No. _____

IN THE SUPREME COURT OF THE UNITED STATES

In re VERNON MADISON,

VERNON MADISON, Petitioner,

vs.

STATE OF ALABAMA, Respondent.

PETITION FOR AN ORIGINAL WRIT OF HABEAS CORPUS

CAPITAL CASE

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THIS IS A DEATH PENALTY CASE WITH AN EXECUTION SCHEDULED FOR TODAY, MAY 12, 2016, AT 6:00 P.M.

CAPITAL CASE

QUESTION PRESENTED

This case presents exceptional circumstances warranting this Court's original jurisdiction. Vernon Madison was sentenced to death after a jury of his peers determined that he should be sentenced to life without parole. In overriding the jury's verdict, the trial judge – not the jury – made the findings necessary to impose the death sentence under Alabama law.

Recently, in Hurst v. Florida, this 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). Because Alabama's death penalty scheme is patterned on the Florida sentencing scheme at issue in Hurst, it suffers from the same defects. See 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").

In response to the Hurst decision, the Florida legislature amended its statute and ended judicial override where the jury returns a life verdict.

See Fla. Stat. §§ 921.141(3)(a), 921.142(4)(a). Last week, in Johnson v. Alabama, this Court acknowledged that Alabama's death penalty sentencing scheme raises Sixth and Eighth Amendment concerns under Hurst. In light of these very recent developments, and questions about the constitutionality of judicial override, the execution of Mr. Madison is likely prohibited. Specifically, these recent developments give rise to the following question:

> Does Mr. Madison's sentence, as imposed through judicial override, violate the Sixth and Eighth Amendments as set forth in Hurst v. Florida, 136 S. Ct. 616 (2016), and Johnson v. Alabama, No. 15-7091, 2016 WL 1723290 (U.S. May 2, 2016).

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PETITION FOR AN ORIGINAL WRIT OF HABEAS CORPUS

Petitioner Vernon Madison respectfully requests that this Court grant an original writ of habeas corpus and stay **Mr. Madison's execution is scheduled for today, May 12, 2016, at 6:00 p.m.**

Vernon Madison is on death row as a 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 made the findings necessary to impose a death sentence under Alabama law and overrode the jury's verdict.[1]

This Court has recently signaled that there are serious questions

[1]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 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)).

about a death penalty scheme in which a judge is permitted to sentence a defendant to death despite a jury's verdict of life. Just last week, in Johnson v. Alabama, this Court granted review, vacated the judgement, and remanded the case 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, No. 15-7091, 2016 WL 1723290, at *1 (U.S. May 2, 2016).

In Hurst, this Court held that the Sixth Amendment requires that every fact necessary to impose a sentence of death must be found by a jury. 136 S. Ct. 616, 621-22 (2016). In Alabama, this means that the jury must find that penalty phase aggravating circumstances exist and that those 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)).

In this case, Mr. Madison's death sentence was imposed by the trial court despite the fact that 1) the jury never made a unanimous finding in the penalty phase as to the existence of any aggravating circumstance beyond a reasonable doubt, and 2) the jury 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 in this case were never made by the jury, but were instead made by the judge, Mr. Madison's sentence of death is unconstitutional.

The issues raised by this Court's decision in Johnson last week are particularly acute in this case because Mr. Madison's death sentence is the result of judicial override. Unlike constitutional claims applicable in other cases, see Brooks v. Alabama, 136 S. Ct. 708 (2016), a determination that judicial override is unconstitutional would likely prohibit the State from executing any death sentenced prisoner who has received a life sentence from a jury. See Montgomery v. Louisiana, 136 S. Ct. 718, 729 (2016) (finding rule established in Miller v. Alabama, 132 S. Ct. 2455 (2012), banning mandatory life without parole sentences for children, to be categorical prohibition on state's ability to sentence, and therefore

retroactively applicable).

For these reasons, this Court should stay Mr. Madison's execution and grant this original habeas petition.

OPINION BELOW

This is a petition for an original writ of habeas corpus. A motion for a stay of execution was denied by the Alabama Supreme Court on May 11, 2016. That order is attached at Appendix D. The circuit court's May 9, 2016, order denying Mr. Madison's Rule 32 petition challenging the judicial override in his case in light of Hurst and Johnson (attached as Appendix B), is attached at Appendix C. The Alabama Supreme Court's order denying Mr. Madison's initial motion for a stay of execution on May 6, 2016, is attached at Appendix A.

STATEMENT OF JURISDICTION

This is a petition for an original writ of habeas corpus. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1651 and 2241 and Article III of the United States Constitution.

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> 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 . . . .

The Eighth Amendment to the U.S. Constitution provides in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.

