No. 19-6531

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

---

REPLY TO BRIEF IN OPPOSITION

Christine A. Freeman, Executive Director
Natalie Carroll Rezek Olmstead, Esq.*
John Anthony Palombi, Esq.
Federal Defenders, Middle District of Alabama
817 S. Court Street
Montgomery, Alabama 36104
Telephone: 334.834.2099
Email: natalie_olmstead@fd.org

**Counsel of Record*

January 17, 2020

Table of Contents

Table of Contents i

Table of Authorities ii

Reasons for Granting the Petition 1

Conclusion 3

Table of Authorities

FEDERAL CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000) 1

Burt v. Titlow, 571 U.S. 12 (2013) 3

Felker v. Turpin, 518 U.S. 651 (1996) 1

Hurst v. Florida, 136 S. Ct. 616 (2016) ..... *passim*

Miller-El v. Cockrell, 537 U.S. 322 (2003) 2

Panetti v. Quarterman, 551 U.S. 930 (2007) 1

Penry v. Lynaugh, 492 U.S. 302 (1989) 3

Ring v. Arizona, 536 U.S. 584 (2002) ..... *passim*

Slack v. McDaniel, 529 U.S. 473 (2000) 1

Stewart v. Martinez-Villareal, 523 U.S. 637 (1998) 1

Teague v. Lane, 489 U.S. 288 (1989) ..... *passim*

Woodward v. Alabama, 134 S. Ct. 405 (2013) 2

STATE CASES

Asay v. State, 210 So.3d 1 (Fla. 2016) 3

Ex parte Bohannon, 222 So. 3d 525 (Ala. 2016) 2

Hurst v. State, 202 So.3d 40 (Fla. 2016) ..... *passim*

Lambrix v. Secretary, Department of Corrections, 872 F.3d 1170 (11th Cir. 2017) 3

Powell v. State, 153 A. 3d 69 (Del. 2016) 3

Rauf v. State, 145 A. 3d 430 (Del. 2016) 2

Reeves v. State, 226 So.3d 711 (Ala. Crim. App. 2016) 3

FEDERAL STATUTES

28 U.S.C. § 2253(c) 2

Reasons for Granting the Petition

As explained in Mr. Frazier's Petition for a Writ of Certiorari, the following points raised by the state in its Brief in Opposition are erroneous:

(1) The state's contention that "Frazier raised a Ring/Apprendi claim in his first habeas proceedings" and that this petition raising a claim under *Hurst v. Florida*, 136 S. Ct. 616 (2016), is therefore barred as second or successive. Br. in Opp'n at 5; *see* Pet. Cert. pp. 15-17.

(2) The state's argument that the circumstances of this case are identical to *Felker v. Turpin*, 518 U.S. 651 (1996). Br. in Opp'n at 8-9; *see* Pet. Cert. pp. 17-19.

(3) And the state's assertion that Alabama's pre-2017 sentencing scheme "remains constitutional after *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)], *Ring* [*v. Arizona*, 536 U.S. 584 (2002)], and *Hurst*." Br. in Opp'n at 12; *see* Pet. Cert. pp. 10-15.

Because these points were adequately address in Mr. Frazier's Petition for a Writ Certiorari, it is unnecessary to repeat the arguments here. Instead, only three points merit a reply.

First, the state is incorrect that "Frazier cites no precedent to support his argument that his petition is not second or successive." Br. in Opp'n at 8. Mr. Frazier clearly relies upon *Panetti v. Quarterman*, 551 U.S. 930 (2007), *Slack v. McDaniel*, 529 U.S. 473 (2000), and *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), to support his argument that "[t]he phrase 'second or successive petition' [as used in 28 U.S.C. §2244] is a term of art" and not a literal command. *Slack*, 529 U.S. at 486; *see* Pet. Cert. pp. 16.

