No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

COREY WIMBLEY,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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January 28, 2016

CAPITAL CASE

QUESTIONS PRESENTED

After law enforcement officers arrested Petitioner Corey Wimbley and began interrogating him about the murder in this case, Mr. Wimbley invoked his right to counsel. In response, the officers placed Mr. Wimbley in what the officers referred to as "the hole," which is a special six-foot by eight-foot jail cell that lacked adequate water and light. After being confined in "the hole" for four days without counsel, Mr. Wimbley asked to speak with officers to complain about the conditions of his confinement. In response, officers began interrogating Mr. Wimbley about the crime and threatened to keep him in "the hole" if he did not tell them what they considered to be the truth.

1. Under Miranda v. Arizona, 384 U.S. 436 (1966), and Edwards v. Arizona 451 U.S. 477 (1981), are law enforcement officers permitted to interrogate a defendant after he invokes his right to counsel, is placed in a jail cell that does not have adequate water and light, is held there without counsel for four days, and then contacts officers to discuss the conditions of his confinement?

2. Does this Court's decision in Hurst v. Florida, No. 14-7505 (U.S. Jan. 12, 2016), invalidate a death sentence that is based on a judge's independent findings that aggravating circumstances existed and that they outweigh mitigating circumstances, rather than a jury's verdict?

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Corey Wimbley respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals affirming Mr. Wimbley's conviction and death sentence, Wimbley v. State, No. CR-11-0076, 2014 WL 7236984 (Ala. Crim. App. Dec. 19, 2014), is not yet reported and is attached at Appendix A, along with that court's order denying rehearing. The order of the Alabama Supreme Court denying Mr. Wimbley's petition for a writ of certiorari, Ex parte Wimbley, No. 1140613 (Ala. Sept. 25, 2015), is unreported and attached at Appendix B.

JURISDICTION

On December 19, 2014, the Alabama Court of Criminal Appeals issued an opinion affirming Mr. Wimbley's capital murder conviction and death sentence. Wimbley v. State, No. CR-11-0076, 2014 WL 7236984 (Ala. Crim. App. Dec. 19, 2014). On March 6, 2015, the court denied Mr.Wimbley's rehearing application. On September 25, 2015, the Alabama Supreme Court denied Mr. Wimbley's petition for a writ of certiorari. Ex parte Wimbley, No. 1140613 (Ala. Sept. 25, 2015). On

December 16, 2015, Justice Thomas extended the time to file this petition until January 28, 2016. Mr. Wimbley invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment of the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . .

The Eighth Amendment of the United States Constitution provides in pertinent part:

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

The Fourteenth Amendment of the United States 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.

Alabama's capital sentencing statute, Ala. Code § 13A-5-47(e), reads:

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

STATEMENT OF THE CASE

This is a case in which the death penalty has been imposed. On December 19, 2008, Wagarville shopkeeper Connie Ray Wheat was found dead inside his store, the Harris Grocery. (R. 649.)[1] Mr. Wheat had been shot and a gasoline mixture had been poured around the store. (R. 751- 52, 798-99.) Later that day, Petitioner Corey Wimbley was arrested and taken to the Washington County Jail to be questioned by sheriff's deputies in a videotaped interrogation regarding the murder of Mr. Wheat. (State's Ex. 50.) Mr. Wimbley initially waived his rights (C. 552), and answered several questions about his activities that day and his intent to go to Florida over the holidays. (See State's Ex. 50 (videotaped statement of Corey Wimbley on December 19, 2008).) However, once Mr. Wimbley was informed that he was suspected of murder, he requested a lawyer. (State's Ex. 50; C. 553.)

After Mr. Wimbley invoked his right to counsel, law enforcement officers stopped the interrogation, but placed him in solitary confinement at the county jail in a place the officers referred to as "the hole." (C. 559). "The hole" is a six-by-eight foot holding cell without light, working water, or a bed. (C. 536, 553; R. 887-88.) Law enforcement officers confined Mr. Wimbley in solitary confinement in the dark

[1]References are to the appellate record below in this case. "C." Refers to the clerk's record. "R" refers to the trial transcript.

for the next four days. (R. 886.)