The Fourteenth Amendment to the U.S. Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On May 20, 1985, Mr. Madison was indicted on two counts of capital murder arising from the death of City of Mobile police officer Julius Schulte on April 18, 1985. Madison v. State, 620 So. 2d 62, 62-64 (Ala. Crim. App. 1992). A jury subsequently found Mr. Madison guilty of capital murder and the trial judge sentenced him to death. Madison v. State, 545 So. 2d 94, 99 (Ala. Crim. App. 1987). The Alabama Court of Criminal

Appeals reversed this conviction, however, after concluding that the State had illegally struck African American jurors because of their race in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Madison, 545 So. 2d at 99. After retrial, Mr. Madison was again convicted of capital murder, and the trial judge again imposed a sentence of death in September of 1990. Madison, 620 So. 2d at 63. The Court of Criminal Appeals then reversed Mr. Madison's conviction a second time, this time on the grounds that the State had improperly elicited expert testimony "based partly on facts not in evidence," in violation of state law. Madison, 620 So. 2d at 73.

Mr. Madison was tried for a third time in April of 1994. After convicting him of capital murder pursuant to Ala. Code § 13A-5-40(5), Ex parte Madison, 718 So. 2d 104, 106 (Ala. 1998), Mr. Madison's jury considered undisputed evidence that he suffered from mental illness marked by paranoid delusions, including documentation that Mr. Madison struggled with mental illness even in adolescence, had been prescribed numerous anti-psychotic medications, and told law enforcement officers, in his statements about the offense, that he suffered from mental illness and had been diagnosed as paranoid schizophrenic. (R. 704-800.)

Mr. Madison's death-qualified jury then, by a vote of 8-4, reached a verdict of life without parole. Madison v. State, 718 So. 2d 90, 94 (Ala. Crim. App. 1997). The trial just subsequently made his own findings, however, independently finding two aggravating circumstances and concluding that those circumstances outweighed any mitigating circumstances.[2] Id. at 97. The judge then relied on his own findings to impose a sentence of death contrary to the jury's life verdict. See id. Judge McRae has overridden jury life verdicts in more cases than any other judge in Alabama; Mr. Madison's is one of six such cases. See Woodward v. Alabama, 134 S. Ct. 405, 409 (2013) (Sotomayor, J., dissenting from denial of certiorari) ("One Alabama judge, who has overridden jury verdicts to impose the death penalty on six occasions, campaigned by running several advertisements voicing his 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

[2]In so doing, despite the extensive mitigating evidence presented in this case, Judge McRae found no statutory or non-statutory mitigating circumstances to exist in this case. Madison, 718 So. 2d at 97.

sentenced to death, in at least one case over a jury's contrary judgment.").

On direct appeal, Mr. Madison presented both the Alabama Court of Criminal Appeals and the Supreme Court of Alabama with the claim that his death sentence, as imposed through judicial override, is unconstitutional. Both courts rejected the claim and affirmed Mr. Madison's conviction and death sentence. Madison, 718 So. 2d at 103-04 (relying solely on Spaziano v. Florida, 468 U.S. 447, 459 (1984)), aff'd, 718 So. 2d 104 (Ala. 1998). After this Court denied certiorari, Madison v. Alabama, 525 U.S. 1006 (1998), Mr. Madison exhausted his state postconviction remedies. See Madison v. State, 999 So. 2d 561 (Ala. Crim. App. 2006), cert. denied, No. 1060460 (Ala. Aug. 15, 2008).

Mr. Madison next filed a petition for habeas corpus relief in federal district court, which included his claim that his death sentence, as imposed through judicial override, violates the Constitution. Madison v. Allen, No. 1:09-00009-KD-B, 2011 WL 1004885, at *36-37 (S.D. Ala. Mar. 21, 2011). After the district court denied habeas corpus relief, id. at *42, the Eleventh Circuit Court of Appeals granted a Certificate of Appealability on three issues, including the judicial override claim. Madison v. Comm'r, Ala.

Dep't of Corr., 677 F.3d 1333, 1335 (11th Cir. 2012) (per curiam). Though the appellate court did reverse and remand in part on other grounds,[3] id. at 1339, it affirmed the lower court's denial of relief with respect to judicial override, id. at 1336 (relying on Harris v. Alabama, 513 U.S. 504 (1995)). After remand, the Eleventh Circuit affirmed Mr. Madison's conviction and sentence. Madison v. Comm'r, Ala. Dep't of Corr., 761 F.3d 1240, 13255 (11th Cir. 2014). This Court denied certiorari on March 23, 2015. Madison v. Thomas, 135 S. Ct. 1562 (2015).

On January 12, 2016, this Court struck down Florida's death penalty sentencing scheme in Hurst v. Florida, 136 S. Ct. 616 (2016), because it

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[3]Mr. Madison's first conviction and death sentence were reversed because the prosecutor engaged in illegal racially discriminatory jury selection when he removed all seven of the qualified African American veniremembers in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Madison, 545 So. 2d 94 (Ala. Crim. App. 1987). With respect to Mr. Madison's third trial – the one that is the subject of this appeal – the prosecutor removed nearly half of the qualified African American veniremembers and failed to pose any questions at all to three of the peremptorily struck black veniremembers. While the Eleventh Circuit ultimately found that Mr. Madison was not entitled to habeas relief on his Batson claim, the court below did find that "the circumstances supporting Mr. Madison's prima facie case were strong" and that "[t]he history of racial discrimination at the Mobile County District Attorney's Office that prosecuted Mr. Madison is significant." Madison v. Comm'r, Ala. Dep't of Corr., 761 F.3d 1240, 1252 (11th Cir. 2014).

