No. 16-6746

In the
Supreme Court of the United States

JERRY BOHANNON,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Alabama

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

The petition presents four confusing, overlapping questions. At least one of them is not even implicated on the facts of this case. They all implicitly ask the Court to overrule longstanding precedents. These questions are:

1. Does the Constitution require—in a state where each aggravating circumstance is critical to the determination of sentence—that every aggravating circumstance on which a death sentence is premised be found by a unanimous jury?

2. Does the Constitution require—in a state where a sentencer is required to find that the aggravating circumstances outweigh the mitigating circumstances to impose death—that this finding be made by a unanimous jury?

3. Does the imposition of a death sentence in the absence of a unanimous jury verdict in support of death—a result that, today, can occur only in Montana and Alabama in their standard sentencing procedures, and in extremely rare circumstances in Indiana and Missouri—violate the Constitution?

4. Does the Constitution prohibit imposition of a death sentence in a case where the jury was instructed that its sentencing determination would be advisory or a recommendation?

PARTIES

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STATEMENT

Around 8 a.m., after a night of partying, Jerry Bohannon shot and killed Anthony Harvey and Jerry Duboise in the parking lot of a nightclub. He was convicted of capital murder for killing two persons by one act or pursuant to one scheme or course of conduct in violation of section 13A-5-40(a)(10) of the Code of Alabama. C. 84–85.

The evidence of Bohannon's guilt was overwhelming because surveillance cameras captured the events outside the bar that morning.

The surveillance video shows Bohannon and his victims speaking in the parking lot of the bar. At some point during this conversation, Duboise pushes Bohannon, but Bohannon does nothing. R. 33–34. After Duboise and Harvey turn and walk about twenty-five feet away, Bohannon reaches behind his back and draws a gun. R. 26, 34. The other men turn to face Bohannon, possibly at the sound of the hammer being cocked, see Bohannon with a gun, and run; Bohannon chases them around the building. C. 72; R. 26–27.

Both Duboise and Harvey were also armed, and a gunfight ensues. C. 72. Bohannon shoots one of the victims, who falls against a car. Bohannon then stands over the victim, points his gun at the victim's chest, and shoots again. R. 26–27. He then beats the victim with his hands and gun. R. 27. Bohannon's girlfriend runs out of the bar and to Bohannon; they appear to argue, he pushes her to the side, and she walks back to the bar. R. 27–28. Meanwhile, the other victim is attempting to hide behind the building, but Bohannon approaches him and shoots, and the victim falls to the ground. R. 28. Bohannon stands

over the second victim, turns his gun around, and beats him. R. 28–30. Bohannon's girlfriend runs back to Bohannon again and grabs him, but he knocks her to the ground and resumes beating the second victim. When he is finished killing both victims, Bohannon walks with his girlfriend to the side of the bar. R. 30.

The victims died from multiple gunshot wounds. R. 1314–32. But they also sustained numerous abrasions and lacerations from the beatings. R. 1314, 1332.

At the conclusion of the guilt phase of trial, the trial court instructed the jury that it must unanimously agree on several elements to convict Bohannon. One of those elements was that the State must prove beyond a reasonable doubt "that the murder of . . . Jerry Duboise and the murder of Anthony Harvey were pursuant to one scheme or course of conduct." R. 1521:7–19. The Court reminded the jurors that it was their duty "to deliberate and return a unanimous verdict." R. 1530:15–16. The jury unanimously found Bohannon guilty of murdering Harvey and Duboise pursuant to one scheme or course of conduct. R. 1542–43 (polling jury).

The penalty phase of trial followed. The jury was instructed that its guilt phase verdict had already established the aggravating factor of killing two or more persons pursuant to one scheme or course of conduct. R. 1656–57. After being instructed to weigh this aggravating factor against any mitigating circumstances, the jury voted 11 to 1 to recommend a sentence of death. R. 1670. The judge later imposed that sentence. C. 67–83; R. 1685. The only aggravating factor that the judge considered in imposing

the sentence was the aggravating factor established by the jury's unanimous guilt-phase verdict—that "the defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct." C. 77.

REASONS FOR DENYING THE WRIT

In *Harris v. Alabama*, 513 U.S. 504 (1995), the Court rejected the arguments that Bohannon makes in his petition about judicial sentencing. The Court has consistently denied certiorari on the question of whether to overrule *Harris*, and did so again as recently as March of this year after it decided *Hurst v. Florida*, 136 S. Ct. 616 (2016).[1] The Court should deny this petition for the same reasons it denied all the others.

