Nos. 15-7786 AND 15A755

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER BROOKS,
Petitioner,

v.

ALABAMA,
Respondent.

On Petition for a Writ of Certiorari
to the Alabama Supreme Court

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO BROOKS' PETITION AND MOTION FOR STAY OF EXECUTION

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ARGUMENT

The State responded to Brooks' Application for Stay of Execution and Petition for Writ of Certiorari in the same document, and Brooks, for ease of this Court's review, will reply in a single document. The State makes three arguments in opposition to the Writ, and one brief response in opposition to the stay. Brooks will deal with these arguments in turn.

I. The State mischaracterizes Brooks' pleading in the Alabama Supreme Court in an attempt to detract from the nature of his petition: a request for relief from an unlawful sentence, which the Alabama Supreme Court denied.

Because it has somehow interpreted this certiorari petition as an appeal from a denial of relief under Rule 8(d)(1) of the Alabama Rules of Appellate Procedure, the State argues that Mr. Brooks has improperly invoked this Court's jurisdiction.[1] But, Mr. Brooks' pleadings in the Alabama Supreme Court did not invoke, mention, or imply that his appeal was premised on Rule 8. The State's assertion is wrong, and a red herring designed to distract this Court from the substantive issues

[1] State's BIO, pp. 10-11.

before it.

Mr. Brooks invoked the Alabama Supreme Court's original jurisdiction to determine whether his death sentence violated the Sixth Amendment in light of *Hurst v. Florida*.[2] The Alabama Supreme Court is "the last state court in which a decision of that (constitutional) question could be had."[3] The Alabama Supreme Court has authority "[t]o issue writs of injunction, habeas corpus, and such other remedial and original writs as are necessary to give to it a general superintendence and control of courts of inferior jurisdiction."[4] For that reason, Mr. Brooks pleading was captioned "Petition for Stay of Execution and Relief from Unconstitutional Punishment." Having considered Mr. Brooks' arguments respecting *Hurst*, the Alabama Supreme Court's one-sentence denial of that petition constitutes a final order under 28 U.S.C. § 1257(a).

The Alabama Supreme Court denied Brooks relief on the question

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[2] 2016 WL 112683 (Jan. 12, 2016).

[3] *Gotthilf v. Sills*, 375 U.S. 79, 80 (1963).

[4] Ala. Code § 12-2-7.

he presented. There is nothing left for it to decide. "In general, the final-judgment rule has been interpreted 'to preclude reviewability ... where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.'"[5] Thus, contrary to what the State has argued, there is no impediment to this Court's jurisdiction.

II. The question of the applicability of *Hurst* to Alabama's capital sentencing scheme, and the continued vitality of *Harris v. Alabama*,[6] is an open federal question that can only be resolved by this Court through a grant of *certiorari*.

The State's next argument in the Brief in Opposition is that *certiorari* should be denied because *Hurst v. Florida*[7] does not apply to invalidate Alabama's capital sentencing statute and because Alabama's death penalty sentencing scheme is different from Florida's.[8] This

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[5] *Flynt v. Ohio*, 451 U.S. 619, 620 (1981)(quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)).

[6] 513 U.S. 504 (1995).

[7] 2016 WL 112683 (Jan. 12, 2016).

[8] State's BIO, p. 11.

argument should be rejected by this Court. In *Harris v. Alabama,*[9] this Court upheld Alabama's capital sentencing scheme against an Eighth Amendment challenge.[10] *Certiorari* is necessary to resolve the issue of whether Alabama's capital sentencing scheme violates the Sixth Amendment and to determine the continued vitality of *Harris* in light of *Hurst.*[11]

There is no question that Florida and Alabama have virtually identical capital sentencing schemes. The *Harris* Court recognized the similarities between Alabama's scheme and Florida's. It stated directly:

> Alabama's capital sentencing scheme is much like that of Florida. Both require jury participation in the sentencing process but give ultimate sentencing authority to the trial judge.[12]

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[9] *Harris v. Alabama*, 513 U.S. 504, 512-513 (1995).

