No. _____

In the Supreme Court of the United States

THOMAS D. ARTHUR, PETITIONER

v.

STATE OF ALABAMA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

CAPITAL CASE
EXECUTION OF THOMAS D. ARTHUR
SCHEDULED FOR THURSDAY,
NOVEMBER 3, 2016

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

I. Petitioner, Thomas Arthur, was sentenced to death under Alabama's capital sentencing scheme on the fact-finding of a judge after a non-unanimous advisory jury recommendation. In *Hurst* v. *Florida*, 136 S. Ct. 616 (2016), this Court held that Florida's capital sentencing scheme violated the Sixth Amendment right to a jury trial because it permitted a judge to enter a sentence of death based on his own fact-finding. *Id.* at 624. The questions presented are:

A. Whether Alabama's advisory jury death sentencing scheme, which is in all relevant respects the same as the Florida scheme reviewed in *Hurst*, violates the Sixth Amendment.

B. Whether *Hurst* and the Sixth and Eighth Amendments require, at least, a unanimous jury recommendation for a sentence of death, as the Florida Supreme Court held on remand in *Hurst*.

II. In *Teague* v. *Lane*, 489 U.S. 288 (1989), this Court held that new, watershed rules of criminal procedure apply retroactively to defendants no longer on direct appeal. The question presented is whether the Supreme Court's decision in *Hurst* v. *Florida* applies retroactively to Mr. Arthur's case, and the cases of other condemned inmates sentenced under unconsti-

tutional capital sentencing laws, where the new rule announced in *Hurst* implicates the fundamental right to a fair trial and substantially enhances fact-finding procedures.

PARTIES TO THE PROCEEDINGS

Petitioner is Thomas D. Arthur, a seventy-four year old inmate sentenced to death, and currently incarcerated at Holman Correctional Facility in Atmore, Alabama.

Respondent is the State of Alabama.

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INTRODUCTION

In 1992, Mr. Arthur was sentenced to death by a judge in Alabama, based on his own fact-finding following a non-unanimous advisory jury recommendation. In *Hurst* v. *Florida*, this Court held that Florida's death penalty scheme violated the Sixth Amendment to the United States Constitution because the jury renders an advisory verdict but the judge makes the final sentencing determination based on his own fact-finding. *Hurst* v. *Florida*, 136 S. Ct. 616, 624 (2016). In doing so, the *Hurst* court found unconstitutional a death penalty sentencing scheme that relies on judicial fact-finding and judicial weighing of aggravating factors for imposition of the death sentence.

Despite this Court's holding in *Hurst*, Alabama intends tomorrow to execute Mr. Arthur, who was sentenced to death by a judge following a non-unanimous jury recommendation based on the *judge's* findings that an aggravating factor (i) existed such that Mr. Arthur could be put to death and (ii) was not outweighed by any mitigating factors. In short, Mr. Arthur was sentenced to death under a statutory scheme on all fours with the Florida scheme found unconstitutional in *Hurst*.

When *Hurst* was decided, three states, Florida, Delaware and Alabama, permitted judicial fact-finding for imposition of a sentence of death following a non-binding advisory jury verdict. Brief for Alabama and Montana as *Amicus Curiae* in Support of Respondents, *Hurst* v. *Florida*, 136 S. Ct. 616 (2016), 2015 WL 4747983 at *7. Since *Hurst*, the Delaware Supreme Court has held that Delaware's scheme, like Florida's, is unconstitutional. *Rauf* v. *Delaware*, No. 39-2016, 2016 WL 4224252 at *1 (Aug. 2, 2016). The Alabama Supreme Court, however, has defied this Court's *Hurst* ruling and purported to uphold the constitutionality of Alabama's capital sentencing scheme based on irrelevant distinctions between its law and Florida's. *See In re Bohannon* v. *State*, No. 1150640, 2016 WL 5817692 (Ala. Sept. 30, 2016).

It is critical that the constitutionality of Alabama's capital sentencing statute, "based on Florida's sentencing scheme," *Harris* v. *Alabama*, 513 U.S. 504, 508 (1995), be clarified by this Court. Additionally, Mr. Arthur's case (and numerous other pending cases) raise the important question of whether *Hurst* applies retroactively to permit condemned inmates no longer on direct appeal to have their constitutional right to a jury trial vindicated.

OPINIONS BELOW

The order of the Supreme Court of Alabama denying Mr. Arthur's Petition to Vacate or Stay Order of Execution (Pet. App. A) is unreported.

JURISDICTION

The order of the Alabama Supreme Court denying Mr. Arthur's Petition to Vacate or Stay Order of Execution to the Alabama Supreme Court was entered on

November 2, 2016. This petition was timely filed the same day. The Court has jurisdiction pursuant to 28 U.S.C. Section 1257(a).

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." U.S. Const. amend. VI.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Alabama Code provides:

> (d) Based upon the evidence presented at trial, the evidence presented during the sentencing 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. The trial court shall also enter written findings of facts summarizing the crime and the defendant's participation in it.

> (e) In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such verdict has been waived pursuant to Section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

Code of Alabama, 1975 ("Ala. Code") § 13A-5-47.

STATEMENT OF THE CASE

A. Alabama's Capital Sentencing Scheme

This Court has recognized that Alabama's sentencing scheme is "based on Florida's sentencing scheme." *Harris* v. *Alabama*, 513 U.S. 504, 508 (1995). Likewise, in Alabama's *amicus* brief urging the Supreme Court not to invalidate Florida's death sentencing statute in *Hurst*, Alabama's Solicitor General conceded that the laws were the same and explained that Florida and Alabama had relied on (now overturned) precedent "to sentence hundreds of murderers in the intervening decades." Brief of Amici Curiae Alabama and Montana in Support of Respondent, *Hurst* v. *Florida*, 136 S. Ct. 616 (2016), 2015 WL 4747983 at *7.

In Alabama, the trial judge alone holds the authority to impose a capital sentence, Ala. Code Section 13A-5-47(e), and that sentence is imposed based on the aggravating and mitigating factors found and weighed by the judge, after an advisory recommenda-

tion from the jury, which is subject to "judicial override." *Id.*

Alabama law requires the sentencing judge to conduct an evidentiary hearing before the jury. Ala. Code § 13A-5-46. After that hearing, the jury deliberates to return an "advisory verdict," which "is not binding upon the court," and does not need to be unanimous. Ala. Code § 13A-5-46(d)-(f). The jury is not required to set forth written findings. Ala. Code § 13A-5-46(f). Only the trial court is required to set forth written findings imposing the death sentence. Ala. Code § 13A-5-47(d). Alabama, like Florida's old scheme, has no statutory or constitutional requirement that the jury make specific findings of aggravating or mitigating circumstances during this sentencing phase of the capital case.[1] In Alabama, a capital defendant is sentenced to death based on a *trial court* weighing its own factual findings and deciding to impose a capital sentence with, at most, "consideration" given to a jury's advisory verdict. Ala. Code § 13A-5-47(a). Indeed, the judge may depart from the jury's recommendation and impose death despite a jury recommendation for life imprisonment without parole. Ala. Code § 13A-5-47(e).