In any event, even if the Court wanted to reconsider Alabama's sentencing scheme, this would not be the case in which to do it. Bohannon was convicted of capital murder by a unanimous jury, which expressly found an aggravating factor for the purposes of sentencing. That jury also voted 11 to 1 that he should be sentenced to death. The judge imposed a death sentence based on the jury's unanimous find-

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[1] *See Shanklin v. State,* 187 So. 3d 734 (Ala. Crim. App. 2014), *cert. denied* 136 S. Ct. 1467 (2016); *Lockhart v. State*, 163 So. 3d 1088 (Ala. Crim. App. 2013), *cert. denied* 135 S. Ct. 1844 (2015); *Scott v. State*, 163 So. 3d 389 (Ala. Crim. App. 2012), *cert. denied* 135 S. Ct. 1844 (2015);*Woodward v. State*, 123 So. 3d 989 (Ala. Crim. App. 2011), *cert. denied* 134 S. Ct. 405 (2013); *Sharifi v. State*, 993 So. 2d 907 (Ala. Crim. App. 2008), *cert. denied* 129 S. Ct. 491 (2008).

ing of an aggravating factor at the guilt phase and its 11 to 1 recommendation at the sentencing phase. Nothing about that process is inconsistent with the principles of the Sixth or Eighth Amendments. The petition for writ of certiorari should be denied.

I. The Court should not grant certiorari on any question because Bohannon's sentence is perfectly consistent with *Hurst*.

The crux of Bohannon's petition is that Alabama's death penalty sentencing procedures violate the Sixth Amendment as interpreted by this Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016). But Bohannon's argument misunderstands *Hurst*, the Sixth Amendment, and the way that Alabama's capital sentencing statute works. Accordingly, before addressing each of his proposed questions individually, we will briefly explain why his sentence is consistent with *Hurst*.

A. *Hurst* requires the jury to find the existence of aggravating factors that make a defendant eligible for the death penalty.

This Court has clearly distinguished two separate determinations to be made in capital sentencing: "the eligibility decision and the selection decision." *Tuilaepa v. California*, 512 U.S. 967, 970–971 (1994). "To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment." *Id.* (citing *Coker v. Georgia*, 433 U.S. 584 (1977)). That includes a finding of an "'aggravating circumstance' (or its

equivalent) at either the guilt or penalty phase." *Tuilaepa*, 512 U.S. at 972. But the Court has recognized "a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence." *Id.* That question involves whether the aggravating factors outweigh any mitigating factors.

Alabama's current death penalty statute was a remedial response to the problem of the arbitrariness of unfettered jury discretion that this Court identified in *Furman v. Georgia*, 408 U.S. 238 (1972). The jury would continue to make certain fact-findings to establish "eligibility." But, as to "selection," the jury would merely render an advisory sentencing recommendation that the judge could consider in making the ultimate decision. *See* Nathan A. Forrester, *Judge Versus Jury: The Continuing Validity of Alabama's Capital Sentencing Regime After* Ring v. Arizona, 54 ALA. L. REV. 1157, 1164–78 (2003) (describing this history). The Court upheld this system as constitutional in *Harris*.

The Court revisited the issue of capital sentencing in *Ring v. Arizona*, 536 U.S. 584 (2002), and applied the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to death penalty cases. In *Ring*, the Court held that, although a judge can make the "selection decision," the jury must find the existence of any fact that makes the defendant "eligible" for the death penalty by increasing the range of punishment to include the imposition of the death penalty. The Court held 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, the trial judge cannot make a finding of "any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589. Only the jury can.

Hurst did not add anything of substance to *Ring*. In *Hurst*, the State of Florida prosecuted a defendant for first-degree murder, which carried a maximum sentence of life without parole. *Hurst*, 136 S. Ct. at 620. Florida did not ask a jury to find the existence of any aggravating circumstance at the guilt phase. *Id.* At the sentencing phase, the jury also did not find the existence of any particular aggravating circumstance. The jury merely returned a non-unanimous advisory sentencing recommendation of seven to five in favor of death. *Id.* Because the jury found no aggravating factor at the guilt or sentencing phase, the judge should have imposed a life without parole sentence. Instead, the judge found an aggravating circumstance herself and imposed a death sentence, making both the eligibility and selection determinations. *Id.* Applying *Ring*, the Court held the resulting death sentence unconstitutional because "the judge alone [found] the existence of an aggravating circumstance" that expanded the range of punishment to include the death penalty. *Id.* at 624.