gave the trial court the final authority to make the "findings necessary to impose the death penalty." 136 S. Ct. at 621-22. Hurst held that the Sixth Amendment "required Florida to base [a capital defendant]'s death sentence on a jury's verdict, not a judge's factfinding," id. at 624, and found that even where Florida law required sentencing-phase findings by the jury, those findings were constitutionally insufficient insofar as the trial court, sitting alone, could override them, id. at 619 ("A jury's mere recommendation is not enough.").

Importantly, in Hurst, this Court explicitly overruled Hildwin v. Florida, 490 U. S. 638 (1989) (per curiam), and Spaziano v. Florida, 468 U.S. 447 (1984), two cases it had relied on to uphold Alabama's judicial override procedure in Harris v. Alabama, 513 U.S. 504 (1995). Hurst, 136 S. Ct. at 624 ("Time and subsequent cases have washed away the logic of Spaziano and Hildwin."). Accordingly, members of this Court have acknowledged that Hurst opened important questions about the constitutionality of Alabama's death penalty sentencing scheme, specifically as it relates to judicial override. See Brooks v. Alabama, 136 S. Ct. 708 (2016) (Sotomayor, J., concurring in denial of cert.) (noting

"[t]his Court's opinion upholding Alabama's capital sentencing scheme was based on Hildwin and Spaziano, two decisions we recently overruled in Hurst" (citations omitted) before ascribing denial of certiorari "in this particular case" to procedural grounds).

Regardless, on January 22, 2016, the State of Alabama moved the Supreme Court of Alabama to set an execution date for Mr. Madison. Undersigned counsel then filed a petition in the Mobile County Circuit Court pursuant to Ala. Code § 15-16-23, challenging Mr. Madison's competency to be executed,[4] and filed a response with the Alabama Supreme Court asking it to refrain from setting an execution date until the competency proceedings had been resolved. The Alabama Supreme Court did not respond to this request, and on March 4, 2016, issued an order scheduling Mr. Madison's execution for May 12, 2016. The circuit court

[4]Mr. Madison suffers from critically deteriorated health, having experienced multiple strokes over the past year. These strokes resulted in significant cognitive decline and vascular dementia, and Mr. Madison no longer understands why the State is attempting to execute him. He now speaks in a dysarthic or slurred manner, is legally blind, can no longer walk independently, and has urinary incontinence as a consequence of damage to his brain. Mr. Madison also suffers from additional critical medical conditions including Type 2 Diabetes, chronic hypertension, and small blood vessel ischemia that will continue to negatively impact both his bodily and cognitive functioning.

denied Mr. Madison's § 15-16-23 petition on April 29, 2016.[5]

On May 2, 2016, this Court granted review in Johnson v. Alabama, No. 15-7091, 2016 WL 1723290 (U.S. May 2, 2016), vacating the judgment in that case and remanding it to the Alabama Court of Criminal Appeals for "further consideration in light of Hurst v. Florida, 577 U. S. ___ (2016)." Mr. Madison then filed a motion for stay of execution at the Alabama Supreme Court on May 5, 2016, requesting a stay pursuant to Rules 2(b) and 8(d)(1) of the Alabama Rules of Appellate Procedure and Alabama Code § 12-2-2 in order to provide time for his death sentence to be reexamined in light of Johnson and Hurst. On May 6, 2016, after the State of Alabama filed a motion to strike arguing that Mr. Madison's constitutional claims "must be pursued through the mechanisms set forth by Rule 32", Motion to Strike, Ex parte Madison, No. 1961635 (Ala. May

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[5]Mr. Madison did not appeal the denial of that petition in state court as the appellate courts have no jurisdiction over such an appeal. See Ala. Code §15-16-23 ("This mode of suspending the execution of sentence after conviction on account of the insanity of the convict shall be exclusive and final and **shall not be reviewed or revised by or renewed before any other court or judge**"). Mr. Madison subsequently filed a habeas petition in the Southern District of Alabama, challenging his competency to be executed. This petition was denied on the merits, and an appeal is now pending at the Eleventh Circuit Court of Appeals. Madison v. Dunn, No. 16-12279-P.

6, 2016), the Alabama Supreme Court denied the motion to stay (see Appendix A).

Mr. Madison then filed a Rule 32 petition in Mobile County Circuit Court on May 9, 2016, raising the same claim that his sentence is unconstitutional under Johnson and Hurst (Appendix B); in that court, the State argued that Mr. Madison's legal claims were not cognizable in Rule 32 proceedings. The circuit court agreed and dismissed the petition that same day. (Appendix C.) On May 10, 2016, Mr. Madison filed another motion to stay at the Alabama Supreme Court, requesting that the court stay his execution in order to allow time for the appeal of his petition to the Alabama Court of Criminal Appeals. The Alabama Supreme Court denied that motion to stay on May 11, 2016. (Appendix D.)