Second, the state incorrectly characterizes the standard necessary for a certificate of appealability. The question is not whether "*Hurst* is merely an

application of *Ring*", Br. in Opp'n at 8, but instead whether reasonable jurists could debate whether *Hurst* is a new rule or merely an application of *Ring*. 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." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). A court should grant a COA if "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*, 529 U.S. at 484 (quotation marks and citation omitted). When debating whether Alabama's pre-2017 capital sentencing scheme runs afoul of *Hurst*, reasonable jurists not only could disagree, but, in fact, have disagreed. *Compare Rauf v. Delaware*, 145 A.3d 430 (Del. 2016) *and Hurst v. State*, 202 So. 3d 40 (Fla. 2016) *with, Ex parte Bohannon*, 222 So. 3d 525 (Ala. 2016); *See also Woodward v. Alabama*, 134 S. Ct. 405, 410-411 (2013) (Sotomayor, J., dissenting from denial of certiorari). Therefore, Mr. Frazier was entitled to a certificate of appealability on this issue.

Finally, the state is incorrect that *Hurst* does not apply retroactively to Mr. Frazier's case. Br. in Opp'n at 10-11. Again, the standard is not whether *Hurst* is a new rule that applies retroactively, but instead whether jurists could debate the retroactive application of *Hurst*. *Slack*, 529 U.S. at 484. Under *Teague v. Lane*, 489 U.S. 288 (1989), courts must give retroactive effect to new substantive rules of constitutional law. Substantive rules are "rules forbidding criminal punishment of certain primary conduct," and "rules prohibiting a certain category of punishment

for a class of defendants because of their status or offense." *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989); *see also Teague*, 489 U.S. at 307. Courts also must give retroactive effect to new "'watershed rules of criminal procedure.'" *Penry*, 492 U.S. at 352; *see also Teague*, 489 U.S. at 312–313. To fall under *Teague*'s exception for watershed rules, a procedural ruling must "implicate the fundamental fairness of the trial" and "significantly improve . . . pre-existing fact-finding procedures." *Teague*, 489 U.S. at 312-13.

Jurists of reasons could debate whether *Hurst* is retroactive under these standards. In fact, courts below are split over *Hurst*'s retroactive effect. Alabama and the Eleventh Circuit continue to hold that *Hurst* is not retroactive (*Reeves v. State*, 226 So. 3d 711, 756-757 (Ala. Crim. App. 2016); *Lambrix v. Sec'y, Dep't Corrs.*, 872 F.3d 1170, 1180 (11th Cir. 2017)), while Delaware has held that *Hurst* announced a retroactive new watershed rule of criminal procedure. *Powell v. State of Delaware*, 153 A.3d 69 (Del. 2016). Florida concluded, based on state law, that *Hurst* does not apply to cases where the person's conviction was final prior to this Court's decision in *Ring*. *Asay v. State*, 210 So. 3d 1, 15-22 (Fla. 2016). Because the retroactive effect of *Hurst* is debatable among jurists of reasons, the Eleventh Circuit improperly denied a COA.

CONCLUSION

As this Court has said, "state courts have the solemn responsibility *equally with the federal courts* to safeguard constitutional rights." *Burt v. Titlow,* 571 U.S. 12, 19 (2013) (emphasis added) (internal quotations omitted). In regards to *Hurst*,

Alabama has shirked that responsibility. While Alabama rightly changed its unconstitutional capital sentencing scheme post-*Hurst*, that change only grants prospective relief. Alabama stands alone in refusing to apply *Hurst* to any petitioner on collateral review. For the foregoing reasons, and those outlined in the original petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Natalie Olmstead

Christine Freeman, Executive Director
Natalie Carroll Rezek Olmstead, Esq.*
John Anthony Palombi, Esq.
Federal Defenders
Middle District of Alabama
817 S. Court Street
Montgomery, AL 36104
Email: natalie_olmstead@fd.org
Telephone: 334.834.2099

*Counsel of Record