B. Mr. Arthur's Trial and Sentencing

Mr. Arthur was indicted on April 29, 1982 for the killing of Troy Wicker.

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[1]Ala. Code § 13A-5-46(e); *Adams* v. *State*, 955 So. 2d 1037, 1101 (Ala. Crim. App. 2003); *Boyd* v. *State*, 715 So. 2d 825, 846 (Ala. Crim. App. 1997); *Gaddy* v. *State*, 698 So. 2d 1100, 1143 (Ala. Crim. App. 1995); *Haney* v. *State*, 603 So. 2d 368, 387-388 (Ala. Crim. App. 1991).

Following two earlier trials (the results of which were reversed due to constitutional violations), Mr. Arthur was tried again in 1991. The prosecution submitted one charge to the jury: a single count of murder, made capital because Mr. Arthur previously had been convicted of second degree murder in the twenty years prior to Wicker's killing. *See* Ala. Code § 13A-5-40(a)(13). Mr. Arthur was convicted of capital murder in the Tenth Judicial Circuit Court, Jefferson County, on December 5, 1991.

On the same day as his conviction, the sentencing phase of the trial was held, during which Mr. Arthur's counsel presented letters and written testimony as mitigating evidence. (Trial Tr. 1169-70.)

The judge instructed the jury that the verdict form would contain their recommendation and numerical vote (Trial Tr. 1230-1231), and that they could consider one aggravating factor: whether Arthur was "under sentence of imprisonment" when the crime was committed, (Trial Tr. 1210-1211.). The jury returned an advisory verdict for death to the judge by a vote of 11-1 (eleven in favor and one against imposing the death penalty). The jury vote was the only information provided to the judge by the jury, who were not asked to answer any specific questions. (Trial Tr. 1237.)

On January 24, 1992, the trial court conducted the final sentencing phase of the trial. (Trial Tr. 1247-1300.) The trial court found the existence of one aggravating circumstance under Ala. Code 13A-5-49, namely, that the capital offense was committed by one under sentence of imprisonment. (Trial Tr. 1299-1300; January 24, 1992 Order of the Court on the Imposition of the Death Penalty 9-10 ("January 24, 1992

Order").) The trial court then found that one mitigating factor existed under Ala. Code Section 13A-5-52: even though the culpability of Mr. Arthur's alleged accomplices, Teresa Rowland and Theron McKinney, in the murder of Troy Wicker was "unquestioned", they were not prosecuted by the State. (January 24, 1992 Order 11-12.) The trial court found that the aggravating circumstance outweighed the mitigating circumstance and sentenced Mr. Arthur to death. (*Id.* at 12-13.)

C. Procedural History

Following trial and sentencing, Mr. Arthur's conviction and death sentence were affirmed by the Court of Criminal Appeals on March 8, 1996. *Arthur* v. *State*, 711 So. 2d 1031 (Ala. Crim. App. 1996). The Alabama Supreme Court affirmed on November 21, 1997 and denied Mr. Arthur's motion for rehearing on March 20, 1998. *Ex. Parte Arthur*, 711 So. 2d 1097 (Ala. 1997), *reh'g denied* (Mar. 20, 1998).

Mr. Arthur was unrepresented by counsel and had no access to state-funded legal assistance after the Alabama Supreme Court denied his motion for rehearing on March 20, 1998. Without the benefit of counsel or other assistance, Mr. Arthur never filed a petition for *certiorari* to the United States Supreme Court. The Court of Criminal Appeals issued a certificate of judgment on April 7, 1998.

On January 25, 2001, with the assistance of *pro bono* counsel, Mr. Arthur moved to reargue the dismissal but his motion was denied by the trial court on March 14, 2001. On April 25, 2001, the Alabama Court of Criminal Appeals affirmed that decision, and the Alabama Supreme Court denied Mr. Arthur's petition for *certiorari* on November 2, 2001. *Arthur* v. *State*,

820 So. 2d 886 (Ala. Crim. App. 2001), *reh'g denied* (July 27, 2001), *cert. denied* (Nov. 2, 2001). This Court denied certiorari on May 13, 2002. *Arthur* v. *Alabama*, 535 U.S. 1053 (2002).

On November 1, 2016, Mr. Arthur filed in the Alabama Supreme Court a Petition to Vacate or Stay Order of Execution based on his *Hurst* claims. The same day, the State filed its opposition. On November 2, 2016, the Alabama Supreme Court denied Mr. Arthur's petition — with one dissenting justice[2] — without an opinion or reasons for decision.[3]

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[2] The dissenting judge in Mr. Arthur's case concurred in the result only in the recent Alabama Supreme Court decision upholding the constitutionality of Alabama's capital sentencing scheme. *Bohannon* v. *State*, No. 1150640, 2016 WL 5817692 (Ala. Sept. 30, 2016)(Murdock, J., concurring.)

[3] The State opposed Mr. Arthur's petition before the Alabama Supreme Court on jurisdictional grounds, among others. The State's position that the Alabama Supreme Court did not have jurisdiction has no merit. Under Ala. Code § 12-2-2, the Supreme Court of Alabama has authority to "issue writs of certiorari and to grant injunctions and stays of execution of judgment." *See also* Ala. Code § 12-2-7(2) (court has jurisdiction "in the issue and determination of writs of *quo warranto* and mandamus in relation to matters in which no other court has jurisdiction"); Ala Code 12-2-7(3) (court has jurisdiction to "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.") Further, pursuant to Ala. R. Crim. App. 8(d), the Alabama Supreme Court may "enter an order fixing a date of execution and may make other appropriate orders upon disposition of the appeal or other review." This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). In all events, in light of the position the State took in its opposition before the Alabama Supreme Court, Mr. Arthur has also, out of an abundance of caution, filed an action in the Tenth Judicial Circuit Court, Jefferson County, Alabama for relief based on *Hurst*.

D. Other Proceedings

On November 2, 2016, the Court of Appeals for the Eleventh Circuit affirmed judgment against Mr. Arthur with respect to his challenge to Alabama's lethal injection protocol under 42 U.S.C. Section 1983. Mr. Arthur plans to file a petition for a writ of *certiorari* in this Court by November 3.

E. Petitioner's Execution Date

The Alabama Supreme Court has set an execution date for tomorrow, **November 3, 2016.**

F. The Alabama Supreme Court's Opinion

On November 1, 2016, Mr. Arthur filed a petition before the Alabama Supreme Court under Rule 8(d)(1) of the Alabama Rules of Appellate Procedure, pursuant to which that court is permitted to set an execution date "at the appropriate time." Mr. Arthur sought a stay or vacatur of his execution date pending completion of the review of Alabama's capital sentencing scheme. The Alabama Supreme Court dismissed Mr. Arthur's petition on November 2, 2016, with one dissenting justice, without an opinion or reasons for decision.

