No. 16-5726

In the
Supreme Court of the United States

AUBREY SHAW,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari to the
Alabama Court of Criminal Appeals

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED (REPHRASED)

Aubrey Shaw ("Shaw") fatally stabbed his great-aunt and great-uncle, 83-year-old Doris Gilbert and 79-year-old Robert Gilbert, a total of fifty times with a steak knife. Shaw took a .38 caliber revolver and a .357 Magnum from their house. The jury convicted Shaw of murder during a burglary and murder of two or more people by one act or pursuant to one scheme or course of conduct, both capital offenses, and then, by a vote of 10 to 2, recommended that he be sentenced to death. The trial court followed that recommendation.

The petition presents the following questions:

1. There is no racial element to this case because Shaw and his victims are both white. Should this Court review Shaw's weak and fact-specific claim regarding *Batson v. Kentucky*, 476 U.S. 79 (1986), which was resolved in the Alabama state appellate courts in accordance with this Court's precedent, including *Foster v. Chatman*, 136 S. Ct. 1737 (2016)?

2. Does this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), invalidate a death sentence where a jury unanimously found beyond a reasonable doubt the existence of two aggravating circumstances by virtue of its verdicts during the guilt phase and, on a vote of 10–2, recommended a sentence of death based on those circumstances?

PARTIES

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STATEMENT

This is a capital case that involves two issues: the straightforward application of *Batson v. Kentucky*, 476 U.S. 79 (1986), which was not altered by this Court's decision in *Foster v. Chatman*, 136 S. Ct. 1737 (2016), and a death sentence consistent with *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 136 S. Ct. 616 (2016).

Robert and Doris Gilbert lived on a farm called Gilbert Stables in Irvington, Alabama. R. 988, 993.[1] Robert's brother and sister-in-law, Tommy and Helen Gilbert, lived in another house on the property, along with Joanne Shaw, the mother of Helen's grandson, Aubrey Shaw. R. 984, 986, 1114–16. Robert and Doris Gilbert were Shaw's great-uncle and great-aunt by marriage.

On the evening of August 19, 2007, Shaw twice went to the home of Herald Drake, a caretaker who lived at Gilbert Stables, and asked to borrow $20; Drake refused, and Shaw left. R. 984, 989–90. Drake testified that Robert Gilbert kept a .357 Magnum handgun on his bedside table and a .38 caliber revolver in the living room. R. 988.

That same evening, Shaw went to the home of James Watson, who lived nearby. R. 1018–26. Watson testified that he and Shaw had done drugs to-

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[1] Citations to the clerk's record are designated "C." Citations to the reporter's transcript are designated "R." Citations to the second supplemental record are designated "S2." Citations to the third supplemental record are designated "S3."

gether in the past, but did not recall previously telling a detective that Shaw had wanted drugs that night. R. 1018–21. Watson testified that Shaw was there for three to four hours, but left and came back two hours later around 1:00 AM. R. 1022–23. Watson recounted that Shaw seemed paranoid, that they drank beer, and that Shaw asked him if he knew anyone who would want to buy a .357 caliber handgun. R. 1025. Watson told him that he did not know of anyone who would want it, and Shaw stayed at the house overnight. R. 1026.

The next morning, August 20, 2007, Joanne Shaw knocked on the door of Tera Orellana, who lived across the street from Tommy and Helen Gilbert, and asked her to come back to their house and talk to Shaw because something terrible had happened. R. 997–99. When Orellana arrived, Shaw told her that he had killed two people. R. 1000. Orellana told him not to say something like that, but Shaw declared, "No, I did it. I F'd up." R. 1000. When Orellana asked him who he had killed, Shaw looked out the window toward Robert and Doris Gilbert's home. R. 1000. Orellana asked him if he was referring to "Mister Bob" and why he did it, but Shaw responded simply, "I just F'd up." R. 1000.

Orellana testified that Shaw appeared high at the time and was sweating; he was wearing a muscle shirt, shorts, and tennis shoes, but he did not appear to have blood on himself or his clothes. R. 1006. Shaw asked Orellana to give him a ride, but she told him that she needed to find her car keys and that she would come back. R. 1001. Frightened, Orellana

walked back to her house and called her next-door neighbor, Karen Rivers, who then called 911. R. 1001–02, 1010–11.

Robert and Doris were 79 and 83 years old, respectively, and lived primarily on the first floor of their home because they could no longer climb the stairs. R. 988, 1238. When Mobile County Sheriff's Deputy James Melton arrived on the scene, he observed blood spatter and bloody footprints in the garage that led to the door into the house. R. 1035, 1065, 1127. The tread pattern from a pair of blood-stained gray Nike tennis shoes recovered from the bedroom where Shaw was eventually found matched the bloody shoeprints found in the victims' garage. R. 1115–18.

When Deputy Melton opened the unlocked door to the house, he immediately saw Doris's body lying face-up on the bed and Robert's body lying face-down on the floor nearby. R. 1037–39, 1065–66. Autopsies indicated that Doris had sustained eighteen stab wounds and that Robert had sustained thirty-two stab wounds. R. 1200–34. The medical examiner determined that both died from multiple sharp-force injuries. R. 1234. Robert's .357 Magnum handgun and his .38 caliber revolver were missing from the home. R. 1133.

After approximately eight hours of searching, deputies found Shaw in his mother's house, trying to hide under a bed. R. 1042–43, 1101–11. When Shaw was apprehended, the lower portion of his pants and his socks appeared to have blood stains, and he was not wearing a shirt or shoes. R. 1084, 1108, 1134.

Officers discovered a bloody steak knife on the ground near victims' house. R. 1050–51. They also located a .38 caliber revolver, a .357 Magnum handgun, and a bloodstained t-shirt within 1500 feet of the victims' driveway. R. 1087–91, 1134. Forensic tests revealed that Robert's blood was on the Nike tennis shoes, on Shaw's socks, and on the shirt and knife found near the victims' home. R. 1163–66, 1169–73.

Shaw was interviewed after being informed of his Miranda rights and signing a waiver-of-rights form. C. 447–50; R. 1135–41. The recording of the interview was played for the jury. R. 1142. No witnesses testified for Shaw. His main defense was that he was so intoxicated at the time of the murders that it amounted to insanity, preventing him from forming the specific intent to kill. R. 971–75, 1266, 1277, 1279.

