NEWS ADVISORY
Luther Strange
Alabama Attorney General

FOR IMMEDIATE RELEASE
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For More Information, contact:
Mike Lewis (334) 353-2199
Joy Patterson (334) 242-7491

ALABAMA APPEALS COURT VACATES JEFFERSON COUNTY CIRCUIT COURT ORDER HOLDING ALABAMA'S DEATH PENALTY SENTENCING SCHEME TO BE UNCONSTITUTIONAL

Appeals Court Holds Alabama Capital Murder Sentencing is Constitutional under Hurst

(MONTGOMERY) – Attorney General Luther Strange announced the Alabama Court of Criminal Appeals has granted the State of Alabama's request to vacate a Jefferson County trial court's order declaring Alabama's "capital sentencing scheme" to be facially unconstitutional.

"Today's decision by the Alabama Court of Criminal Appeals is the first case to affirm under *Hurst* that Alabama's capital sentencing is constitutional," said Attorney General Strange. "The Appeals Court vacated the Jefferson County Court's March order and thereby held that Alabama can continue to seek the death penalty in capital murder prosecutions."

In its March 10, 2016, filing the State of Alabama pointed out that the lower trial court had no power to prevent the state from seeking the death penalty for four offenders.

Today the Alabama Court of Criminal Appeals granted the state's petition for mandamus in each of the four capital murder cases of Kenneth Eugene Billups, Stanley Brent Chapman, Terrell Corey McMullin and Benjamin Todd Acton.

A copy of the court's order is attached

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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2015-2016

CR-15-0619

Ex parte State of Alabama

PETITION FOR WRIT OF MANDAMUS

(In re: State of Alabama v. Kenneth Eugene Billups)

Appeal from Jefferson Circuit Court
(CC-05-1755)

CR-15-0622

Ex parte State of Alabama

PETITION FOR WRIT OF MANDAMUS

(In re: State of Alabama v. Stanley Brent Chapman)

Appeal from Jefferson Circuit Court
(CC-14-3011 and CC-14-3012)

CR-15-0623

Ex parte State of Alabama

PETITION FOR WRIT OF MANDAMUS

(In re: State of Alabama v. Terrell Corey McMullin)

Appeal from Jefferson Circuit Court
(CC-14-3015 and CC-14-3016)

CR-15-0624

Ex parte State of Alabama

PETITION FOR WRIT OF MANDAMUS

(In re: State of Alabama v. Benjamin Todd Acton)

Appeal from Jefferson Circuit Court
(CC-12-1194 and CC-12-1195)

KELLUM, Judge.

The State of Alabama has filed four petitions for a writ of mandamus asking this Court to direct the Jefferson Circuit Court to vacate its order declaring Alabama's "capital-sentencing scheme" unconstitutional and barring the State from

seeking the death penalty in capital-murder prosecutions. Because these petitions address the same issue, we consolidate them for the purpose of writing a single opinion. We grant the petitions and issue the writs.

Facts and Procedural History

Kenneth Eugene Billups, Stanley Brent Chapman, Terrell Corey McMullin, and Benjamin Todd Acton (hereinafter collectively referred to as "respondents") were indicted for various counts of capital murder. Billups and Acton were each indicted for one count of murder made capital because it was committed during the course of a robbery, see § 13A-5-40(a)(2), Ala. Code 1975.[1] Chapman and McMullin were each indicted for one count of the murder of two or more persons pursuant to one act or one scheme or course of conduct, see § 13A-5-40(a)(10), Ala. Code 1975, for two counts of murder made capital because it was committed during the course of a robbery, see § 13A-5-40(a)(2), Ala. Code 1975, and for two counts of murder made capital because it was committed during

[1]The charges against Billups and Acton are based on unrelated offenses.

the course of a burglary, see § 13A-5-40(a)(4), Ala. Code 1975.[2]

Before trial, the respondents each filed a motion to bar imposition of the death penalty in their cases and to hold Alabama's capital-sentencing scheme unconstitutional based on the United States Supreme Court's recent decision in Hurst v. Florida, 577 U.S. ___, 136 S.Ct. 616 (2016).[3] The circuit court consolidated the motions and, after conducting a hearing, entered an order in all four cases concluding that "the capital sentencing scheme as provided by the Alabama Criminal Code is unconstitutional and is this day barred from enactment." (Petitions, Appendix A, p. 28.)

Standard of Review

> "Before a writ of mandamus may issue, the petitioner must show (1) a clear legal right in the petitioner to the relief sought; (2) an imperative

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[2]The charges against Chapman and McMullin are based on the same murders.

[3]In 2006, Billups was convicted of capital murder as charged in his indictment and was sentenced to death. This Court affirmed Billups's conviction and sentence on direct appeal, but the Alabama Supreme Court reversed this Court's judgment and remanded the cause for a new trial. See Billups v. State, 86 So. 3d 1032 (Ala. Crim. App. 2009), rev'd, 86 So. 3d 1079 (Ala. 2010), after remand, 86 So. 3d 1087 (Ala. Crim. App. 2011). Billups filed his motion before his retrial.

> duty upon the respondent to perform, accompanied by a refusal to do so; (3) no adequate remedy at law; and (4) the properly invoked jurisdiction of the reviewing court."

State v. Reynolds, 819 So. 2d 72, 79 (Ala. Crim. App. 1999). "A writ of mandamus is a drastic and extraordinary writ and will not be issued unless the petitioner has a clear and undisputable right to a particular result." Ex parte Springer, 619 So. 2d 1267, 1258 (Ala. 1992). "'A writ of mandamus is not granted unless there is a clear showing of error in the trial court to the injury of the petitioner.'" Ex parte Hutcherson, 847 So. 2d 386, 388 (Ala. 2002) (quoting Ex parte Southland Bank, 514 So. 2d 954, 955 (Ala. 1987)).

Analysis

I.

As a threshold matter, we must determine whether mandamus is the proper avenue by which the State can seek review of the circuit court's order. The State argues that mandamus is appropriate because, it says, it has no other avenue to seek review of the court's order and the order, which prohibits the State from seeking the death penalty in capital-murder prosecutions, represents "an extraordinary disruption in the administration of criminal justice." (Petition, p. 19.) The

respondents argue, on the other hand, that the State has a right to appeal the circuit court's ruling pursuant to § 12-22-91, Ala. Code 1975, and that, therefore, mandamus is not appropriate.

Although § 12-22-91 gives the State the right to appeal a lower court's order holding unconstitutional the statute "under which the indictment or information is preferred," as the State correctly argues the circuit court in this case did not hold unconstitutional the statute under which the respondents' indictments were preferred -- § 13A-5-40, Ala. Code 1975. Rather, the circuit court held unconstitutional Alabama's "capital-sentencing scheme," i.e., those statutes setting forth the procedures for imposing the death penalty in Alabama, see §§ 13A-5-44 through -52, Ala. Code 1975. "All statutes that authorize appeals are to be strictly construed," Dixon v. City of Mobile, 859 So. 2d 462, 463 (Ala. Crim. App. 2003), and "may not be enlarged or extended by judicial construction." State v. Gautney, 344 So. 2d 232, 234 (Ala. Crim. App. 1977). Under the plain language of § 12-22-91, the State could not appeal the circuit court's order in this case because the circuit court did not hold unconstitutional § 13A-

5-40, Ala. Code 1975, the statute under which the indictments were preferred.[4]

This Court "has jurisdiction not only to issue all writs necessary or appropriate in aid of [our] appellate jurisdiction, but also has authority to issue such remedial and original writs as are necessary to give [us] a general superintendence and control of jurisdictions inferior to [us] in criminal matters." Ex parte Nice, 407 So. 2d 874, 877 (Ala. 1981). "[I]t is fairly well settled that notwithstanding the fact that the State has a restricted right in criminal cases to prosecute an appeal, the actions of a trial judge as to certain rulings in criminal cases may be reviewed by mandamus proceedings under appropriate circumstances." Id. at 878. Indeed, "a writ of mandamus is a supervisory order; thus, an appellate court may issue this writ in any situation, within recognized limits, where this

[4]We note that Rule 15.7(a), Ala. R. Crim. P., permits the State to appeal a lower court's order suppressing evidence, dismissing an indictment, or quashing an arrest or search warrant; that § 12-12-70(c), Ala. Code 1975, permits the State to appeal a district court's order holding a statute or ordinance invalid; and that § 12-22-90(b), Ala. Code 1975, permits the State to appeal an adverse ruling on a petition for a writ of habeas corpus. These cases do not fall into any of those categories.

writ is necessary to protect the proper judicial administration of the courts." Ex parte Sullivan, 779 So. 2d 1157, 1161 (Ala. 2000).

