No. 19-6531
CAPITAL CASE

In the
Supreme Court of the United States

DEMETRIUS FRAZIER,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED

Frazier failed to request to request permission from the Eleventh Circuit Court of Appeals to file a successive habeas petition in the District Court for the Northern District of Alabama, and so the district court dismissed his successive habeas petition for lack of jurisdiction. In light of these facts, did the Eleventh Circuit properly deny Frazier's motion for certificate of appealability?

RELATED CASES

Underlying Trial:

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

Direct Appeal:

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

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

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

2001 Rule 32 and Appeal:
Frazier v. State, CC-95-2606.60, Circuit Court of Jefferson County, Alabama.
Judgment Entered February 8, 2002.
Remanded by Alabama Court of Criminal Appeals: February 23, 2003.
Judgment Entered: May 7, 2003

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

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

2004 Federal Habeas (2254) and Appeal:

Frazier v. Bouchard, 2:04-CV-00211, United States District Court for the Northern District of Alabama, Southern Division.
Judgment Entered: September 28, 2007.

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

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

2017 R32 and Appeal:
Frazier v. State, CC-1995-2606.61, Circuit Court of Jefferson County, Alabama.
Judgment Entered: November 14, 2017.

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

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

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

2018 Federal Habeas (2254):

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

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

PARTIES

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STATEMENT OF THE CASE

A. Statement of the Facts

There is no doubt about Frazier's guilt or the seriousness of the crime. While under arrest on other charges in Michigan in 1992, Frazier confessed that he brutally murdered Pauline Brown in Alabama. In a later, recorded statement, Frazier told the police that he broke into Brown's apartment in an effort to burglarize it. When he came across Brown asleep in bed, he robbed her at gunpoint, then raped her. Brown repeatedly begged him not to kill her, and when she refused to stop begging him, he put the gun to the back of her head and fired. After leaving the apartment to make sure no one had heard the gunshot, he returned and searched for more money. He confirmed that Brown was dead, then went to the kitchen, ate two bananas, and left. He later threw the pistol in a ditch. Vol. 9, Tab #R-37 (*Ex parte Frazier*, 758 So. 2d 611, 611–12 (Ala. 1999)).[1]

B. The Proceedings Below

On June 5, 1996, Frazier was convicted of one count of capital murder for the brutal murder of Pauline Brown. Specifically, Frazier was found guilty of murder during a robbery, in violation of section 13A-5-40(a)(2) of the Code of Alabama (1975). By convicting Frazier of that crime, the jury, at the guilt phase of trial, unanimously found beyond a reasonable doubt that the capital offense was committed while Frazier was engaged in a robbery—a statutory aggravating circumstance under

1. Volume and tab references are to the habeas record filed in the district court.

section 13A-5-49(4) of the Code—which exposed Frasier to the death penalty. Following a sentencing hearing, the jury recommended that Frazier be sentenced to death by a ten-to-two vote. The trial court followed the jury's recommendation.

The Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Frazier's conviction and death sentence. Vol. 8, Tabs #R-33 and 37 (*Frazier v. State*, 758 So. 2d 577 (Ala. Crim. App.), *aff'd*, 758 So. 2d 611 (Ala. 1999)). The United States Supreme Court denied Frazier's petition for writ of certiorari. Vol. 10, Tab #R-40 (*Frazier v. Alabama*, 531 U.S. 843 (2000)).

Frazier next filed a Rule 32 petition for state postconviction relief. He raised the following claim in this petition: "As applied in Alabama, and as imposed in this case, the provisions of the Alabama death penalty statutes providing for judicial sentencing in capital cases violates the Due Process Clause of the Fourteenth Amendment and Mr. Frazier's Sixth Amendment right to a trial by jury." The circuit court summarily denied the petition in a one-page docket entry. On appeal, the Court of Criminal Appeals remanded the case to the circuit court with instructions that the circuit court correct numerous deficiencies in its judgment and ordered the circuit court to conduct an evidentiary hearing if necessary. Vol. 15, Tab #R-49 (*Frazier v. State*, 884 So. 2d 908 (Ala. Crim. App. 2003)).

