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Honorable Julia Jordan Weller
Clerk Of The Court

No.____________

IN THE ALABAMA SUPREME COURT

EX PARTE VERNON MADISON	*	
	*	
STATE OF ALABAMA,	*	**EXECUTION SCHEDULED FOR MAY 12, 2016**
	*	
Petitioner,	*	
	*	On Appeal From
v.	*	Mobile County Circuit
	*	Court, No. CC-1985-1385.61
VERNON MADISON, SR.,	*	
	*	
Respondent.	*	

MOTION FOR STAY OF EXECUTION

Vernon Madison is under sentence of death at Holman Prison in Atmore, Alabama, **and he is currently scheduled to be executed on Thursday, May 12, 2016.**

Pursuant to Rules 2(b) and 8(d)(1) of the Alabama Rules of Appellate Procedure, and Alabama Code § 12-2-2, Mr. Madison respectfully requests that this Court stay his execution scheduled for May 12, 2016, so that an appeal of the denial of his Rule 32 petition challenging the judicial override in his case as a violation of

recent United States Supreme Court precedent could be considered. In support of this request, Mr. Madison states as follows:

On Monday, May 9, 2016, Mr. Madison file a Rule 32 petition challenging the judicial override in his case as a violation of Johnson v. Alabama, 2016 WL 1723290, *1 (U.S. May 2, 2016) and Hurst v. Florida, 136 S. Ct. 616 (2016). In response, the State filed several motions to dismiss, which were granted by the trial court that same day. See Order of Dismissal.

Mr. Madison is now attempting to appeal this improper ruling to the Alabama Court of Criminal Appeals. A stay of execution is necessary to allow him to litigate the denial of his Rule 32 petition in the appellate courts.[1]

Last week, Mr. Madison filed a motion to stay his execution in this Court in light of Johnson v. Alabama,

[1] Seehttp://www.al.com/news/anniston-gadsden/index.ssf/2015/02/alabama_supreme_court_issues_s.html (reporting that this Court granted a stay of execution in the case of William Kuenzel, in order to allow Mr. Kuenzel to litigate the denial of his Rule 32 claim in the Court of Criminal Appeals).

2016 WL 1723290, *1 (U.S. May 2, 2016), in which the Supreme Court determined that it is incumbent upon Alabama courts to examine Alabama death sentences in light of Hurst v. Florida, 136 S. Ct. 616 (2016). In response, the State of Alabama argued that Mr. Madison's motion should be denied because the stay request was not "connected to a particular legal proceeding" where "there is no state court that presently has before it a properly filed claim challenging Alabama's sentencing scheme under Hurst," and that if Mr. Madison wanted to file such a challenge, it must be "pursued through the mechanism set forth by Rule 32." (State's Response Opposing Motion to Stay Execution at 2-3; State's Motion to Strike at 2.) This Court agreed, and denied Mr. Madison's Motion to Stay the Execution on May 6, 2016.

As Mr. Madison is now attempting to appeal the denial of his Rule 32 petition, a stay is appropriate. See, e.g., Arthur v. State, 71 So. 3d 733, 738 (Ala. Crim. App. 2010) (noting that this Court granted a stay of execution in order to allow petitioner to litigate his Rule 32 claim).

Mr. Madison respectfully requests that this Court stay his execution scheduled for May 12, 2016, to allow him to litigate his Rule 32 challenge to Alabama's death penalty sentencing scheme and judicial override system in light Hurst and Johnson.

I. THE TRIAL COURT'S REJECTION OF THE JURY LIFE VERDICT AND IMPOSITION OF THE SENTENCE OF DEATH IN THIS CASE IS UNCONSTITUTIONAL UNDER HURST V. FLORIDA.

On Monday, May 2, 2016, in Johnson v. Alabama, the United States Supreme Court granted review, vacated the judgment, and remanded to the Alabama Court of Criminal Appeals an Alabama death penalty case challenging Alabama's death penalty scheme as a violation of Hurst v. Florida, 136 S. Ct. 616 (2016). Johnson v. Alabama, 2016 WL 1723290, *1 (U.S. May 2, 2016).