Although generally "[m]andamus cannot be used as a substitute for appeal, when no appeal is authorized by law or court rule, [it] can be used to prevent a gross disruption in the administration of criminal justice." Ex parte Nice, 407 So. 2d at 879. Mandamus may also "be used by the government in aid of its lawful rights in the prosecution of criminal cases," id. at 879, and "in exceptional circumstances which amount to judicial usurpation of power." Id. at 878. "[O]nly the rarest of circumstances merit an intervention in a criminal case by mandamus; nevertheless, circumstances can arise which present a compelling need for the issuance of the mandamus to further important countervailing public interests." Id. at 880. These four cases present just the type of rare and exceptional circumstance that merits intervention by mandamus to prevent a gross disruption in the administration of criminal justice. Therefore, mandamus is the appropriate avenue for the State to seek review of the circuit court's order.

II.

The State contends that the circuit court erred in holding that Hurst v. Florida, 577 U.S. ___, 136 S.Ct. 616 (2016), rendered Alabama's capital-sentencing scheme unconstitutional. The State argues that Alabama's capital-sentencing scheme is constitutional under Hurst because the statutory scheme requires the jury, not the trial court, to make the findings necessary for imposition of the death penalty, during either the guilt phase or the penalty phase of the trial, and that it has a clear legal right to seek the death penalty in capital-murder prosecutions under Alabama's statutory scheme. In its order, the circuit court found that "capital defendants in Alabama are subject to having the 'maximum authorized punishment ... increased by a judge's own factfinding'" and that, therefore, "[i]n light of the ruling in Hurst, Alabama's capital-sentencing scheme, 'under which an advisory jury makes a recommendation to a judge, and the judge makes the critical findings needed for the imposition of a death sentence, violates the Sixth Amendment right to trial by jury.'" (Petitions, Appendix A, pp. 26-27; citations omitted.)

Initially, we point out that "statutes are presumed to be constitutional," State v. Adams, 91 So. 3d 724, 732 (Ala. Crim. App. 2010), and courts "should be very reluctant to hold any act unconstitutional." Ex parte Boyd, 796 So. 2d 1092, 1094 (Ala. 2001). In reviewing the constitutionality of a statute, courts "'must afford the Legislature the highest degree of deference, and construe its acts as constitutional if their language so permits.'" Adams, 91 So. 3d at 732 (quoting Monroe v. Harco, Inc., 762 So. 2d 828, 831 (Ala. 2000)). "'[I]n passing upon the constitutionality of a legislative act, the courts uniformly approach the question with every presumption and intendment in favor of its validity, and seek to sustain rather than strike down the enactment of a coordinate branch of government.'" Herring v. State, 100 So. 3d 616, 620 (Ala. Crim. App. 2011) (quoting Alabama State Fed. of Labor v. McAdory, 246 Ala. 1, 9, 18 So.2d 810, 815 (1944)). "It is the duty of a court to sustain an act unless [the court] is convinced beyond a reasonable doubt of [the act's] unconstitutionality." Handley v. City of Montgomery, 401 So. 2d 171, 180 (Ala. Crim. App. 1981). With respect to Alabama's capital-sentencing scheme, § 13A-5-58,

Ala. Code 1975, specifically directs: "This article shall be interpreted, and if necessary reinterpreted, to be constitutional."

Before examining the opinion in Hurst, we first reexamine the opinions on which Hurst was based: Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002).[5] In Apprendi, the United States Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. at 490 (emphasis added). The Court stated that pursuant to the Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

[5]Although both this Court and the Alabama Supreme Court have already exhaustively examined both Apprendi and Ring, it is important that we do so again here to understand the context in which Hurst was decided.

Id. (quoting Jones v. United States, 526 U.S. 227, 252 (1999) (Stevens, J., concurring)). In determining whether a sentencing statute is constitutional in this respect, the Court said, "the relevant inquiry is one not of form but of effect -- does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Id. at 494 (emphasis added). The Court noted, however, that it is permissible "for judges to exercise discretion -- taking into consideration various factors relating both to offense and offender -- in imposing judgment within the range prescribed by statute" and that "judges in this country have long exercised discretion of this nature in imposing sentence within statutory limits in the individual case." Id. at 481 (emphasis in original).

In Ring, the United States Supreme Court applied its holding in Apprendi to capital sentencing and held Arizona's capital-sentencing scheme unconstitutional. Under Arizona's capital-sentencing scheme as it then existed,[6] the maximum sentence authorized by a jury verdict finding a defendant

[6]Arizona amended its capital-sentencing scheme after Ring was decided.

guilty of first-degree murder was life imprisonment without the possibility of parole; the defendant became eligible for the death penalty only if the trial court, sitting without a jury, found the existence of an aggravating circumstance and found that there were no mitigating circumstances sufficiently substantial to call for leniency. The Court held that "[c]apital defendants, no less than noncapital defendants, ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589 (emphasis added). The Court reiterated the principle from Apprendi that "[a] defendant may not be 'expose[d] ... to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" Ring, 536 U.S. at 602 (quoting Apprendi, 530 U.S. at 483 (some emphasis added)). Because a sentence of death exceeded the maximum punishment authorized for a conviction of first-degree murder in Arizona, the Court concluded, the fact necessary to expose a defendant to the death penalty -- the existence of an aggravating circumstance -- must be found by a jury. The Court in Ring overruled its previous opinion in Walton v. Arizona, 497 U.S. 639 (1990),

upholding as constitutional Arizona's capital-sentencing scheme "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Ring, 536 U.S. at 609 (emphasis added).

In Hurst, the United States Supreme Court held Florida's capital-sentencing scheme unconstitutional. The Court noted that "[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's." Hurst, 577 U.S. at ___, 136 S.Ct. at 621-22. Florida's capital-sentencing scheme as it then existed[7] was similar to Arizona's in that the maximum sentence authorized by a jury verdict finding a defendant guilty of first-degree murder was life imprisonment without the possibility of parole; the defendant became eligible for the death penalty only if the trial court found the existence of an aggravating circumstance and found that there were insufficient mitigating circumstances to outweigh the aggravating circumstances. Although Florida's procedure, unlike Arizona's, included an advisory verdict by

[7]Florida amended its capital-sentencing scheme after Hurst was decided.

a jury recommending a sentence, the Court found this distinction "immaterial" because a Florida jury "'does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge[; therefore, a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.'" Hurst, 577 U.S. at ___, 136 S.Ct. at 622 (quoting Walton, 497 U.S. at 648). The Court reiterated that "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' ... must be submitted to a jury," Hurst, 577 U.S. at ___, 136 S.Ct. at 621 (emphasis added), and concluded that Florida's procedure was unconstitutional because "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,'" Hurst, 577 U.S. at ___, 136 S.Ct. at 622 (quoting former Fla. Stat. § 785.082(1)(a)); "[t]he trial court alone must find 'the facts ... [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating

circumstances.'" Hurst, 577 U.S. at ___, 136 S.Ct. at 622 (quoting former Fla. Stat. § 921.141(3).) As in Ring, in which the Court overruled its previous decision in Walton upholding Arizona's capital-sentencing scheme, the Court in Hurst overruled its previous decisions in Hildwin v. Florida, 490 U.S. 638 (1989), and Spaziano v. Florida, 468 U.S. 447 (1984), upholding as constitutional Florida's capital-sentencing scheme to the extent "they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." Hurst, ___ U.S. at ___, 136 S.Ct. at 624 (emphasis added).