The circuit court denied relief on the claims in the Rule 32 petition without holding an evidentiary hearing, and the Court of Criminal Appeals affirmed on August 15, 2003, in an unpublished opinion. Vol. 15, Tab #R-49 (Frazier v. State, CR-

01-1317 (Ala. Crim. App. Aug. 15, 2003)). The Alabama Supreme Court denied Frazier's petition for a writ of certiorari.

Frazier next filed a petition for a writ of habeas corpus in the District Court for the Northern District of Alabama. In his amended habeas petition, Frazier raised a claim challenging the constitutionality of Alabama's capital sentencing scheme, relying on this Court's opinions in *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Vol. 20, Tab #R-62, at 60–66. In September 2007, the district court entered a memorandum opinion and final judgment dismissing the habeas petition. Regarding the *Ring*/*Apprendi* claim, the district court denied relief, holding:

> Respondent argues the state court's decision was primarily based upon independent and adequate state procedural rules, thus precluding federal review of this claim. In any event Frazier cannot take advantage of *Ring v. Arizona*, 536 U.S. 584 (2002), because it is not retroactive to cases on collateral review. (Doc. 16, pp. 33-34 and Doc. 18, pp. 88-89, respectively). Frazier admits that *Ring* is not retroactive to his case. (Doc. 18, pp. 80-81).
>
> New procedural rules are only applicable to cases on direct review at the time the Supreme Court's decision is made. *Schriro v. Summerlin*, 542 U.S. 348, 351–52 (2004) ("*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review.")). Because Frazier's case became final on direct review in 1999, he cannot benefit from the Supreme Court's 2002 decision in *Ring*. This claim is procedurally defaulted and due to be dismissed.

Vol. 23, Tab #R-70, at 180–82.

The Eleventh Circuit Court of Appeals affirmed the district court's judgment. Vol. 24, Tab #R-76 (*Frazier v. Bouchard*, 661 F.3d 519 (11th Cir. 2011)). This Court denied Frazier's petition for writ of certiorari. Vol. 25, Tab #R-81 (*Frazier v. Thomas*, 568 U.S. 833 (2012)).

On January 11, 2017, Frazier filed a successive Rule 32 petition in the Jefferson County Circuit Court raising one ground for relief. Vol. 26, Tab #R-83. Specifically, he argued that Alabama's death penalty statute violates the right to trial by jury under the Sixth and Eighth Amendments to the United States Constitution, relying on *Hurst v. Florida*, 136 S. Ct. 661 (2016).

On February 16, 2017, the state filed a joint answer and motion to summarily dismiss Frazier's successive petition. Vol. 26 Tab #R-84. Frazier filed an opposition, Vol. 26, Tab #R-85, and in November 2017, he filed a motion for final order with the circuit court, acknowledging that the court was bound by the decisions of the Court of Criminal Appeals, *see Wimbley v. State*, 238 So. 3d 1268 (Ala. Crim. App. 2016), holding that Alabama's death penalty statute is consistent with *Hurst*. On November 14, the circuit court issued the following one-sentence order dismissing the successive petition: "SUCCESSIVE PETITION FOR RELIEF FROM JUDGMENT filed by FRAZIER DEMETRIUS TERRENCE is hereby DISMISSED."

Frazier appealed the denial of his successive petition to the Court of Criminal Appeals, which affirmed in a memorandum opinion on June 29, 2018. Vol. 27, Tab #R-89 (*Frazier v. State of Alabama*, No. CR-17-0372). The Alabama Supreme Court denied certiorari on November 16, 2018 (*Frazier v. Alabama*, Vol. 27, Tab #R-92 (*Frazier v. State of Alabama*, No. 1171020). This Court denied Frazier's cert petition regarding the denial of his successive Rule 32 petition on October 7, 2019.

