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 ALABAMA SUPREME COURT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Alabama stands alone in its refusal to acknowledge the implications of this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Following that decision, both the Delaware Supreme Court and the Florida Supreme Court struck down their death penalty sentencing schemes – the only other capital sentencing laws in the country to feature "hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations," *Ring v. Arizona*, 536 U.S. 584, 608 n.6 (2002) – as failing to comply with this Court's Sixth and Eighth Amendment jurisprudence. *See Rauf v. State*, 145 A.3d 430, 433 (Del. 2016) (per curiam); *Hurst v. State*, No. SC12-1947, 2016 WL 6036978, at *2 (Fla. Oct. 14, 2016) (per curiam) ["*Hurst II*"]. In contrast, the Alabama Supreme Court has refused to meaningfully reconsider its own death penalty sentencing scheme, choosing instead to rely on a fourteen-year-old precedent to reaffirm its law after *Hurst*. *Ex parte Bohannon*, No. 1150640, 2016 WL 5817692, at *2-4 (Ala. Sept. 30, 2016) (quoting *Ex parte Waldrop*, 859 So. 2d 1181, 1187-90 (Ala. 2002)).

In its Brief in Opposition, Alabama's primary argument is that there is no "split of authority" between Alabama, Florida, and Delaware, but instead just "a difference of opinion rooted in state law." Resp't's Br. Opp'n 12. Yet the recent decisions out of Florida and Delaware were entirely the result of this Court's decision in *Hurst* and

Hurst's clarification of constitutional requirements. *See Hurst II*, 2016 WL 6036978, at *2 ("[W]e hold that the Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury."); *Rauf*, 145 A.3d at 433 (Setting forth "majority's collective view that Delaware's current death penalty statute violates the Sixth Amendment role of the jury as set forth in *Hurst*."). As a result, the "difference of opinion" between the Alabama Supreme Court and the highest courts of Florida and Delaware is a difference resulting in widely divergent applications of the same federal constitutional law. *See* Sup. Ct. R. 10(b)-(c). The inconsistent application of this Court's holding in *Hurst* to the strikingly similar laws of Alabama, Delaware, and Florida requires this Court's intervention to ensure the consistent application of the Sixth Amendment and the constitutional imposition of the death penalty in those states and across the country.[1]

Alabama also incorrectly claims that the questions presented in this case "would have the Court consider – for the first time – expanding the scope of the Eighth

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[1]While Alabama now asserts to this Court that Florida's law has "significant differences" from Alabama's and that the split of authority following *Hurst* is "rooted in state law," Resp't's Br. Opp'n 11-12, Alabama previously informed this Court that its capital sentencing statute was directly implicated by this Court's consideration of the issues in *Hurst*. *See* Br. of Amici Curiae Alabama and Montana in Supp. of Resp't, *Hurst v. Florida*, No. 14-7505 (U.S. Aug. 5, 2015). Indeed, Alabama urged this Court not to overrule *Spaziano v. Florida*, 468 U.S. 447 (1984), noting that it had "relied on this Court's decisions in *Spaziano* and *Harris*[*v. Alabama*, 513 U.S. 504 (1995),] to sentence hundreds of murderers in the intervening decades." Br. of Amici Curiae at 9. To take the position now that *Hurst*, which explicitly overruled *Spaziano* despite this request from Alabama, has no bearing on Alabama's capital sentencing scheme is disingenuous.

Amendment to regulate criminal *procedure*, instead of substance." Resp't's Br. Opp'n 11-12. Beginning with *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), this Court has long applied the Eighth Amendment to death penalty sentencing procedures in order to ensure that such procedures meet the increased "need for reliability in the determination that death is the appropriate punishment in a specific case," *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). *See also, e.g.*, *Mills v. Maryland*, 486 U.S. 367, 383-84 (1988); *Sumner v. Shuman*, 483 U.S. 66, 72 (1987); *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978). Mr. Bohannon is not arguing, as Alabama claims, *see* Resp't's Br. Opp'n 16-17, that some characteristic of himself or his offense has rendered him *per se* ineligible for the death penalty – rather, he argues that Alabama's law did not reliably guide the sentencer's discretion in his case and in that way failed to meet the "basic requirement" of the Eighth Amendment, *Woodson*, 428 U.S. at 303.