GROUNDS FOR AN ORIGINAL WRIT OF HABEAS CORPUS

This Court's power to grant an original writ of habeas corpus is reserved for extraordinary cases in which "appeal is a clearly inadequate remedy." Ex parte Fahey, 332 U.S. 258, 260 (1947). "To justify the granting of a writ of habeas corpus," Rule 20 of this Court provides, "the petitioner must show that exceptional circumstances warrant the exercise

of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court."

Mr. Madison faces an execution set for today, May 12, 2016, at 6:00 p.m. In the time since the Alabama Supreme Court set that date, this Court has issued an order implicating the constitutionality of the Alabama law under which Mr. Madison was sentenced, but the state courts have repeatedly refused to stay Mr. Madison's execution to allow for review of his sentence in light of those developments. His case presents exceptional circumstances that warrant exercise of this Court's discretionary powers.

I. GIVEN THE PENDENCY OF CRITICAL CONSTITUTIONAL QUESTIONS, THE ALABAMA SUPREME COURT'S REFUSAL TO STAY MR. MADISON'S IMMINENT EXECUTION CREATES EXCEPTIONAL CIRCUMSTANCES.

In the 22 years since he was sentenced to death by Judge McRae, Mr. Madison has diligently sought relief on the grounds that death sentences such as his, imposed through judicial override of a jury's life verdict, violate the constitution. See, e.g., Madison v. Allen, No. 1:09-00009-KD-B, 2011 WL 1004885, at *36-37 (S.D. Ala. Mar. 21, 2011); Madison v. State. 718 So. 2d 90, 103-04 (Ala. Crim. App. 1997). With Hurst v. Florida, 136

S. Ct. 616 (2016), this Court brought its Sixth and Eighth Amendment jurisprudence a critical step closer to vindicating that claim by striking down Florida's death penalty sentencing scheme because it gave the trial court the final authority to make the "findings necessary to impose the death penalty." 136 S. Ct. at 621-22. Though Alabama's death penalty sentencing scheme is nearly identical to the Florida law struck down in Hurst, it was not until May 2, 2016, when this Court issued its order in Johnson v. Alabama, No. 15-7091, 2016 WL 1723290 (U.S. May 2, 2016), that it became clear that Hurst is applicable to Alabama's law.

By May 2, 2016, however, Mr. Madison faced an execution date scheduled only days away. Without any available form of expedited state review, Mr. Madison has not had, and will not have, sufficient time to pursue his claims under Hurst and Johnson without a stay of execution. Among the state courts, only the Supreme Court of Alabama possesses the authority to issue such a stay. See Ala. R. App. Pro. 8(d)(1).[6]

Yet the Alabama Supreme Court has repeatedly denied Mr.

[6]Mr. Madison has not applied for relief in the United States District Courts because he would be prevented from doing so under 28 U.S.C. §§ 2244 and 2254. See 28 U.S.C. § 2242; United States Supreme Court Rule 20.4.

Madison's requests for a stay of execution, refusing to acknowledge the exceptional circumstances that have left Mr. Madison with critical new rulings from this Court, yet no time to obtain relief based on those rulings. Following this Court's order in Johnson, Mr. Madison initially filed a motion for stay of execution on May 5, 2016, alerting the Alabama Supreme Court of his constitutional claim as well as the limitations of his circumstances. The court promptly denied that motion, however (Appendix A), forcing Mr. Madison to pursue his constitutional claim by filing a petition for postconviction relief in the circuit court (Appendix B). After the circuit court denied that petition, Mr. Madison was forced to file another motion for a stay of execution with the Alabama Supreme Court, specifying, this time, that he needed time to appeal his constitutional claims to the Court of Criminal Appeals. The Alabama Supreme Court again denied Mr. Madison's motion for a stay of execution on May 11, 2016 (Appendix D), and appears prepared to allow the execution of Mr. Madison even as his meritorious constitutional claims remain pending, unresolved, on appeal.

II. HURST AND JOHNSON CREATE SERIOUS DOUBTS ABOUT THE CONSTITUTIONALITY OF MR. MADISON'S DEATH SENTENCE THAT WARRANT A STAY OF EXECUTION.

This Court's recent rulings in Hurst and Johnson establish that Alabama's death penalty sentencing scheme is unconstitutional to the extent that it allows for judicial override. In Hurst, this Court overruled Spaziano and Hildwin and held that the constitution requires that every fact necessary to impose a sentence of death must be found by a jury. 136 S. Ct. at 621-22. In a weighing state like Alabama, this means that the jury must find the aggravating circumstances *and* that those 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 o*nly* 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)).[7] According to Hurst, then, a statutory scheme that

[7]Additionally, both state and federal courts have held that weighing determinations, in the capital sentencing context, are factual findings that must be made by a jury. See McLaughlin v. Steele, No. 4:12CV1464 CDP,

allows these findings to be made by a judge, not a jury, violates the Constitution. 136 S. Ct. at 621-22.