In Hurst, the United States Supreme Court held that the Sixth Amendment requires that every fact necessary to impose a sentence of death must be found by a jury. Hurst v. Florida, 136 S. Ct. 616, 621-22 (2016). In a weighing state like Alabama, this means that the jury must find the aggravating circumstances and that these circumstances outweigh any mitigation. See Ala. Code

§13A-5-46; Ex parte Woodard, 631 So. 2d 1065, 1071 (Ala. Crim. App. 1993) ("A greater punishment – death – *may* be imposed on a defendant convicted of a capital offense, but *only* if one or more of the aggravating circumstances enumerated in § 13A-5-49 is found to exist *and* that aggravating circumstance(s) outweighs any mitigating circumstance(s) that may exist.") (emphasis in original). A statutory scheme that allows these findings to be made by a judge violates Hurst.

The Johnson case is critical to Mr. Madison's case because his death sentence is the result of judicial override. That is, a death qualified jury of Mr. Madison's peers determined that he should be sentenced to life without parole and the only reason he is now on death row is because the trial judge overrode the jury's verdict,[2] a practice that is now being called into

[2]Vernon Madison was sentenced to death by Mobile County Circuit Judge Ferrill McRae. Judge McRae has overridden six jury verdicts of life without parole, more than any other judge in Alabama. See Woodward v. Alabama, 134 S. Ct. 405, 409 (2013) (Sotomayor, J., dissenting) ("One Alabama judge, who has overridden jury verdicts to impose the death penalty on six occasions, campaigned by running several advertisements voicing his

question as unconstitutional. In this case, Mr. Madison's death sentence was imposed by the trial court despite the fact that the jury never made a unanimous finding in the penalty phase as to the existence of any aggravating circumstance beyond a reasonable doubt, and affirmatively found that the aggravating circumstances did not outweigh the mitigating circumstances. (R. 800.) Because the findings necessary for the imposition of a sentence of death were never made by the jury, but were instead made by the judge, Mr. Madison's sentence of death violates Hurst.

A. Mr. Madison's Death Sentence is Invalid Because the Precedent Upon Which Judicial Override is Based has Been Overruled.

Like the Florida sentencing scheme at issue in Hurst, Alabama allows a jury to reach a non-binding advisory

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support for capital punishment. One of these ads boasted that he had " 'presided over more than 9,000 cases, including some of the most heinous murder trials in our history,'" and expressly named some of the defendants whom he had sentenced to death, in at least one case over a jury's contrary judgment.") (citing Equal Justice Initiative, The Death Penalty in Alabama: Judge Override 16 (2011), http://eji.org/eji/files/Override_Report.pdf).

sentencing recommendation but requires the judge to independently make "the critical findings necessary to impose the death penalty." Hurst, 136 S. Ct. at 622; see also Ring v. Arizona, 536 U.S. 584, 608 n. 6 (2002) (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"). Because Alabama's death penalty sentencing scheme has exactly the same defect that was declared unconstitutional in Hurst, it is no longer viable.

More specifically, there is a serious question as to whether Alabama's judicial override system can sustain when the very precedent upon which it is based has been overruled by Hurst.[3] In Harris v. Alabama, 513 U.S. 504,

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[3]Indeed, the Attorney General for the State of Alabama filed a brief in Hurst, asking the Court not to overrule

515 (1995), the United States Supreme Court held that Alabama's judicial override system did not violate the Eighth Amendment: "The Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight." In so holding, the Court specifically relied on its prior decision in Spaziano v. Florida, 468 U.S. 447 (1984), in which the Court held that the Eighth Amendment was not violated where Florida "vest[ed] sentencing authority in the judge and relegat[ed] the jury to an advisory role." Harris, 513 U.S. at 509.

The Hurst Court explicitly overruled those cases,

Spaziano v. Florida, 468 U.S. 447 (1984), specifically because it provided the legal foundation for Alabama's death penalty scheme. See Brief of Amici Curiae Alabama and Montana in Support of Respondent at 9 ("Alabama [has] relied on this Court's decisions in Spaziano and Harris to sentence hundreds of murderers in the intervening decades."). The Supreme Court rejected this argument, explaining that "*stare decisis* does not compel adherence to a decision whose underpinnings have been eroded by subsequent developments of constitutional law." Hurst, 136 S. Ct. at 623-24 (internal citations and quotation marks omitted).

however, declaring that "[t]ime and subsequent cases have washed away the logic of Spaziano and Hildwin." 136 S. Ct. at 624. As a result, Harris is no longer valid. See Brooks v. Alabama, 136 S. Ct. 708 (U.S. Jan. 21, 2016) (Sotomayor, J., concurring in 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, 136 S. Ct. 616 (2016).").