On March 28, 2008, a Mobile County grand jury indicted Shaw on four counts of capital murder for the deaths of Robert and Doris Gilbert pursuant to sections 13A–5–40(a)(4) and 13A–5–40(a)(10) of the Code of Alabama (1975). C. 116, 123. Shaw's trial began nearly three years later on March 23, 2011. R. 114. The voir dire process was extensive, lasting two full days and comprising nearly eight hundred pages of the record. R. 114–899.

Following peremptory strikes, the defense raised a *Batson* objection, as the State had used eleven of its eighteen strikes to remove black veniremembers. R. 900–06. The court denied a reverse *Batson* objection, which the prosecution raised because the de-

fense had used all of its strikes to remove white veniremembers.[2] R. 909, 936. Finding that Shaw had established a prima facie case of a *Batson* violation, the court asked the prosecutor to explain the reasons for striking certain black jurors.[3] R. 909. After a lengthy discussion, the court determined that there were sufficient race-neutral reasons for all of the State's strikes. R. 906–33. The Alabama Court of Criminal Appeals reviewed the *Batson* claim on appeal and agreed. *Shaw v. State*, ___ So. 3d ___, No. CR-10-1502, 2014 WL 3559389, at *8-13 (Ala. Crim. App. Apr. 17, 2015).

The jury was sworn on March 25, and testimony began. R. 951–62. Three days later, the jury found Shaw guilty of four counts of capital murder for the

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[2] When making the objection, the State argued that Shaw had struck one black veniremember. However, unless there is an error on the strike list, the record indicates that Shaw, in fact, used all of his strikes on white veniremembers, eleven white males and seven white females. S2. 123–29.

[3] The petitioner notes that the trial court erroneously believed that the State struck eleven of fifteen qualified black veniremembers rather than eleven of fourteen. The error is immaterial. The court considered the high percentage of black veniremembers struck when finding that Shaw had established a prima facie case of discrimination under *Batson*, and eleven of fifteen was a high enough percentage, in conjunction with other factors, to prompt the court to require the State to explain its strikes. The fact that the State struck 78.6% of the black veniremembers, leaving three on the final jury, as opposed to 73.3%, leaving three on the final jury, is not sufficient evidence to persuade any court that the State's nondiscriminatory reasons for striking the black veniremembers were merely pretextual.

deaths of Doris and Robert Gilbert.[4] The guilty verdicts are reflected in the verdict forms reproduced as an appendix to this brief. *See* App. 1a–8a. The jurors were individually polled and confirmed the verdicts. R. 1332–34.

During the penalty phase of the trial, the State alleged six aggravating circumstances. R. 1359–62, 1558–61. Two of the aggravating circumstances—that the offense was committed during a burglary and that Shaw intentionally caused the death of two or more persons—were established as a matter of law by the jury's verdicts during the guilt phase. C. 100–03. Two other aggravating circumstances—that the offense was committed by someone on probation and by someone who had previously been convicted of a crime involving the use or threat of violence—were established with certified copies of two prior convictions, and the defense did not challenge their existence. C. 99–100, 459–83; R. 1397–1401. The fifth alleged aggravating circumstance was duplicative, C. 100–01, and the court found the existence of the sixth, that the offense was especially heinous, atrocious, or cruel. C. 102.

After the penalty phase, the jury recommended 10–2 that Shaw be sentenced to death; the jurors were individually polled and confirmed the vote. C. 121–22, 128–29; R 1601–03. This vote is reflected

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[4] One of Shaw's four convictions was set aside because it violated the Double Jeopardy Clause. *See Shaw*, 2014 WL 3559389, at *50 (opinion on return to remand).

in verdict forms, which are also contained in the appendix to this brief. *See* App. 9a–12a.

The trial court ordered a presentence investigation, then conducted a sentencing hearing on July 1, 2011. C. 209–17; R. 1639–60. After weighing the statutory and non-statutory mitigating circumstances against the statutory aggravating circumstances, the court followed the jury's recommendation and sentenced Shaw to death. C. 99–113; R. 1659–60.

REASONS FOR DENYING THE WRIT

This is a heavily fact-bound case that presents no novel questions for this Court to answer and involves no circuit split in need of resolution. Rather, Shaw takes issue with the routine application of this Court's precedents under *Foster v. Chatman*, 136 S. Ct. 1737 (2016), and *Hurst v. Florida*, 136 S. Ct. 616 (2016), which did not expand this Court's holdings in *Batson v. Kentucky*, 476 U.S. 79 (1986), and *Ring v. Arizona*, 536 U.S. 584 (2002), respectively.

Shaw argues that *Foster* requires his case to be remanded for a new consideration of his *Batson* claims. This Court's decision in *Foster* did not alter the *Batson* analysis, and Shaw's *Batson* claims were addressed by the Alabama Court of Criminal Appeals. *Shaw*, 2014 WL 3559389, at *8–13. The claims are exceedingly weak, and the state courts accepted the prosecution's race-neutral reasons for striking each prospective juror that Shaw contends was improperly removed. *Id.* at *9–11.

Shaw's sentence is also consistent with *Ring* and *Hurst*. The jury in this case unanimously found beyond a reasonable doubt two aggravating circumstances by virtue of its verdicts during the guilt phase—that Shaw murdered two or more people by one act or pursuant to one scheme or course of conduct and that the murders were committed during a burglary—which made Shaw eligible for the death penalty. App. 1a–8a; R. 1332–34. The jury, by a vote of 10–2, then advised that Shaw be sentenced to death. App. 9a–12a. Following the jury's recommendation, the judge determined that Shaw did, in fact,

deserve that sentence. C. 99–113; R. 1659–60. Shaw's sentence fits well within the parameters set out in *Ring* and applied in *Hurst*.

Although this Court has remanded other cases for the Alabama appellate courts to consider after *Hurst*, there is no reason for a similar remand in this case. After this Court remanded *Johnson v. Alabama*, 136 S. Ct. 1837 (2016), *Wimbley v. Alabama*, 136 S. Ct. 2387 (2016), and *Kirksey v. Alabama*, 136 S. Ct. 2409 (2016), to the Court of Criminal Appeals, that court concluded that Alabama's capital-sentencing scheme remains constitutional after *Hurst*. The Court of Criminal Appeals determined that Alabama's capital-sentencing scheme is consistent with *Hurst* and does require the jury to make the findings of fact necessary for the imposition of the death penalty. *Ex parte State*, ___ So. 3d ___, Nos. CR-15-0619, CR-15-0622, CR-15-0623, CR-15-0624, 2016 WL 3364689 (Ala. Crim. App. June 17, 2016).