On December 23, 2008, Mr. Wimbley asked to speak with the sheriff's deputies regarding the conditions of his confinement. (C. 553.) When the deputies came to talk with him, Mr. Wimbley immediately described the punitive conditions in "the hole" and specifically noted the lack of light and water in his cell. (C. 553-68) ("I'll sleep on the floor, it's dark in there, the water don't work."). He stated, "I can't take it up in the hole," and asked for a transfer to general population. (C. 553-68.) In response to Mr. Wimbley's request that he be removed from "the hole," the deputies told Mr. Wimbley that if he wished to leave the hole, he should tell "the truth" about the day of the crime. (C. 553.)

Mr. Wimbley then described his activities on the day Mr. Wheat was killed, from the time he awoke in the morning until his arrest that afternoon. (C. 554-58.) He denied having any role in Mr. Wheat's death. (C. 554-58.) Throughout the statement, Mr. Wimbley repeatedly denied taking any part in the murder of Ray Wheat. (C. 554, 556-57.)

The sheriff's deputies did not accept Mr. Wimbley's statement as described above. They told him to stop "lying," and described their own theory of the case in detail: namely, that Mr. Wimbley had killed the victim during a robbery. (C. 558-59.) The deputies told Mr. Wimbley that they knew he was one of the perpetrators of Mr.

Wheat's shooting and there was no point in denying it. (R. 558-59.) Deputy Sheriff Ferrell Grimes then told Mr. Wimbley, "You tell us the truth and I'll get you out of the hole." (C. 559.) Grimes continued:

Grimes:	**You want out of the hole today? You want to go to general population?**
Corey Wimbley:	Yes, Sir.
Grimes:	Start over from when you got up and tell us the truth, the whole truth, until the time that the US Marshall (inaudible) took you down.

(C. 559) (emphasis added). Mr. Wimbley eventually complied, providing an inculpatory statement that was consistent with the theory the deputies proposed. (C. 560-66.) And, as the deputies promised, immediately after Mr. Wimbley made this statement, the deputies transferred Mr. Wimbley out of "the hole." (C. 568.)

Mr. Wimbley was charged with capital murder in connection with Mr. Wheat's death, and was tried in September, 2011. The videotaped statement law enforcement officers obtained from Mr. Wimbley, which was played and transcribed for the jury, was an important element of the State's case. (R. 885, 922, 929, 955-56; C. 553-68.) Mr. Wimbley was subsequently convicted of capital murder during a robbery and capital murder during an arson. (R. 996.)

In a non-binding advisory recommendation, the jury voted for a death sentence

by a ten-to-two vote for murder during an arson, and by an eleven-to-one vote for murder during a robbery. (C. 355-58; R. 1100.) A sentencing hearing was held on October 12, 2011, at which Mr. Wimbley spoke and stated that he was innocent and had been wrongly convicted. (R. 1121-24.) He explained that law enforcement officers coerced him into giving a statement and the tape of his statement simply showed him agreeing to whatever the officers wanted him to say. (R. 1123-24.) He added that "throwing my life away, robbing somebody is something I would never do." (R. 1123.) In making its sentencing determination, the trial court considered a pre-sentence report that was not available to the jury. The report contained information on Mr. Wimbley's criminal history of property crimes, misdemeanor crimes, and a felony case pending in the same court. (C. 372.) It also contained mitigating facts including, facts about his relationship with his family, financial status, and an assessment by his psychologist. (C. 359-67.) In addition to the report, the trial court considered an allocution from Mr. Wimbley. (R. 1121-24.) The trial court then independently determined that the two aggravating circumstances existed and that the aggravating factors outweighed the mitigating factors. Based on these two findings, he sentenced Mr. Wimbley to death. (C. 375.)

HOW THE FEDERAL QUESTIONS WERE PRESENTED AND DECIDED BELOW

In an appeal to the Alabama Court of Criminal Appeals, Mr. Wimbley argued that his confession was illegally obtained because, after he invoked his right to counsel, law enforcement officers punished him by placing him in "the hole" at the county jail. (C. 553, 559.) Mr. Wimbley argued that when he sought out the Sheriff's deputies to complain about being in "the hole," law enforcement officers exploited this request to talk about his conditions of confinement by interrogating him about the crime, in violation of Edwards v. Arizona, 451 U.S. 477, 484-85 (1981). He asserted that both the waiver of his Miranda rights and his confession were involuntary because of the coercive tactics used by police and the oppressive conditions of his solitary confinement. He also argued that his sentence was unconstitutional under Ring v. Arizona, 536 U.S. 584, 602 (2002), because he was sentenced by a judge rather than by unanimous jury verdict.