This Court's order last week in Johnson confirmed that Hurst's principles apply in Alabama as well as Florida. Johnson, 2016 WL 1723290 (vacating Alabama Court of Criminal Appeals's judgment affirming capital conviction and sentence and remanding case to state court for "further consideration in light of Hurst v. Florida, 577 U. S. ___ (2016)").

Hurst's consequences in Alabama are unsurprising given that it overruled the core precedent that had previously been relied upon to

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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).

uphold Alabama's judicial override system. Twenty-one years ago, in Harris v. Alabama, 513 U.S. 504 (1995), this Court upheld Alabama's judicial override provisions against an Eighth Amendment challenge by relying on Hildwin v. Florida, 490 U. S. 638 (1989) (per curiam), and Spaziano v. Florida, 468 U.S. 447 (1984). Hurst explicitly overruled those cases, however, declaring that "[t]ime and subsequent cases have washed away the logic of Spaziano and Hildwin." 136 S. Ct. at 624. Without the core precedent on which it relied, Harris is no longer valid and the constitutionality of judicial override is questionable. See Brooks v. Alabama, 136 S. Ct. 708 (2016) (Sotomayor, J., concurring in denial of cert.).[8]

[8]Alabama's judicial override law further violates the requirement of the Eighth and Fourteenth Amendment that there be a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not," Gregg v. Georgia, 428 U.S. 153, 188 (1976) (quoting Furman v. Georgia, 408 U.S. 238 (1972)), and that these petitioners are not "among a capriciously selected random handful" sentenced to death upon arbitrary considerations. Furman, 408 U.S. at 309; see also Hurst, 136 S. Ct. at 624 (Breyer, J., concurring); Woodward v. Alabama, 134 S. Ct. 405 (2013) (Sotomayor, J., dissenting from denial of certiorari).

III. A RULING THAT JUDICIAL OVERRIDE IS UNCONSTITUTIONAL WOULD BE APPLIED RETROACTIVELY AS A SUBSTANTIVE RULE OF CONSTITUTIONAL LAW.

If this Court were to apply Hurst and Johnson to Alabama's death penalty sentencing scheme and conclude that judicial override violates the Sixth and Eighth Amendments, such a ruling would apply to Mr. Madison. As this Court recently reiterated in Montgomery v. Louisiana, 136 S. Ct. 718 (2016), while new rules of constitutional law are not typically applied retroactively, an exception is made for "substantive" rules of constitutional law. 136 S. Ct. at 728 (citing Teague v. Lane, 489 U.S. 288 (1989), Penry v. Lynaugh, 492 U.S. 302 (1989), and Schriro v. Summerlin, 542 U.S. 348 (2004)). Constitutional rulings are substantive when they "set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose," id. at 729, and such rules must be applied retroactively because "a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced," id. at 731.

Were this Court to strike Alabama's system of judicial override as

unconstitutional, that ruling would undoubtedly set forth a "categorical constitutional guarantee" placing "certain criminal laws" – namely, laws allowing for judicial override – "altogether beyond the State's power to impose." Montgomery, 136 S. Ct. at 731. Accordingly, such a ruling would apply retroactively to any case involving judicial override, such as Mr. Madison's, even if it were on postconviction review. See id.; Penry, 492 U.S. at 330; cf. Brooks, 136 S. Ct. 708 (Sotomayor, J., concurring in denial of cert.) (noting "procedural difficulties" as barrier to Hurst relief in case not involving judicial override). This case presents compelling reasons for recognizing that judicial override is likely unconstitutional and that review would warrant relief that precludes the execution of Mr. Madison.

IV. MR. MADISON'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE CONSTITUTION UNDER HURST AND JOHNSON.

The trial court's rejection of the jury life verdict in this case violates Hurst because it allowed Mr. Madison to be sentenced to death even though 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, this Court noted that, under Florida law, "the findings necessary to impose the death penalty" extended beyond the existence of an aggravating circumstance to findings regarding mitigating circumstances and the relative weight of each. 136 S. Ct. at 622. Because Florida's 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. Yet in this case, the jury affirmatively determined that the aggravating circumstances *did not* outweigh the mitigating circumstances before recommending that Mr. Madison be sentenced to life without parole. (R. 800.) This violates Hurst.

Moreover, the record in this case does not establish that Mr. Madison's jury unanimously found the existence of any statutory aggravating circumstances. As in Johnson, the guilt/innocence phase verdict in Mr. Madison's capital trial, which found him guilty of capital murder pursuant to Ala. Code § 13A-5-40(a)(5) (murder of on-duty police officer), did not include a finding of any statutory aggravating circumstance that would have rendered Mr. Madison 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)).

Further, while the trial judge instructed the jury at the penalty phase that it had to find the existence of at least one of the three statutory aggravating circumstances proffered by the State[9] in order to return a death sentence (R. 787), the jury was never instructed that it was required to unanimously find, beyond a reasonable doubt, the existence of one and the same aggravating circumstance (R. 786-800). Nor is there a special verdict form or any 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 majority's holding mandates that facts increasing punishment be found by a "unanimous jury . . .