We first point out what the Supreme Court in Hurst did not hold: The Court in Hurst did not hold, as the respondents argue, that judicial override of a jury's capital-sentencing recommendation is unconstitutional. The issue of judicial override was not even before the Court when it decided Hurst because the trial court in Hurst did not override the jury's sentencing recommendation; the trial court in Hurst followed the jury's recommendation of death. The Court in Hurst also did not hold, as the respondents argue, that judicial

sentencing in capital cases is unconstitutional or that it is unconstitutional to allow a trial court, in determining the appropriate sentence in a capital case, to consider evidence that was not presented to the jury. Although the Court in Hurst found that a jury's capital-sentencing recommendation alone was not sufficient to establish that the jury found the facts necessary for imposition of the death penalty under Florida's capital-sentencing scheme, the Court did not state, or even imply, that it is constitutionally required that a jury, and not a judge, make the ultimate decision whether to sentence a defendant to death or to life imprisonment without the possibility of parole. Indeed, in reaching its decision in Hurst, the Court relied on its holdings in Apprendi and Ring, and, as noted above, the Court in Apprendi specifically found that it was permissible "for judges to exercise discretion -- taking into consideration various factors relating both to offense and offender -- in imposing judgment within the range prescribed by statute." Apprendi, 530 U.S. at 481.

Simply put, the Court in Hurst did not, as the respondents argue, hold unconstitutional the broad overall

structure of Florida's capital-sentencing scheme -- a hybrid scheme beginning with a bifurcated capital trial during which the jury first determines whether the defendant is guilty of the capital offense and then recommends a sentence, followed by the trial court making the ultimate decision as to the appropriate sentence. Rather, the Court held that Florida's capital-sentencing scheme was unconstitutional to the extent that it specifically conditioned a capital defendant's eligibility for the death penalty on findings made by the trial court and not on findings made by the jury, which contravened the holding in Ring. The Court emphasized several times in its opinion that Florida's capital-sentencing statutes did not make a capital defendant eligible for the death penalty until the trial court made certain findings. See Former Fla. Stat. § 775.082(1)(a) (2010) ("[A] person who has been convicted of a capital felony shall be punished by death" only "if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole." (emphasis

added)). And the Court held only that "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional." Hurst, 577 U.S. at ___, 136 S.Ct. at 624.

The Court in Hurst did nothing more than apply its previous holdings in Apprendi and Ring to Florida's capital-sentencing scheme. The Court did not announce a new rule of constitutional law, nor did it expand its holdings in Apprendi and Ring. As the State correctly argues, "Hurst did not add anything of substance to Ring." (Petitions, p. 6.) The Alabama Supreme Court has repeatedly construed Alabama's capital-sentencing scheme as constitutional under Ring. See, e.g., Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002); Ex parte Hodges, 856 So. 2d 936 (Ala. 2003); Ex parte Martin, 931 So. 2d 759 (Ala. 2004); Ex parte McNabb, 887 So. 2d 998 (Ala. 2004); and Ex parte McGriff, 908 So. 2d 1024 (Ala. 2004). For the reasons explained below, these authorities establish that Alabama's capital-sentencing scheme is constitutional under Apprendi, Ring, and Hurst and that the State is entitled to the relief it seeks.

In Alabama, a capital trial is bifurcated into two phases. See § 13A-5-43, Ala. Code 1975. In the first phase of the trial, often referred to as the guilt phase, the jury must determine whether the defendant is guilty of the capital offense with which he or she is charged.[8] See § 13A-5-40(a), Ala. Code 1975 (defining the capital offenses in Alabama). If the jury finds the defendant guilty of the capital offense, the second phase of the trial, delineated by statute as a sentence hearing but often referred to in caselaw as the penalty phase or sentencing phase, begins.[9] At the penalty phase, the parties present to the jury any evidence relevant to sentencing, particularly relating to aggravating circumstances as listed in § 13A-5-49, Ala. Code 1975, and mitigating circumstances as listed in §§ 13A-5-51 and 13A-5-52, Ala. Code 1975. See §§ 13A-5-45 and 13A-5-46, Ala. Code 1975. After hearing the evidence during the penalty phase of

[8]Even when the defendant pleads guilty to a capital offense, the State must prove the defendant's guilt to a jury beyond a reasonable doubt if it is seeking the death penalty. § 13A-5-42, Ala. Code 1975.

[9]If a jury finds the defendant not guilty of the capital offense, or if the defendant waives his right to jury participation in sentencing, the jury portion of the proceedings end. See §§ 13A-5-43(b), 13A-5-43(c) and 13A-5-44(c), Ala. Code 1975.

the trial, the jury then returns an advisory verdict recommending a sentence of either life imprisonment without the possibility of parole or death. See § 13A-5-46, Ala. Code 1975.

Section 13A-5-46(e) provides specific guidance to the jury in recommending a sentence. If the jury finds that no aggravating circumstance in § 13A-5-49 exists, the jury must recommend a sentence of life imprisonment without the possibility of parole. See § 13A-5-46(e)(1). If the jury unanimously finds that one or more aggravating circumstances in § 13A-5-49 exist, but finds that they do not outweigh any mitigating circumstances in § 13A-5-51 and § 13A-5-52, the jury must recommend a sentence of life imprisonment without the possibility of parole. See § 13A-5-46(e)(2). If the jury unanimously finds that one or more aggravating circumstances exist and finds that they outweigh any mitigating circumstances, the jury must recommend a sentence of death. See § 13A-5-46(e)(2).[10]

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[10]Section 13A-5-45(g), Ala. Code 1975, provides: "The defendant shall be allowed to offer any mitigating circumstance defined in Sections 13A-5-51 and 13A-5-52. When the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of

After the jury makes its sentencing recommendation, the trial court "shall proceed to determine the sentence." § 13A-5-47(a), Ala. Code 1975. In determining the appropriate sentence in a capital case, the trial court must order a presentence-investigation report, see § 13A-5-47(b); must conduct another sentencing hearing before the trial court alone, see § 13A-5-47(c); must issue a sentencing order

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interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence." The jury need not unanimously agree on the existence of mitigating circumstances. See, e.g., Scott v. State, 163 So. 3d 389, 458-59 (Ala. Crim. App. 2012). The jury must unanimously agree only on the existence of an aggravating circumstance. Once the jury unanimously finds the existence of an aggravating circumstance, each juror must then individually determine whether or not he or she believes any mitigating circumstances exist and whether the aggravating circumstance the jury has unanimously found to exist outweighs the mitigating circumstance or circumstances that juror has found to exist. If a juror concludes that the aggravating circumstance that the jury has unanimously found to exist outweighs the mitigating circumstance or circumstances that juror has found to exist, that juror should vote to recommend the death penalty. If, on the other hand, a juror concludes that the aggravating circumstance that the jury has unanimously found to exist does not outweigh the mitigating circumstance or circumstances that juror has found to exist, the juror should vote to recommend a sentence of life imprisonment without the possibility of parole. The number of jurors who voted for the death penalty and the number of jurors who voted for life imprisonment without the possibility of parole is reflected on the penalty-phase verdict form.

containing "specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in Section 13A-5-49, each mitigating circumstance enumerated in Section 13A-5-51, and any additional mitigating circumstances offered pursuant to Section 13A-5-52 ... [and] summarizing the crime and the defendant's participation in it," § 13A-5-47(d); and must "determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so ... [must] consider the recommendation of the jury contained in its advisory verdict." § 13A-5-47(e).