The Alabama Court of Criminal Appeals affirmed Mr. Wimbley's conviction and death sentence on December 19, 2014. Wimbley v. State, No. CR-11-0076, 2014 WL 7236984 (Ala. Crim. App. Dec. 19, 2014). In the three-judge majority opinion, over two dissents, the court found that there was no Edwards violation because "officers investigating his crime, not merely his jailers," and "evinced" a "desire for

a generalized discussion about the investigation." Wimbley, 2014 WL 7236984, at *10. It also held that he "voluntarily waived his Miranda rights," id. at *15, and that the "circuit court's determination that Wimbley's will was not overborne by any promises of a benefit was supported by evidence in the record," Id. at *17. Both Judge Samuel Welch and Judge Michael Joiner dissented, writing separate opinions finding that Mr. Wimbley's custodial statement was unconstitutionally obtained and that Mr. Wimbley is entitled to a new trial.

In Judge Welch's dissent, he found that Mr. Wimbley spoke to officers in order to "negotiate his release from 'the hole,'" and that he "would hold that the confession was involuntary and that Wimbley's will was overborne because the confession was coerced and induced by a promise of the transfer to general population after four days in a small, dark holding cell that Wimbley said he could not endure." Wimbley, 2014 WL 7236984, at *63 (Welch, J., dissenting) (citing Culombe v. Connecticut, 367 U.S. 568 (1961)).

In a separate dissenting opinion, Judge Joiner stated that "Wimbley's clearly stated reason for [initiating contact with law enforcement] was to get out of 'the hole' and into the 'general population' because 'he couldn't take it,'" and that he "would hold that his waiver of his constitutional right to counsel was involuntary, as was his subsequent confession to participating in the crimes." Wimbley, 2014 WL 7236984,

at *66 (Joiner, J., dissenting).

On March 6, 2015, the Court of Criminal Appeals denied Mr. Wimbley's application for rehearing. Mr. Wimbley then presented the claims to the Alabama Supreme Court, which denied review. Ex parte Corey Wimbley, No. 1140613 (Ala. Sept. 25, 2015).

REASONS FOR GRANTING THE WRIT

I.
THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE ALABAMA COURT OF CRIMINAL APPEALS, OVER TWO SEPARATE DISSENTING OPINIONS, REFUSED TO FOLLOW PRECEDENT FROM THIS COURT AND FIND THAT PETITIONER'S CUSTODIAL STATEMENT WAS UNCONSTITUTIONALLY OBTAINED.

The Fifth Amendment to the United States Constitution guarantees that "[n]o person shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. To enforce this protection during custodial interrogations, this Court has held that a criminal defendant must be informed of his right to silence and to counsel. Miranda v. Arizona, 384 U.S. 436 (1966). Once an accused has invoked his right to counsel, all interrogation must cease unless "the accused himself initiates further communication, exchanges or conversations with the police." Edwards v. Arizona, 451 U.S. 477, 484-85 (1981).

In Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983) (plurality opinion), this Court explained that "initiation" for the purpose of Edwards *does not include conversations about conditions of confinement*. This Court recognized that, for practical reasons, a person held in custody must be able to speak to police officers without automatically subjecting himself to further interrogation:

> [S]ome inquiries, such as a request for a drink of water or a request to use a telephone . . . cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally "initiate" a conversation in the sense in which that word was used in Edwards.

Id. at 1045.

Courts have reaffirmed that, to initiate for Edwards purposes, the defendant must do more than simply ask to speak to an officer. See United States v. Whaley, 13 F. 3d 963, 964 (6th Cir. 1994) ("[A]n Edwards initiation occurs when, without influence by the authorities, the suspect shows a willingness and a desire to talk generally about his case."); Haynes v. State, 934 So. 2d 983, 987 (Miss. 2006) (finding no Edwards reinitiation where defendant, after invoking his right to counsel, asked to speak with a police officer, singed a waiver form, and asked "several questions about his bond, scheduling, and a preliminary hearing. . . ."); Osburn v. State, 326 S.W.3d 771, 780-81 (Ark. 2009) (defendant's questions about whether he

would be able to see his family before being taken to jail and his statement that he was "in a mess" was not reinitiation); State v. Staats, 658 N.W.2d 207, 214 (Minn. 2003) (holding questions "about the extension of [defendant's] 36- hour hold, a shower, and a phone call to his mother" do not evince a desire "to open up a more generalized discussion about the investigation"); Blake v. State, 381 A.2d 410, 413 (Md. 2004) (defendant's question "'I can still talk to you?'" was not initiation when given document improperly saying he was subject to death penalty and when kept "in a cold holding cell with little clothing"); Kraft v. State, 713 S.W.2d 168,172 (Tex. App. 1st Dist. 1986) (questions to police officer regarding bail were not initiation).