Following that decision, this Court remanded *Russell v. Alabama*, No. 15-9918 (U.S. Oct. 3, 2016), to the Alabama Court of Criminal Appeals for further consideration in light of *Hurst*. Three days prior to that remand, the Alabama Supreme Court found in *Ex parte Bohannon* that *Hurst* has no effect on Alabama's capital-sentencing scheme. That decision came after this Court had already considered *Russell* at conference. In *Ex parte Bohannon*, the Alabama Supreme Court held that "because in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defend-

ant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment." ___ So. 3d ___, No. 1150640, 2016 WL 5817692, at *5 (Ala. Sept. 30, 2016). Notably, Bohannon's case, like Shaw's, was a case in which aggravating circumstances were found beyond a reasonable doubt by virtue of the jury's guilt-phase verdict. Because the Alabama appellate courts have held Alabama's capital-sentencing scheme to be constitutional under both *Ring* and *Hurst*, a remand in this case would be pointless.

I. The Alabama Court of Criminal Appeals correctly applied the analysis and reasoning of both *Batson v. Kentucky* and *Foster v. Chatman*.

In this case, the trial court addressed Shaw's *Batson* challenge and required the State to articulate nondiscriminatory reasons for each of the eleven strikes of black prospective jurors. The court was satisfied with the race-neutral explanations. On appeal, the Alabama Court of Criminal Appeals also examined Shaw's *Batson* claims, and after scrutinizing the voir dire transcript, the juror questionnaires, and the State's justifications, that court discerned multiple nondiscriminatory reasons for removing each of the prospective jurors. *Shaw*, 2014 WL 3559389, at *8–13.

Foster involved a straightforward application of *Batson* to a specific fact scenario in a Georgia case and did not change the *Batson* analysis. Shaw's peti-

tion merely seeks a more thorough review of the case-specific factual questions involving the State's peremptory strikes of prospective jurors. His arguments do not raise a compelling reason to invoke this Court's jurisdiction.

First, the only purported evidence of discrimination that Shaw identifies is the fact that the State used eleven of its eighteen peremptory strikes to remove all but three black veniremembers and the fact that some of these veniremembers had similar characteristics to certain white jurors on the final jury. Shaw made those precise arguments to the Alabama Court of Criminal Appeals. He may disagree with that court's findings, but he identifies nothing in *Foster* that would require a different *Batson* analysis by that court.

For instance, Shaw draws comparisons between veniremember Sondra McGhee and jurors Debra Reach and Sandra Bush. Pet. 12–14. McGhee and Reach circled two conflicting answers on the jury questionnaires regarding their ability to impose the death penalty. S3. 164, 175, and McGhee and Bush indicated that drug and alcohol abuse were sad. S3. 164, 916. The Court of Criminal Appeals considered this "evidence" and determined that Shaw was due no relief. First, the State had several valid reasons for striking McGhee, including one that was unique to her: she looked "put-out" to be there, "like she did not want to be" there, and "appear[ed] inattentive or bored." R. 932–33. This is precisely the type of subjective judgment about "credibility and demeanor [that] lie[s] peculiarly within a trial judge's prov-

ince." *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) (internal citation and quotations omitted). McGhee was the only veniremember that the State described as inattentive during the entire *Batson* discussion. Second, Reach did not answer the question about drug and alcohol abuse in a comparable way to McGhee, and Bush did not demonstrate uncertainty about her ability to impose the death penalty. Thus, the State's explanation was not simply a blanket, vague excuse used to justify all of its strikes of black veniremembers.

Shaw also draws comparisons between veniremember Mary Rivers and several other jurors. Pet. 15. Shaw argued this claim in the Court of Criminal Appeals and was again unsuccessful. As that court pointed out, Rivers "had prior convictions" that she did not disclose on her juror questionnaire. *Shaw*, 2014 WL 3559389, at *12. Her convictions were different from that of juror Brendan Weishaar, the only other veniremember who failed to disclose a prior arrest. Weishaar had been convicted of underage drinking at twenty years old, a record that he believed had been expunged. R. 398. By contrast, Rivers had been convicted of "a disorderly conduct charge and failure to obey the police." R. 390. Obviously, in a case in which the State was going to call several law enforcement officers to testify, Rivers's conviction would have been much more disconcerting. Additionally, a failure to mention an arrest that involves a negative interaction with the police stands in stark contrast to the exclusion of an underage drinking arrest that had purportedly been expunged.

The comparisons that Shaw attempts to draw between struck black veniremembers and seated white jurors are meager at best. The Alabama Court of Criminal Appeals rejected the bare numbers arguments and the flimsy juror comparisons that Shaw now makes to this Court, finding in the record "nothing to suggest that the circuit court abused its considerable discretion in denying Shaw's *Batson* motion." *Shaw*, 2014 WL 3559389, at *12. That court reviewed these claims using the same reasoning and analysis that this Court applied in both *Batson* and *Foster*.

Second, Shaw alleges "strong evidence of a pattern of discrimination by the Mobile County District Attorney's Office." Pet. 9. This was an argument he raised for the first time on appeal. The Alabama Court of Criminal Appeals did not find that the District Attorney's Office had committed a *Batson* violation in a single case that Shaw cited. In most of these cases, *Batson* was not even an issue argued on appeal. In one of the few cases Shaw cited that actually does discuss *Batson*, the trial court "specifically noted that the current Mobile County District Attorney's Office did not have a history of violating *Batson* and that the cases cited by the defense for this proposition were cases tried under a former administration." *Whatley v. State*, 146 So. 3d 437, 457 (Ala. Crim. App. 2010). The only cases that Shaw now cites to support his contention of a pattern of discrimination are an Eleventh Circuit case from 1990 and one of this Court's cases from 1965. In short, Shaw's questionable contention is supported by nothing.

Third, Shaw claims that the Alabama Court of Criminal Appeals "engaged in an analysis of limited evidence," that it only reviewed a "limited sampling" of struck jurors, that it did not make "a determination in light of the totality of the circumstances," and that it "ignored evidence of disparate treatment." Pet. 18–19. It is unclear what Shaw is talking about. He identifies nothing specific in the record that the Court of Criminal Appeals failed to consider. He implies that the court considered only the "first four" strikes by the prosecution and ignored "the next five" before concluding that there was "no evidence of disparate treatment," *id.*, but this is the full quotation from which Shaw borrowed only a limited sampling: "The record shows that, of the prosecutor's 18 strikes, the prosecutor struck 7 white prospective jurors and 11 black prospective jurors. A review of the prosecutor's striking process shows no evidence of disparate treatment." *Shaw*, 2014 WL 3559389, at *11. The Court of Criminal Appeals made this assessment after recounting the State's proffered reasons for striking each black juror. Any rational reading of the court's opinion confirms that it did not ignore anything in the record.