With respect to the Eighth and Sixth Amendment implications of Alabama's failure to impose a unanimity requirement, Alabama does not dispute that its laws render it an outlier on the national stage. Instead, Alabama argues that "the supposed constitutional problem" in this case does not merit this Court's attention because it "is but the difference of a single juror." Resp't's Br. Opp'n 12. Yet, in 22 of the 30 other death penalty jurisdictions, the eleven-to-one sentencing vote in this case would have automatically resulted in Mr. Bohannon being sentenced to life or life without parole.[2]

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[2]*See* Ark. Code Ann. § 5-4-603(c); Colo. Rev. Stat. § 18-1.3-1201(2)(d); Fla. Stat. § 921.141(2)(c); Ga. Code Ann. § 17-10-31(c); Idaho Code Ann. § 19-2515(7); Kan. Stat. Ann. § 21-6617(e); La. Code Crim. Proc. Ann. art. 905.8; Miss. Code Ann. § 99-19-101(3); N.H. Rev. Stat. Ann. § 630:5(IX); N.C. Gen. Stat. § 15A-2000(b); Okla.

In five other death penalty states, a single juror declining to vote for a death sentence would have required an entirely new penalty phase proceeding with a unanimous recommendation of death by a jury before a death sentence could be imposed.[3] The "difference of a single juror" in those jurisdictions, then, is in fact the difference between life and death.

Alabama further asserts that this Court "would end judicial sentencing across the board" if it required that the weighing finding in Alabama's death penalty sentencing scheme be made by a jury. Resp't's Br. Opp'n 15. This is incorrect on two counts. First, the Sixth Amendment analysis set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny requires careful analysis not of labels – such as "elements" and "sentencing factors" – but of the actual functioning of specific sentencing schemes, *see Hurst*, 136 S. Ct. at 621-22; *Ring*, 536 U.S. at 602; *Apprendi*,

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Stat. tit. 21, § 701.11; 42 Pa. Cons. Stat. § 9711(c)(1)(v); S.C. Code Ann. § 16-3-20(C); Tenn. Code Ann. § 39-13-204(h); Tex. Code Crim. Proc. Ann. art. 37.071 Sec. 2(g); Utah Code Ann. § 76-3-207(5); Va. Code Ann. § 19.2-264.4(D); Wash. Rev. Code § 10.95.080(2); Wyo. Stat. Ann. § 6-2-102(b); *Jones v. United States*, 527 U.S. 373, 381 (1999) (holding that if jury in federal criminal proceeding is "unable to reach a unanimous verdict, the sentencing determination passes to the court" to impose life without parole); *State v. Brooks*, 661 N.E.2d 1030, 1042 (Ohio 1996) ("In Ohio, a solitary juror may prevent a death penalty recommendation by finding that the aggravating circumstances in the case do not outweigh the mitigating factors."); *Piper v. Weber*, 771 N.W.2d 352, 356 (S.D. 2009) ("[I]f one juror votes against imposing death, the defendant will receive a life sentence."); *see also Hurst II*, 2016 WL 6036978, at *18 (requiring unanimity for recommendation of death under Florida law).

[3] *See* Ariz. Rev. Stat. Ann. § 13-752(K); Cal. Penal Code § 190.4(b); Nev. Rev. Stat. § 175.556(1); Or. Rev. Stat. § 163.150(2)(a); *McPherson v. Com.*, 360 S.W.3d 207, 218-19 (Ky. 2012) (holding in capital case that conducting second penalty phase to determine sentence was appropriate when first penalty phase jury was unable to agree on punishment).

