No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN DEBLASE, Petitioner,

v.

STATE OF ALABAMA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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January 6, 2020

CAPITAL CASE

QUESTIONS PRESENTED

1. Do the Sixth Amendment and the Due Process Clause permit, in a capital case, the admission of statements of a nontestifying codefendant, acknowledged by all parties as violating the Confrontation Clause, without any evidence of a knowing and voluntary waiver by the defendant?

2. Does the Constitution permit the imposition of a death sentence in the absence of a unanimous jury verdict in support of death?

RELATED PROCEEDINGS

Mobile County Circuit Court:

State v. DeBlase, CC-2012-3095. Order of conviction entered November 5, 2014; sentencing order entered January 8, 2015.

Alabama Court of Criminal Appeals:

Ex parte State (In re: State v. DeBlase), No. CR-13-0040. Order denying petition for writ of mandamus to the Mobile County Circuit Court entered October 15, 2013.

DeBlase v. State, No. CR-14-0482. Opinion affirming conviction and death sentence issued November 16, 2018; order overruling application for rehearing entered February 22, 2019.

Alabama Supreme Court:

Ex parte DeBlase, No. 1180393. Order denying petition for writ of certiorari to the Alabama Court of Criminal Appeals entered August 23, 2019.

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PETITION FOR WRIT OF CERTIORARI

John DeBlase respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals in this case.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals affirming Mr. DeBlase's convictions and sentence, *DeBlase v. State*, No. CR-14-0482, 2018 WL 6011199 (Ala. Crim. App. Nov. 16, 2018), is attached as Appendix A. The order of that court denying Mr. DeBlase's application for rehearing is unreported and is attached as Appendix B. *DeBlase v. State*, No. CR-14-0482 (Ala. Crim. App. Feb. 22, 2019). The order of the Alabama Supreme Court denying Mr. DeBlase's petition for writ of certiorari is also unreported and is attached as Appendix C. *Ex parte DeBlase*, No. 1180393 (Ala. Aug. 23, 2019).

JURISDICTION

The Alabama Court of Criminal Appeals affirmed Mr. DeBlase's capital convictions and death sentence on November 16, 2018. *See* Appendix A. That court overruled a timely application for rehearing on February 22, 2019. *See* Appendix B. The Alabama Supreme Court denied Mr. DeBlase's petition for a writ of certiorari on August 23, 2019. *See* Appendix C. On November 15, 2019, Justice Thomas extended the time to file this petition for a writ of certiorari until January 6, 2020. *DeBlase v. Alabama*, No. 19A533 (U.S. Nov. 15, 2019). Petitioner invokes this Court's jurisdiction

pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In November 2005, Natalie DeBlase was born to John DeBlase and Corrine Findley in Mobile, Alabama. The couple married in 2006, and their second child,

Jonathan "Chase" was born that December. (C. 2310; R. 3113-14.)[1] Soon thereafter, Corrine left Mr. DeBlase and her children to pursue a relationship with another man. (R. 3130.) Mr. DeBlase was then given primary custody of Natalie and Chase; at trial, multiple witnesses testified that he was a caring father. (R. 3129, 3170-73, 4127-30.)

Mr. DeBlase struggled to maintain employment, however, due to his responsibilities as a single parent and his intellectual impairments. (C. 1382-88, 1467, 1624-28.) These impairments emerged in elementary school, where he was placed in special education. (C. 2792-96, 2957.) Corrine's own struggles limited her contact with the children, and Mr. DeBlase began to seek a mother figure for them. (C. 857, 890; R. 3126.)

In late 2008, Mr. DeBlase started dating Heather Keaton. She spoke convincingly about her background in child care, and Mr. DeBlase began to defer to Ms. Keaton regarding the discipline of his children. (C. 213-14; R. 3172-75, 3229-30, 4133-38.) According to the testimony of multiple witnesses, however, including a social worker, Ms. Keaton expressed resentment and animosity toward the children, poor judgment with respect to her behavior around them, and poor caregiving skills. (R. 3182-83, 3327, 3715, 4136-37.) Friends observed Ms. Keaton beating Natalie with a studded belt, withholding food from both children, and cursing them. (C. 213-14; R. 3229-30, 3273.) In early 2010, Ms. Keaton became pregnant, and Mr. DeBlase

[1]"C." refers to the clerk's record, and "R." refers to the reporter's transcript.

attended massage therapy school while she stayed home with the children. (*See* R. 3327.)