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[9]Mr. Madison's jury was instructed that it could consider the following three statutory aggravating circumstances: that the capital offense was committed by a person under the sentence of imprisonment, per Ala. Code §13A-5-49(1); that the defendant was previously convicted of another felony involving the use or threat of violence, per Ala. Code § 13A-5-49(a); and that the defendant knowingly created a great risk of death to many persons, per Ala. Code § 13A-5-49(a). (R. 788-89.)

beyond a reasonable doubt"). Indeed, because Mr. Madison's jury returned a verdict of life, the record gives no indication that the jury even agreed on any of the three proffered statutory aggravating circumstances. Because this necessary "fact" was never found to exist by the jury, the trial judge's decision to impose a sentence of death based on his own factfinding runs afoul of Hurst. 136 S. Ct. at 622.

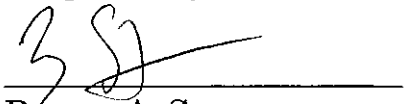
In Johnson, this Court acknowledged that Alabama's death penalty sentencing scheme raises constitutional concerns under Hurst. These same concerns now require that this Court take action in Mr. Madison's case, a case in which Mobile County Circuit Court Judge McRae sentenced Mr. Madison to death despite the jury's verdict of life, and despite the fact that the jury never made either of the two factfindings necessary for a sentence of death under Alabama law.

CONCLUSION

For the foregoing reasons, Vernon Madison respectfully requests that this Court grant an original writ of habeas corpus and vacate Mr. Madison's sentence as unconstitutionally imposed in violation of Hurst v. Florida, 136 S. Ct. 616 (2016), and Johnson v. Alabama, No. 15-7091, 2016

WL 1723290 (U.S. May 2, 2016).

Respectfully submitted,



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May 12, 2016

Counsel for Petitioner

APPENDIX A

IN THE SUPREME COURT OF ALABAMA

May 6, 2016

1961635

Ex parte Vernon Madison. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Vernon Madison v. State of Alabama) (Mobile Circuit Court: CC-85-1385.8; Criminal Appeals: 93-1788).

ORDER

The Motion for Stay of Execution filed by Vernon Madison on May 5, 2016, having been submitted to this Court,

IT IS ORDERED that the Motion for Stay of Execution is DENIED.

Moore, C.J., and Stuart, Bolin, Parker, Shaw, Wise, 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.

Witness my hand this 6TH day of May, 2016.

Julia Jordan Weller

Clerk, Supreme Court of Alabama

cc:
D. Scott Mitchell
Mobile County Circuit Clerk's Office
Luther Strange
James Roy Houts
Angela Setzer

IN THE SUPREME COURT OF ALABAMA

May 6, 2016

Randall S. Susskind
Madison Vernon

APPENDIX B

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

VERNON MADISON,	*	
	*	
Petitioner	*	
v.	*	Case No. CC-85-1385.80
	*	
STATE OF ALABAMA	*	**EXECUTION SCHEDULED FOR**
	*	**MAY 12, 2016**
Respondent.	*	

PETITION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 32 OF THE ALABAMA RULES OF CRIMINAL PROCEDURE

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.** He now petitions this Court for relief from his unconstitutional sentence pursuant to Ala. R. Crim. P. 32.1(a), (b), (c) and (e).[1]

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[1]On May 5, 2016, Mr. Madison moved the Alabama Supreme Court to stay his execution and consider Alabama's death penalty scheme in light of Hurst and Johnson. In response, the State of Alabama argued that "the only way to present such a claim at this juncture is through a proceeding under Rule 32 of the Alabama Rules of Criminal Procedure. Ala. R. Crim. P., 32.4." State of Alabama's Opposition to Madison's Application for a Stay of Execution, filed in the Alabama Supreme Court May 5, 2016 , at 3. The Alabama Supreme Court agreed with the State and denied Mr. Madison's motion for a stay of execution on May 6, 2016.

INTRODUCTION

1. Since the Alabama Supreme Court scheduled Mr. Madison's execution, an intervening decision from the United States Supreme Court has raised fundamental questions about the constitutionality of the use of judicial override in Alabama. While previous decisions have raised questions about Florida's death penalty sentencing scheme, last week, the Supreme Court, for the first time, directly held that Alabama courts must reevaluate Alabama's death penalty sentencing scheme in light of recent Supreme Court precedent.

2. 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).

3. In Hurst, the United States Supreme Court held that Florida's capital sentencing scheme violates the Sixth Amendment's requirement that a jury, not a judge, must find each fact necessary to impose a sentence of death. Because a Florida jury's recommendation is only advisory and may be overruled by the trial judge, who alone makes the findings necessary to impose death, the "jury's mere recommendation is not enough." 136 S. Ct. at 620.

4. The announcement from the Supreme Court last week in Johnson 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 question as unconstitutional.