[10] The questions presented in *Harris* were both related to the Eighth Amendment and did not involve a Sixth Amendment challenge to Alabama's capital sentencing scheme. *See Harris v. Alabama*, 1994 WL 501803 (Petitioner's Brief).

[11] Alabama also argues to this Court that this Court's denial of *certiorari* in *Lockhart v. Alabama*, 135 S.Ct. 1844 (2015) somehow validates Alabama's capital sentencing scheme. Alabama did not acknowledge this Court's long-held precedent that denial of *certiorari* is not precedential and does not reflect on the merits of the argument. *See United States v. Carver,* 260 U.S. 482, 490 (1923) ("The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.").

[12] *Harris*, 504 U.S. at 508-09.

The *Harris* Court further observed that the two States only differed in one important respect: the weight that the judge must give to the jury's advisory verdict.[13]

Alabama's recent pleadings in this Court acknowledge the similarities between the two systems. In its *amicus* brief filed in this Court in *Hurst*, Alabama stated:

> States like Florida and Alabama responded to *Furman* by creating hybrid systems under which the jury recommends an advisory sentence, but the judge makes the final sentencing decision.[14]

As Alabama acknowledged in that brief, it has a capital sentencing system where the jury renders an advisory sentence, but the judge makes the final decision.

In Alabama, regardless of what the jury found, or did not find, when it found it or if it found it, its sentence is wholly advisory. As in Florida, there is no death sentence in Alabama until the judge finds

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[13] *Harris*, 504 U.S. at 509.

[14] *Hurst v. Florida*, 14-7505, Brief of *Amici Curiae* Alabama and Montana in Support of Respondent, p. 4.

that an aggravator exists.

And most importantly, as in Florida, a capital defendant in Alabama is not sentenced to death unless the trial court has determined that to be the sentence.[15] The jury recommendation is advisory only and does not stand as a sentence, let alone a final one.[16] As with Timothy Hurst, in the absence of the trial court's fact-findings and imposition of sentence, Christopher Brooks would not have received a death sentence.[17]

In Mr. Brooks' case, the jury voted, 11-1, in favor of an advisory death verdict. Weeks later, the trial judge sentenced him to death after improperly[18] considering aggravating evidence which had not been

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[15] Ala. Code § 13A-5-47(a).

[16] Ala. Code § 13A-5-47(e).

[17] Ala. Code § 13 A-5-47(d) ("Based upon the evidence presented at trial, the evidence presented during the sentence hearing, and the pre-sentence 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).

[18] The Eighth Amendment forbids the admission of "a victim's family members' characterization and opinions about the crime, the defendant, and the appropriate sentence." *Payne v. Tennessee*, 501 U.S. 808, 830 n.2 (1991).

presented to the jury, and independently evaluating aggravating and mitigating circumstances.

Hurst now forbids "a judge [to] increase[] … authorized punishment based on her own fact-finding."[19] In so holding, the Supreme Court explicitly overruled its decisions in *Hildwin v. Florida*[20] and *Spaziano v. Florida*,[21] which concluded that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury."[22]

Thus, *Hurst* imperils the constitutionality of Alabama's capital sentencing scheme, which also vests in the trial judge sole discretion for determining whether to impose the death penalty. Contrary to the State's assertion,[23] *Hurst* holds that a judge may not be the final

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[19] *Id.* at *6.

[20] *Hildwin v. Florida*, 490 U.S. 638 (1989).

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

[22] *Hurst*, No. 14-7505, 2016 WL 112683, at *8.

[23] State's BIO, p. 18.

sentencing authority.[24] *Certiorari* is appropriate to resolve this question.

III. The question of retroactive application of *Hurst* is before this Court but the jurisdictional question raised in *Montgomery v. Louisiana*,[25] must be resolved before that question can be reached.

As it did in the Alabama Supreme Court, the State now argues that *Hurst* does not apply to Mr. Brooks because his case was not on direct appeal when *Hurst* was rendered.[26] Mr. Brooks acknowledged in his petition that the issue of retroactive application of *Hurst* was before the Court.[27] However, there is a jurisdictional issue that must be resolved before the Court may resolve the question of retroactivity.