Because the very precedent upon which Alabama's judicial override system is based has been overruled by Hurst, the underpinnings of Alabama's death penalty sentencing scheme have been removed.

Unlike Brooks, which did not involve a judicial override, a determination that judicial override is unconstitutional constitutes a "categorical constitutional guarantee[] that place[s] certain criminal laws and punishments altogether beyond the State's power to impose" and therefore applies retroactively. See Montgomery v. Louisiana, 136 S. Ct. 718, 729 (2016)

(holding that rule established in Miller v. Alabama, 132 S.Ct. 2455 (2012), banning mandatory life without parole sentences for children, to be a categorical prohibition on State's ability to sentence, and therefore retroactively applicable); Acra v. State, 105 So. 3d 460, 467 (Ala. Crim. App. 2012) (grounds for preclusion set forth in Rule 32.2 do not apply to claims that rely on new rule of constitutional law that applies retroactively to cases on collateral review).

B. Mr. Madison's Death Sentence Violates Hurst Because the Jury Affirmatively Found that the Aggravating Circumstances Did Not Outweigh the Mitigating Circumstances.

The trial court's rejection of the jury life verdict in this case violates Hurst because the jury never made the factual finding that the aggravating circumstances outweighed the mitigating circumstances, as is necessary for a sentence of death in Alabama. See Ala. Code §13A-5-46(e). In Hurst, the Supreme Court noted that, under Florida law, the "findings necessary to impose the death penalty" extended beyond the existence of an aggravating factor to findings regarding mitigating circumstances and

the relative weight of each. 136 S. Ct. at 622. Because the weighing determination involved a fact-finding necessary to render the defendant eligible for the death penalty, Hurst held, it could not be made by the trial court alone. Id.[4]

In this case, the jury affirmatively determined that the aggravating circumstances *did not* outweigh the mitigating circumstances and sentenced Mr. Madison to

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[4]Both federal and state courts have concluded that similar weighing determinations are factual findings that must be made by juries. See McLaughlin v. Steele, No. 4:12CV1464 CDP, 2016 WL 1106884, at *27-30 (E.D. Mo. Mar. 22, 2016) (finding violation of Ring and Hurst because death sentence imposed after finding by court, not jury, that "evidence in mitigation [was not] sufficient to outweigh the evidence in aggravation"); State v. Whitfield, 107 S.W.3d 253, 259-61 (Mo. 2003) (en banc) (finding Missouri requirement that capital jurors determine whether "evidence in mitigation" was "sufficient to outweigh the evidence in aggravation" before sentencing defendant to death was "factual finding" properly made by jury); State v. Ring, 65 P.3d 915, 942-43 (Ariz. 2003) (en banc) (on remand from U.S. Supreme Court, finding Sixth Amendment required that jury "find[] mitigating circumstances and balanc[e] them against the aggravator"); Woldt v. People, 64 P.3d 256, 265-66 (Colo. 2003) (en banc) (finding Colorado requirement that sentencer decide "whether the mitigating factors outweighed the aggravating factors" was "fact-finding" that rendered defendant eligible for death sentence and must be made by jury).

life without the possibility of parole. (R. 800.) Despite the jury's decision, the trial court independently weighed the aggravating and mitigating circumstances, finding that "the aggravating circumstances overwhelmingly outweigh the mitigating circumstances," and sentenced Mr. Madison to death. (Sent. Hg. R. 23-24); see also Ala. Code § 13A-5-47(b)-(d). The judge's independent determination that the aggravating circumstances outweighed the mitigating circumstances, in spite of the jury's verdict to the contrary, is a violation of Hurst. 136 S. Ct. at 619, 622.

C. Mr. Madison's Death Sentence Violates Hurst Because the Jury Never Found the Existence of An Aggravating Circumstance.

Moreover, the record in this case does not establish that Mr. Madison's jury unanimously found the existence of any aggravating circumstance. As in Hurst and Johnson, the guilt/innocence phase verdict in Mr. Madison's capital case for murder of a police officer[5] did

[5]Mr. Madison was indicted for, and convicted of, two counts of capital murder for the intentional killing of

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. See Ex parte McNabb, 887 So. 2d 998, 1004 (Ala. 2004) (penalty phase aggravating circumstances not encompassed by conviction of capital murder for intentional killing of police officer pursuant to Ala. Code §13A-5-40(a)(5)).