5. The Supreme Court has now determined that it is incumbent upon Alabama courts to examine Alabama death sentences in light of Hurst. Johnson v. Alabama, 2016 WL 1723290, *1 (U.S. May 2, 2016). The context for this is that the very precedent upon which Alabama's judicial override system is based has been overruled by Hurst. In Harris v. Alabama, 513 U.S. 504, 508-09 (1995), the United States Supreme Court upheld Alabama's judicial override system based upon its prior

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[2]As this Court is aware, 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 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).

decision upholding Florida's override system in Spaziano v. Florida, 468 U.S. 447 (1984). The Hurst Court explicitly overruled Spaziano. 136 S. Ct. at 624. As such, the underpinnings of Alabama's death penalty sentencing scheme have been removed.

6. Pursuant to Rules 32 of the Alabama Rules of Criminal Procedure, Mr. Madison requests that this Court determine that his sentence is a violation of the Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Alabama law, vacate his unconstitutional sentence of death, and resentence him to life without parole.

PROCEDURAL HISTORY

7. Mr. Madison was indictedon two counts of capital murder on May 20, 1985, in the Mobile County Circuit Court. Madison v. State, 620 So. 2d 62, 62 (Ala. Crim. App. 1992). The charges arose from the death of City of Mobile police officer Julius Schulte on April 18, 1985. Id. at 63-64. On September 12, 1985, a jury found Mr. Madison guilty of capital murder, and the trial court subsequently sentenced him to death. Id. at 63. The Alabama Court of Criminal Appeals reversed Mr. Madison's conviction and sentence after concluding that the prosecution had illegally struck African American jurors because of their race, in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Madison v. State, 545 So. 2d 94 (Ala. Crim. App. 1987).

8. On September 14, 1990, Mr. Madison was again convicted of capital

murder, and the trial court imposed a sentence of death. Madison, 620 So. 2d at 63. The Alabama Court of Criminal Appeals reversed on the ground that the State had elicited expert testimony "based partly on facts not in evidence," in violation of Ex parte Wesley, 575 So. 2d 127 (Ala. 1990). Madison, 620 So. 2d at 73.

9. Mr. Madison's third trial was held from April 18, 1994, through April 21, 1994. At its conclusion, the jury found Mr. Madison guilty of capital murder. After hearing significant evidence concerning Mr. Madison's profound history of mental illness, the same death-qualified jury voted to sentence Mr. Madison to life imprisonment without parole. On July 7, 1994, Judge Ferrill McRae overrode the jury's verdict and sentenced Mr. Madison to death. Mr. Madison's case was affirmed on appeal, Madison v. State, 718 So. 2d 90 (Ala. Crim. App. 1997); Ex parte Madison, 718 So. 2d 104 (Ala. 1998), and the United States Supreme Court denied certiorari review. Madison v. Alabama, 525 U.S. 1006 (1998).

10. Mr. Madison subsequently filed a petition for post-conviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. The Alabama Court of Criminal Appeals affirmed the dismissal of that appeal without a hearing, Madison v. State, 999 So. 2d 561 (Ala. Crim. App. 2006), and the Alabama Supreme Court denied certiorari review.

11. On January 8, 2009, Mr. Madison filed a petition for habeas corpus relief

pursuant to 28 U.S.C. § 2254. This Court denied relief, but the United States Court of Appeals for the Eleventh Circuit reversed this Court's denial in part on April 27, 2012, and remanded the case with instructions. Madison v. Comm'r, Ala. Dep't of Corr., 677 F.3d 1333 (11th Cir. 2012). On April 25, 2013, this Court again denied Mr. Madison's petition for habeas corpus relief, and the United States Court of Appeals for the Eleventh Circuit affirmed that denial on August 4, 2014. Madison v. Comm'r, Ala. Dep't of Corr., 761 F.3d 1240 (11th Cir. 2014). The United States Supreme Court denied certiorari review on March 23, 2015. Madison v. Thomas, 135 S. Ct. 1562 (2015). Mr. Madison then filed a petition for a rehearing, which the United States Supreme Court denied on May 18, 2015. Madison v. Thomas, 135 S. Ct. 2346 (2015).

12. On January 22, 2016, the State of Alabama moved the Alabama Supreme Court to set an execution date for Mr. Madison. On February 12, 2016, undersigned counsel filed a petition in this Court pursuant to Alabama Code § 15-16-23, moving the trial court to stay Mr. Madison's execution because, as a result of his dementia, strokes, and cognitive decline, Mr. Madison no longer understands why the State is attempting to execute him and he is incompetent to be executed. On February 15, 2016, undersigned counsel asked the Alabama Supreme Court to delay setting an execution date until after Mr. Madison's competency claim have been adjudicated.

Nevertheless, on March 3, 2016, the Supreme Court of Alabama ordered that Thursday, May 12, 2016, be set as the date for Mr. Madison's execution.