The State maintains that this issue is "convoluted."[28] It is certainly clear to the Court, because it was the Court that raised the

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[24] *Hurst*, No. 14-7505, 2016 WL 112683, at *9 (U.S. Jan. 12, 2016) ("The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death *sentence on a jury's verdict, not a judge's factfinding*.").

[25] No. 14-280.

[26] State's BIO, p. 18.

[27] Petition, p. 26.

[28] State's BIO, p. 19.

issue in *Montgomery*.[29] Does this Court have jurisdiction to review a ruling of a state court that decides a retroactivity question using federal law?

The State also argues that because this Court did not hold in *Hurst* that the case applied retroactively, it does not apply retroactively.[30] This argument fails because the issue was not present in *Hurst*; therefore, there was no need for this Court to decide it. The issue is present here, and *certiorari* is appropriate to determine whether *Hurst* applies retroactively to petitioners such as Mr. Brooks.

Further, the State's response treats the issue as resolved immutably in its favor.[31] This is not the case, and *certiorari* is appropriate to resolve the question.

Warren Summerlin was convicted of first-degree murder and sexual assault in Arizona under a capital sentencing scheme which allowed a trial judge to impose a death sentence without a jury's

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[29] 135 S.Ct. 1546 (2015).

[30] State's BIO, p. 19.

[31] *Id.*

input.[32]

While Summerlin's case was pending in federal habeas, this Court decided *Ring v. Arizona*[33], which "concluded that, because Arizona law authorized the death penalty only if an aggravating factor was present, *Apprendi* required the existence of such a factor to be proved to a jury rather than to a judge."[34] Summerlin asserted that *Ring* invalidated the capital sentencing scheme under which he had been sentenced to death. More specifically, he argued that his judge-alone sentencing proceeding violated his Sixth Amendment jury trial rights.[35] The Ninth Circuit agreed, reasoning that "under *Teague,* the rule announced by the Supreme Court in *Ring,* with its restructuring of Arizona murder law and its redefinition of the separate crime of capital murder, is necessarily a 'substantive' rule."[36]

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[32] *Schriro v. Summerlin*, 542 U.S. 348, 350 (2004)("Arizona's capital sentencing provisions in effect at the time authorized the death penalty if one of several enumerated aggravating factors was present.")

[33] 536 U.S. 584 (2002).

[34] *Id.* at 351 (2004) (citing *Ring*, 536 U.S. at 603-609).

[35] *Summerlin v. Stewart*, 341 F.3d 1082, 1088 (9th Cir. 2003).

[36] *Summerlin v. Stewart*, 341 F.3d at 1092 *rev'd and remanded sub nom. Schriro v.*

On *certiorari* to this Court, Summerlin asked: "whether *Ring v. Arizona* . . . applies retroactively to cases already final on direct review."[37] And, answering that question in the negative, *Summerlin* held that neither the rule announced in *Ring v. Arizona* nor in *Apprendi v. New Jersey* would apply retroactively to convictions already final.[38] Thus, this Court decided in *Summerlin* that, for some condemned petitioners, there is no remedy for patently death unconstitutional sentences.[39]

This Court asserted two reasons for its conclusion that the patent Sixth Amendment violation embodied in Summerlin's sentence could not be remedied. First, this Court said that "*Ring's* holding is properly classified as procedural,"[40] because it spoke to the method for imposing

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Summerlin, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004).

[37] 124 S. Ct. 2519 (2004).

[38] *Summerlin*, 542 U.S. at 358 ("*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review.").

[39] *Danforth v. Minnesota*, 552 U.S. 264, 291 (2008)("A decision by this Court that a new rule does not apply retroactively under *Teague* does not imply that there was no right and thus no violation of that right at the time of trial—only that no remedy will be provided in federal habeas courts.")

[40] *Summerlin*, 542 U.S. at 353.

a death sentence and "did not alter the range of conduct Arizona law subjected to the death penalty."[41] Next, this Court implied that *Ring* was a not "watershed rule[]of criminal procedure," warranting an exception to *Teague*.[42]

Leaving aside (for the moment) whether this Court has jurisdiction to impose retroactivity rules on Alabama, *Summerlin*'s resolution does not foreclose retroactive application of *Hurst*.