A jury's advisory verdict recommending a sentence of life imprisonment without the possibility of parole pursuant to § 13A-5-46(e)(1) based on the jury's finding that no aggravating circumstance exists is binding on the trial court. See Ex parte McGriff, 908 So. 2d at 1038 ("Section 13A–5–46(e)(1) reads: 'If the jury determines that no aggravating circumstances as defined in Section 13A–5–49 exist, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole.' Ring requires that this subsection be applied in these terms: If

the jury determines that no aggravating circumstance as defined in § 13A–5–49 exists, the jury must return a verdict, binding on the trial court, assessing the penalty of life imprisonment without parole."). A jury's advisory verdict recommending a sentence of life imprisonment without the possibility of parole pursuant to § 13A-5-46(e)(2) based on the jury's findings that one or more aggravating circumstances exist but do not outweigh the mitigating circumstances, is not binding on the trial court, but the trial court, in determining the appropriate sentence, must treat the jury's recommendation as a mitigating circumstance. See Ex parte Carroll, 852 So. 2d 833, 836 (Ala. 2002). A jury's advisory verdict recommending a sentence of death pursuant to § 13A-5-46(e)(3) is not binding on the trial court.

Section 13A-5-45(f) provides that "[u]nless at least one aggravating circumstance as defined in Section 13A-5-49 exists, the sentence shall be life imprisonment without parole." Section 13A-5-45(e) further provides:

> "At the sentence hearing the state shall have the burden of proving beyond a reasonable doubt the existence of any aggravating circumstances. Provided, however, any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at

> trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing."

Under these provisions, a capital defendant in Alabama is not eligible for the death penalty unless at least one of the aggravating circumstances in § 13A–5–49 exists. Since Ring was decided, the Alabama Supreme Court has interpreted these provisions as requiring that the jury unanimously find beyond a reasonable doubt the existence of an aggravating circumstance in § 13A-5-49 before a capital defendant is eligible for the death penalty. See Ex parte McGriff, 908 So. 2d at 1037-38; Ex parte McNabb, 887 So. 2d at 1005; and Ex parte Waldrop, 859 So. 2d at 1187-90. Alabama's capital-sentencing scheme, as interpreted by the Alabama Supreme Court in light of Ring, "forecloses the trial court from imposing a death sentence unless the jury has unanimously found beyond a reasonable doubt the existence of at least one § 13A–5–49 aggravating circumstance." Ex parte McGriff, 908 So. 2d at 1037 (emphasis added). Thus, contrary to the circuit court's conclusion in its order that "capital defendants in Alabama are subject to having the maximum authorized punishment ... increased by a judge's own factfinding," it is the jury, not

the trial court, that makes the finding of an aggravating circumstance "that is necessary for imposition of the death penalty." Hurst, 577 U.S. at ___, 136 S.Ct. at 624.[11]

It is important here to distinguish between whether a capital defendant is eligible for the death penalty, and whether the death penalty is an appropriate sentence for a capital defendant who is eligible for the death penalty. Ring and Hurst require that any factual finding that exposes a defendant to, or makes a defendant eligible for, a sentence of death must be proven to a jury beyond a reasonable doubt. However, once the jury unanimously finds the fact or facts that expose a defendant to imposition of the death penalty, Ring and Hurst have no further application, and a trial court may then "exercise discretion -- taking into consideration various factors relating both to offense and offender -- in imposing ... sentence within statutory limits in the

[11]Notably, after Ring was decided, the Florida Supreme Court declined to address the impact Ring had on Florida's capital-sentencing scheme, holding instead that Ring did not apply to Florida. See, e.g., Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), abrogated by Hurst, supra. In contrast, the Alabama Supreme Court, in the above-cited cases, held that Ring applied in Alabama and addressed the impact of Ring on Alabama's capital-sentencing scheme.

individual case." Apprendi, 530 U.S. at 481 (emphasis omitted).

As already noted, "Alabama law requires the existence of only one aggravating circumstance in order for a defendant to be sentenced to death" and that aggravating circumstance must be unanimously found by a jury to exist beyond a reasonable doubt before a capital defendant is eligible for the death penalty. Ex parte Waldrop, 859 So. 2d at 1190. Once the jury makes the required finding that an aggravating circumstance exists, the trial court must then exercise its discretion in determining the appropriate sentence. Pursuant to §§ 13A-5-47(d) and (e), the trial court must make findings of fact regarding the existence and nonexistence of aggravating circumstances and mitigating circumstances and determine whether the aggravating circumstance or circumstances the court finds to exist outweigh the mitigating circumstance or circumstances the court finds to exist. However, the trial court's findings are not, as the circuit court found and the respondents argue, the findings required under Alabama law to render a defendant eligible for the death penalty. Rather, the findings required by § 13A-5-47(d) and (e) are to guide

the trial court in determining the appropriate sentence for a capital defendant who is already eligible for the death penalty by virtue of the jury's finding that an aggravating circumstance exists and to assist this Court in its review of a death sentence.

The respondents' argument that a capital defendant in Alabama is not eligible for the death penalty unless the trial court finds that the aggravating circumstances outweigh the mitigating circumstances is simply incorrect under Alabama law. As already explained, the only finding necessary to render a capital defendant eligible for the death penalty in Alabama is the existence of an aggravating circumstance, which must be unanimously found by the jury. Whether the aggravating circumstances outweigh the mitigating circumstances is not a finding of fact necessary to make a capital defendant eligible for the death penalty but is a "moral or legal judgment" guiding the trial court's discretion in determining "'whether a defendant eligible for the death penalty should in fact receive that sentence.'" Ex parte Waldrop, 859 So. 2d at 1189 (quoting Tuilaepa v. California, 512 U.S. 967, 972 (1994)). Additionally, nothing in Apprendi,

Ring, or Hurst prohibits a trial court from finding the existence of additional aggravating circumstances beyond the circumstance or circumstances the jury finds to exist. Because Alabama law requires the existence of only one aggravating circumstance in § 13A-5-49 for imposition of the death penalty, once the jury finds the existence of one aggravating circumstance, a capital defendant is then exposed to, or eligible for, the death penalty, and the trial court's finding of any additional aggravating circumstances "has application only in weighing the mitigating and the aggravating circumstances" to determine the appropriate sentence. Ex parte Waldrop, 859 So. 2d at 1190.

Under Apprendi, Ring, and Hurst, the crucial question is -- does the required finding that an aggravating circumstance exists expose the defendant to a greater punishment than that authorized by the jury's guilty verdict alone? In Alabama, unlike Arizona and Florida, the answer to that question depends on the capital offense at issue. The Alabama legislature has chosen in some cases to have the jury make the finding that an aggravating circumstance exists during the guilt phase of the trial and has chosen in some cases to have

the jury make that finding during the penalty phase of the trial.[12]

"Many capital offenses listed in Ala. Code 1975, § 13A-5-40, include conduct that clearly corresponds to certain aggravating circumstances found in § 13A-5-49." Ex parte Waldrop, 859 So. 2d at 1188. As noted above, "any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing." § 13A-5-45(e). When the capital offense itself includes as an element one of the aggravating circumstances in § 13A-5-49 (often referred to as "overlap"), the jury will make the finding that an aggravating

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[12]The United States Supreme Court in neither Ring nor Hurst expressed any opinion as to when, during a bifurcated capital trial, the finding of an aggravating circumstance necessary to make a capital defendant eligible for the death penalty must be made, only that it must be made by a jury. In his special concurrence in Ring, the late Justice Scalia noted: "Those States that leave the ultimate life-or-death decision to the judge may continue to do so -- by requiring a prior jury finding of [an] aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase." 536 U.S. at 612-613 (Scalia, J., concurring specially) (emphasis added). The Alabama legislature has chosen a combination of the two approaches.

circumstance necessary for imposition of the death penalty exists during the guilt phase of the trial. In those cases, the maximum sentence a defendant convicted of a capital offense may receive based on the jury's guilty verdict alone is death, and Apprendi, Ring, and Hurst are satisfied because the jury's guilt-phase verdict necessarily includes the finding of an aggravating circumstance necessary for imposition of the death penalty.