Finally, Shaw has never advanced a theory about why the prosecutors would have specifically endeavored to strike black jurors from a case in which a white man murdered his elderly white relatives. This Court and the Alabama Court of Criminal Appeals have recognized that a "trial court's ruling on a *Batson* motion is entitled to great deference on appeal." *Shaw*, 2014 WL 3559389, at *12 (citing *Hernandez v. New York*, 500 U.S. 352, 365 (1991)). Giving defer-

ence to the trial court's findings, the Court of Criminal Appeals reasonably required Shaw to support his argument with more than bare numbers and weak juror comparisons.

This Court in *Foster* required far more than Shaw has alleged when deciding that a *Batson* violation had occurred. In *Foster*, this Court reiterated that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination." *Foster*, 136 S. Ct. at 1754 (quoting *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005)). However, this Court also relied on substantial additional case-specific evidence, including evidence that the prosecution's stated reasons for striking were inconsistent and fluctuating, that the prosecution misrepresented the record, and that a persistent focus on race permeated the prosecution's jury selection file.

By contrast, in Shaw's case, he has failed to show that the black jurors who were struck were similarly situated to white jurors who were not. Important, relevant differences existed. Additionally, the prosecution did not offer explanations for striking black jurors that shifted between the *Batson* discussion and the end of the trial, as the prosecution did in *Foster*. The State gave multiple, consonant reasons for striking each of the jurors immediately following the *Batson* challenge, and they did not change over time. There were no overt misrepresentations of the record that are comparable to those in *Foster* and no allegation or evidence that the prosecution had any

particular preoccupation with race in its jury selection file.

This Court and the Alabama Supreme Court described all types of evidence tending to prove purposeful discrimination that could conceivably apply here long before the Alabama Court of Criminal Appeals decided the *Batson* issue in Shaw's case. *See Miller-El*, 545 U.S. at 241; *Ex parte Branch*, 526 So. 2d 609, 622–23 (Ala. 1987). If this Court believes that the trial court's factual findings on the question of prosecutorial intent are clearly erroneous, it is, of course, free to grant the petition for a writ of certiorari, delve into the case-specific facts, and spend the time to engage in a full review. However, because *Foster* offers no additional applicable guidance, were this case to be remanded, the Court of Criminal Appeals would simply conduct an identical *Batson* analysis and come to the same conclusion: the record in Shaw's case fails to support the contention that the trial court abused its discretion by denying Shaw's *Batson* motion. Vacating and remanding would be a waste of time and an exercise in futility.

Because *Foster* did not change the legal principles of *Batson*, and certainly did not do so in any way that would apply to this case, this Court should not grant Shaw's petition for writ of certiorari.

II. Shaw's sentence of death is consistent with *Ring* and *Hurst* and does not violate the Sixth Amendment.

Shaw erroneously argues that Alabama's capital-sentencing procedures violate the Sixth Amendment because they allow a judge to determine whether to sentence a defendant to death. He claims that *Ring v. Arizona* and *Hurst v. Florida* hold that the Sixth Amendment does not allow "a non-binding advisory sentencing recommendation" by a jury or a sentence that is "handed down by a judge rather than a jury." Pet. 20–21. Shaw misunderstands *Ring*, *Hurst*, and the way that Alabama's capital-sentencing statutes work. Because the jury unanimously found two statutory aggravating factors beyond a reasonable doubt by virtue of its verdict during the guilt phase, App. 1a–8a; R. 1332–34, and recommended 10–2 that he be sentenced to death, App. 9a–12a, Shaw's death sentence is constitutional under *Hurst*.

A. *Ring* and *Hurst* require the jury to find the existence of aggravating circumstances that make a defendant eligible for the death penalty.

Ring holds that a jury must find the existence of the facts that increase the range of punishment to include the imposition of the death penalty. In *Ring*, this Court applied the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to death penalty cases, holding that Arizona's death penalty statute violated the Sixth Amendment right to a jury trial "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 585. Thus, a trial court cannot make a finding of "any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589. Only a jury can.

Hurst did not add anything of substance to *Ring*. As the Alabama Court of Criminal Appeals recognized, this Court's decision in *Hurst* "was based solely on its previous opinion in *Ring*." *Reeves v. State*, ___ So. 3d ___, No. CR-13-1504, 2016 WL 3247447, at *37 (Ala. Crim. App. June 10, 2016). Likewise, the Alabama Supreme Court observed that this Court's "holding in *Hurst* was based on an application, not an expansion, of *Apprendi* and *Ring*." *Ex parte Bohannon*, 2016 WL 5817692, at *6.

In *Hurst*, the State of Florida did not ask a jury to find the existence of any aggravating circumstance at the guilt or penalty phases. *Hurst*, 136 S. Ct. at 621–22. The judge, however, did find aggravating circumstances and imposed a death sentence. This Court likened Florida's sentencing scheme to Arizona's in *Ring* because "Florida [did] not require the jury to make the critical findings necessary to impose the death penalty." *Id.* at 622. Instead, "the judge alone [found] the existence of an aggravating circumstance" that expanded the range of punishment to include the death penalty. *Id.* at 624. By contrast, Alabama's statutory and case law make it clear that the jury must unanimously find the existence of at least one aggravating circumstance beyond a reasonable doubt to impose the death penalty. *See* ALA.

CODE § 13A–5–45(f) (1975); *Ex parte Waldrop*, 859 So. 2d 1181, 1190 (Ala. 2002).

There is no reason to remand this case for the Alabama appellate courts to evaluate *Ring* and *Hurst* because those courts have already held that Alabama's sentencing scheme is consistent with *Ring* and *Hurst*. The Alabama Supreme Court held that state law is consistent with *Ring* several years ago:

> *Ring* and *Apprendi* do not require that the jury make *every* factual determination; instead, those cases require the jury to find beyond a reasonable doubt only those facts that result in "an increase in a defendant's authorized punishment . . ." or "'expose [ ] [a defendant] to a greater punishment . . . .'" *Ring*, 536 U.S. at 602, 604, 122 S. Ct. at 2439, 2440 (quoting *Apprendi*, 530 U.S. at 494, 120 S. Ct. 2348). Alabama law requires the existence of only one aggravating circumstance in order for a defendant to be sentenced to death. ALA. CODE 1975, § 13A–5–45(f). The jury in this case found the existence of that one aggravating circumstance . . . . At that point, [the defendant] became "exposed" to, or eligible for, the death penalty.