And, while the judge instructed the jury at the penalty phase that it had to find the existence of at least one of the three proffered aggravating circumstances in order to return a death sentence,[6] (R.

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a police officer while the defendant knew the officer was on duty and during the performance of an official or job-related act pursuant to Alabama Code Section 13A-5-40(a)(5). (Sent. Hg. R. 10-11.) At the time of the offense, Mr. Madison could only be guilty of capital murder if he knew that the victim was a police officer on duty. See Ex parte Murry, 455 So. 2d 72, 78 (Ala. 1984), superseded by statute as stated in Ex parte Jackson, 614 So. 2d 405, 408 (Ala. 1993).

[6]The jury was instructed that it could consider the following three aggravating circumstances: that the capital offense was committed by a person under a sentence of imprisonment (Ala. Code §13A-5-49(1)); that the defendant was previously convicted of another felony involving the use or threat of violence (Ala. Code §13A-5-49(2); and that the defendant knowingly created a great

787), the jury was never instructed that it must unanimously find the existence of one and the same aggravating circumstance beyond a reasonable doubt. (R. 786-800.) Nor is there a verdict form or other evidence in the record to affirmatively indicate that the jury unanimously found one and the same aggravating circumstance to exist. See Ring v. Arizona, 536 U.S. 584, 610 (2002) (Scalia, J., concurring)(explaining that Ring's majority holding mandates that facts increasing punishment be found by a "unanimous jury . . . beyond a reasonable doubt") Indeed, because the jury returned a life verdict, the record gives no indication that the jury even agreed on any of the three proposed aggravating circumstances. Because this necessary "fact" was never found to exist by a jury, the judge's decision to impose death based on his own factfinding runs afoul of Hurst. 136 S. Ct. at 622.

II. THIS COURT SHOULD GRANT A STAY TO ALLOW MR. MADISON TO APPEAL THE DENIAL OF HIS RULE 32 PETITION CHALLENGING HIS DEATH SENTENCE AS A VIOLATION OF

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risk of death to many persons (Ala. Code §13A-5-49(3)). (R. 788-89.)

HURST AND JOHNSON.

As in Hurst, in this case, the trial court independently determined that Mr. Madison should be sentenced to death. See Ala. Code §§ 13A-5-46 to-47.[7] The trial court's rejection of the jury's life verdict not only violates the Sixth Amendment, see Hurst, 136 S. Ct. at 622, but also violates Mr. Madison's rights under the Eighth and Fourteenth Amendments to the United States Constitution. See Hurst, 136 S. Ct. at 624 (Breyer, J., concurring) ("[T]he Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death.").

In Johnson, the United States Supreme Court acknowledged that Alabama's death penalty sentencing scheme raises Sixth and Eighth Amendment concerns under

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[7]In so doing, and despite the extensive mitigating evidence presented in this case – including a wealth of mitigating evidence concerning Mr. Madison's well-documented mental illness (R. 714-55), as well as the testimony of Mr. Madison's mother, who spoke to her son's humanity and the love she has for him (R. 756-60) – the trial court found no statutory or nonstatutory mitigating circumstances to exist in this case. See Madison v. State, 718 So. 2d 90, 97 (Ala. Crim. App. 1997).

Hurst.[8] These same concerns now require that this Court take action in Mr. Madison's case, a case in which Judge McRae rejected the jury's life verdict and sentenced Mr. Madison to death, despite the fact that the jury never made either of the two factfindings necessary for a sentence of death.

For these reasons, Mr. Madison **moves this Court to stay his execution scheduled for May 12, 2016**, in order that Mr. Madison is permitted an opportunity to litigate his Rule 32 challenge to Alabama's death penalty sentencing scheme and judicial override pursuant to Hurst and Johnson.

Respectfully submitted,

/s/ Angela L. Setzer
Randall S. Susskind
Angela L. Setzer
Equal Justice Initiative

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[8] Unlike Alabama, Florida recently revised its statute to comply with Hurst and one of the key features of the newly-enacted law is that it prohibits judicial override where the jury verdict specifies a sentence of life without parole. Fla. Stat. §§ 921.141(3)(a), 921.142(4)(a) (where jury has recommended death, court may override and impose life without parole, but where jury has recommended life without parole, "the court shall impose the recommended sentence").

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May 10, 2016

CERTIFICATE OF SERVICE

I certify that on May 10, 2016, a copy of the attached pleading was sent by email to:

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/s/Angela L. Setzer
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