In conflict with all of these cases from other jurisdictions, the court below held that even though Mr. Wimbley asked to speak with officers about the conditions of his custody in "the hole," he nevertheless was indicating "a willingness and a desire for a generalized discussion about the investigation," Wimbley, 2014 WL 7236984, at *10 (internal quotations omitted). The Court of Criminal Appeals inappropriately relied in part on the fact that Mr. Wimbley requested to speak with "officers investigating his crime, not merely his jailers," Wimbley, 2014 WL 7236984, at *10, manufacturing a meaningless distinction between "jailers" and "investigating officers" that is legally irrelevant and unsupported by precedent from this Court. See e.g. Bradshaw, 462 U.S. at 1044-46 (failing to distinguish between police officers and

jailers during Edwards analysis).

Moreover, with the intention of requesting release from "the hole," Mr. Wimbley asked to speak with the officers who actually *placed* him in "the hole" four days earlier. When he eventually spoke to Officer Grimes and Mr. Lolley, Mr. Wimbley immediately stated his sole reason for contacting them: his desire to be moved from "the hole" to general population. (C. 553, 559.) Thus Mr. Wimbley's conversation with Officer Grimes and Mr. Lolley on December 23, 2008, not only arose directly from the "incidents of the custodial relationship," Bradshaw, 462 U.S. at 1045, they pertained primarily to his custody. The Court of Criminal Appeals should have complied with this Court's precedent and focused on the content of the accused's contact with law enforcement. Id. at 1044-46.

As this Court stated in Maryland v. Shatzer, 559 U.S. 98 (2010), the "Edwards presumption of involuntariness ensures that police will not take advantage of the mounting coercive pressures of prolonged police custody." Id. at 105 (internal quotations omitted). When Mr. Wimbley was placed in solitary confinement for four days after requesting counsel, it created exactly the kind of "coercive pressures" Edwards was designed to prevent. Mr. Wimbley's confinement constituted what this Court has described as the "paradigm Edwards case." Shatzer, 559 U.S. at 106. Mr. Wimbley was held in "uninterrupted pretrial custody while [the] crime [was] being

actively investigated. After the initial interrogation . . . he remain[ed] cut off . . . thrust into and isolated in an unfamiliar, police-dominated atmosphere . . . where his captors appear[ed] to control his fate." Id. (internal quotations omitted).

As Judge Joiner stated in his dissent below: "Wimbley's perception of [these] conditions was such that it took only four days for him to backtrack from his assertion of his constitutional right to counsel and initiate contact with law enforcement." Wimbley, 2014 WL 7236984, at *66 (Joiner, J., dissenting). The fact that Mr. Wimbley desperately offered to do or say "everything" they wanted in order to have his custodial concerns addressed does not change the nature or purpose of his initial inquiry. (State's Exhibit 56.) "Wimbley's clearly stated reason for [initiating contact with law enforcement] was to get out of 'the hole' and into the 'general population' because 'he couldn't take it.'" Wimbley, 2014 WL 7236984, at *66 (Joiner, J., dissenting). Mr. Wimbley was merely attempting to negotiate his transfer to more humane conditions and because of the oppressiveness of "the hole," he was pressured into speaking with officers without counsel and in violation of this court's holding in Edwards.

In addition to the violation of Edwards v. Arizona, the statement was unconstitutionally obtained because the Miranda waiver was not voluntary. In Colorado v. Spring, this Court held that "the relinquishment of [Miranda rights] must

have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." 479 U.S. 564, 573 (1987). "Only if the totality of the circumstances surrounding [an] interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived." Id. (internal quotations omitted).

This Court has acknowledged that when "a period of . . . three days elapse[s] between the unsatisfied request for counsel and the interrogation about a[n] . . . offense . . . there is a presumption of coercion that is created by prolonged police custody . . . ." Arizona v. Roberson, 486 U.S. 675, 686 (1988) (internal quotations omitted).