B. The jury found the aggravating factor that made Bohannon eligible for the death penalty.

Alabama's sentencing practices, and what happened in Bohannon's case, are perfectly consistent

with *Hurst*. Justice Scalia joined the Court's opinion in *Hurst* in full. And, as Justice Scalia explained in his concurrence in *Ring*, "[w]hat today's decision says is that the jury must find the existence of the fact that an aggravating factor existed." *Ring*, 536 U.S. at 612. "Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding or aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase." *Id.* at 612–13 (Scalia, J., concurring).

Alabama has chosen the second and most "logical" option—to secure a jury determination of aggravating circumstances at the guilt phase. Alabama law provides that "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." ALA. CODE § 13A-5-45(e). The elements of capital murder in Alabama track aggravating circumstances. For example, one way the State can convict a person of capital murder is to show that "two or more persons [we]re murdered by the defendant by one act or pursuant to one scheme or course of conduct." ALA. CODE § 13A-5-40(a)(10). This same showing is also an aggravating factor. *See* ALA. CODE § 13A-5-49(9) ("The defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct.").

Unlike in *Hurst*, the jury found all that it needed to find to allow the judge to sentence Bohannon to death. In *Hurst*, Florida argued that the jury's non-

unanimous and non-specific advisory sentencing recommendation was a fact-finding that satisfied *Ring*. *Hurst*, 136 S. Ct. at 622. The Court rejected that argument and held that "the advisory recommendation by the jury" is not "the necessary factual finding that *Ring* requires." *Id.*

But, in this case, the State is relying on a unanimous jury finding at the guilt phase to satisfy *Ring*, not an advisory sentencing recommendation. The judge instructed the jury that to convict it must unanimously find that Bohannon intentionally murdered two people pursuant to one scheme or course of conduct. R. 1521:7–19. That is precisely what the jury did when it convicted Bohannon. This jury finding is an aggravating factor that made Bohannon eligible for a death sentence, and it is the only finding that the judge considered in determining whether to impose a death sentence.

II. The Court should not grant certiorari on the first question presented.

The petition argues that the Court should grant certiorari to resolve a purported conflict "between the state courts regarding whether the Sixth, Eighth, and Fourteenth Amendments require . . . that each aggravating circumstance be found to exist by a unanimous jury before a death sentence may be imposed." Pet. 12. The petition asserts that the Alabama Supreme Court decided this question differently than the Delaware and Florida Supreme Courts.

There are two problems with granting certiorari on this question.

First, this question is not presented by the facts of this case. This is not a case where a sentencing judge considered an aggravating factor that was not "found to exist by a unanimous jury." Instead, the sentencing judge considered a single aggravating factor: "the defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct." C. 77.

The sentencing judge considered that aggravating factor *because* it was found to exist by the jury at the guilt phase of trial. As the Alabama Supreme Court explained, "[t]he 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 or course of conduct,' which made Bohannon eligible for a sentence of death." *In re Bohannon v. State*, No. 1150640, 2016 WL 5817692, at *6, (Ala. Sept. 30, 2016). For that reason, the trial court instructed the jury before the sentencing phase began that it had already found the existence of one aggravating factor by way of its guilty verdict. R. 1656–57. The only aggravating factor at issue in this case is one that the jury unanimously found to exist.

Second, even if the question were presented by the facts of the case, there is no split on this question—just different state courts interpreting their state laws differently. The Alabama Supreme Court, the Delaware Supreme Court, and the Florida Su-

preme Court all agree on the holding of *Hurst*: a jury must make "the critical findings necessary to impose the death penalty." *Hurst*, 136 S. Ct. at 622. And each of these state courts looked to their various state laws to determine what those "critical findings" were.

It is true that these state courts held that their state laws require different findings. The Alabama Supreme Court held that, under Alabama law, "[o]nly one aggravating circumstance must exist in order to impose a sentence of death." *In re Bohannon*, 2016 WL 5817692, at *3 (quoting *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002)). But the Florida Supreme Court held that "Florida law has long required findings beyond the existence of a single aggravator before the sentence of death may be recommended or imposed." *Hurst v. State*, No. SC12-1947, 2016 WL 6036978, at *10 n.7 (Fla. Oct. 14, 2016) ("*Hurst II*"). Similarly, although the Delaware Supreme Court did not explain its reasoning, Chief Justice Strine's concurrence was based on his conclusion that "[u]nder our statute the findings required to make a defendant 'eligible' for the death penalty are not sufficient to enable him to be sentenced to death." *Rauf v. State*, 145 A.3d 430, 464 (Del. 2016).

