

Less than two weeks ago, for the fourth time this year, the United States Supreme Court has asked the Alabama courts to review Alabama's capital sentencing scheme in light of the Supreme Court's ruling in *Hurst v. Florida*. In four cases — *Johnson*, *Kirksey*, *Wimbley*, and *Russell* — the Supreme Court has granted the petition for certiorari (request to review the opinion of a lower court) and vacated the judgment of the Alabama courts and remanded the cases for further consideration in light of *Hurst*.

In January of this year, the Supreme Court found Florida's capital sentencing scheme unconstitutional because "[t]he 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." Prior to that ruling, Florida's sentencing scheme, like Alabama's allowed for a judge to override a jury's recommendation of life or death.

Unlike Alabama, Florida judges had not used that override power to sentence anyone to death since 1999. Approximately a quarter of Alabama's death row inmates are on death row solely because a single elected judge decided they should be and used his or her override power to overrule a jury's recommendation of life. Alabama's capital sentencing scheme implicates the fundamental fairness of the trial and is all the more stark because this life-and-death decision is being made by judges facing intense electoral pressure.

Prior to the ruling in *Hurst*, Florida, Alabama and Delaware all allowed judicial override in their capital sentencing schemes. Following *Hurst*, Delaware got rid of judicial override — and Florida courts have been working out how to deal with death row inmates on the row due to override, the Florida legislature has re-worked its capital sentencing scheme.

Alabama, however, has taken little to no steps to make changes following the *Hurst* ruling:

- Alabama's legislature has made no moves toward re-working the state's capital sentencing scheme.
- The Attorney General's office has been adamant that Alabama is different and *Hurst* doesn't impact Alabama's law. This is the same Attorney General's office that argued in a prior pleading that "the Alabama statute is essentially the same as Florida's capital sentencing statute."

A circuit court judge in Birmingham did find that Alabama's sentencing scheme was unconstitutional pursuant to *Hurst*, but the Court of Criminal Appeals overruled that decision based on procedural issues. Recently, in *Bohannon v. State*, the Alabama Supreme Court was faced with a challenge to a death sentence alleging that Alabama's sentencing scheme is unconstitutional following the ruling in *Hurst*. Bohannon was sentenced to death by both the jury and judge that heard his case, so override was not an issue. The Alabama Supreme Court ruled that its "reading of *Apprendi*, *Ring*, and *Hurst* leads us to the conclusion that Alabama's capital-sentencing scheme is consistent with the Sixth Amendment."

As the United States Supreme Court has sent back four cases for reconsideration in light of *Hurst*, it doesn't seem that the Court agrees with Alabama. It is also interesting that the Alabama Court of Criminal Appeals has held off ruling on these cases, as *Johnson*, the earliest case sent back, was remanded on May 2, 2016.

In the case of someone who received a life recommendation from the jury, which is then overridden by a judge to a death sentence, there has been no finding of the facts necessary to impose a sentence of death by a jury. Since *Hurst* has made a finding of aggravating factors by the jury "essential to the death penalty," the use of judicial override in these cases violates the Sixth Amendment and these cases should be reversed.