In this case, the Court of Criminal Appeals held that Mr. Wimbley voluntarily waived his Miranda rights, Wimbley, 2014 WL 7236984, at *12-15, despite the fact that he was held without water, light, or a bed in a "six-foot by eight-foot holding cell," Wimbley, 2014 WL 7236984, at *61, for four days while the police ignored his request for an attorney. As Judge Joiner explained, "Mr. Wimbley's perception of conditions" in the hole compelled him to "backtrack from his assertion of his constitutional right to counsel and initiate contact with law enforcement" even without the aid of an attorney. Wimbley, 2014 WL 7236984, at *66 (Joiner, J.,

dissenting). Under this Court's precedent, Mr. Wimbley's Miranda waiver was not voluntary because being placed in the "hole" after asserting his rights made Mr. Wimbley "desperat[e]" enough for relief to waive his constitutional rights. Wimbley, 2014 WL 7236984, at *63 (Welch, J., dissenting).

In addition to the Edwards violation and the involuntary Miranda waiver, the statement should have been suppressed because it was involuntarily obtained. Culombe v. Connecticut, 367 U.S. 568, 602 (1961) ("Is the confession the product of an essentially free and unconstrained choice by its maker? . . . If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."); see also Brown v. Mississippi, 297 U.S. 278, 287 (1936)

After Mr. Wimbley initially provided an exculpatory statement, (C. 554-57), the deputies told Mr. Wimbley that his statement was unacceptable and that his punitive solitary confinement would end only if he confessed. (C. 559); Wimbley, 2014 WL 7236984, at *63 (Welch, J., dissenting) ("Deputy Grimes said: 'You tell us the truth and I'll get you out of the hole.'"). Law enforcement officers then obtained an incriminating statement from Mr. Wimbley. (C. 560-68.) The "bargaining was initiated and controlled by Lolley and Deputy Grimes." Wimbley, 2014 WL 7236984, at *64 (Welch, J., dissenting) "They made it clear through repeated statements that,

only if Wimbley told them their version of 'the truth,' that is, only if he gave a confession, would he be released from 'the hole.'" Wimbley, 2014 WL 7236984, at *63 (Welch, J., dissenting). By promising Mr. Wimbley relief only if he gave a statement consistent with the investigating officers' theory of the case, the officers coerced and forced Mr. Wimbley to give an inculpatory statement. Both dissenting opinions below acknowledged the coerciveness of the circumstances surrounding Mr. Wimbley's confession and found this confession involuntary. Wimbley, 2014 WL 7236984, at *60 (Welch, J., dissenting) and *65 (Joiner, J., dissenting). The totality of the circumstances establishes that Mr. Wimbley's confession to the deputies was not a "free and unconstrained choice," and the Alabama Court of Criminal Appeals' opinion finding Mr. Wimbley's confession voluntary conflicted with this Court's decision in Culombe, 367 U.S. at 602.

After requesting counsel, Mr. Wimbley was placed in solitary confinement without sufficient water, light or bedding. After four days in these conditions, Mr. Wimbley was improperly interrogated without his requested counsel and his confession was unconstitutionally obtained in violation of this court's decisions in Edwards v. Arizona 451 U.S. 477 (1981), Colorado v. Spring, 479 U.S. 564 (1987), and Culombe v. Connecticut, 367 U.S. 568 (1961).

II.

UNDER HURST V. FLORIDA, THIS COURT SHOULD GRANT CERTIORARI TO INVALIDATE THE DEATH SENTENCE IN THIS CASE BECAUSE IT WAS BASED ON A JUDGE'S INDEPENDENT FINDINGS THAT AGGRAVATING CIRCUMSTANCES EXISTED AND THAT THEY OUTWEIGHED MITIGATING CIRCUMSTANCES, RATHER THAN A JURY'S VERDICT.

Alabama's capital murder sentencing statute provides for a sentencing hearing before a jury, which results in an "advisory verdict" and a subsequent sentencing hearing before the trial judge. Ala. Code § 13A-5-46, 47. Only the trial judge holds the ultimate authority to impose sentence, and that sentence must be based on the judge's independent finding that aggravating circumstances exist and the judge's finding that the aggravating circumstances outweigh mitigating circumstances. The judge is not restricted to, or bound by, the jury's findings regarding aggravating and mitigating factors, and is even empowered to reach a different sentencing decision altogether. "While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court":

> In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to Section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given

consideration, it is not binding upon the court.

Ala. Code § 13A-5-47(e).

In Hurst v. Florida, No. 14-7505, 2016 WL 112683, at *5 (Jan. 12, 2016), this Court applied its decision in Ring v. Arizona, 536 U.S. 584 (2002), to invalidate Florida's capital sentencing scheme under the Sixth Amendment to the United States Constitution. "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." Hurst, 2016 WL 112683, at *6 (internal quotations and citations omitted).