Ex parte Waldrop, 859 So. 2d at 1190. Because *Hurst* did not alter or expand *Apprendi* or *Ring*, "no reason exists to disturb [the Alabama Supreme Court's] decision in *Ex parte Waldrop*." *Ex parte Bohannon*, 2016 WL 5817692, at *6.

The Alabama Supreme Court recently explained why Alabama's capital-sentencing statutes are still constitutional after *Hurst*:

> Our reading of *Apprendi*, *Ring*, and *Hurst* leads us to the conclusion that Alabama's capital-sentencing scheme is consistent with the Sixth Amendment. As previously recognized, *Apprendi* holds that any fact that elevates a defendant's sentence above the range established by a jury's verdict must be determined by the jury. *Ring* holds that the Sixth Amendment right to a jury trial requires that a jury "find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 585, 122 S. Ct. 2428. *Hurst* applies *Ring* and reiterates that a jury, not a judge, must find the existence of an aggravating factor to make a defendant death-eligible. *Ring* and *Hurst* require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty—the plain language in those cases requires nothing more and nothing less. Accordingly, because in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment.

Ex parte Bohannon, 2016 WL 5817692, at *5.

The Alabama Court of Criminal Appeals also recently described why Alabama's capital statutes remain constitutional after *Hurst*:

> [U]nder 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 [ALA. CODE] § 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 *the trial court* that an aggravating circumstance existed, Alabama law conditions a capital defendant's eligibility for the death penalty on a finding by *the jury* 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 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.

Ex parte State, 2016 WL 3364689, at *11.

Shaw incorrectly contends that Alabama's capital-sentencing scheme "is virtually identical to the Florida statute that was struck down in *Hurst*." Pet. 20. Although the Alabama and Florida schemes are similar in many respects, they are different where it matters for the Sixth Amendment.

Unlike Florida, Alabama law does not expose a defendant to a possible sentence of death based on a trial court's finding that an aggravating circumstance exists. Rather, Alabama law requires that the jury must unanimously find the existence of at least one aggravating circumstance beyond a reasonable doubt to impose the death penalty. *See* ALA. CODE § 13A–5–45(f) (1975); *Ex parte Waldrop*, 859 So. 2d at 1190. Alabama courts have unambiguously said that the jury, not a judge, must unanimously find beyond a reasonable doubt the presence of an aggravating circumstance and that "[i]f 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." *Ex parte McGriff*, 908 So. 2d 1024, 1038 (Ala. 2004). Thus, *Hurst* did not invalidate Alabama's capital-sentencing scheme.

B. The jury unanimously found an aggravating circumstance that made Shaw eligible for the death penalty.

The jury in this case unanimously found two aggravating circumstances by virtue of their verdicts during the guilt phase, which is all that *Ring* and *Hurst* require. App. 1a–8a; R. 1332–34. The jury then, by a vote of 10 to 2, recommended that Shaw be sentenced to death. App. 9a–12a. In sentencing Shaw, the judge considered the aggravating circumstances that the jury unanimously found to exist.

Hurst, as Shaw is aware, states that a sentencing judge cannot "find an aggravating circumstance, independent of a jury's factfinding, that is **necessary** for imposition of the death penalty." *Hurst*, 136 S. Ct. at 624 (emphasis added). Shaw argues that he "could only be sentenced to death after the trial judge found the existence of" a statutory aggravating circumstance, which contravenes *Hurst*. Pet. 22. According to Shaw, *Hurst* prevents a sentencing judge from making any findings of fact that are separate from a jury's determinations. That is not what *Hurst* and *Ring* say. A trial court cannot find the presence of an aggravating circumstance that the jury has not found that is **necessary** to increase a defendant's authorized punishment to the sentence of death, but if a jury has found the existence of at least one aggravating circumstance, then any additional factfinding by a trial court would not be necessary for the imposition of the death penalty.

The record reveals that nothing in Shaw's case runs afoul of this Court's holding in *Hurst*. In *Hurst*, "the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole," and the "judge in-

creased Hurst's authorized punishment based on her own factfinding." 136 S. Ct. at 622. In Shaw's case, the maximum punishment he could have received without judge-made findings was death, and the trial court did not increase his authorized range of punishment based on its own factfinding. Rather, the **jury** increased Shaw's authorized punishment based on its unanimous agreement that the State had proven beyond a reasonable doubt the existence of two aggravating circumstances. App. 1a–8a; R. 1332–34. Thus, Shaw's jury clearly made "the critical findings necessary to impose the death penalty." *Hurst*, 136 S. Ct. at 622.

C. The relative weight of aggravating and mitigating circumstances is not a finding of fact or an element of a capital murder charge that must be found by the jury.

In his effort to fit this case into *Hurst*'s framework, Shaw erroneously conflates two separate issues: (1) whether an aggravating circumstance exists and (2) whether the aggravating circumstances outweigh the mitigating circumstances. The first issue is a finding of fact that may be submitted to a jury. The second is not; instead, it is a prudential determination that hundreds of judges make every day in non-capital sentencing.

Shaw cites no cases that support his contention that the weighing of aggravating and mitigating factors is a finding of fact that must be made by a jury. On the contrary, the vast majority of courts have held that a judge may perform the "weighing" of fac-

tors and arrive at an appropriate sentence without violating the Sixth Amendment.[5]

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[5] *See Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1198 (11th Cir. 2013) ("*Ring* does not foreclose the ability of the trial judge to find the aggravating circumstances outweigh the mitigating circumstances."); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); *United States v. Purkey*, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); *Higgs v. United States*, 711 F. Supp. 2d 479, 540 (D. Md. 2010) ("Whether the aggravating factors presented by the prosecution outweigh the mitigating factors presented by the defense is a *normative* question rather than a *factual* one."); *Nunnery v. State*, 263 P.3d 235, 253 (Nev. 2011) ("[T]he weighing of aggravating and mitigating circumstances is not a fact-finding endeavor."); *Brice v. State*, 815 A.2d 314, 322 (Del. 2003), *overruled by Rauf v. State*, ___ A.3d ___, 2016 WL 4224252 (Del. Aug. 2, 2016) (*Ring* does not apply to the weighing phase because weighing "does not increase the punishment."); *Ritchie v. State*, 809 N.E.2d 258, 266 (Ind. 2004) ("In *Bivins v. State*, 642 N.E.2d 928, 946 (Ind. 1994), we concluded, as a matter of state law, that '[t]he determination of the weight to be accorded the aggravating and mitigating circumstances is not a 'fact' which must be proved beyond a reasonable doubt but is a balancing process.' *Apprendi* and its progeny do not change this conclusion."); *Oken v. State*, 835 A.2d 1105, 1158 (Md. 2003) ("[T]he weighing process never was intended to be a component of a 'fact finding' process."); *State v. Gales*, 658 N.W.2d 604, 627–29 (Neb. 2003) ("[W]e do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review be undertaken by a jury."); *State v. Fry*, 126 P.3d 516, 534 (N.M. 2005) ("[T]he weighing of aggravating and mitigating circumstances is thus not a 'fact that increases the penalty for a crime beyond the