When the capital offense does not include as an element one of the aggravating circumstances in § 13A-5-49, the maximum sentence a defendant may receive based on the jury's guilty verdict alone is life imprisonment without the possibility of parole. In those cases (referred to here as "non-overlap" cases), the jury must make the finding that an aggravating circumstance necessary for imposition of the death penalty exists during the penalty phase of the trial. However, Alabama law still requires that the jury unanimously find the existence of an aggravating circumstance before the defendant is eligible for the death penalty. Thus, in non-overlap cases, just as in overlap cases, Apprendi, Ring, and Hurst are satisfied because it is the jury, not the trial

court, that must make the finding that an aggravating circumstance necessary for imposition of the death penalty exists, albeit during the penalty phase of the trial instead of the guilt phase.

The only question that arises in non-overlap cases is whether it can be determined, from the jury's penalty-phase advisory verdict alone, that the jury unanimously found the existence of an aggravating circumstance necessary to make a defendant eligible for the death penalty. In all but one scenario -- where the jury unanimously recommends a sentence of life imprisonment without the possibility of parole -- a trial court will be able to determine, from the jury's advisory verdict alone, that the jury unanimously found the existence of an aggravating circumstance. In Alabama, unlike Florida, the jury cannot consider an aggravating circumstance unless the jury unanimously agrees that the particular circumstance exists, and the jury cannot vote on whether to impose the death penalty unless it first unanimously finds the existence of at least one aggravating circumstance.[13] Because

[13]The Proposed Pattern Jury Instructions for Use in the Sentence Stage of Capital Cases Tried Under Act No. 81-178 include unanimity instructions. See also Moody v. State, 888

the jury cannot vote on whether to recommend the death penalty unless it first unanimously finds the existence of the same aggravating circumstance, as long as at least one juror votes for the death penalty, the jury's advisory verdict, regardless of what sentence it recommends,[14] necessarily establishes that the jury unanimously agreed that the same aggravating circumstance existed and then proceeded to the next step in

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So. 2d 532, 601 (Ala. Crim. App. 2003), in which this Court quoted with approval particularly clear and concise unanimity instructions that included not only the pattern instructions, but additional language regarding unanimity.

[14]Section 13A-5-46(f) provides:

> "The decision of the jury to return an advisory verdict recommending a sentence of life imprisonment without parole must be based on a vote of a majority of the jurors. The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors. The verdict of the jury must be in writing and must specify the vote."

Contrary to the respondents' argument, neither Ring nor Hurst held that a jury's advisory verdict recommending a sentence of death must be unanimous. Rather, as already explained, both Ring and Hurst held only that the factual finding necessary to make a capital defendant eligible for the death penalty must be unanimously found by a jury. The factual finding necessary to make a capital defendant eligible for the death penalty in Alabama is the existence of an aggravating circumstance, not the jury's advisory verdict. Thus, it is permissible for a jury that has unanimously found the existence of an aggravating circumstance to return a non-unanimous sentencing recommendation.

the process to weigh the aggravating circumstance and the mitigating circumstance or circumstances and vote on whether to recommend the death penalty. See Ex parte McNabb, 887 So. 2d at 1004-06 (holding that the jury's advisory verdict recommending a sentence of death, even though not unanimous, established that the jury had unanimously found the existence of an aggravating circumstance during the penalty phase of the trial because the trial court had properly instructed the jury that it must unanimously agree that at least one aggravating circumstance existed before it could even consider recommending the death penalty and that it could not consider an any aggravating circumstance to exist unless the jury unanimously agreed that that particular circumstance existed); Jackson v. State, 169 So. 3d 1, 96-97 (Ala. Crim. App. 2010) (opinion on return to remand) (holding that the jury's advisory verdict recommending a sentence of life imprisonment without the possibility of parole by a vote of 10-2 established that the jury had unanimously found the existence of an aggravating circumstance because the trial court had properly instructed the jury that it must unanimously agree on the existence of an aggravating circumstance before it could

even consider recommending the death penalty). "The fact that the jury's deliberations yielded a vote whether to impose the death penalty -- where the jury had been instructed that it could not proceed to a vote unless it first unanimously found the existence of at least one aggravating circumstance -- establishes that the jury unanimously found that at least one aggravating circumstance existed." Moody v. State, 888 So. 2d 532, 601-02 (Ala. Crim. App. 2003). It is "the fact of the jury's vote, rather than the actual vote tally following the jury's weighing process, [that] is the telling circumstance." Id. at 602.

This, we believe, was one of the constitutional defects in Florida's capital-sentencing scheme. In Florida, the jury did not have to unanimously find the existence of an aggravating circumstance before the jury could vote on whether to recommend a sentence of death or even before the jury recommended death; only the jurors who voted for death had to find the existence of an aggravating circumstance, and even the jurors who voted for death did not have to unanimously agree on which aggravating circumstance existed. See Steele v. State, 921 So. 2d 538, 545 (Fla. 2005) ("Under the law, ...

the jury may recommend a sentence of death so long as a majority concludes that at least one aggravating circumstance exists [and n]othing in the statute, the standard jury instructions, or the standard verdict form ... requires a majority of the jury to agree on which aggravating circumstances exist." (emphasis added)). Under Florida law, then, the jury's verdict in Hurst recommending a sentence of death by a vote of 7-5 established only that 7 members of the jury found that 1 of the 2 aggravating circumstances the State had relied on in seeking the death penalty existed. It did not signify that all 12 jurors unanimously found the existence of the same aggravating circumstance. Therefore, the United States Supreme Court rejected Florida's argument in Hurst that the jury's verdict recommending a sentence of death established that the jury had found the existence of an aggravating circumstance beyond a reasonable doubt, noting that "[t]he State cannot now treat the advisory recommendation by the jury as the necessary factual finding that Ring requires." 577 U.S. at ___, 136 S.Ct. at 622. In Alabama, unlike Florida, the jury must unanimously agree that an aggravating circumstance exists and must unanimously agree on

which aggravating circumstance exists before the jury can even consider whether to recommend the death penalty. Thus, unlike Florida, a jury's capital-sentencing recommendation that includes at least one vote for death establishes that all 12 jurors unanimously found the existence of the same aggravating circumstance.

However, if the jury returns a verdict unanimously recommending a sentence of life imprisonment without the possibility of parole, it will be impossible to know whether that verdict was based on the jury's finding that no aggravating circumstance existed (in which case, the defendant would not be eligible for the death penalty and the jury's advisory verdict would be binding on the trial court) or was based on the jury's finding that at least one aggravating circumstance existed but that the aggravating circumstance did not outweigh the mitigating circumstance or circumstances (in which case, the defendant would be eligible for the death penalty and the jury's advisory verdict would not be binding on the trial court). In that scenario, the trial court would be left in the position of having to guess whether the defendant is eligible for the death penalty. Although neither

this Court nor the Alabama Supreme Court would presume that a trial court would impose the death penalty based on guesswork, to avoid having trial courts placed in such an untenable position, the Alabama Supreme Court in Ex parte McGriff endorsed the use of special-verdict forms during the penalty phase of a capital trial in non-overlap cases so that "the count of the jurors' votes on the issue of the existence of an aggravating circumstance be expressly recorded on the verdict form." 908 So. 2d at 1039. The Court in Ex parte McGriff also emphasized that the jury be properly instructed on unanimity with respect to the existence of an aggravating circumstance, and, because of the critical and central role the jury plays under Alabama's capital-sentencing scheme -- as the body that makes the factual finding necessary to render a capital defendant eligible for the death penalty -- that the jury not "be told that its decision on the issue of whether the proffered aggravating circumstance exists is 'advisory' or 'recommending.'"[15] Ex parte McGriff, 908 So. 2d at 1038.