On November 19, 2018, Frazier filed a successive petition for writ of habeas corpus with the District Court for the Northern District Court of Alabama. Doc. 1 at

1.[2] The district court denied that petition due to a lack of jurisdiction to hear the claim. Doc. 16 at 1. Frazier then appealed to the Eleventh Circuit, which denied his motion for a certificate of appealability on August 2, 2019.

REASONS FOR DENYING THE PETITION

This Court should deny Frazier's petition both because this Court "rarely" grants a petition that asserts only a "misapplication of a properly stated rule of law," S. Ct. Rule 10, because the courts applied the law correctly. The district court properly dismissed Frazier's successive habeas petition for lack of jurisdiction because Frazier failed to request permission from the Eleventh Circuit to file his successive habeas petition, and the circuit court then correctly denied Frazier's application for a certificate of appealability. Moreover, *Hurst* cannot be retroactively applied because Alabama's capital sentencing statute is in compliance with *Ring*. Therefore, this Court should deny Frazier's petition.

I. THIS COURT SHOULD DENY CERT BECAUSE THE DISTRICT COURT PROPERLY DISMISSED FRAZIER'S SUCCESSIVE HABEAS PETITION BECAUSE IT LACKED JURISDICTION TO ENTERTAIN THE CLAIM.

As set forth above, Frazier raised a *Ring*/*Apprendi* claim in his first habeas proceedings. Vol. 20, Tab #R-62, at 60–66. There, he argued the following:

> Mr. Frazier was sentenced under an Alabama death penalty statute providing for judicial sentencing in capital cases. The statute violates the Sixth and Fourteenth Amendment rights to a trial by jury held by Alabama capital defendants, such as Mr. Frazier. Alabama's hybrid capital sentencing scheme, where the jury's penalty verdict is merely

2. Document numbers reference filings in *Frazier v. Dunn*, 2:18-CV-01899 (N.D. Ala.).

> advisory and the trial court, sitting alone, has the discretion to make its own factual findings of aggravating circumstances and then make the ultimate sentencing decision, is plainly unconstitutional in light of the United States Supreme Court's holdings in *Ring v. Arizona*, 536 U.S. 548 (2002) and *Apprendi v. United States*, 530 U.S. 466 (2000).

Vol. 20, Tab #R-62, at 60. The district court denied relief, finding that Frazier's *Ring* claim was not retroactive to cases on collateral review and noting that Frazier admitted *Ring* was not retroactive to his case. Vol. 23, Tab #R-70, at 181. The district court relied on this Court's decision in *Schriro v. Summerlin*, 542 U.S. 348, 351–52 (2004), to support its determination that *Ring* could not be retroactively applied to Frazier's case. Vol. 23, Tab #R-70, at 181–82.

Now, Frazier has filed a successive habeas petition alleging that Alabama's capital sentencing statute violates the Court's holding in *Hurst v. Florida*, 136 S. Ct. 616 (2016). This Court should refuse to grant cert to review the Eleventh Circuit's denial of Frazier's certificate on appealability because the district court correctly dismissed Frazier's successive habeas petition, as that court lacked jurisdiction to consider Frazier's claim. 28 U.S.C. § 2244(b)(1) provides that "[a] claim presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(2) states that a second or successive petition that was not presented in a prior application shall be dismissed unless:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Then, 28 U.S.C. §2244(b)(3)(A) provides:

> Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

Again, Frazier did not seek permission from the Eleventh Circuit to file a successive petition in the district court.

The Eleventh Circuit stated the following concerning claims raised in a second or successive habeas petition in *Lambrix v. Secretary, Department of Corrections*, 872 F.3d 1170, 1180 (11th Cir. 2017):

> A state habeas petitioner seeking to file a second or successive § 2254 petition must seek authorization from this Court before the district court may consider his petition. 28 U.S.C. § 2244(b)(3)(A). When a petitioner fails to seek or obtain such authorization, the district court lacks jurisdiction to consider the merits of the petition. *Burton v. Stewart*, 549 U.S. 147, 157 (2007). (citation edited.)