The petition erroneously argues that the "Alabama Supreme Court's divergence on this point cannot be traced to differences between the laws of Alabama, Florida, or Delaware" because "Alabama's law was patterned after" Florida's law. Pet. 15. But this argument misses the point. No federal constitutional principle requires the Alabama Supreme Court to interpret Alabama's statutes in the same way that the Florida courts have interpreted Florida's similar

statutes. Even if Florida's statute and Alabama's statute used the exact same words—and there are significant differences between the two that have built up over the years—different state courts can interpret the same words differently. That happens all the time.

In summary, Bohannon was sentenced based on an aggravating factor that the jury unanimously found. So his sentence does not implicate a purported split of authority about whether a judge may impose a sentence by considering an aggravating factor that is *not* found by a jury. And there is no split of authority in any event. These state courts simply read their state laws differently.

III. The Court should not grant certiorari on the second or third questions.

The second and third questions are at the heart of the petition's legal arguments. They argue that a death sentence is unconstitutional unless a unanimous jury concludes that the aggravating circumstances outweigh the mitigating circumstances. Essentially, the petition asks this Court to consider whether the Constitution requires unanimous jury sentencing in capital cases, even though all other sentences are imposed by judges.

These questions ask for a complete reevaluation of this Court's longstanding case law. They ask the Court to consider overruling *Harris v. Alabama*, which approved of judicial sentencing in capital cases. They would have the Court consider—for the first time—expanding the scope of the Eighth Amendment to regulate criminal *procedure,* instead

of substance. And if the Court accepted the first two propositions, the Court would then have to consider whether to overrule *Apodaca v. Oregon*, 406 U.S. 404 (1972), which held that the Constitution does not require jury unanimity even when it requires a jury determination.

There is no reason for the Court to wade into these waters. The supposed split of authority that the petition identifies is a difference of opinion rooted in state law. And the supposed constitutional problem is but the difference of a single juror. The jury voted 11 to 1 for Bohannon to receive the death penalty. The Court need not consider radically changing its criminal procedural case law so that Bohannon gets a new sentencing hearing where the jury is instructed that it must be unanimous.

A. The weight of aggravating and mitigating circumstances is not a "fact" under the Sixth Amendment, and there is no split.

The second and third questions start by asking the Court to hold that the respective "weight" of aggravating circumstances and mitigating circumstances is a "fact" that the Sixth Amendment requires a jury to find. Alabama law, like the law of other States, reserves the death penalty for offenders and offenses where the aggravating factors outweigh the mitigating circumstances. *See* ALA. CODE § 13A-5-47(e). In the words of this Court, this phase is the "selection" decision. *Tuilaepa*, 512 U.S. at 971. Although a jury issues an advisory verdict on this question—as the jury did here with an 11 to 1 vote—the

judge ultimately makes the determination in Alabama.

There are at least three reasons why the Court should not grant certiorari to consider whether the "selection decision" is a "fact" that must be submitted to the jury under the Sixth Amendment.

First, there is no split on this question. Although the Delaware Supreme Court and Florida Supreme Court have held that the respective weight of aggravating and mitigating factors is a "fact," this question is ultimately a question of state law. At the very least, it is so bound up in state law that it is impossible to say that there is split between these state courts instead of a difference of opinion about how to interpret their similar state laws.

Second, if there were a split, the Alabama Supreme Court would be on the right side. The Alabama Supreme Court held that the question of whether aggravating circumstances outweighs mitigating circumstances is not a factual determination. Instead, it is "a moral or legal judgment that takes into account a theoretically limitless set of facts." *In re Bohannon*, 2016 WL 5817692, at *4 (quoting *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002)). For example, there is no factual answer to the question of whether a defendant's difficult childhood "outweighs" the heinousness of his crime. Instead, that analysis reflects the kind of prudential sentencing determination that judges make every day in non-capital sentencing.