13. On April 29, 2016, this Court denied Mr. Madison's § 15-16-23 petition. Pursuant to Alabama Code § 15-16-23, there is no appellate review of that decision in the Alabama state courts. See Weeks v. State, 663 So. 2d 1045, 1046 (Ala. Crim. App. 1995) (granting State's motion to dismiss appeal because Ala. Code § 15-16-23 "clearly states that a finding by the trial court on the issue of insanity, as it relates to this statute, is not reviewable by any other court"); Magwood v. State, 449 So. 2d 1267, 1268 (Ala. Crim. App. 1984) (Ala. Code § 15-16-23 explicitly prohibits appellate review of trial court's findings). On May 4, 2016, Mr. Madison filed a habeas petition in the Southern District of Alabama requesting relief from his warrant of execution pursuant to Panetti v. Quarterman and Ford v. Wainwright,

GROUNDS SUPPORTING THE PETITION FOR RELIEF

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.

14. On January 12, 2016, 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.

15. 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.

16. Like the Florida sentencing scheme at issue in Hurst, 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; 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.

17. 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, 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

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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 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).

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.

18. The Hurst Court explicitly overruled those cases, 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).").

19. 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.

20. 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]

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

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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).

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.

23. 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 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)).

24. 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

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

in order to return a death sentence,[6] (R. 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. PURSUANT TO RING, HURST AND JOHNSON, ALABAMA'S CAPITAL SENTENCING SCHEME IS NOW UNCONSTITUTIONAL AND THIS COURT SHOULD GRANT RELIEF.

25. As in Hurst, in this case, the trial court independently determined that

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

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.").

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

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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).

[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").

PRAYER FOR RELIEF

For all the above stated reasons and other such reasons, Petitioner Vernon Madison respectfully asks this Honorable Court to grant him the following relief:

(a) **stay his execution scheduled for May 12, 2016**;

(b) determine that the judicial override in this case is unconstitutional;

(b) grant this petition;

(d) issue an order relieving Mr. Madison of his unconstitutional death sentence and order that he be resentenced to life without parole; and

(e) grant Petitioner any such additional relief as is just, equitable, and proper under federal and state law.

Respectfully Submitted,

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Fax: (334) 269-1806
asetzer@eji.org
jswiergula@eji.org

Counsel for Mr. Madison

May 9, 2016

ATTORNEY'S VERIFICATION

I affirm under penalty of perjury that, upon information and belief, the foregoing is true and correct. Signed on the 9th day of May, 2016.

ANGELA L. SETZER
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
Phone: (334) 269-1803

Subscribed to and sworn to before me this

the 9th day of May, 2016.

Notary Public

My commission expires on: 9/23/17

CERTIFICATE OF SERVICE

I certify that on May 9, 2016, a copy of the attached pleading was sent by email to:

James Houts
Thomas Govan
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130
jhouts@ago.state.al.us
TGovan@ago.state.al.us

ANGELA L. SETZER

APPENDIX C

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

VERNON MADISON
Petitioner,

V. Case No.: CC-1985-001385.61

STATE OF ALABAMA
Respondent

ORDER OF DISMISSAL

This Rule 32 of Alabama Rules of Criminal Procedure motions was filed in the Circuit Court of Mobile County on May 9, 2016.. Costs were paid for filing. This Court ordered that the State of Alabama respond to the Rule 32 Petition by noon on May 10, 2016.

The State promptly filed several Motions to Dismiss under Rule 32.2(c), 32.2(a)(5), and 32.2(b), on May 9, 2016.

As to the grounds of the Petition attacking the constitutionality of the defendant's sentence (32.1(a)), this Court **DISMISSES** the Petition. As to the grounds concerning the Court having lacked jurisdiction to render the judgment and sentence (32.1(b)), this Court **DISMISSES** the Petition. As to the grounds that the sentence exceeds the maximum authorized by law or is otherwise not authorized by law (32.1(c)), the Petition is **DISMISSED.** As to 32.2(a)(5), this Court **DISMISSES** the Petition and as to 32.2(b) this Court **DISMISSES** the Petition, notwithstanding that the Court of Criminal Appeals is currently reviewing the Alabama Death Statute in light of Hurst v. Fla., 136 S. Ct. 616 (2016), see Johnson v. Alabama, 2016 WL 172390 (U.S. May 2, 2016).

Costs taxed as paid. The Petition is **DISMISSED.**

DONE the 9th day of May, 2016.

ROBERT H. SMITH
CIRCUIT COURT JUDGE

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

May 11, 2016

1961635

Ex parte Vernon Madison. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Vernon Madison v. State of Alabama) (Mobile Circuit Court: CC-85-1385.8; Criminal Appeals: 93-1788).

ORDER

The Motion for Stay of Execution filed by Vernon Madison on May 10, 2016, having been submitted to this Court,

IT IS ORDERED that the Motion for Stay of Execution is DENIED.

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

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.

Witness my hand this 11th day of May, 2016.

Julia Jordan Weller

Clerk, Supreme Court of Alabama

cc:
Madison Vernon
Luther Strange
James Roy Houts
Angela Setzer
Randall S. Susskind

IN THE SUPREME COURT OF ALABAMA

May 11, 2016