Because Frazier failed to request permission to file a successive petition with the Eleventh Circuit, the district court had no jurisdiction to consider the claim. Therefore, this Court should refuse to grant cert on this claim because jurists of reason could not disagree with the district court's resolution of this matter.

Frazier argues that because *Hurst* was not decided until January 16, 2016, his petition is not second or successive. He is incorrect. There is nothing in 28 U.S.C.

§ 2244 that allows a defendant to file a second or successive habeas petition based on an alleged "new rule" without requesting authorization from the appropriate court of appeals, and Frazier cites no precedent to support his argument that his petition is not second or successive because the legality of his detention was not determined in his prior habeas petition.

In fact, as set forth above, Frazier raised a *Ring*/*Apprendi* challenge to the constitutionality of Alabama's capital sentencing scheme in his first habeas petition. The Eleventh Circuit has determined that *Hurst* is merely an application of *Ring* to Florida's capital sentencing scheme. *Lambrix*, 872 F.3d at 1175 (noting that *Hurst* applied its prior decisions in *Apprendi* and *Ring* to Florida's capital sentencing scheme). Contrary to Frazier's argument, he raised this claim in his habeas proceedings, and his claim that his petition is not successive is meritless.

Frazier also argues that "if 28 U.S.C. § 2244 deprives" the district court of jurisdiction, then "§ 2244 unconstitutionally suspends the Writ of Habeas Corpus." This Court, in *Felker v. Turpin*, 518 U.S. 651, 664 (1996), expressly rejected this argument, holding, "The added restrictions which the Act places on second habeas petitions are well within the compass of this evolutionary process, and we hold that they do not amount to a 'suspension' of the writ contrary to Article I, § 9." *See also Wyzkowski v. Dep't of Corr.*, 226, F.3d 1213, 1217 (11th Cir. 2000) (holding that 2244(d)'s limitation period is not an unconstitutional suspension of the writ of habeas corpus).

Finally, Frazier argues that the district court's order incorrectly characterizes this Court's holding in *Felker*. The district court properly rejected Frazier's claim that his case is distinguishable from *Felker* because the successive petition in *Felker* presented a claim that could have been raised in a prior petition, whereas Frazier's claim could not have been presented in his first habeas petition. As discussed above, Frazier raised a *Ring*/*Apprendi* challenge in his first habeas petition, and the Eleventh Circuit has determined that *Hurst* is merely an application of *Ring* to Florida's capital sentencing scheme. Thus, the facts in this case are not distinguishable from *Felker*. In addition, the district court properly found as follows concerning Frazier's argument that *Felker* does not apply to his case:

> Frazier attempts to distinguish *Felker* on the ground that the successive petition there presented a claim that could have been raised in a prior petition, while here Frazier's *Hurst* claim (based on a supposedly new rule of constitutional law) could not have been raised until after *Hurst* was decided in 2016. But Frazier does not explain why this supposed distinction between *Felker* and his case makes any constitutional difference as it relates to the Suspension Clause. The Supreme Court in *Felker* did not analyze or rely on the particular type of claim asserted in a successive petition to hold that § 2244's circuit-court screening requirement was constitutional. Nothing in *Felker* or any other authority Frazier has identified suggests that § 2244's circuit court screening requirement is unconstitutional as applied to successive petitions asserting claims based on new rules of constitutional law. *Felker* instead stated, in broad terms, that "[t]he added restrictions which [§ 2244] places on second habeas petitions are well within the compass of [the evolutionary development of habeas law], and we hold that they do not amount to a 'suspension' of the writ contrary to Article I, § 9." *Id*. The court therefore rejects Frazier's argument that § 2244 unconstitutionally suspends the writ of habeas corpus as applied to his successive petition.

Doc. 16 at 3.

Because Frazier failed to request permission from the Eleventh Circuit to file his successive habeas petition, the district court properly found that it lacked jurisdiction to consider Frazier's claim. This Court should refuse to grant cert on this claim because jurists of reason could not disagree with the district court's resolution of this matter.