Shaw distorts the holding of *Hurst*. According to Shaw, the determination of whether "the weight of [an aggravating] circumstance was greater than that of any mitigating circumstances" is a finding of fact that the jury must make in order to impose the death penalty, and an advisory verdict by the jury is insufficient under *Ring*. Pet. 22. *Hurst* did not say either of those things. *Hurst* did not declare that a recommendation by the jury about whether to sentence a defendant to death or life without parole is unconstitutional. *Hurst* also did not say that the weighing of aggravating and mitigating circumstances is a finding of fact. Instead, this Court merely held that an advisory verdict could not function as a substitute for a jury's factual finding that an aggravating circumstance exists, which is necessary to expose a defendant to the death penalty. *Hurst*, 136 S. Ct. at 622.

Hurst held that a jury's non-unanimous advisory verdict that recommends death cannot be considered

---

prescribed statutory maximum.'"); *Commonwealth v. Roney*, 866 A.2d 351, 360 (Pa. 2005) ("[B]ecause the weighing of the evidence is a function distinct from fact-finding, *Apprendi* does not apply here."). *But see Rauf*, 2016 WL 4224252, at *2 (The Sixth Amendment "require[s] a jury not a sentencing judge, to find that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist."); *Hurst v. State*, ___ So. 3d ___, No. SC 12-1947, 2016 WL 6036978, at *10 (Fla. Oct. 14, 2016) ("Florida law has long required findings beyond the existence of a single aggravator before the sentence of death may be recommended or imposed." The jury must "unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge. This holding is founded upon the Florida Constitution.").

a factual finding that an aggravating circumstance exists, which would qualify a defendant for the sentence of death. As this Court made clear, Florida was not permitted to "treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Id.* *Ring* requires only that a jury "find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 609. The Alabama capital-sentencing scheme, unlike Florida's former capital-sentencing scheme, requires the jury to unanimously find the existence of an aggravating circumstance beyond a reasonable doubt. That meets the specifications of *Ring* and *Hurst* to the letter.

The Alabama Court of Criminal Appeals recently reaffirmed its understanding that the balancing of aggravating and mitigating circumstances is not a factual determination "susceptible to any quantum of proof" and that *Ring* and *Apprendi* do not require a jury to engage in the weighing process:

> [T]he weighing process is not a factual determination or an element of an offense; instead, it is a moral or legal judgment that takes into account a theoretically limitless set of facts and that cannot be reduced to a scientific formula or the discovery of a discrete, observable datum . . . .
>
> Thus, the determination whether the aggravating circumstances outweigh the mitigating circumstances is not a finding of fact or an element of the offense. Consequently, *Ring* and *Apprendi* do not require that a jury weigh

> the aggravating circumstances and the mitigating circumstances.

Petric v. State, 157 So. 3d 176, 252–53 (Ala. Crim. App. 2013) (quotation omitted); *see also Ex parte State*, 2016 WL 3364689, at *8 (quoting *Ex parte Waldrop*, 859 So. 2d at 1189).

The Alabama Supreme Court also noted that *Hurst* did not address the weighing process:

> *Hurst* does not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. This Court rejected that argument in *Ex parte Waldrop*, holding that that the Sixth Amendment "do[es] not require that a jury weigh the aggravating circumstances and the mitigating circumstances" because, rather than being "a factual determination," the weighing process is "a moral or legal judgment that takes into account a theoretically limitless set of facts." 859 So.2d at 1190, 1189. *Hurst* focuses on the jury's factual finding of the existence of a[n] aggravating circumstance to make a defendant death-eligible; it does not mention the jury's weighing of the aggravating and mitigating circumstances. The United States Supreme Court's holding in *Hurst* was based on an application, not an expansion, of *Apprendi* and *Ring*; consequently, no reason exists to disturb our decision in *Ex parte Waldrop* with regard to the weighing process. Furthermore, nothing in our review of *Apprendi*,

> *Ring*, and *Hurst* leads us to conclude that in *Hurst* the United States Supreme Court held that the Sixth Amendment requires that a jury impose a capital sentence. *Apprendi* expressly stated that trial courts may "exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute." 530 U.S. at 481, 120 S. Ct. 2348. *Hurst* does not disturb this holding.

Ex parte Bohannon, 2016 WL 5817692, at *6.

The Sixth Amendment does not apply differently in death penalty cases. The weight of aggravating and mitigating circumstances is no more a factfinding in a capital case than the weight of "the nature and circumstances of the offense and the history and characteristics of the defendant" is a factfinding in a non-capital case. 18 U.S.C. § 3553. The Sixth Amendment provides the right to a trial by jury, not a sentencing by jury.

Shaw has not demonstrated how his sentence is unconstitutional under *Ring* and *Hurst*, and this Court should not grant his petition for writ of certiorari.

III. This Court should not GVR this case for further consideration in light of *Hurst*.

Unlike the Florida law addressed in *Hurst*, Alabama law requires a jury to unanimously find the existence of an aggravating circumstance—at either the guilt phase or the sentencing phase—before a de-

fendant can be sentenced to death. In comparable cases, this Court has declined to grant plenary review or GVR in light of *Hurst*. *See Shanklin v. Alabama*, 136 S. Ct. 1467 (Mar. 21, 2016); *Fletcher v. Florida*, 136 S. Ct. 980 (Jan. 25, 2016), rehearing denied, 136 S. Ct. 1403 (Mar. 7, 2016).

But, since its decision *not* to GVR in *Shanklin*, this Court appears to have concluded that it should GVR in every Alabama direct appeal that raises a *Hurst* issue. This Court should reconsider its GVR practice in general and should not GVR this particular case.