This petition followed.

REASONS FOR GRANTING THE PETITION

This Court's review of Alabama's capital sentencing scheme under the Sixth and Eighth Amendments to the U.S. Constitution is urgently needed.

After *Hurst*, Alabama is now the *only* state where a hybrid non-binding advisory sentencing scheme is

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That petition does not, however, alter jurisdiction in this Court to review the Alabama Supreme Court's denial of relief.

still deemed constitutional. *Compare Hurst* v. *State*, No. SC12-1947, 2016 WL 6036978 (Fla. Oct. 14, 2016); *Rauf* v. *Delaware*, No. 39-2016, 2016 WL 4224252 (Aug. 2, 2016) *with In re Bohannon* v. *State*, No. 1150640, 2016 WL 5817692 (Ala. Sept. 30, 2016). Both Florida and Delaware have held that it is unconstitutional for judges to impose a sentence of death, after a non-unanimous jury recommendation. *Id.* Alabama is now a constitutional outlier. Absent this Court's review, it is likely that the Alabama Supreme Court will continue to uphold sentences based on judicial fact-finding in a manner inconsistent with *Hurst*. *In re Bohannon* v. *State*, No. 1150640, 2016 WL 5817692 (Ala. Sept. 30, 2016)

Additionally, the Court should grant *certiorari* to clarify the retroactive applicability of *Hurst* to cases not on direct appeal. Clarification of whether *Hurst* retroactively applies is of the utmost importance to resolving challenges and potential challenges of the many inmates on death row who were sentenced pursuant to Alabama and Florida's unconstitutional sentencing schemes.

I. THE RULING OF THE ALABAMA SUPREME COURT CONFLICTS WITH THIS COURT'S PRECEDENT.

In *Hurst*, this Court held that a death penalty sentencing scheme that relied on judicial fact-finding, with the jury limited to an advisory role, could not satisfy the requirements of the Sixth Amendment announced in *Ring* v. *Arizona*, 536 U.S. 584 (2002): "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." *Hurst*, 136 S. Ct. at 619.

Alabama's death penalty scheme has the same defects that were declared unconstitutional in *Hurst* and is likewise unconstitutional.[4] In Alabama, *only* the trial judge holds the authority to impose the death sentence, and that sentence need only be based on the aggravating and mitigating factors found and weighed *by the judge*. Ala. Code § 13A-5-47(e) ("While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court."). Like Florida's unconstitutional scheme, Alabama: (1) employs a "hybrid" procedure where the jury renders an advisory verdict but the judge makes the ultimate sentencing decision, Ala. Code § 13A-5-47(e); *Harris*, 513 U.S. at 508; (2) requires the jury to deliberate and return an "advisory verdict," Ala. Code § 13A-5-46(d), which "is not binding upon the court," Ala. Code § 13A-5-47(e); and (3) requires only the trial court — not the jury — to set forth findings imposing the death sentence, Ala. Code § 13A-5-47(d). As in Florida, a capital defendant in Alabama is not sentenced to death unless *the trial court* has weighed its findings and determined that to be the sentence. Ala. Code § 13A-5-47(a). Thus, Alabama requires the judge to independently make "the critical findings necessary to impose the death penalty" in violation of the constitutional principles set forth in *Hurst*, 136 S. Ct. at 622; Fla. Stat. § 921.141(3) (2010).

In Alabama's amicus brief to this Court in *Hurst*, Alabama's Solicitor General acknowledged that Alabama's statute has the same mechanism as Florida's, noting that "[t]hree states — Delaware, Florida, and

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[4] Indeed, this Court has recognized that Alabama's sentencing scheme is "based on Florida's sentencing scheme." *Harris* v. *Alabama*, 513 U.S. 504, 508 (1995).

Alabama — allow a judge to impose a sentence regardless of a jury's recommendation. *See* Ala. Code § 13A-5-47; Fla. Stat. § 921.141 (2010); Del. Code tit. 11, § 4209(d)." Brief for Alabama and Montana as *Amicus Curiae* in Support of Respondents, *Hurst* v. *Florida*, 136 S. Ct. 616 (2016), 2015 WL 4747983 at *7. Critically, Alabama's Solicitor General repeatedly urged the Court not to "upset established precedent" by overruling the pre-*Ring* cases *Harris* v. *Alabama*, 513 U.S. 504 (1995), and *Spaziano* v. *Florida*, 468 U.S. 447 (1984). This Court rejected Florida (and Alabama's) arguments, however, and "expressly overrule[d] *Spaziano* and *Hildwin* [v. *Florida*, 490 U.S. 638 (1989),] . . . to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's fact-finding, that is necessary for imposition of the death penalty." *Hurst*, 136 S. Ct. at 623-24.

Following *Hurst*, the Supreme Court of Delaware (the only other state, aside from Florida and Alabama to use this "hybrid system") ruled that Delaware's death penalty scheme violated the Sixth Amendment to the United States Constitution. *Rauf* v. *Delaware*, No. 39-2016, 2016 WL 4224252 at *1 (Aug. 2, 2016).

Florida's Supreme Court followed suit in its decision in the *Hurst* case on remand, applying this Court's *Hurst* decision and both the Federal and state constitutions to conclude that, "before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances," and that these requirements

could no longer be "consigned" to the trial judge. *Hurst* v. *State*, No. SC12-1947, 2016 WL 6036978, at *10 (Fla. Oct. 14, 2016)

A. Alabama's Attempt to Evade *Hurst* Is Unavailing.

In contrast to the Delaware and Florida courts, the Alabama Supreme Court ruled that *Hurst* did not invalidate Alabama's scheme, "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." *In re Bohannon* v. *State*, No. 1150640, 2016 WL 5817692, at *5 (Ala. Sept. 30, 2016). This is *not* what occurred in Mr. Arthur's case — a jury rendered nothing more than a non-unanimous, non-binding verdict that did not ensure, as the Court in *Bohannon* claims, that a unanimous jury found the existence of the aggravating factor used by the judge to sentence Mr. Arthur to death.

The *Bohannon* decision fails to address *Hurst*'s rule in two respects. *First*, as Mr. Arthur's case itself demonstrates, judges in Alabama are not required to consider the same facts in sentencing as the jury finds during the guilt phase of the trial. Under Alabama's scheme, in such cases it is the judge who "determines . . . the critical finding that an aggravating circumstance exists," *not* the jury. *Second*, even where a jury has found an aggravating factor as part of the guilt phase, the judge may in the sentencing phase find additional facts related to mitigation or aggravation that were not addressed by the jury. Thus, the judge alone determines whether to impose a death sentence based on a combination of factors, only some of which may have been considered by the jury during

the guilt phase. Indeed, the Ala. Code explicitly contemplates a situation in which a jury finds *no* aggravating factors in the "sentencing phase" of a capital case — but the judge could ignore such a finding and sentence the defendant to death. Ala. Code § 13A-5-46(e)(1) ("If the jury determines that no aggravating circumstances as defined in Section 13A-5-49 exist, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole.").