II. *HURST* CANNOT BE RETROACTIVELY APPLIED TO FRAZIER AND DOES NOT ENTITLE HIM TO A CERTIFICATE OF APPEALABILITY.

Frazier, relying on *Hurst*, argues that his jury did not find beyond a reasonable doubt all of the facts necessary to sentence him to death, and therefore, his sentence violates the Sixth Amendment. This argument fails for several reasons.

First, *Hurst* cannot be retroactively applied to Frazier's successive federal habeas proceedings. This Court held that its opinion in *Ring* did not apply retroactively on collateral review to cases that were already final when the decision was announced. *Schriro*, 542 U.S. 348 (2004). *Hurst* is a mere application of *Ring*—it did not announce a new rule of constitutional law. The Eleventh Circuit noted as much in *Lambrix*, explaining that "*Hurst*, like *Ring*, is not retroactively applicable to cases on collateral review under federal law." 872 F.3d at 1175. The Alabama Court of Criminal Appeals reached a similar conclusion in *Reeves v. State*:

> [I]t follows that *Hurst* [] does not apply retroactively on collateral review. Rather, *Hurst* applies only to cases not yet final when that opinion was released, such as *Johnson*, supra, a case that was still on direct appeal (specifically pending certiorari review in the United States Supreme Court) when *Hurst* was released.

226 So. 3d 711, 757 (Ala. Crim. App. 2016).

As the district court found in denying relief in Frazier's first habeas proceedings, Frazier's case became final in 1999. Vol. 23, Tab #R-70, at 181–82. This was seventeen years before *Hurst* was decided. *Hurst*, therefore, cannot be retroactively applied to Frazier's case.

Second, Frazier has not alleged, and cannot show, that the denial of relief on this claim in state court "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). Because Frazier failed to allege that the Alabama courts decided this claim in a manner that is contrary to or involves an unreasonable application of clearly established federal law as determined by this Court, the Eleventh Circuit properly denied a certificate of appealability. The Court of Criminal Appeals did, in fact, correctly apply *Schriro*, and thus, according to the habeas statute, the application for a writ of habeas corpus before the Eleventh Circuit Court "shall not be granted." 28 U.S.C. § 2254(d). Likewise, this Court should deny certiorari.

Third, and without waiving the foregoing, Frazier is not entitled to relief on his *Hurst* claim. At the outset, the Alabama Supreme Court explained in *Ex parte Bohannon*, 222 So. 3d 525 (Ala. 2016), *cert. denied, Bohannon v. Alabama*, 137 S. Ct. 831 (2017) (mem.), that Alabama's capital sentencing scheme—including judicial

override—remains constitutional after *Apprendi*, *Ring*, and *Hurst*. Since then, this Court has declined to grant certiorari every time an Alabama petitioner attempts to apply *Ring*/*Hurst* or challenge the *Bohannon* rule.

Ring holds that a jury must find the existence of the facts that increase the range of the punishment to include the imposition of the death penalty. In *Ring*, the Court applied the rule of *Apprendi* to death penalty cases. In doing so, it overruled part of *Walton v. Arizona*, 497 U.S. 639 (1990). The Court held that Arizona's death penalty statute violated the Sixth Amendment right to a jury trial "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of a death penalty." *Ring*, 536 U.S. at 585. Thus, a trial court cannot make a finding of "any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589. Only the jury can.

Alabama's sentencing practices differ from the procedures that Florida followed in *Hurst*. As Justice Scalia explained in his concurrence in *Ring*, "[w]hat today's decision says is that the jury must find the existence of the fact that an aggravating factor existed." 536 U.S. at 612 (Scalia, J., concurring). "Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factors in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase." *Id.* at 612–13 (Scalia, J., concurring).

In most cases, Alabama has chosen the second and most "logical" option—to secure a jury determination of aggravating circumstances at the guilt phase. The

elements of capital murder in Alabama mostly track aggravating circumstances. For example, one way the State can convict a person of capital murder is to show that the murder was committed during a robbery. *See* Ala. Code § 13A-5-40(a)(2). This same showing is also an aggravating factor for the purposes of sentencing. *See id.* § 13A-5-49(4). Alabama law expressly provides that "any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of this sentencing hearing." *Id.* § 13A-5-45(e).