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[15]This is not to say that a jury cannot be informed that its penalty-phase verdict is advisory or a recommendation. The Court stated only that the jury should not be informed that its factual finding as to the existence of an aggravating circumstance was advisory or a recommendation because, under

In sum, under Alabama's capital-sentencing scheme, a capital defendant is not eligible for the death penalty unless the jury unanimously finds beyond a reasonable doubt, either during the guilt phase or during the penalty phase of the trial, that at least one of the aggravating circumstances in § 13A-5-49 exists. Unlike both Arizona and Florida, which conditioned a first-degree-murder defendant's eligibility for the death penalty on a finding by <u>the trial court</u> that an aggravating circumstance existed, Alabama law conditions a capital defendant's eligibility for the death penalty on a finding by <u>the jury</u> that at least one aggravating circumstance exists. If the jury does not unanimously find the existence of at least one aggravating circumstance, the trial court is foreclosed from sentencing a capital defendant to death. If the jury unanimously finds that at least one aggravating circumstance does exist, then the trial court must proceed to determine the appropriate sentence. Although the trial court in Alabama must also make findings of fact regarding the existence or nonexistence of aggravating circumstances, the trial court's findings are not the findings that render a

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Alabama law, it is not.

capital defendant eligible for the death penalty, as was the case in Ring and Hurst. Under Alabama law, only a jury's finding that an aggravating circumstance exists will expose a capital defendant to the death penalty.

Alabama's capital-sentencing scheme, unlike the schemes held unconstitutional in Ring and Hurst, does not "allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." Hurst, ___ U.S. at ___, 136 S.Ct. at 624; accord Ring, 536 U.S. at 609. Because in Alabama it is the jury, not the trial court, that makes the critical finding necessary for imposition of the death penalty, Alabama's capital-sentencing scheme is constitutional under Apprendi, Ring, and Hurst.

With respect to the particular cases currently before this Court, all four cases are overlap cases -- each respondent was indicted for one or more capital offenses that has as an element of the offense itself one of the aggravating circumstances in § 13A-5-49. If the respondents are found guilty by a jury of the capital offense or offenses with which they are charged, the jury's guilty verdict will necessarily

include a unanimous finding by the jury that an aggravating circumstance exists and that finding by the jury at the guilt-phase of the trial will make the respondents eligible for the death penalty. Therefore, in these four cases, Apprendi, Ring, and Hurst will be satisfied by virtue of the jury's guilt-phase verdicts.

Conclusion

Alabama's capital-sentencing scheme is constitutional under Apprendi, Ring, and Hurst, and the circuit court erred in holding otherwise and prohibiting the State from seeking the death penalty in capital-murder prosecutions. The State has established the prerequisites for mandamus to issue. Therefore, the circuit court is directed to set aside its order holding Alabama's capital-sentencing scheme unconstitutional and to allow the State to seek the death penalty in capital-murder prosecutions if it chooses to do so.

CR-15-0619 -- PETITION GRANTED; WRIT ISSUED.

CR-15-0622 -- PETITION GRANTED; WRIT ISSUED.

CR-15-0623 -- PETITION GRANTED; WRIT ISSUED.

CR-15-0624 -- PETITION GRANTED; WRIT ISSUED.

Windom, P.J., and Welch, J., concur. Joiner, J., concurs in part and concurs in the result, with opinion. Burke J., concurs in the result, with opinion.

JOINER, Judge, concurring in part and concurring in the result.

I concur in Part I of the main opinion; I agree that these matters are properly before this Court by way of petitions for writs of mandamus. As to Part II of the opinion, I concur only in part. I concur to grant the petitions and issue the writs.

Initially, I question whether the circuit court had jurisdiction to decide the motions filed by Kenneth Eugene Billups, Stanley Brent Chapman, Terrell Corey McMullin, and Benjamin Todd Acton (hereinafter collectively referred to as "the respondents") in which they argued that the death-penalty portion of Alabama's capital-murder statute is facially unconstitutional. First, the materials before us do not indicate that the respondents served the attorney general with a copy of their motions, and when the attorney general attempted to intervene, the circuit court denied his request to appear to defend the constitutionality of Alabama's capital-sentencing scheme.[16] See § 6-6-227, Ala. Code 1975

[16]The transcript of the proceedings in the circuit court indicates that a representative from the Attorney General's Office was present at the hearing on the respondents' motions. When the attorney general's representative attempted to make

("In any proceeding which involves the validity of a municipal ordinance, or franchise, such municipality shall be made a party and shall be entitled to be heard; and if the statute, ordinance, or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and be entitled to be heard."); see also Guy v. Southwest Alabama Council on Alcoholism, 475 So. 2d 1190, 1191 (Ala. Civ. App. 1985) ("The Alabama Supreme Court has held that compliance with the requirements of § 6–6–227 is mandatory and jurisdictional. Barger v. Barger, 410 So. 2d 17 (Ala. 1982); Sullivan v. Murphy, 279 Ala. 202, 183 So. 2d 798 (1966); Smith v. Lancaster, 267 Ala. 366, 102 So. 2d 1 (1958); Wheeler v. Bullington, 264 Ala. 264, 87 So. 2d 27 (1956). Hence, when a party challenges the constitutionality of a state statute and fails to serve the attorney general, the trial court has no jurisdiction to decide the constitutional claims, and its decree is void. Jones v. Sears, Roebuck & Co., 342 So. 2d 16 (Ala. 1977); Busch Jewelry Co. v. City of

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an oral notice of appearance to defend the constitutionality of Alabama's death-penalty statute, the respondents (with the exception of Billups) objected. The circuit court agreed with the respondents' position and denied "the State's request for the attorney general to enter any sort of arguments on the record."

Bessemer, 266 Ala. 492, 98 So. 2d 50 (1957); Bond's Jewelry Co. v. City of Mobile, 266 Ala. 463, 97 So. 2d 582 (1957); Wheeler, 264 Ala. at 267, 87 So. 2d at 29.").[17]

Furthermore, I question the appropriateness--in terms of ripeness and standing--of the respondents' constitutional challenge to Alabama's capital-sentencing scheme. At root, as noted above, the respondents' challenge is a facial challenge, i.e., they argue that under no circumstance could Alabama's capital-sentencing scheme be applied in a constitutional manner. See State ex rel. King v. Morton, 955 So. 2d 1012, 1017 (Ala. 2006) ("The State's challenge to the Act is

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[17]This Court, in Townsend v. City of Mobile, 793 So. 2d 828 (Ala. Crim. App. 1998), rev'd on other grounds, 793 So. 2d 835 (Ala. 2000), held that "§ 6-6-227 is a provision included in the civil practice section of the Code and is inapplicable in a criminal proceeding." Townsend, however, has been criticized by members of this Court and by the Alabama Supreme Court. In a dissenting opinion joined by Justice Wise, who was then a judge on this Court, Justice Shaw, when he was a member of this Court, criticized our decision in Townsend, explaining that Townsend "incorrectly states Alabama law." Boyd v. State, 960 So. 2d 717, 721 (Ala. Crim. App. 2006) (Shaw, J. dissenting). Justice See, in an opinion joined by Justice Parker, concurred specially to the Alabama Supreme Court's decision quashing the writ of certiorari in Boyd. Justice See echoed Justice Shaw's sentiments, explaining that, "[b]y its terms, § 6–6–227, Ala. Code 1975, applies to 'any proceeding.' The statute does not purport to limit its application to civil statutes, nor does it exclude challenges to criminal statutes." Boyd v. State, 960 So. 2d 722, 724 (Ala. 2006) (See, J., concurring specially).