530 U.S. at 494. In Alabama, the capital statute unquestionably requires that there be a specific finding that the existing aggravating circumstances "outweigh the mitigating circumstances" *before* a death sentence may be imposed. Ala. Code §§ 13A-5-46(e), -47(e). Holding that this necessary weighing finding "is [a] critical finding upon which the sentencing judge 'shall impose a sentence of death'" in Alabama, *Rauf*, 145 A.3d at 434, would not automatically invalidate any other judicial sentencing scheme unless that scheme, too, authorized imposition of a certain sentence "only upon finding some additional fact" at sentencing, *Blakely v. Washington*, 542 U.S. 296, 305 (2004). Second, insofar as this Court relies upon the Eighth Amendment in this case, its jurisprudence there has long allowed imposition of heightened standards in capital proceedings only, rather than "across the board," given the "significant constitutional difference between the death penalty and lesser punishments." *Beck v. Alabama*, 447 U.S. 625, 637 (1980).

Moreover, Alabama's continued insistence that there exists some legal consensus in support of its position that the weighing finding "is not a factual determination" but "'a moral or legal judgment that takes into account a theoretically limitless set of facts,'" Resp't's Br. Opp'n 13 (quoting *Bohannon*, 2016 WL 5817692, at *4 (quoting *Waldrop*, 859 So. 2d at 1189)), cannot survive scrutiny. As an initial matter, Alabama cites this Court's decision in *Kansas v. Carr*, 136 S. Ct. 633 (2016), as supportive authority, Resp't's Br. Opp'n 13-14, but in that case this Court approved of exactly the type of scheme that Alabama here argues is not feasible – under Kansas law, "both the existence of aggravating circumstances and the conclusion that they outweigh

mitigating circumstances must be proved beyond a reasonable doubt," *Carr*, 136 S. Ct. at 643. Further, and perhaps most importantly, Alabama's claim to the support of a consensus is belied by the recent decisions out of Florida and Delaware, each of which found their analogous weighing finding to be one of the "elements" "allowing imposition of the death penalty" that must be found by a jury beyond a reasonable doubt.[4] *Hurst II*, 2016 WL 6036978, at *10; *see also Rauf*, 145 A.3d at 434.

Finally, contrary to Alabama's claim that the first question presented "is not even implicated on the facts of this case," Resp't's Br. Opp'n i, one of the Alabama Supreme Court's key findings in this case was that the jury's guilt/innocence phase verdict "made Bohannon eligible for a sentence of death" *regardless* of any additional penalty-phase findings with respect to the existence or non-existence of aggravating circumstances. *Bohannon*, 2016 WL 5817692, at *6. Indeed, there is a strong possibility that Mr. Bohannon's jury did, in fact, consider additional aggravating circumstances at the penalty phase. In its penalty phase opening statement in this case, the State introduced three aggravating circumstances for the jury to consider (R. 1549-50); though the court ultimately ruled that the State had failed to meet its burden with respect to the two additional aggravating circumstances (R. 1629-30), the court also failed to announce that decision to the jury or to identify the one aggravating

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[4]In fact, one of the cases Alabama relies on as evidence of a consensus in its favor, *Brice v. State*, 815 A.2d 314 (Del. 2003), Resp't's Br. Opp'n 14-15 n.2, was explicitly overruled in *Rauf*. *See Rauf*, 145 A.3d at 486 (Holland, J., concurring) ("Thus, just as '[t]ime and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*[*v. Florida*, 490 U.S. 638 (1989) (per curiam)],' the reasoning of *Brice* is no longer viable following the decision [in] *Hurst*." (quoting *Hurst*, 136 S. Ct. at 624)).

circumstance that remained for its consideration (*see* R. 1663-64 (referring to "aggravating circumstances")). Nothing on the record establishes that that the jurors did not, in fact, consider either or both of the two additional aggravating circumstances initially alleged by the State. (*See* C. 87, 89 (penalty phase verdict forms fail to specify aggravating circumstance(s) considered).) According to the Alabama Supreme Court's interpretation of Alabama law in this case, however, such confusion is inconsequential because the sole "finding[] necessary to impose the death penalty," *Hurst*, 136 S. Ct. at 622, is the existence of "'[o]nly one aggravating circumstance,'" *Bohannon*, 2016 WL 5817692, at *3 (quoting *Waldrop*, 859 So. 2d at 1188).

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the Alabama Supreme Court.

Respectfully submitted,

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