No. 15-7091

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

BART JOHNSON, Petitioner,

v.

STATE OF ALABAMA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR REHEARING

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February 5, 2016

PETITION FOR REHEARING

Pursuant to this Court's Rule 44.2, Petitioner Bart Johnson respectfully petitions for rehearing of the Court's order denying certiorari in this case, entered on January 11, 2016. Mr. Johnson requests that this Court grant this petition, vacate his death sentence, and remand his case for further proceedings in accordance with the recent decision in Hurst v. Florida, 136 S. Ct. 616 (2016).[1] This petition is filed within 25 days of denial of certiorari in Mr. Johnson's case.

GROUNDS FOR REHEARING

In Hurst v. Florida, 136 S. Ct. 616 (2016), this Court applied its decision in Ring v. Arizona, 536 U.S. 584 (2002), and found that Florida's capital sentencing scheme violated the Sixth Amendment to the United States Constitution:

> The maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. [... A] judge increased Hurst's authorized punishment based on her own factfinding. In light of Ring, Hurst's sentence violates the Sixth Amendment.

Hurst, 136 S. Ct. at 622. In reversing Mr. Hurst's death sentence and declaring Florida's sentencing scheme unconstitutional, this Court explained:

[1]Rehearing is appropriate when this Court issues an opinion that calls into question a case in which certiorari was recently denied. See, e.g., Melson v. Allen, 561 U.S. 1001 (2010) (granting rehearing, vacating denial of certiorari, and remanding in light of decision released after denial of certiorari); Hawkins v. United States, 543 U.S. 1097 (2005) (same); cf. Greene v. Fisher, 132 S. Ct. 38, 45 (2011) (denying relief based on clearly established law at time of state court's ruling and noting that defendant could have petitioned this Court and obtained remand in light of intervening decision).

> The Florida sentencing statute does not make a defendant eligible for death until findings by the court that such person shall be punished by death . . . [T]he jury's function under the Florida death penalty statute is advisory only. The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that Ring requires.

Id. (internal quotations and citations omitted).

Alabama's death penalty scheme has exactly the same defect that was declared unconstitutional in Hurst. See Ring, 536 U.S. at 608 n.6 (both Florida and Alabama have "hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations"); Harris v. Alabama, 513 U.S. 504, 508–09 (1995) (finding Alabama's death penalty statute to be "much like that of Florida" because "[b]oth require jury participation in the sentencing process but give ultimate sentencing authority to the trial judge").[2] Like Florida, Alabama allows a jury to reach a non-binding advisory sentencing recommendation but requires the judge to independently make "the critical findings necessary to impose the death penalty." Hurst,136 S. Ct. at 622; Ala. Code § 13A-5-47(e) ("In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist

[2]Hurst overruled the cases that upheld Alabama's death penalty scheme. 136 S. Ct. at 624 ("Time and subsequent cases have washed away the logic of Spaziano and Hildwin."); see also Brooks v. Alabama, No. 15-7786, 2016 WL 266239, at *1 (U.S. Jan. 21, 2016) (Sotomayor, J., concurring with denial of certiorari) ("This Court's opinion upholding Alabama's capital sentencing scheme was based on Hildwin v. Florida, 490 U. S. 638 (1989) (per curiam), and Spaziano v. Florida, 468 U.S. 447 (1984), two decisions we recently overruled in Hurst v. Florida, 577 U. S. ___ (2016)."); Brief for Alabama and Montana as Amici Curiae Supporting Respondent at 9, Hurst v. Florida, 136 S. Ct. 616 (2016) (No. 14-7505) ("Alabama [has] relied on this Court's decisions in Spaziano and Harris to sentence hundreds of murderers in the intervening decades.").

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 . . .”). As a result, just as in Hurst, Mr. Johnson’s death sentence was imposed by a trial judge based on a judicial finding of two statutory aggravating circumstance under a sentencing scheme that does not require a jury finding of aggravation or a jury recommendation of death in order for the judge to impose death. (C. 427, 438-39)[3]; Ala. Code § 13A-5-47(e); Hurst,136 S. Ct. at 620.

Moreover, it is not clear whether Mr. Johnson’s jury unanimously found any aggravating circumstances. (C. 407, 411.) As in Hurst, the guilt/innocence phase verdict in Mr. Johnson’s capital case for murder of a police officer from within a vehicle did not include a finding of any aggravating factor that is identical to, or necessarily corresponds to, a penalty phase aggravating circumstance that would make him eligible for the death penalty under Alabama law. Compare Ala. Code § 13A-5-40(a)(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.”) and id. at (a)(18) (“Murder committed by or through the use of a deadly weapon fired or otherwise used within or from a vehicle.”) with Ala. Code § 13A-5-49(5) (“The capital offense was

[3]“C.” refers to the clerk’s record. “R.” refers to the trial record. “SH.” refers to the judicial sentencing hearing.

committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.") and id. at (7) ("The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws."); see also Hurst, 136 S. Ct. at 619-20. While the trial judge instructed the jury at the penalty phase that it had to find at least one aggravating circumstance to recommend death (R. 2222-23, 2243), the judge also instructed the jury that it could recommend death based on "***one or fewer*** aggravating circumstances" (R. 2219, 2244 (emphasis added)). Thus, the jury was told it could recommend death even if it did not find the existence of an aggravating circumstance. The jury did not indicate whether or by what vote it found either of the aggravating circumstances and did not unanimously recommend a sentence of death (C. 407, 411; R. 2250-52),[4] thereby failing the Sixth Amendment requirement that the decision to impose the death penalty be found by a unanimous jury. See Ring, 536 U.S. at 610 (Scalia, J., concurring) (explaining that

[4]The jury's recommendation in this case is also inadequate because "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Caldwell v. Mississippi, 472 U.S. 320, 328–29 (1985). In Alabama, capital juries are routinely instructed that their verdicts will play a merely advisory function in the determination of the defendant's sentence. See, e.g., Martin v. State, 548 So. 2d 488, 494 (Ala. Crim. App. 1988) ("the instructions of the trial court accurately inform[ed] [the] jury of the extent of its sentencing authority and that its sentence verdict was 'advisory' and a 'recommendation'"). Indeed, the judge at Mr. Johnson's trial repeatedly did just that. (R. 2206, 2207, 2208, 2210, 2211, 2212, 2214, 2218, 2220, 2221, 2222, 2224, 2236, 2237, 2238, 2240, 2244, 2245, 2246.) Such instructions precisely lead the jury "to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere," Caldwell, 472 U.S. at 328–29, and as such the jury cannot produce findings or a verdict sufficiently reliable to support a sentence of death.

Ring majority's holding mandates that facts increasing punishment be found by "a unanimous jury... beyond a reasonable doubt"). At the sentencing hearing, the judge found both aggravating circumstances, mentioned only two of the many mitigating circumstances that Mr. Johnson presented, considered the jury's recommendation, and independently made the factual findings necessary to impose a death sentence. (SH. 43-45.)

"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. These same Sixth Amendment concerns require action in Mr. Johnson's case—a case in which the judge made the findings necessary to impose the death penalty. Mr. Johnson requests that this Court grant this petition for rehearing, vacate his death sentence, and remand his case for further proceedings in accordance with the recent decision in Hurst v. Florida.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

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RANDALL S. SUSSKIND