B. The Judge, Not the Jury, Made the Factual Findings on Which Mr. Arthur's Death Sentence Was Based.

Hurst forbids "a judge [to] increase[] . . . authorized punishment based on her own fact-finding." *Hurst*, 136 S. Ct. at 622. This is, however, exactly what Alabama's capital sentencing scheme requires.[5] Alabama's sentencing statute requires that, to impose a death sentence, the judge make her own factual determination — independent of the jury's determination on this issue — that an aggravating circumstance has been proved. *See* Ala. Code § 13A-5-47(d) (requiring judge to make "findings concerning the existence or nonexistence of each aggravating circumstance[]"). In Mr. Arthur's case, a sentence of death was imposed upon a finding — made only by the judge, not the jury — of the existence of an aggravating factor. (January 24, 1992 Order 9-10 (finding as aggravating fac-

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[5] *See Harris* v. *State*, 632 So. 2d 503, 538 (Ala. Crim. App. 1992) *aff'd sub nom. Ex parte Harris*, 632 So. D 543 (Ala. 1993), *on reh'g* (Oct. 29, 1993) *aff'd sub nom. Harris* v. *Alabama*, 513 U.S. 504, 115 S. Ct. 1031 (1995) ("Pursuant to § 13A–5–47(e) . . . '[t]he trial court and not the jury is the sentencing authority.'") (citations omitted).

tor that Mr. Arthur committed crime while under a term of imprisonment).)[6]

Mr. Arthur's sentence further violates the Sixth Amendment to the United States Constitution because the judge, rather than the jury, made the factual finding that the aggravating circumstances outweighed the mitigating circumstances, and imposed the death penalty despite a non-unanimous advisory recommendation.

As *Hurst* confirmed, requiring the judge to make this factual determination violates the Sixth Amendment. *See* 136 S. Ct. at 622 ("The trial court *alone* must find the facts . . . [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances. . . . The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." (quotation marks omitted) (emphasis and alternations in original)). As *Hurst* recognized, because it is merely an advisory recommendation, even a jury's advisory verdict recommending a sentence of death where the jury was statutorily required to find that the aggravating circumstances outweighed any mitigating circumstances does not constitute the "necessary factual

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[6] In contrast to *Bohannon*, the judge in Mr. Arthur's case engaged in fact-finding on a question distinct from what was charged in the indictment. Mr. Arthur's case therefore exposes a constitutional defect in Alabama law – one that was not raised on the facts in *Bohannon*. There is no requirement in Alabama law that the sentencing judge only weigh aggravating factors that were found, by the jury, in the "guilt phase" of the trial. In applying and finding an aggravating factor different from the elements considered by the jury in formulating their guilty verdict, Alabama's sentencing scheme violated Mr. Arthur's Sixth Amendment right, even under *Bohannon*'s reasoning.

finding" that the aggravating factor(s) outweigh any mitigating factor(s) required under the Sixth Amendment. *Id.*

II. THE REASONING IN *HURST* AND THE SIXTH AND EIGHTH AMENDMENTS REQUIRE THAT A DEATH SENTENCE BE IMPOSED ONLY ON A UNANIMOUS JURY VERDICT.

Mr. Arthur's sentence violated the Sixth and Eighth Amendments of the United States Constitution for the additional reason that the jury's recommendation was not unanimous. As recently recognized by the Florida Supreme Court on remand in *Hurst*, "the trend of states either eliminating the death penalty as a punishment or requiring jury unanimity in fact-finding and the final recommendation before sentencing a defendant to death demonstrates 'the evolving standards of decency' with respect to the jury's fact-finding role in capital punishment in the United States." *Hurst*, 2016 WL 6036978 at *28. The Florida Supreme Court further acknowledged that, of the thirty-one states still permitting capital punishment when this Court decided *Hurst*, only Alabama, Delaware, and Florida permitted defendants to be sentenced to death without a unanimous jury. *See id.* at *28.

Post-*Hurst*, the Florida Supreme Court has now held that "based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment . . . [,] in order for the trial court to impose a sentence of death, the jury's recommended sentence of death

must be unanimous." *Hurst*, 2016 WL 6036978 at *2.[7] In addition to recognizing that the jury's capital sentence "recommendation is tantamount to the jury's verdict in the sentencing phase of trial, the Florida Supreme Court drew on the long history of the "right to a unanimous jury in English jurisprudence," *id.* In addition, the Florida Supreme Court recognized the literature indicating that unanimity is critical to preserving the integrity of jury deliberation and sentencing. *See id.* at *10-14 (citing, *inter alia*, Scott E. Sundby, *War & Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 Hastings L.J. 103 (2010); Elizabeth F. Loftus & Edith Greene, *Twelve Angry People: The Collective Mind of the Jury*, 84 Colum. L. Rev. 1425, 1428 (1984)). The Florida Supreme Court further concluded that, given the unparalleled gravity of the death sentence, "the foundational precept of the Eighth Amendment calls for unanimity in any death recommendation that results in a sentence of death." *Id.* at *15.

This Court should grant *certiorari* to apply the same reasoning to Alabama's death penalty scheme.

III. *CERTIORARI* IS NECESSARY TO DECIDE THE IMPORTANT QUESTION OF WHETHER *HURST* APPLIES RETROACTIVELY.

To determine whether a rule of constitutional law will apply to a petitioner on collateral review, a court

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[7] Alabama, like Florida, requires unanimity in jury verdicts. *See, e.g.*, *Ex Parte Madison*, 718 So. 2d 104, 107 at n.5 (Ala. 1998) ("[T]he Constitution of Alabama of 1901 has long provided criminal defendants a . . . guaranty of a unanimous jury verdict" (citations omitted).)

must first determine whether the rule is a "new" rule, and if so whether it will apply retroactively. In order for a rule of criminal procedure to apply retroactively, it must be a "watershed" rule of procedure. *Hurst* announced a new, watershed rule of criminal procedure, and should therefore be applied to Mr. Arthur's case.

A case announces a new rule if "the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague* v. *Lane*, 489 U.S. 288, 301 (1989) (emphasis removed); *see also Caspari* v. *Bohlen*, 510 U.S. 383, 390 (1994) (rule is not "new" if state court considering habeas petitioner's claim "would have felt compelled by existing precedent to conclude that the rule [petitioner] seeks was required by the Constitution" (internal quotations and citation omitted)).

"A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Caspari*, 510 U.S. at 390, citing *Griffith* v. *Kentucky*, 479 U.S. 314, 321 n.6 (1987).