First, failing to make *Hurst* retroactive would be incompatible with the Eighth Amendment, which recognizes that capital punishment is qualitatively different from any other form of punishment.[43] "All of [the Court's] Eighth Amendment jurisprudence concerning capital

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[41] *Id.*

[42] *Id.* at 355.

[43] *Woodson v. N. Carolina*, 428 U.S. 280, 305 (1976) ("the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."); ...."); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) ("[D]eath as a punishment is unique in its severity and irrevocability").

sentencing is directed toward the enhancement of reliability and accuracy in some sense."[44] To the extent that *Summerlin* rejected the Eighth Amendment concerns raised by the unconstitutional death sentence in that case,[45] it was wrongly decided. As Justice Breyer wrote, concurring in the *Hurst* judgement, "the Eighth Amendment [also] requires that a jury, not a judge, make the decision to sentence a defendant to death."[46]

Second, assuming *Hurst* can be said to be a new rule,[47] it should be applied retroactively because Sixth Amendment rights are

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[44] *Sawyer v. Smith*, 497 U.S. 227, 243 (1990).

[45] *Summerlin*, 542 U.S. at 357 ("The dissent also advances several variations on the theme that death is different (or rather, 'dramatically different,' *post,* at 2529). Much of this analysis is not an application of *Teague,* but a rejection of it, in favor of a broader endeavor to 'balance competing considerations,' *post,* at 2528. Even were we inclined to revisit *Teague* in this fashion, we would not agree with the dissent's conclusions.")

[46] *Hurst v. Florida*, No. 14-7505, 2016 WL 112683, at *9 (U.S. Jan. 12, 2016).

[47] *Hurst* is arguably an old rule under *Teague* because it rests on well-established Sixth Amendment precedent. *See Teague v. Lane*, 489 U.S. 288, 301 (1989) ("a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.") The State appears to agree. *See* (State's BIO, p. 16)("*Hurst* did not create new law, but merely applied *Ring* to peculiarities in Florida law that are not present in Alabama.")

fundamental rights, both under the federal constitution[48] and in Alabama.[49] As this Court said in *Teague*, "a new rule should be applied retroactively if it requires the observance of 'those procedures that ... are 'implicit in the concept of ordered liberty[.]"[50]And "*Teague* by its terms only applies to procedural rules."[51]

In the most basic sense, *Hurst*'s reaffirmance of the jury trial right remedies a "'structural defect [ ] in the constitution of the trial

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[48] *Ring v. Arizona*, 536 U.S. 584, 610 (2002)(Scalia, J., concurring)("On the other hand, as I wrote in my dissent in *Almendarez–Torres v. United States,* 523 U.S. 224, 248, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), and as I reaffirmed by joining the opinion for the Court in *Apprendi,* I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.")

[49] *Gilbreath v. Wallace*, 292 Ala. 267, 271-72, 292 So. 2d 651, 655 (1974)("In Alabama the basic principles which apply to constitutional juries in criminal cases also apply in civil cases. The crucial words which control these principles are 'shall remain inviolate.' To provide that the right of trial by jury shall remain inviolate is to forbid the state through the legislative, judicial, or executive department-one or all-from ever burdening, disturbing, qualifying, or tampering with this right to the prejudice of the people. *Alford v. State, supra*. Historically, a jury (with minor exceptions, e.g., insanity inquisitions) has consisted of 12 people selected from the community in which the trial is to be held.")

[50] *Teague*, 489 U.S. at 311.

[51] *Bousley v. United States*, 523 U.S. 614, 620 (1998).

mechanism,'"[52]: it vindicates "the jury guarantee ... [as] a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function."[53]

A rule through which the Supreme Court "mak[es] a certain fact essential to the death penalty" is substantive.[54] *Hurst* unquestionably substantively redefined Florida's capital sentencing scheme (as well as Alabama's). As *Ring* did to Arizona's scheme, *Hurst* transformed Florida's aggravators into elements by reaffirming that a fact that "'exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an 'element' that must be submitted to a jury."[55] This Court has said repeatedly that capital punishment results

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[52] *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993).