As discussed above, the Alabama courts have already resolved the issue of how *Hurst* applies to capital sentences in Alabama. Since this Court began issuing GVRs, the Alabama Supreme Court and Court of Criminal Appeals have held that *Hurst* does not affect the constitutionality of death sentences in Alabama. *See Ex parte Bohannon*, 2016 WL 5817692; *Ex parte State*, 2016 WL 3364689. Because of the Alabama Supreme Court's and Criminal Appeals' decisions, there are no open questions for the lower courts to answer about how *Hurst* applies to Alabama's death penalty scheme.

Several months before this Court's most recent GVR in *Russell*, the Alabama Court of Criminal Appeals held that *Hurst* does not call into question longstanding precedent about the constitutionality of Alabama's death penalty scheme. *Ex parte State*, 2016 WL 3364689, at *11.

Then, three days before this Court's most recent GVR in *Russell*, but after this Court had already considered *Russell* at conference, the Alabama Supreme Court held that *Hurst* does not require changes in Alabama's statute or precedent. "Our reading of *Apprendi*, *Ring*, and *Hurst* leads us to the conclusion that Alabama's capital-sentencing scheme is consistent with the Sixth Amendment." *Ex parte Bohannon*, 2016 WL 5817692, at *5. "The United States Supreme Court's holding in *Hurst* was based on an application, not an expansion, of *Apprendi* and *Ring*; consequently, no reason exists to disturb our [precedent]." *Id.* at *6. "*Ring* and *Hurst* require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty—the plain language in those cases requires nothing more and nothing less." *Id.* at *5. "Accordingly, because in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment." *Id.*

Notably, Bohannon's case, precisely like Shaw's, was a case in which an aggravating circumstance was found beyond a reasonable doubt by virtue of the jury's guilt-phase verdict. The juries in both Shaw's and Bohannon's cases even unanimously found the existence of an **identical** aggravating circumstance with their guilt-phase verdicts:

> Bohannon's death sentence is consistent with *Apprendi*, *Ring*, and *Hurst* and does not vio-

> late the Sixth Amendment. The jury, by its verdict finding Bohannon guilty of murder made capital because "two or more persons [we]re murdered by the defendant by one act or pursuant to one scheme or course of conduct," see § 13A–5–40(a)(10), ALA. CODE 1975, also found the existence of the aggravating circumstance, provided in § 13A–5–49(9), ALA. CODE 1975, that "[t]he defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme of course of conduct," which made Bohannon eligible for a sentence of death. *See also* § 13A–5–45(e), Ala. Code 1975 ("[A]ny 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."). Because the jury, not the judge, unanimously found the existence of an aggravating factor—the intentional causing of the death of two or more persons by one act or pursuant to one scheme of course of conduct—making Bohannon death-eligible, Bohannon's Sixth Amendment rights were not violated.

Ex parte Bohannon, 2016 WL 5817692, at *6. A GVR in this case would unquestionably produce the same results as in *Ex parte Bohannon*.

Shaw's sentence is consistent with *Hurst*. The jury in this case unanimously found beyond a reasonable doubt two aggravating circumstances by virtue of its verdicts during the guilt phase—that Shaw mur-

dered two or more people by one act or pursuant to one scheme or course of conduct and that the murders were committed during a burglary—which made Shaw eligible for the death penalty. App. 1a–8a; R. 1332–34. Shaw's sentence fits well within the parameters set out in *Ring* and applied in *Hurst*.

Although this Court has remanded other cases for the Alabama appellate courts to consider after *Hurst*, there is no reason for a similar remand in this case. The Alabama Court of Criminal Appeals and Supreme Court have confirmed that Alabama law currently requires a jury to unanimously make the critical finding of fact that an aggravating circumstance exists beyond a reasonable doubt to expose a defendant to a possible sentence of death. *See Ex parte Bohannon*, 2016 WL 5817692; *Ex parte State*, 2016 WL 3364689. Thus, Alabama's capital-sentencing scheme is consistent with *Hurst*.

Because the jury in Shaw's case unquestionably found the existence of two aggravating circumstances beyond a reasonable doubt, App. 1a–8a; R. 1332–34, this Court should do what it has done in other post-*Hurst* cases in which the jury incontrovertibly found the existence of an aggravating circumstance beyond a reasonable doubt as a result of its fact finding during the guilt phase. Namely, this Court should decline to grant plenary review or GVR in light of *Hurst*. *See Shanklin*, 136 S. Ct. 1467; *Fletcher*, 136 S. Ct. 980, rehearing denied, 136 S. Ct. 1403.

Because the Alabama appellate courts have held Alabama's capital-sentencing scheme to be constitu-

tional under *Hurst*, a GVR in this case would be pointless.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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October 26, 2016

APPENDIX

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE OF ALABAMA,	*	
	*	
	*	
v.	*	**CASE NO. CC-2008-1209**
	*	
	*	
AUBREY LYNN SHAW,	*	
	*	
Defendant.	*	

VERDICT FORM

COUNT I

We, the jury, find the defendant, **AUBREY LYNN SHAW**, guilty of the offense of **CAPITAL MURDER** in the death of Doris Gilbert, as charged in **COUNT I** of the indictment.

3/28/2011
DATE

FOREPERSON

We, the jury, find the defendant, **AUBREY LYNN SHAW**, guilty of the offense of **MURDER**, as a lesser-included offense in the death of Doris Gilbert as charged in **COUNT I** of the indictment.

DATE

FOREPERSON

We, the jury, find the defendant, **AUBREY LYNN SHAW**, guilty of the offense of **MANSLAUGHTER**, as a lesser-included offense in the death of Doris Gilbert as charged in **COUNT I** of the indictment.

DATE FOREPERSON

We, the jury, find the defendant, **AUBREY LYNN SHAW**, guilty of the offense of **FELONY MURDER**, as a lesser-included offense in the death of Doris Gilbert as charged in **COUNT** I of the indictment.

DATE FOREPERSON

We, the jury, find the defendant, **AUBREY LYNN SHAW**, guilty of the offense of **BURGLARY IN THE FIRST DEGREE** as a lesser-included offense in the death of Doris Gilbert as charged in **COUNT I** of the indictment.

DATE FOREPERSON

We, the jury, find the defendant, **AUBREY LYNN SHAW**, not guilty.

DATE FOREPERSON

COUNT II

We, the jury, find the defendant, **AUBREY LYNN SHAW**, guilty of the offense of **CAPITAL MURDER** in the death of Doris Gilbert as charged in **COUNT II** of the indictment.