Mr. Arthur's conviction became final on July 7, 1998,[8] when *Spaziano* v. *Florida*, 468 U.S. 447 (1984) and *Harris* v. *Alabama*, 513 U.S. 504 (1995) (relying on *Spaziano* in rejecting constitutional challenge to Alabama's sentencing scheme) were law. At that time, the

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[8] The Alabama Court of Criminal Appeals issued a certificate of judgment on April 7, 1998. The filing period for a writ of *certiorari* is "within [ninety] days after the entry of the judgment." Ala. Sup. Ct. R. 13.

Alabama state courts would have been compelled to follow *Harris* and hold the Alabama scheme to be constitutional. *Hurst* is therefore a new rule.

As a new rule, the rule in *Hurst* should be construed to operate retroactively because it is a "watershed rule[] of criminal procedure" and accordingly is not prohibited by *Teague*'s general bar against applying new rules retroactively. *See Teague*, 489 U.S. at 311. 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." *Id.* at 312-13. *Hurst* satisfies this exception.

First, *Hurst* relies on the Sixth Amendment right to a jury trial under the U.S. Constitution. *See, e.g.*, *Duncan* v. *Louisiana*, 391 U.S. 145, 155 (1968) ("The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government."). This right is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely* v. *Washington*, 542 U.S. 296, 306 (2004). "*Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended." *Id.*

Hurst's holding protects the fundamental reservation of power in the Constitution and the fundamental fairness of a capital defendant's trial. *See Hurst*, 136 S. Ct. at 621-22; *Ring*, 536 U.S. at 610 (Scalia, J., concurring) ("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."). This holding is all the more critical here given the life-and-death stakes. *See, e.g., Gregg* v. *Georgia*, 428 U.S. 153, 187 (1976) ("When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed."); *Ford* v. *Strickland*, 696 F.2d 804, 820 n.2 (11th Cir. 1983) (observing that "in death cases there is a heightened need for reliable factual determinations" and collecting cases recognizing the heightened need for reliability in capital cases).

Second, requiring that juries, rather than judges, find the necessary facts to impose a death sentence — the fact-finding requirement that is the touchstone of *Hurst* — significantly improves fact-finding procedures. *See Hurst*, 2016 WL 6036978 at *14-18 (discussing critical role of jury fact-finding in imposing death sentence and surveying law); *see also, e.g., Ring*, 536 U.S. at 618 (Breyer, J., concurring) ("[T]he danger of unwarranted imposition of the [death] penalty cannot be avoided unless the decision to impose the death penalty is made by a jury rather than by a single government official" (internal quotations and citation omitted)); *Gregg*, 428 U.S. at 181 ("The Court has said that 'one of the most important functions any jury can perform in making . . . a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system'" (citation omitted)). Stephen Gillers, *Deciding Who Dies*, 129 U. Pa. L. Rev. 1, 60-69 (1980) ("The jury is

substantially more likely than the judge to reliably reflect community feelings on the need for a retributive response to the offender and the offense.").

That Alabama's capital sentencing scheme implicates the fundamental fairness of the trial is all the more stark because this life-and-death decision is being made by judges facing intense electoral pressure. *See* Equal Justice Initiative, The Death Penalty in Alabama: Judge Override 4, 8, 16 (July 2011), *available at* http://eji.org/sites/default/files/death-penalty-in-alabama-judge-override.pdf (last visited Oct. 16, 2016) ("[R]ecent studies show that elections exert significant direct influence on decision-making in death penalty cases."; "[P]olitical pressure injects unfairness and arbitrariness into override decisions . . . ."); Paul Brace & Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 Am. J. Pol. Sci. 360, 370 (2008) ("[E]lections and strong public opinion [in support of capital punishment] exert a notable and significant direct influence on judge decision making in [capital] cases . . . ."); Karin E. Garvey, *Eighth Amendment—the Constitutionality of the Alabama Capital Sentencing Scheme*, 86 J. Crim. L. & Criminology 1411, 1434-35 (1996) (observing the political pressure on elected judges to support the death penalty "simply increases the arbitrariness of the sentences imposed by Alabama judges"); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 759, 792-93 (1995) (observing "[t]he political liability facing judges who enforce the Bill of Rights in capital cases undermines the independence, integrity, and impartiality of the state judiciary").

For these reasons, *Hurst* represents a watershed rule and must be applied retroactively to Mr. Arthur's claims.

CONCLUSION

For the forgoing reasons, Mr. Arthur's Petition for Writ of *Certiorari* should be granted.

Respectfully submitted,

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NOVEMBER 2, 2016

APPENDIX A

IN THE SUPREME COURT OF ALABAMA

November 2, 2016

1951985

Ex parte Thomas Douglas Arthur. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Thomas Douglas Arthur v. State of Alabama) (Jefferson Circuit Court: CC-87-577; Criminal Appeals: CR-91-0718).

ORDER

The Petition to Vacate or Stay Order of Execution filed by Thomas Douglas Arthur on November 1, 2016, having been submitted to this Court,

IT IS ORDERED that the Petition to Vacate or Stay Order of Execution is DENIED.

Stuart, Bolin, Parker, Shaw, Main, and Bryan, JJ., concur.

Murdock, J., dissents.

I, Julia Jordan Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

IN THE SUPREME COURT OF ALABAMA

November 2, 2016

Witness my hand this 2nd day of November, 2016.

/s/ Julia Jordan Weller

Clerk, Supreme Court of Alabama

cc:
D. Scott Mitchell
James H. Hard IV
J. Scott Vowell
Jefferson County Circuit Clerk's Office
LaJuana Davis
Suhana S. Han
Arnold Levine
Sara L. Manaugh
Jennifer L. Parkinson
John P. Rall
Jordan T. Razza
Bryan Allen Stevenson
Bill Pryor
Luther Strange
James Clayton Crenshaw
Kathryn D. Hubbard
Andy Scott Poole
Jason Kreag
Peter J. Neufeld

APPENDIX B

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA TENTH JUDICIAL CIRCUIT CRIMINAL DIVISION

STATE OF ALABAMA)
)
vs.) CASE NO. CC87–577
)
)
THOMAS DOUGLAS ARTHUR

ORDER OF THE COURT ON IMPOSITION OF THE DEATH PENALTY

Defendant Arthur was charged by indictment-reindictment returned August 29, 1991, by the Colbert County grand jury, charging defendant in a two-count indictment with Capital Murder.

Count I concerned the intentional murder by one previously convicted of murder in the twenty years preceding the instant offense. Count II concerned an intentional murder for pecuniary or other valuable consideration.

The case was submitted to the jury on Count I only, the jury being charged on the capital offense, felony murder and manslaughter.

The jury deliberated for about three hours and thirty-five minutes returning a verdict of guilty of the capital offense charged.