[53] *Id.*

[54] *Summerlin*, 542 U.S. at 352-53.

[55] *Hurst v. Florida*, No. 14-7505, 2016 WL 112683, at *5 (U.S. Jan. 12, 2016); *Id.* at *6 ("As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring,* we hold that Hurst's sentence violates the Sixth Amendment.")

in a substantive, categorical transformation of the crimes charged.[56] So too here. Because Florida's scheme failed to protect the defendant's right to jury fact-finding in capital sentencing, this Court declared Florida's statute unconstitutional, which means that it must be reinvented.[57] Substantive rules must apply retroactively, this Court has said, because they "'necessarily carry a significant risk that a defendant' . . . faces a punishment that the law cannot impose upon him."[58]

Alternatively, *Hurst* should be considered a "watershed rule . . . implicating the fundamental fairness and accuracy of the criminal

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[56] *Sattazahn v. Pennsylvania,* 537 U.S. 101, 111 (2003) ("Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment *that may be imposed* on a defendant, that fact … constitutes an element, and must be found by a jury beyond a reasonable doubt.") (emphasis added); *Ring,* 536 U.S. at 613 ("[T]he finding of an aggravating circumstance *exposes* 'the defendant to a greater punishment than that authorized by the jury's guilty verdict.' When a finding has this effect, *Apprendi* makes clear, it cannot be reserved for the judge.") (Kennedy, J., concurring) (internal citation omitted) (emphasis added).

[57] *Hurst,* No. 14-7505, 2016 WL 112683, at * 9. ("Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.")

[58] *Summerlin*, 542 U.S. at 352 (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998) (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974))).

proceeding."[59] *Summerlin* does not control the result here because the majority opinion did not squarely decide that question.[60] *Hurst* confirms that a death sentence cannot be imposed where the judge, not the jury, has made factual determinations.[61]

Admittedly, "in the years since *Teague,* [this Court] [has] rejected every claim that a new rule satisfied the requirements for watershed status."[62] But, the jury's role in sentencing is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure."[63] And, as this Court has recognized "[t]he historic link between verdict and judgment and the consistent limitation on judges'

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[59] *Id.* (citations omitted)("we give retroactive effect to only a small set of 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding.")

[60] Marc E. Johnson, *Everything Old Is New Again: Justice Scalia's Activist Originalism in Schriro v. Summerlin*, 95 J. Crim. L. & Criminology 763, 797 (2005)("It is interesting that Justice Scalia failed to even discuss whether *Ring*'s rule was of 'watershed' significance.")

[61] *Hurst v. Florida*, No. 14-7505, 2016 WL 112683, at *3 (U.S. Jan. 12, 2016)("The 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.")

[62] *Whorton v. Bockting*, 549 U.S. 406, 418 (2007).

[63] *Blakely v. Washington*, 124 S. Ct. 2531, 2358-59 (2004).

discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone."[64] Thus, *Hurst's* affirmation of the jury right should constitute a watershed rule. *Certiorari* is appropriate to resolve this important question.

IV. The State offers no compelling reason to deny Brooks a stay of execution pending resolution of the legality of his death sentence.

The State concluded by arguing that the equities were against granting a stay, because the crime in this case happened in 1992.[65] While that is true, and while it is true that a State has a legitimate interest in enforcement of its sentences, it has no interest in carrying out a sentence that was obtained illegally. Mr. Brooks' death sentence was the result of a statutory sentencing scheme that violates the Sixth

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[64] *Apprendi v. New Jersey*, 530 U.S. 466, 482-83 (2000).

[65] State's BIO, p. 20.

Amendment. A stay of execution is appropriate to allow this Court to review the case, grant *certiorari*, and resolve this important constitutional issue.

CONCLUSION

For the forgoing reasons, and those outlined in his initial petition, the petition for a writ of *certiorari* should be granted and Mr. Brooks' execution should be stayed.

Respectfully submitted,

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