2244. Mr. Frazier argued that his petition did "not constitute a second or successive petition" because *Hurst* was not decided until January 12, 2016, well after the final judgment and appeal of his initial § 2254 petition. (Doc. 1, p. 4; Pet. App. A-9.) Therefore, the claim raised in this petition was not successive because it could not have been raised in the initial petition, or any time prior to 2016. 28 U.S.C. § 2244 could not constitute a jurisdictional bar under these circumstances because the legality of Mr. Frazier's detention, under the new rule announced in

Hurst, had not "been determined by a judge or court of the United States on a prior application for a writ of habeas corpus." 28 U.S.C. § 2244; *see also* (Doc. 1, p. 4; Pet. App. A-9.)

A COA was appropriate because reasonable jurists could debate whether 28 U.S.C. § 2244 limits jurisdiction in every second in time habeas petition or whether it only applies to claims that were, or could have been raised, in the initial petition. The plain language of 28 U.S.C. § 2244 states that it only applies when "the legality of [an inmate's] detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus." No federal court has considered the legality of Mr. Frazier's detention under *Hurst*. Reasonable jurists could debate whether cases where a federal court has not determined the legality of detention under a ground that was not previously ripe, falls within this parameter.

This Court has "declined to interpret 'second or successive' as referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application." *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007). "The phrase 'second or successive petition' is a term of art" not a literal command. *Slack*, 529 U.S. at 486. In fact, this Court has specifically held that 28 U.S.C. § 2244 does not strip the district court of jurisdiction if the claim was not previously "ripe for resolution." *Stewart v. Martinez-Villareal*, 523 U.S. 637, 645 (1998).

Here, reasonable jurists could debate whether § 2244 applied because Mr. Frazier's *Hurst* claim was not previously "ripe for resolution." The claims raised in

Mr. Frazier's petition could not be raised in the district court until (1) this Court issued its decision in *Hurst*, and, (2) Alabama violated *Hurst* by denying Mr. Frazier relief. Under these circumstances, Mr. Frazier raised this claim at the first available opportunity. Therefore, the Eleventh Circuit erred by denying Mr. Frazier's motion for a certificate of appealability.

C. Reasonable jurists could debate whether 28 U.S.C. § 2244 unconstitutionally suspends the writ of habeas corpus by stripping the district court of jurisdiction to hear claims that were not previously ripe and therefore could not have been raised in a prior habeas petition.

It is fundamentally unfair to strip the district court of jurisdiction where an inmate raises a claim at the first available opportunity. If 28 U.S.C. § 2244 denies the opportunity for a petitioner to be heard on a claim that arises anew, reasonable jurists could debate whether it unconstitutionally suspends access to the great writ.

The district court, citing *Felker v. Turpin*, 518 U.S. 651, 664 (1996) held that "the Supreme Court has squarely rejected the argument that § 2244's circuit-court screening requirement is unconstitutional." (Doc. 16, p. 3; Pet. App. A-4.) However, this holding incorrectly characterizes *Felker*. In *Felker*, the Supreme Court held that the restrictions set forth in § 2244, on their face, did not unconstitutionally suspend the writ of habeas corpus because they were "well within the compass of [the] evolutionary process [of the writ.]" *Id.* However, depriving this court of jurisdiction to hear a claim that was not previously decided, and could not have been previously decided, would fall well outside of the historical evolution and purpose of the great writ.

The circumstances of *Felker* are distinguishable from this case because Mr. Felker raised claims that could have been raised in a prior habeas petition, while the claim raised by Mr. Frazier did not become ripe until the United States Supreme Court decided *Hurst*. Because *Felker* is distinguishable, the district court's holding that it was bound by *Felker* was misplaced. *See* (Doc. 16, p. 3; Pet. App. A-4.)

The district court's determination that a suspension clause claim was not debatable after *Felker* was also incorrect. Jurists in the Eleventh Circuit debated the issue as recently as 2017. *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1094 (11th Cir. 2017).

In *McCarthan*, the Eleventh Circuit held that 28 U.S.C. § 2255 did not unconstitutionally suspend the writ of habeas corpus. *Id.* at 1094. However, Judge Rosenbaum disagreed, opining that, "a careful reading of *Felker* dispels [the majority's] notion that the existence of the Original Writ allows Congress to preclude relief for second or successive claims required under the Suspension Clause to be permitted." *Id.* at 1145. She argued that *Felker* stands for the principle that the suspension clause requires that habeas corpus relief be available to redress situations where the doctrinal underpinnings of habeas review are violated. *Id.* Mr. Frazier argued that depriving the district court of jurisdiction in this case violated these doctrinal underpinnings and went against the historical evolution and purpose of the writ of habeas corpus. *See* (Doc. 15, p. 2; Pet. App. A-65.).

Although the debate in *McCarthan* was over whether § 2255 suspends the writ, reasonable jurists could similarly debate whether, under the circumstances of this case, § 2244 unconstitutionally suspends the writ.

II. This case presents an issue that only this Court can resolve.

Certiorari is necessary because this Court must stop Alabama's and the Eleventh Circuit's disregard for the Constitution and this Court's authority. Alabama repeatedly ignores that it is unconstitutional for a statute to require "[t]he trial court alone [to] find 'the facts . . . [t]hat sufficient aggravating circumstances exist' **and** '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" *Hurst*, 136 S. Ct. at 622 (emphasis added) (quoting Fla. Stat. § 921.141(3)). The Alabama courts pervert the holding of *Hurst* and ignore this second clause. *Frazier v. State of Alabama*, No. CR-17-0372, unpublished slip op. at 8 (Ala. Crim. App. June 29, 2018) (Pet. App. B-8); *see also State v. Billups*, 223 So. 3d 954 (Ala. Crim. App. 2016); *Ex parte Bohannon*, 222 So. 3d 525 (Ala. 2016). Alabama maintains that *Hurst* does not invalidate its capital sentencing scheme even though a finding that the aggravating circumstances outweigh the mitigating circumstances is "necessary to impose a sentence of death" and under Alabama's pre-2017 capital sentencing scheme, the judge, not the jury, made this finding. *Hurst*, 136 S. Ct. at 619. The Eleventh Circuit enables the Alabama courts by refusing to even allow death row inmates such as Mr. Frazier, to brief and argue this claim. If this Court does not step in, it is possible that hundreds of people will remain on Alabama's death row in violation of their Constitutional rights.

Conclusion

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

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