Second stage commenced shortly after the return of the verdict and conferencing with attorneys, no testimony was adduced. The relevant portions of the guilt portions of the trial were adopted per §13A–5–45(c). Written exhibits for the defense were admitted, chiefly concerning defendant's exemplary conduct as a state prisoner.

Opening statements were waived. In closing, Honorable Harold Walden, chief counsel for the defendant, implored jury to return a verdict advising life without parole, highlighting that Theresa Rowland and Theron McKinney, participants in the murder according to the state's theory of the case, were never arrested for this crime. The defendant implored the jury to return a verdict advising death – reasoning that his chances at achieving a reversal, new trial and ultimate acquittal would be enhanced by the careful appellate scrutiny mandated in death cases by §13A–5–53.

The jury was charged, virtually verbatim from the Pattern Jury Instructions, supplemented in 1989 by the Honorable Ed Carnes.

The jury was allowed to consider one aggravating circumstance, i.e., that the capital offense was committed by a person under sentence of imprisonment, §13A–5–49(1). At the time of the killing defendant resided at the Decatur Work Release Center. See §13A–5–39(7).

At defense request all mitigating circumstances were submitted to the jury, including the "8th" embodied in §13A–5–52.

Additionally, eleven written requested charges covered in five typed pages submitted by the defendant's counsel were allowed to go to the juryroom at counsel's request.

The jury deliberated for about one hour before returning an advisory verdict for death by a vote of eleven to one.

This court commends the respective attorneys for putting aside any attempt to emotionally influence the jury with passion, prejudice or other arbitrary factors in arriving at their advisory verdict.

The trial record abundantly supports the court's finding that the jury's advisory verdict was not imposed under the influence of passion, prejudice or any arbitrary factor.

The case was continued to January 24, 1992 for final sentencing and a pre sentence report was ordered.

BACKGROUND

Defendant Arthur was first indicted in Colbert County in April, 1982 for the capital murder of Troy Wicker, Jr. The case tried in February, 1983 to a conviction, death sentence and reversal, see Ex Parte Arthur, 472 So.2d 665, Supreme Court of Alabama, reversing on grant of certiorari, rehearing denied May 10, 1985.

Arthur was retried in May, 1987, second trial being conducted in Jefferson County via a change of venue. Again, Arthur was convicted and sentenced to death.

The Court of Criminal Appeals reversed, the opinion being released May 25, 1990. Certificate of Reversal ensued, dated February 27, 1991, see Arthur vs. State, 575 So.2d 1165.

In June, 1990 the Colbert County trial judge had recused himself, the case being assigned to the undersigned on May 21, 1991. The case was initially set for trial September 30, 1991 but continued at defense request until November 4, 1991 and finally to December 2, 1991.

Trial commenced Monday, December 2, 1991 and concluded December 5, 1991 with the jury's advisory verdict. The jury was selected on Monday, December 2nd and allowed to disperse to their respective homes via a limited separation agreement. Commencing Tuesday, December 3rd, the jury was sequestered throughout the entire proceedings per §13A–5–44.

Two highly distinguished Birmingham attorneys had been appointed to represent the defendant. Open file discovery was practiced from the inception as approved in Ex Parte Monk, 557 So.2d 832.

The previous trial transcripts, the physical exhibits in the clerk's office, the materials in possession of prior counsel, materials in possession of the district attorney and, of course, the appellate decisions referenced above, including Wicker vs. State, 433 So.2d 1190, were among the abundant materials available to counsel for this third trial.

Funds for a private investigator were approved, defendant was permitted to act as co counsel at all stages.

At defendant's request at beginning of the jury trial one of the court appointed attorneys was relieved of duty to actively represent defendant but continued to represent defendant in a "stand by" capacity.

The Honorable Joe Walden was appointed to assist his father, the Honorable Harold Walden, in the defense of the case and sat at the counsel table throughout the evidentiary portions of the litigation.

FINDINGS OF FACT FROM TRIAL

State's case:

Thirteen witnesses testified for the state, the state's case being bottomed on the testimony of accomplice Judy Wicker, Wicker having been indicted and convicted by jury verdict for the intentional murder of her husband, Troy Wicker.

Wicker's conviction and life sentence were affirmed in May, 1983 at Mary Jewel Wicker vs. State, 433 So.2d 1190. Wicker was in state custody when she testified on Wednesday of the trial week.

Preceding Wicker's testimony:

Eddie Lang, sergeant with Muscle Shoals Police Department testified about observations of Ms. Wicker's movements on the morning of the killing, February 1, 1982 and his observations at the house where the deceased was murdered;

Joseph Gary Wallace of Department of Forensic Sciences, lab director in Florence in 1982, testified about his observations at the scene, the gathering and

transfer of physical items from a certain Buick Riviera vehicle;

Brent Wheeler and John Kilbourne of the Huntsville forensics lab testified about lab procedures;

Joel Reagan, who ran a mobile home sales lot testified about the defendant's employment at his place of business;

Talmadge Sterling, correctional officer at the Decatur Work Release Center, testified about defendant's residency at the center as did Pat Halliday, employed at the center, who testified about a discrepancy in the defendant's payroll records;

Pat Yarbrough Green who testified that she became acquainted with defendant at Cher's Lounge (Ms. Green was employed at Cher's Lounge in "parole" status, having suffered several felony convictions); that defendant wanted to talk privately at the lounge; that in the kitchen he asked the witness, "Can you get me some bullets? Has to be .22 calibre mini mag long rifles."; that she enlisted the services of a third person to go across the street to buy the bullets; that the defendant gave her $10.00 for the bullets; that while waiting on the delivery of the bullets the defendant stated "someone will be killed in Tennessee. Don't worry, it won't be traced to us."; also, that defendant asked witness if she had access to "jars" or knockout pills and asked if she knew where defendant could get some jars/pills; that she gave the .22 bullets to the defendant;

Debra Lynn Phillips Tynes, manager of Cher's Lounge and defendant's paramour, states that on the day of the killing defendant was late for a lunch date, that ultimately defendant and she went for a car ride across the Tennessee River Bridge; that defendant stopped the car and threw into the river a "plain black garbage bag" wrapped in a sheet, stating that "I want to get rid of some old memories";

Dr. Pirl, toxicologist, stated that there was no ethanol in the deceased's body nor could he detect any narcotics;

Dr. Aquilar testified as to cause of death; that deceased was shot at close range through the closed right eye;

James Otis Garrard, clerk of the circuit court of Marion County, testified re Court's Exhibit #40, court documentation reflective of defendant's prior conviction for 2nd° murder.