Alabama has the same capital sentencing scheme as Florida. See Ex parte Harrell, 470 So. 2d 1309, 1317 (Ala. 1985) ("Alabama's procedure permitting judicial override is almost identical to the scheme used in Florida.").[2] More specifically, Alabama's death penalty scheme has the same defect that was declared unconstitutional in Hurst: a jury returns an "advisory" sentencing verdict that is "not

[2]See also Ex parte Waldrop, 859 So. 2d 1181, 1188–90 (Ala. 2002) (treating Florida's statute as analogous for purposes of Ring analysis); Knotts v. State, 686 So. 2d 431, 448 (Ala. Crim. App. 1995) ("[W]e find persuasive those cases interpreting the Florida statutes because Alabama's death penalty statute is based on Florida's sentencing scheme.").

binding upon the court." Ala. Code § 13A-5-47(e). 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 (1994) (Alabama's death penalty statute "much like that of Florida" because "[b]oth require jury participation in the sentencing process but give ultimate sentencing authority to the trial judge").[3]

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

> 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, 2016 WL 112683, at *6. The same can be said of Corey Wimbley.

Mr. Wimbley's death sentence was imposed by a trial judge based on a judicial finding of two statutory aggravating factors (C. 373), and a judicial finding that the aggravating circumstances outweighed the mitigating circumstances. (C. 375.) On

[3]In Harris, this Court found that judicial override in Alabama was constitutional, relying on Hildwin v. Florida, 490 U. S. 638 (1989) and Spaziano v. Florida, 468 U.S. 447 (1984). In Hurst, however, the Court explicitly overruled those cases, declaring that "[t]ime and subsequent cases have washed away the logic of Spaziano and Hildwin." 2016 WL 112683, at *8. As a result, Harris is no longer valid. See Brooks v. Alabama, No. 15-7786 (U.S. Jan. 21, 2016) (Sotomayor, J., concurring with denial of certiorari).

multiple occasions, the judge informed the jury that its sentencing decision was merely a recommendation. During voir dire, the judge told potential jurors that "the jury makes a [sentencing] recommendation to the Court, and then the Judge makes the final decision regarding punishment." (R. 256.) Before the jury convicted Mr. Wimbley of capital murder, the judge reminded the jury that "you are not at this stage to concern yourselves with the issue of punishment or sentencing." (R. 967.) In the penalty-phase instructions, the court told the jury that:

> The issue at this hearing concerns the existence of aggravating and mitigating circumstances, which you should weigh against each other to determine the punishment that you recommend. Your verdict recommending a sentence should be based upon the evidence that you've heard while deciding the guilt or innocence of the defendant and the evidence that's been presented to you here today in this proceeding. The Judge, me, will then consider your verdict recommending a sentence in making a final decision regarding this defendant's sentence.

(R. 1087.)

In addition, the judge considered evidence that was not presented to the jury that was included in the pre-sentence investigation report: Mr. Wimbley's criminal history, facts about his relationship with his family, financial status, an assessment by his psychologist, and an allocution from Mr. Wimbley. (C. 359-67, C. 372, R. 1123.) While the jury convicted Mr. Wimbley of capital murder and recommended

the death penalty, he could not have been sentenced to death without the judge's factual determinations. Ala. Code § 13A-5-47(e). Moreover, because the jury recommendation in this case was by a vote of 10-2 for murder during an arson and 11-1 for murder during a robbery (C. 355-58), it did not satisfy 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 Ring majority's holding mandates that facts increasing punishment be found by "a unanimous jury . . . beyond a reasonable doubt").

"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, 2016 WL 112683, at *3. These same Sixth Amendment concerns require action in Mr. Wimbley's death penalty case out of Alabama—the only state in the country where judges routinely impose death sentences in contradiction of advisory jury recommendations for life imprisonment. Woodward v. Alabama, 134 S. Ct. 405, 405 (2013) (Sotomayor, J., dissenting from denial of cert.). Mr. Wimbley requests that this court grant certiorari, vacate his death sentence, and remand the case for further proceedings in accordance with the recent decision in Hurst v. Florida.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant certiorari to the Alabama Court of Criminal Appeals and declare that Mr. Wimbley's constitutional rights were violated.

Respectfully Submitted,

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January 28, 2016

APPENDIX A

APPENDIX B