3/28/2011
DATE

FOREPERSON

We, the jury, find the defendant, **AUBREY LYNN SHAW**, guilty of the offense of **MURDER**, as a lesser-included offense in the death of Doris Gilbert as charged in **COUNT II** of the indictment.

DATE

FOREPERSON

We, the jury, find the defendant, **AUBREY LYNN SHAW**, guilty of the offense of **MANSLAUGHTER**, as a lesser-included offense in the death of Doris Gilbert as charged in **COUNT II** of the indictment.

DATE

FOREPERSON

We, the jury, find the defendant, **AUBREY LYNN SHAW**, guilty of the offense of **FELONY MURDER** as a lesser-included offense in the death of Doris Gilbert as charged in **COUNT II** of the indictment.

DATE FOREPERSON

We, the jury, find the defendant, **AUBREY LYNN SHAW**, guilty of the offense of **BURGLARY IN THE FIRST DEGREE** as a lesser-included offense in the death of Doris Gilbert as charged in **COUNT II** of the indictment.

DATE FOREPERSON

We, the jury, find the defendant, **AUBREY LYNN SHAW**, not guilty.

DATE FOREPERSON

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE OF ALABAMA,	*	
	*	
	*	
v.	*	CASE NO. CC-2008-1210
	*	
	*	
AUBREY LYNN SHAW,	*	
	*	
Defendant.	*	

VERDICT FORM

COUNT I

We, the jury, find the defendant, **AUBREY LYNN SHAW**, guilty of the offense of **CAPITAL MURDER** in the death of Robert Gilbert, as charged in **COUNT I** of the indictment.

3/28/2011
DATE

FOREPERSON

We, the jury, find the defendant, **AUBREY LYNN SHAW**, guilty of the offense of **MURDER**, as a lesser-included offense in the death of Robert Gilbert as charged in **COUNT I** of the indictment.

DATE

FOREPERSON

We, the jury, find the defendant, **AUBREY LYNN SHAW**, guilty of the offense of **MANSLAUGHTER,** as a lesser-included offense in the death of Robert Gilbert as charged in **COUNT I** of the indictment.

DATE FOREPERSON

We, the jury, find the defendant, **AUBREY LYNN SHAW**, guilty of the offense of **FELONY MURDER,** as a lesser-included offense in the death of Robert Gilbert as charged in **COUNT I** of the indictment.

DATE FOREPERSON

We, the jury, find the defendant, **AUBREY LYNN SHAW**, guilty of the offense of **BURGLARY IN THE FIRST DEGREE** as a lesser-included offense in the death of Robert Gilbert as charged in **COUNT I** of the indictment.

DATE FOREPERSON

We, the jury, find the defendant, **AUBREY LYNN SHAW**, not guilty.

DATE FOREPERSON

COUNT II

We, the jury, find the defendant, **AUBREY LYNN SHAW**, guilty of the offense of **CAPITAL MURDER** in the death of Robert Gilbert as charged in **COUNT II** of the Indictment.

3/23/2011
DATE

FOREPERSON

We, the jury, find the defendant, **AUBREY LYNN SHAW**, guilty of the offense of **MURDER**, as a lesser-included offense in the death of Robert Gilbert as charged in **COUNT II** of the indictment.

DATE

FOREPERSON

We, the jury, find the defendant, **AUBREY LYNN SHAW**, guilty of the offense of **MANSLAUGHTER**, as a lesser-included offense in the death of Robert Gilbert as charged in **COUNT II** of the indictment.

DATE

FOREPERSON

We, the jury, find the defendant, **AUBREY LYNN SHAW**, guilty of the offense of **FELONY MURDER** as a lesser-included offense in the death of Robert Gilbert as charged in **COUNT II** of the indictment.

DATE FOREPERSON

We, the jury, find the defendant, **AUBREY LYNN SHAW**, guilty of the offense of **BURGLARY IN THE FIRST DEGREE** as a lesser-included offense in the death of Robert Gilbert as charged in **COUNT II** of the indictment.

DATE FOREPERSON

We, the jury, find the defendant, **AUBREY LYNN SHAW**, not guilty.

DATE FOREPERSON

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE OF ALABAMA,	*	
	*	
	*	
v.	*	**CASE NO. CC 2008-1209**
	*	
	*	
AUBREY LYNN SHAW,	*	
	*	
Defendant.	*	

VERDICT FORM

We, the jury, return a verdict in **Count I** that the penalty be **death.**

The vote is as follows:

10 Death

2 Life in prison without parole

3/30/2011
DATE

FOREPERSON

We, the jury, return a verdict in **Count I** that the penalty be **life in prison without parole.**

The vote is as follows:

____ Death

____ Life in prison without parole

DATE

FOREPERSON

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE OF ALABAMA,	*	
	*	
	*	
v.	*	CASE NO. CC 2008-1209
	*	
	*	
AUBREY LYNN SHAW,	*	
	*	
Defendant.	*	

VERDICT FORM

We, the jury, return a verdict in **Count II** that the penalty be **death.**

The vote is as follows:

10 Death — 2 Life in prison without parole

3/30/2011
DATE

FOREPERSON

We, the jury, return a verdict in **Count II** that the penalty be **life in prison without parole.**

The vote is as follows:

___ **Death** — ___ Life in prison without parole

DATE

FOREPERSON

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE OF ALABAMA,	*	
	*	
	*	
v.	*	**CASE NO. CC 2008-1210**
	*	
	*	
AUBREY LYNN SHAW,	*	
	*	
Defendant.	*	

VERDICT FORM

We, the jury, return a verdict in **Count I** that the penalty be **death.**

The vote is as follows:

10 Death 2 Life in prison without parole

3/30/2011
DATE

FOREPERSON

We, the jury, return a verdict in **Count I** that the penalty be **life in prison without parole.**

The vote is as follows:

____ Death ____ Life in prison without parole

DATE

FOREPERSON

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE OF ALABAMA,	*	
	*	
	*	
v.	*	CASE NO. CC 2008-1210
	*	
	*	
AUBREY LYNN SHAW,	*	
	*	
Defendant.	*	

VERDICT FORM

We, the jury, return a verdict in **Count II** that the penalty be **death**.

The vote is as follows:

10 Death 2 Life in prison without parole

3/30/2011
DATE

FOREPERSON

We, the jury, return a verdict in **Count II** that the penalty be **life in prison without parole.**

The vote is as follows:

____ Death ____ Life in prison without parole

DATE

FOREPERSON