Judy Wicker, who at the time of her testimony in the latest trial resided at a work release center in Wetumpka, serving a life sentence as accomplice to her husband's murder, stated that she lived in Muscle Shoals in 1982 with her husband, their two sons, ages five and seven, and a daughter by a prior marriage; that Troy, her husband, worked on a barge as an engineer; that her marriage(s) to Troy had been marked by intermittent discord; that Troy and her sister, Theresa, did not get along; that Theresa's boyfriend was Theron McKinney; that she met Arthur when they were young and worked with him at Tidwell Homes; that she and Theresa discussed killing Troy in early 1981; that several conversations

occurred between she and Theresa re killing Troy; that there was $90,000 worth of life insurance on Troy's life; that the defendant Arthur called her by phone and stated "I'm hired to do a job – kill your husband"; that about one week after the phone call she and Arthur met at Arthur's father's house or at Reagan's Mobile Homes; that there were sexual encounters between she and Arthur; that she knew the day of February 1 that this was the day her husband was to be killed; that the night preceding the killing she, her husband and Theresa had a drinking party at the Wicker home; that she dropped the children at school on February 1, meets up with her sister, finally getting together with Theresa "out by the airport"; that Theresa was driving a Riviera; that defendant was with her, "made up" to look like a black man – face blackened, wearing an Afro wig and gloves; that Arthur got out of Theresa's car and into her car; that she smelled alcohol on his breath; that he had a pistol plus a garbage bag; that en route to the Wicker home she asked Arthur not to "do it", "I'll give you money or whatever"; that Arthur stated "the SOB deserves to die"; that she had left her husband in bed asleep; that upon entering the house defendant began destroying things. "We went to the bedroom, I ran but I heard the shot. I ran to the utility room – – – "; further, that she ended up in the den, receiving a blow to the head "battering my head badly, knocking out some teeth, upper lip cut up into my nose. I didn't have an upper lip."; that previously it had been established that she was to say that her and Troy's home was burglarized and she was assaulted by a black man; the first persons she saw upon regaining consciousness were her sister and a detective; that after the killing she and Arthur continued to talk, go

places together; that upon receipt of the insurance money witness paid Arthur $10,000, paid her sister, Theresa, $6,000 and Theron McKinney received some jewelry and a Trans Am automobile.

Witness Wicker was thoroughly cross examined by Mr. Walden as to the prior contradictory statements she had made to the police and under oath at her trial, as to what she expected to gain from testifying.

The defense case featured four witnesses:

Officer Coan, a scene witness;

Bruce Carrol, an inmate at St. Clair prison who stated he lost $6,500 to the defendant in a poker game;

Ronald Spears, an inmate at West Jefferson prison who stated that Patsy Yarbrough Green had previously stated to him "the cops told me to lie on Tommy re the 22 bullets";

Gene Moon, residing in the Cullman County jail, stated that "inmate Murry gave me an envelope with $2,000 in it and I put it in Tommy's coat", thus accounting for the defendant's possession of an inordinate amount of currency at the work release center.

The defendant did not testify.

Pursuant to §13A–5–47(d) the court makes the following findings concerning aggravating and mitigating circumstances.

§13A–5–49. Aggravating Circumstances

1) The capital offense was committed by a person under sentence of imprisonment.

Does exist. On February 1, 1982 defendant resided at the Decatur Work Release Center, serving a life term for murder in the second degree. This evidence is uncontroverted and is evidenced in part via the testimony of witnesses Talmadge Sterling and Pat Halliday and James Otis Garrard re Exhibit 840.

2) The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person.

Does not apply – having found existence of 1) above.

3) The defendant knowingly created a great risk of death to many persons.

Does not exist.

4) The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping.

Does not exist.

5) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

Does not exist.

6) The capital offense was committed for pecuniary gain.

Does not exist

7) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the endorcement of laws.

Does not exist.

8) The capital offense was especially heinous, atrocious or cruel compared to other capital offenses.

Does not exist.

The court finds no other aggravating circumstances to exist.

§13A–5–51. Mitigating Circumstances – Generally.

1) The defendant has no significant history of prior criminal activity.

Does not apply. See presentence reports dated May 27, 1987 and January 16, 1992.

2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

Does not exist. There has been no evidence whatsoever that suggests that defendant was mentally or emotionally impaired or disturbed at any time previous to February 1, 1982 or subsequent thereto.

3) The victim was a participant in the defendant's conduct or consented to it.

Does not exist. The evidence strongly suggests that the deceased was asleep in bed when shot through the right eye.

4) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

Does not apply. The defendant was the trigger man, shooting the deceased over the alleged protestations of accomplice Wicker.

5) The defendant acted under extreme duress or under the substantial domination of another person.

Does not apply.

6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

Does not apply. Wicker's testimony that she smelled alcohol on defendant's breath the morning of the killing does not mitigate the defendant's culpability.

7) The age of the defendant at the time of the crime.

Does not apply. Defendant's date of birth is December 20, 1941, thus defendant was forty years of age on February 1, 1982, the date of the offense.

§13A–5–52. Same – Inclusion of defendant's character, record, etc.

In addition to the mitigating circumstances specified in §13A–5–51, mitigating circumstances shall include any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, and any other relevant mitigating circumstance which the defendant offers as a basis for a sentence of life imprisonment without parole instead of death.

Does exist.

The unquestioned culpability of Theresa Rowland and Theron McKinney as accomplices to defendants Arthur and Judy Wicker according to the state's theory of the case and the state's inability to prosecute Rowland and McKinney offer a basis for a sentence of life without parole instead of death.

In conclusion, the court finds that the aggravating circumstance noted above weighted against the mitigating circumstance noted above compel the court to uphold the jury's advisory verdict affixing punishment at death.

DONE and ORDERED this 24th day of January, 1992.

/s/ James H. Hard
James H. Hard
Circuit Judge

APPENDIX C

ALABAMA CODE SECTION 13A-5-40

(a) The following are capital offenses:

(1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant.

(2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant.

(3) Murder by the defendant during a rape in the first or second degree or an attempt thereof committed by the defendant; or murder by the defendant during sodomy in the first or second degree or an attempt thereof committed by the defendant.

(4) Murder by the defendant during a burglary in the first or second degree or an attempt thereof committed by the defendant.

(5) Murder of any police officer, sheriff, deputy, state trooper, federal law enforcement officer, or any other state or federal peace officer of any kind, or prison or jail guard, while such officer or guard is on duty, regardless of whether the defendant knew or should have known the victim was an officer or guard on duty, or because of some official or job-related act or performance of such officer or guard.

(6) Murder committed while the defendant is under sentence of life imprisonment.

(7) Murder done for a pecuniary or other valuable consideration or pursuant to a contract or for hire.

(8) Murder by the defendant during sexual abuse in the first or second degree or an attempt thereof committed by the defendant.

(9) Murder by the defendant during arson in the first or second degree committed by the defendant; or murder by the defendant by means of explosives or explosion.

(10) Murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct.

(11) Murder by the defendant when the victim is a state or federal public official or former public official and the murder stems from or is caused by or is related to his official position, act, or capacity.

(12) Murder by the defendant during the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewmen thereon or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft.