essentially a '"facial challenge," which is defined as "[a] claim that a statute is unconstitutional on its face--that is, that it always operates unconstitutionally."' Board of Water & Sewer Comm'rs of Mobile v. Hunter, 956 So. 2d 403, 419 (Ala. 2006) (quoting Black's Law Dictionary 244 (8th ed. 2004))."). In Woods v. State, 13 So. 3d 1, 38-39 (Ala. Crim. App. 2007), we held that a defendant who had been sentenced to death in accordance with the jury's recommendation did not have standing to challenge the "jury-verdict-override sentencing scheme of Alabama's capital-murder statute" because there had been no override of the jury's recommendation that he be sentenced to death; indeed, the trial court had followed that recommendation. In the procedural posture of the underlying cases, of course, none of the respondents has been convicted of capital murder, much less sentenced to death.[18]

Assuming they are convicted, however, the particular facts of these respondents' cases will not implicate all aspects of Alabama's capital-sentencing scheme. As the Court

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[18]Billups was convicted of capital murder and was sentenced to death in 2006; that conviction and sentence, however, were reversed in 2010, and his case was remanded for a new trial, which he is currently awaiting.

notes, each of the respondents in this case is charged with "overlap" offenses--i.e., "each respondent was indicted for one or more capital offenses that has as an element of the offense itself an aggravating circumstance in § 13A-5-49," Ala. Code 1975. ___ So. 3d at ___. I agree with the Court's thorough and well reasoned analysis of the relevant caselaw--in particular, Apprendi v. New Jersey, 530 U.S. 466 (2000), Ring v. Arizona, 536 U.S. 584 (2002), and Hurst v. Florida, 577 U.S. ___, 136 S. Ct. 616 (2016)--insofar as the Court disposes of the respondents' arguments as they pertain to the "overlap" offenses with which they are charged. Specifically, I agree with the Court's conclusion that

> "[i]f the respondents are found guilty by a jury of the capital offense or offenses with which they are charged, the jury's guilty verdict will necessarily include a unanimous finding by the jury that an aggravating circumstance exists and that finding by the jury at the guilt-phase of the trial will make the respondents eligible for the death penalty. Therefore, in these four cases, Apprendi, Ring, and Hurst will be satisfied by virtue of the jury's guilt-phase verdicts."

___ So. 3d at ___.

In evaluating a claim that a statute is unconstitutional on its face, we should determine whether there is no reasonable circumstance in which the statute may be applied in

a constitutional manner. Here, as the Court aptly explains, the "overlap" nature of the offenses with which the respondents are charged means that the capital-sentencing scheme could be applied in a constitutional manner. Under normal circumstances, having concluded that the statute being challenged can be applied in a constitutional manner, our analysis would end.

The trial court's order in the underlying cases, however, is sweeping and based on virtually no legal analysis. In that context and given our obligation to exercise "a general superintendence and control" of inferior courts, see Ex parte Nice, 404 So. 2d 874, 877 (Ala. 1981), I understand the Court's speculation regarding additional scenarios not necessarily implicated by the facts of the underlying cases, as well as the Court's attempt to address all questions that may arise in these cases or in other capital cases before the trial court. I think, however, that whether and to what extent other possible scenarios are constitutional under Hurst are questions we should decide when they are properly presented to us, and I therefore express no opinion as to them.

I feel compelled to sound a warning, however, as to this Court's holding that "nothing in Apprendi, Ring, or Hurst prohibits a trial court from finding the existence of additional aggravating circumstances beyond that circumstance or those circumstances the jury finds to exist." Although that is a fair reading, Hurst is, in my opinion, deliberately vague on this point. Given the United States Supreme Court's continuing expansion of the constitutional limitations on the use of capital punishment and the fact that any death sentence imposed today will have to withstand years and years of "the rigorous appellate review process," Hagood v. State, 777 So. 2d 221, 223 (Ala. Crim. App. 2000), trial courts imposing a sentence of death should be wary of relying on any aggravating circumstance that has not been found by a jury to exist. Although not required by Alabama's capital-sentencing scheme or by an express holding of the United States Supreme Court (yet), the better practice for a sentencing court imposing the death penalty would be to rely on only those aggravating circumstances a jury has unanimously found to exist.

BURKE, Judge, concurring in the result.

The majority grants the State's petition for a writ of mandamus and, in doing so, holds that Alabama's capital-sentencing scheme is constitutional under Hurst v. Florida, __ U.S. __, 136 S. Ct. 616 (2016). Although I agree with the rationale employed by the majority regarding the constitutional issue, I would not reach the constitutional issue because, in my view, the trial court lacked subject-matter jurisdiction to rule on that issue. Therefore, I concur in the result.

In J.L.N. v. State, 894 So. 2d 751, 753-54 (Ala. 2004), the Alabama Supreme Court held:

> "'Not all controversies ... are justiciable. Justiciability is a compound concept, composed of a number of distinct elements. Chief among these elements is the requirement that a plaintiff have "standing to invoke the power of the court in his behalf."' Ex parte State ex rel. James, 711 So. 2d 952, 960 (Ala. 1998)(quoting Ex parte Izundu, 568 So. 2d 771, 772 (Ala. 1990)). 'Standing ... turns on "whether the party has been injured in fact and whether the injury is to a legally protected right."' State v. Property at 2018 Rainbow Drive, 740 So. 2d 1025, 1027 (Ala. 1999)(quoting Romer v. Board of County Comm'rs of the County of Pueblo, 956 P.2d 566, 581 (Colo. 1998)(Kourlis, J., dissenting)).
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> > "'When a party without standing purports to commence an action, the trial

court acquires no subject-matter jurisdiction. Barshop v. Medina County Underground Water Conservation District, 925 S.W.2d 618, 626 (Tex. 1996)("Standing is a necessary component of subject matter jurisdiction"). See also Raines v. Byrd, 521 U.S. 811, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997); Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996); United States v. Hays, 515 U.S. 737, 742, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995)("'standing "is perhaps the most important of [the jurisdictional] doctrines"'"); National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 255, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994)("Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation."); Romer v. Board of County Comm'rs of the County of Pueblo, supra, 956 P.2d at 585 ("standing is a jurisdictional prerequisite to every case and may be raised at any stage of the proceedings")(Martinez, J., dissenting); Cotton v. Steele, 255 Neb. 892, 587 N.W.2d 693 (1999). But see Hertzberg v. Zoning Bd. of Adjustment of the City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998) (standing is not jurisdictional).'

"State v. Property at 2018 Rainbow Drive, 740 So. 2d at 1028.

"....

"'Appellate courts will not pass upon a constitutional question unless some specific right of the appellant is directly involved; the appellant must belong to that class affected by the statute's provisions. McCord v. Stephens, 295 Ala. 162, 325 So.