The Alabama Supreme Court's reasoning is in harmony with this Court's case law. Just a few weeks after deciding *Hurst* last Term, this Court wrote that whether aggravating factors outweigh

mitigating circumstances is *not* a factual question. The Court explained that "the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy." *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016). Because this is not a factual question, the Court reasoned that "[i]t would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it." *Id.* Lower courts have almost uniformly held that a judge may perform the "weighing" of factors and arrive at an appropriate sentence without violating the Sixth Amendment.[2]

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[2] *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1197–98 (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."); *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 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."); *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 rea-

Third, the Court would end judicial sentencing across the board if it adopted Bohannon's position. Within a statutory range, courts evaluate many different kinds of factors about the offender and the nature of his crime to arrive at a just sentence. *See Apprendi*, 530 U.S. at 481 (allowing that judges may "exercise discretion-taking into consideration various factors relating both to offense and offender-in imposing a judgment within the range") (emphasis omitted). If the Sixth Amendment prevented a court from engaging in this kind of analysis in a capital case, it would also prevent a court from engaging in this kind of analysis in a non-capital case. Although the Eighth Amendment may vary between capital and non-capital cases, the Sixth Amendment does not. If the respective weight of aggravating and mitigating circumstances is a "fact," then it is hard to see how a judge could weigh similar sentencing factors, such as propensity to reoffend or youth, without violating the Sixth Amendment. *Cf.* 18 U.S.C. § 3553 (listing factors to be considered at federal sentencing).

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sonable doubt but is a balancing process.' *Apprendi* and its progeny do not change this conclusion."); *Brice v. State*, 815 A.2d 314, 322 (Del. 2003) (*Ring* does not apply to the weighing phase because weighing "does not increase the punishment."); *State v. Gales*, 658 N.W.2d 604, 628–29 (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"); *Oken v. State*, 835 A.2d 1105, 1158 (Md. 2003) ("the weighing process never was intended to be a component of a 'fact finding' process").

B. The Eighth Amendment does not require jury sentencing in capital cases.

Bohannon also invokes the Eighth Amendment in support of his argument that the Constitution requires jury sentencing. This Court held in *Harris v. Alabama*, 513 U.S. 504 (1995), that Alabama's capital sentencing scheme was consistent with the Eighth Amendment. The Court explained that "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence." *Id.* at 515. The Court should not grant certiorari to reconsider that decision for three reasons.

First, the Eighth Amendment provides a uniquely poor vehicle through which to determine whether there is a constitutional right to jury sentencing in capital cases. In *Coker v. Georgia*, 433 U.S. 584 (1977), *Roper v. Simmons*, 543 U.S. 551 (2005), and similar cases, this Court found that "capital punishment—though not unconstitutional per se—is categorically too harsh a penalty to apply to certain types of crimes and certain classes of offenders." *Graham v. Florida*, 560 U.S. 48, 100 (2010) (Thomas, J., dissenting). As this Court explained in *Graham*, "[t]he classification" it uses under the Eighth Amendment "consists of two subsets, one considering the nature of the offense, the other considering the characteristics of the offender." *Id.* at 60. This framework does not fit Bohannon's challenge to judicial sentencing.

Bohannon does not fall within either of the subsets recognized by this Court's Eighth Amendment jurisprudence. He was convicted of capital murder, a crime for which the death penalty is constitutionally permissible. Consequently, a consideration of the

nature of his offense is inapposite. And, unlike age or mental status, a jury's nonbinding recommendation is not an objective "characteristic of the offender." Rather, the jury's recommendation reflects its subjective opinion regarding the appropriate sentence based on the limited evidence available to it. Thus, Bohannon's argument does not fall within the second classification of cases either. Instead, to reach this claim under the Eighth Amendment, the Court would need to create a third category that focuses on societal consensus about procedure. To accept Bohannon's reasoning would thus have uncertain effects in other areas of criminal and sentencing procedure, in which one or more States are an outlier.

Second, even if the Court were to survey "societal consensus" on the issue, nothing has changed since *Harris* to call that precedent into question. Although courts in Delaware and Florida have held similar schemes unconstitutional, that says nothing about societal consensus because those decisions contravene acts of state legislatures. Moreover, there has been no consistent movement in the intervening years since *Harris*: Indiana, which allowed judicial sentencing in 1995, amended its capital punishment procedures in 2002 to place final sentencing authority in the jury, but, in 2003, Delaware amended its capital punishment procedures to allow judicial sentencing. DEL. CODE ANN. tit. 11, § 4209. If the societal consensus is "evolving" on this issue, the direction of that evolution is not yet clear.