(13) Murder by a defendant who has been convicted of any other murder in the 20 years preceding the crime; provided that the murder which constitutes the capital crime shall be murder as defined in subsection (b) of this section; and provided further that the prior murder conviction

referred to shall include murder in any degree as defined at the time and place of the prior conviction.

(14) Murder when the victim is subpoenaed, or has been subpoenaed, to testify, or the victim had testified, in any preliminary hearing, grand jury proceeding, criminal trial or criminal proceeding of whatever nature, or civil trial or civil proceeding of whatever nature, in any municipal, state, or federal court, when the murder stems from, is caused by, or is related to the capacity or role of the victim as a witness.

(15) Murder when the victim is less than fourteen years of age.

(16) Murder committed by or through the use of a deadly weapon fired or otherwise used from outside a dwelling while the victim is in a dwelling.

(17) Murder committed by or through the use of a deadly weapon while the victim is in a vehicle.

(18) Murder committed by or through the use of a deadly weapon fired or otherwise used within or from a vehicle.

(19) Murder by the defendant where a court had issued a protective order for the victim, against the defendant, pursuant to Section 30-5-1 et seq., or the protective order was issued as a condition of the defendant's pretrial release.

(b) Except as specifically provided to the contrary in the last part of subdivision (a)(13) of this section, the terms “murder” and “murder by the defendant” as

used in this section to define capital offenses mean murder as defined in Section 13A-6-2(a)(1), but not as defined in Section 13A-6-2(a)(2) and (3). Subject to the provisions of Section 13A-5-41, murder as defined in Section 13A-6-2(a)(2) and (3), as well as murder as defined in Section 13A-6-2(a)(1), may be a lesser included offense of the capital offenses defined in subsection (a) of this section.

(c) A defendant who does not personally commit the act of killing which constitutes the murder is not guilty of a capital offense defined in subsection (a) of this section unless that defendant is legally accountable for the murder because of complicity in the murder itself under the provisions of Section 13A-2-23, in addition to being guilty of the other elements of the capital offense as defined in subsection (a) of this section.

(d) To the extent that a crime other than murder is an element of a capital offense defined in subsection (a) of this section, a defendant's guilt of that other crime may also be established under Section 13A-2-23. When the defendant's guilt of that other crime is established under Section 13A-2-23, that crime shall be deemed to have been "committed by the defendant" within the meaning of that phrase as it is used in subsection (a) of this section.

APPENDIX D

ALABAMA CODE SECTION 13A-5-46

(a) Unless both parties with the consent of the court waive the right to have the sentence hearing conducted before a jury as provided in Section 13A-5-44(c), it shall be conducted before a jury which shall return an advisory verdict as provided by subsection (e) of this section. If both parties with the consent of the court waive the right to have the hearing conducted before a jury, the trial judge shall proceed to determine sentence without an advisory verdict from a jury. Otherwise, the hearing shall be conducted before a jury as provided in the remaining subsections of this section.

(b) If the defendant was tried and convicted by a jury, the sentence hearing shall be conducted before that same jury unless it is impossible or impracticable to do so. If it is impossible or impracticable for the trial jury to sit at the sentence hearing, or if the case on appeal is remanded for a new sentence hearing before a jury, a new jury shall be impanelled to sit at the sentence hearing. The selection of that jury shall be according to the laws and rules governing the selection of a jury for the trial of a capital case.

(c) The separation of the jury during the pendency of the sentence hearing, and if the sentence hearing is before the same jury which convicted the defendant, the separation of the jury during the time between the guilty verdict and the beginning of the sentence hearing, shall be governed by the law and court rules

applicable to the separation of the jury during the trial of a capital case.

(d) After hearing the evidence and the arguments of both parties at the sentence hearing, the jury shall be instructed on its function and on the relevant law by the trial judge. The jury shall then retire to deliberate concerning the advisory verdict it is to return.

(e) After deliberation, the jury shall return an advisory verdict as follows:

(1) If the jury determines that no aggravating circumstances as defined in Section 13A-5-49 exist, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole;

(2) If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exist but do not outweigh the mitigating circumstances, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole;

(3) If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exist and that they outweigh the mitigating circumstances, if any, it shall return an advisory verdict recommending to the trial court that the penalty be death.

(f) The decision of the jury to return an advisory verdict recommending a sentence of life imprisonment without parole must be based on a vote of a majority

of the jurors. The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors. The verdict of the jury must be in writing and must specify the vote.

(g) If the jury is unable to reach an advisory verdict recommending a sentence, or for other manifest necessity, the trial court may declare a mistrial of the sentence hearing. Such a mistrial shall not affect the conviction. After such a mistrial or mistrials another sentence hearing shall be conducted before another jury, selected according to the laws and rules governing the selection of a jury for the trial of a capital case. Provided, however, that, subject to the provisions of Section 13A-5-44(c), after one or more mistrials both parties with the consent of the court may waive the right to have an advisory verdict from a jury, in which event the issue of sentence shall be submitted to the trial court without a recommendation from a jury.

APPENDIX E

ALABAMA CODE SECTION 13A-5-47

(a) After the sentence hearing has been conducted, and after the jury has returned an advisory verdict, or after such a verdict has been waived as provided in Section 13A-5-46(a) or Section 13A-5-46(g), the trial court shall proceed to determine the sentence.

(b) Before making the sentence determination, the trial court shall order and receive a written presentence investigation report. The report shall contain the information prescribed by law or court rule for felony cases generally and any additional information specified by the trial court. No part of the report shall be kept confidential, and the parties shall have the right to respond to it and to present evidence to the court about any part of the report which is the subject of factual dispute. The report and any evidence submitted in connection with it shall be made part of the record in the case.

(c) Before imposing sentence the trial court shall permit the parties to present arguments concerning the existence of aggravating and mitigating circumstances and the proper sentence to be imposed in the case. The order of the arguments shall be the same as at the trial of a case.

(d) 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. The trial court shall also enter written findings of facts summarizing the crime and the defendant's participation in it.

(e) In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to Section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

APPENDIX F

ALABAMA CODE SECTION 13A-5-49

Aggravating circumstances shall be the following:

(1) The capital offense was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping;

(5) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital offense was committed for pecuniary gain;

(7) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

(8) The capital offense was especially heinous, atrocious, or cruel compared to other capital offenses;

(9) The defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct; or

(10) The capital offense was one of a series of intentional killings committed by the defendant.

APPENDIX G

ALABAMA CODE SECTION 13A-5-51

Mitigating circumstances shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to it;

(4) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime.

APPENDIX H

ALABAMA CODE SECTION 13A-5-52

In addition to the mitigating circumstances specified in Section 13A-5-51, mitigating circumstances shall include any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, and any other relevant mitigating circumstance which the defendant offers as a basis for a sentence of life imprisonment without parole instead of death.