> 2d 155 (1975); Evans v. State, 338 So. 2d 1033 (Ala. Crim. App. 1976), cert. denied, 348 So. 2d 784 (Ala. 1977); Bozeman v. State, 7 Ala. App. 151, 61 So. 604, cert. denied, 183 Ala. 91, 63 So. 201 (1913). Even under the circumstances where a constitutional attack on a statute may be presented to the trial court prior to trial and, consequently, without benefit of a trial record, adherence to the traditional concepts of standing is required. See, e.g., State v. Friedkin, 244 Ala. 494, 14 So. 2d 363 (1943); State v. Wilkerson, [54 Ala. App. 104, 325 So. 2d 378 (1974)]; People v. Allen, 657 P.2d 447 (Colo. 1983); State v. Raybon, 242 Ga. 858, 252 S.E.2d 417 (1979); State v. Price, 237 N.W.2d 813 (Iowa 1976), appeal dismissed, 426 U.S. 916, 96 S.Ct. 2619, 49 L.Ed.2d 370 (1976); People v. Jose L., 99 Misc. 2d 922, 417 N.Y.S.2d 655 (N.Y.Crim.Ct. 1979); Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980); Commonwealth v. Hughes, 468 Pa. 502, 364 A.2d 306 (1976). Unless these usual rules of standing are not applicable to the situation at bar, they should have precluded the trial court from deciding the constitutionality of the sexual misconduct statute in a factual vacuum.'

"State v. Woodruff, 460 So. 2d [325] at 328 [(Ala. Crim. App. 1984)]."

The phrase "injury in fact" has been defined as "'an invasion of a legally protected interest which is (a) concrete and particularized, see [Allen v. Wright, 468 U.S. 737,] at 756 [(1984)]; Warth v. Seldin, 422 U.S. 490, 508 (1975); Sierra Club v. Morton, 405 U.S. 727, 740–741, n. 16 (1972);

and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" Whitmore[v. Arkansas,] 495 U.S. [149,] at 155 [(1990)] (quoting Los Angeles v. Lyons, 461 U.S. 95[, 102] (1983)).'" Salter v. State, 971 So. 2d 31, 35-36 (Ala. Civ. App. 2007) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

The trial court's order purports to hold "Alabama's capital sentencing scheme" unconstitutional on its face but fails to cite the specific statutes it intends to invalidate. However, the sentencing provisions of Alabama's death-penalty statutes begin in § 13A-5-43, Ala. Code 1975. At the time of the proceedings below, § 13A-5-43(d), Ala. Code 1975, provided[19]:

> "If the defendant is found guilty of a capital offense or offenses with which he is charged, the sentence shall be determined as provided in Sections 13A-5-45 through 13A-5-53[, Ala. Code 1975]."

(Emphasis added.) Section 13A-5-45(a), Ala. Code 1975, details the sentencing proceedings that are to take place

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[19]Section 13A-5-43 was amended effective May 11, 2016. See Act No. 2016-360, Ala. Acts 2016. Although Act No. 2016-360 added language to subpart (d) of § 13A-5-43, it did not alter the pertinent language of the statute quoted above.

"[u]pon conviction of a defendant for a capital offense ...." (Emphasis added.)

In the proceedings below, none of the defendants have been convicted of a capital offense. Rather, all have been indicted for capital murder under various provisions of § 13A-5-40(a), Ala. Code 1975, and are awaiting trial. At the present time, there exists the possibility that some or all of the defendants could be acquitted of capital murder. Consequently, any invasion of a legally protected interest would be hypothetical at this point. Because the defendants are not presently subject to any of the provisions of Alabama's capital-sentencing scheme, they have not suffered an "injury in fact." Therefore, none of the defendants belong to a "'class affected by the statute's provisions,'" J.L.N., 894 So. 2d at 754, (quoting State v. Woodruff, 460 So. 2d at 328), and do not have standing to raise a constitutional challenge.

Accordingly, I would hold that the trial court lacked subject-matter jurisdiction to rule on the defendants' motions, and I would grant the State's petition on that basis alone.

I also note that, at the hearing on the defendants' motion to hold Alabama's capital-sentencing scheme unconstitutional, the trial court refused to allow counsel from the Alabama Attorney General's Office to argue the validity of Alabama's death-penalty statutes on behalf of the State. (Petitions, Appendix B, p. 6.) Assistant Attorney General Clay Crenshaw sought to enter an oral notice of appearance at the beginning of the hearing, but counsel for three of the four defendants objected based on a lack of notice. The trial court stated: "Pursuant to the notice requirement in the Alabama Rules of Criminal Procedure and the laws of the State of Alabama, I'm going to deny the State's request for the attorney general to enter any sort of arguments on the record as it relates to the hearings before this court today." (Petitions, Appendix B, p. 6.)

Section 6-6-227, Ala. Code 1975, provides:

> "All persons shall be made parties who have, or claim, any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance, or franchise, such municipality shall be made a party and shall be entitled to be heard; and if the statute, ordinance, or franchise is alleged to be unconstitutional, the Attorney

> General of the state shall also be served with a copy of the proceeding and be entitled to be heard."

Although this Court has held that § 6-6-227 "is a civil provision which is inapplicable in criminal proceedings," Boyd v. State, 960 So. 2d 717, 719 (Ala. Crim. App. 2006)(citing Townsend v. City of Mobile, 793 So. 2d 828 (Ala. Crim. App. 1998), rev'd on other grounds, 793 So. 2d 835 (Ala. 2000)), I believe, as did then Judge Shaw, that the holding in Townsend should be revisited. See Boyd, 980 So. 2d at 721, (on application for rehearing)(Shaw, J., dissenting). See also Feggans v. State, 983 So. 2d 1152 (Ala. Crim. App. 2007)(Shaw, J., concurring specially)(noting that the attorney general should be notified only when a party asserts a facial challenge, rather than an as-applied challenge, to the constitutionality of a statute).

In Townsend, this Court based its holding that § 6-6-227 applies only to civil actions on the fact that § 6-6-227 "is a provision included in the civil practice section of the Code ...." 793 So. 2d at 829. However, § 1-1-14, Ala. Code 1975, provides:

> "(a) The classification and organization of the titles, chapters, articles, divisions, subdivisions and sections of this Code, and the headings thereto,

> are made for the purpose of convenient reference and orderly arrangement, and no implication, inference or presumption of a legislative construction shall be drawn therefrom.
>
> "(b) Unless otherwise provided in this Code, the descriptive headings or catchlines immediately preceding or within the text of the individual sections of this Code, except the section numbers included in the headings or catchlines immediately preceding the text of such sections, do not constitute part of the law, and shall in no manner limit or expand the construction of any such section. All historical citations and notes set out in this Code are given for the purpose of convenient reference, and do not constitute part of the law."

Thus, the fact that § 6-6-227 appears in the civil-practice section of the Code is not dispositive. Accordingly, I would urge this Court to revisit its holding in Townsend regarding the scope of § 6-6-227.

Finally, I point out that the trial court's 28-page order, which appears to have been pre-drafted because it was read into the record immediately upon the conclusion of the hearing, contains sparse analysis on the application of Hurst to Alabama's capital-sentencing scheme. The majority of the order is devoted to the trial court's opinions regarding partisan politics,[20] the effects of an elected judiciary, court

[20]The trial court's order begins with the trial judge's assertion that "[t]he influence of partisan politics on the

funding, and the propriety of the death penalty in general. Additionally, the trial court extensively cites secondary sources, including materials from "Project Hope to Abolish the Death Penalty" as well as from the Web site of the Equal Justice Initiative, a nonprofit organization whose attorneys are representing the defendants in this very proceeding.[21] In reviewing the materials that were filed with this Court, I find no mention of these issues. Thus, I question whether the trial court's ultimate conclusion is based on its analysis of Hurst or on the trial judge's personal opinions regarding Alabama's death penalty.

Alabama judiciary indeed has never ending, interlaced talons that reach into every aspect of its criminal justice system..." and continues to opine that "Alabama's judiciary has unequivocally been hijacked by partisan interests and unlawful legislative neglect." (Petitions, Appendix A, p. 1.)

[21]Attorneys for Equal Justice Initiative filed a notice of appearance with this Court on March 14, 2016, on behalf of the respondents in the present mandamus proceedings.