Third, Alabama has relied on this Court's decision in *Harris* to sentence hundreds of murderers in the intervening decades. Some of those murderers have likely already been executed. Others are presently

on death row. "[T]he States' settled expectations deserve our respect." *Ring*, 536 U.S. at 613 (Kennedy, J., concurring). The Court should hesitate before retesting the constitutionality of "reforms designed to reduce unfairness in sentencing." *Id.* (Kennedy, J., concurring). And it should decline to consider overruling precedents where "significant reliance interests are at stake that might justify adhering to their result." *Alleyne v. United States*, 133 S. Ct. 2151, 2166 (2013) (Sotomayor, J., concurring).

C. Even if the Sixth or Eighth Amendment required jury sentencing, the jury voted for the death penalty in this case 11 to 1.

The final reason the Court should not grant certiorari on either question 2 or question 3 is that the jury voted 11 to 1 for the death penalty in this case. Accordingly, even if the Court were inclined to say that the "selection decision" is a fact under the Sixth Amendment or that the Eighth Amendment requires jury sentencing, the jury in this case satisfied those standards unless the Constitution *also* requires jury unanimity.

This Court has held that juries do not need to be unanimous. In *Apodaca v. Oregon*, the Court considered whether convictions of crimes by less-than-unanimous juries violated the right to trial by jury in criminal cases under the Sixth Amendment. A plurality of the Court "perceive[d] no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one." 406 U.S. at 411. The plurality concluded that "in either case, the interest of the defendant in hav-

ing the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served." *Id.*

Apodaca is an established precedent. In fact, this "Court has cited or discussed the opinion not less than sixteen times since its issuance" and "each of these occasions, it is apparent that the Court considered that *Apodaca*'s holding as to non-unanimous jury verdicts represents well-settled law." *State v. Bertrand*, 6 So. 3d 738, 742 (La. 2009). Most recently, in *McDonald v. City of Chicag*o, *Ill.*, the Court observed that "Justice Powell's concurrence in the [*Apodaca*] judgment broke the tie" and was therefore controlling. "[H]e concluded that the Sixth Amendment requires juror unanimity in federal, but not state, cases." 561 U.S. 742, 766 n.14 (2010).

Because of *Apodaca*, there is clearly no split on the question of jury unanimity. The Florida Supreme Court was express in its conclusion that any requirement for jury unanimity came from Florida law, not federal law. The Florida court explained that, although federal law did not require unanimity, "this Court, in interpreting the Florida Constitution and the rights afforded to persons within this State, may require more protection be afforded criminal defendants than that mandated by the federal Constitution." *Hurst II*, 2016 WL 6036978, at *13. Similarly, although the Delaware Supreme Court did not issue an opinion explaining its reasoning, one concurrence noted that this Court had never required unanimity. *Rauf*, 145 A.3d at 484–85 (Holland, J., concurring). It ultimately avoided this question because "there is no doubt that unanimous jury verdicts are

required by the Delaware Constitution." *Rauf*, 145 A.3d at 485.

IV. The Court should not grant certiorari on the fourth question presented.

The Petition's fourth question presented seeks certiorari on the constitutionality of instructing an advisory jury that its recommendation is, in fact, advisory.

This question fails every conceivable standard for granting certiorari. There is no alleged split. The issue is not important. And the state court resolved the question on the facts, not the law: "Bohannon's argument that his jury was not impressed with the seriousness and gravity of its finding of the aggravating circumstance during the guilt phase of his trial is not supported by the record." *In re Bohannon*, 2016 WL 5817692, at *7.

In any event, Bohannon's argument on this issue makes no sense. This Court held in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that a prosecutor could not argue to a sentencing jury that it did not bear the ultimate responsibility for sentencing. But *Caldwell* involved a sentencing scheme in which the jury's sentencing decision was binding on the trial court. The problem the Court identified was that the jury was misled about its role. *Id.* at 329. Unlike in *Caldwell*, the "sentencer" under Alabama law is the judge, not the jury. It cannot have been an error for the court to have correctly instructed the jury about its role. The judge who was the actual sentencer knew full well the gravity and importance of that

task and appreciated the binding nature of his decision.

Ultimately, this question merges with the other questions. As we have explained above, when the jury makes a unanimous finding of an aggravating factor in the guilt phase, it has done all the Constitution requires. But in the unusual circumstance when a jury must make fact-findings at sentencing instead of merely suggesting a sentence, the Alabama courts have held that it is error to instruct the jury that its determination is advisory. *See Ex parte McGriff*, 908 So. 2d 1024 (Ala. 2004). This question presented is subsumed by the others and adds nothing to the case.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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