As long as the jury finds the existence of at least one aggravating factor at the guilt phase, both the Alabama Supreme Court and the Eleventh Circuit have held that a resulting death sentence complies with *Ring*. In *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002), the Alabama Supreme Court addressed the effect of *Ring* on the constitutionality of Alabama's sentencing scheme. There, the defendant had been convicted of two counts of murder during the course of a robbery in the first degree, in violation of section 13A-5-40(a)(2) of the Code of Alabama. *Id*. at 1188. The Alabama Supreme Court explained that "[b]ecause the jury convicted Waldrop of two counts of murder during a robbery in the first degree . . . the statutory aggravating circumstance of committing a capital offense while engaged in the commission of a robbery, Ala. Code 1975, § 13A-5-49(4), was 'proven beyond a reasonable doubt.'" *Id.* (citing Ala. Code §§ 13A-5-45(e)-(f)). The court further explained that "[o]nly one aggravating circumstance must exist in order to impose a sentence of death." *Id.* (citing Ala. Code § 13A-5-45(f)). Because "the finings reflected in the jury's verdict

alone exposed Waldrop to a range of punishment that had as its maximum the death penalty," the State has done "all *Ring* and *Apprendi* require. *Id.* The Eleventh Circuit agreed with this reasoning in *Lee v. Commissioner, Alabama Department of Corrections*, 726 F.3d 1172, 1197–98 (11th Cir. 2013).

In 2016, the Alabama Supreme Court upheld a challenge to Alabama's capital sentencing scheme based on *Hurst* in *Ex parte Bohannon*. There, the court considered whether Bohannon's death sentence should be vacated in light of *Hurst*. 222 So. 3d at 527. After considering *Apprendi*, *Ring*, and *Waldrop*, the court held that Alabama's capital sentencing scheme is constitutional. *Id.* at 532–33. In reaching that result, the court reasoned:

> *Hurst* applies *Ring* and reiterates that a jury, not a judge, must find the existence of an aggravating factor to make a defendant death-eligible. *Ring* and *Hurst* require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty—the plain language in those cases requires nothing more and nothing less. Accordingly, because in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment.

Id. at 532. The Alabama Supreme Court found that Bohannon's death sentence was consistent with *Apprendi*, *Ring*, and *Hurst* and did not violate the Sixth Amendment because the jury, by finding Bohannon guilty of capital murder at the guilt phase of his trial, unanimously found the existence of the aggravating circumstance that Bohannon intentionally caused the death of two or more persons by one act or

pursuant to one scheme or course of conduct. *Id.* The court concluded its analysis of Bohannon's *Hurst* argument by stating:

> Nothing in *Apprendi*, *Ring*, or *Hurst* suggests that, once the jury finds the existence of the aggravating circumstance that establishes the range of punishment to include death, the jury cannot make a recommendation for the judge to consider in determining the appropriate sentence or that the judge cannot evaluate the jury's sentencing recommendation to determine the appropriate sentence within the statutory range. Therefore, the making of a sentencing recommendation by the jury and the judge's use of the jury's recommendation to determine the appropriate sentence does not conflict with *Hurst*.

Id. at 534. Notably, this Court denied Bohannon's cert petition on January 23, 2017. *Bohannon v. Alabama*, 137 S. Ct. 831 (2017) (mem.).

Frazier was found guilty of murder during a robbery. The jury necessarily found beyond a reasonable doubt the existence of the corresponding aggravating circumstance specified in section 13A-5-49(4) of the Code of Alabama. This jury finding exposed Frazier to a range of punishment that has as its maximum the death penalty. That is all that *Ring* and *Hurst* require. Frazier, therefore, was not entitled to a certificate of appealability on his claim that his death sentence is unconstitutional.

CONCLUSION

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

Respectfully submitted,

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