On the morning of March 4, 2010, Ms. Keaton became enraged with Natalie, bound her hands and feet with duct tape, and zipped her into a suitcase. (C. 850-51; R. 2414.) Mr. DeBlase meekly departed for school and told Ms. Keaton that Natalie "better be out" when he returned. (R. 3336.) When Mr. DeBlase came home, however, he found Natalie, age 4, still bound in the suitcase and dead. (C. 890-92, 1042-43; R. 2415-18.) In shock, Mr. DeBlase followed Mr. Keaton's directions to leave her body in a wooded area near Citronelle. (C. 869, 881.)

Confoundingly, Mr. DeBlase stayed with Heather Keaton after Natalie's death. He would later tell investigators that he was "blinded by love and just blinded by fear too." (R. 852.) On June 19, 2010, he took a sleeping pill. (C. 910-11.) Chase, now 3, had wet the bed, and Ms. Keaton bound Chase to a broomstick and put tape over his face. (R. 2421-23; C. 854-55.) When Mr. DeBlase awoke, he found his son still taped to the broomstick, dead. As he told police, "He was lifeless in my arms." (C. 855.) Following this, Mr. DeBlase again complied with Ms. Keaton's demands and left Chase's body in rural Mississippi. (R. 2422.)

The couple subsequently left Mobile, and settled in Louisville, Kentucky, where Keaton gave birth to their daughter. (R. 2577-78.) Eventually, suspicions gathered about the two missing children and, on December 2, 2010, Mr. DeBlase was taken into custody. (R. 2447-50.) In his subsequent statements to law enforcement, Mr. DeBlase provided detailed descriptions of finding Natalie lifeless in the suitcase (C. 879-80, 889-

91), and Chase taped to a broom with a sock stuffed in his mouth (C. 877, 883-84). At times, Mr. DeBlase broke down and acknowledged his weakness in staying with Ms. Keaton and failing to intervene in her horrific abuse. (*See, e.g.*, C. 911 ("And because of all this and all I feel like the most stupidest guy in the whole, wide world."); *see also* C. 903, 908.) Mr. DeBlase further agreed to accompany investigators to the areas where the children's remains were eventually found in order to assist them in their search. (R. 2488-2503, 2509-11, 2549-50.) On December 6, 2010, he was charged with aggravated child abuse and abuse of a corpse. (R. 2558-59.)

While incarcerated at the Mobile Metro Jail, Mr. DeBlase was abused by other inmates, including a cellmate who had been previously employed by the local district attorney's office. (R. 3001-02.) At the insistence of that cellmate and another inmate, Mr. DeBlase wrote statements claiming responsibility for his children's deaths. (C. 1050-59; R. 928-31, 3012-17.) In August 2011, after police learned about these jail statements, he was indicted on three counts of capital murder: two counts of intentional murder of a victim under age 14, Ala. Code § 13A-5-40(a)(15), and one count of the intentional murder of two or more victims pursuant to the same scheme or course of conduct, Ala. Code § 13A-5-45(a)(10) (C. 80; 2 Supp. C. 2).

Heather Keaton was also questioned by law enforcement, and gave two lengthy, videotaped testimonial statements. (*See* C. 914-87.) There, she portrayed herself as a loving person who sought to protect Natalie and Chase from other abusive adults. (*See* C. 950-53, 973.) Additionally, these statements incriminated Mr. DeBlase by claiming, among other self-serving assertions, that Ms. Keaton suspected him of

poisoning his children (C. 918, 933), that he had threatened his son Chase with death (C. 919), and that he had directed Ms. Keaton to put Natalie in the closet where she died (C. 919). In a pair of pretrial filings, defense counsel initially moved the court to bar all reference to statements by Ms. Keaton that "have any tendency to implicate or incriminate John DeBlase" (C. 482) while also arguing that they were entitled to present the "inconsistent and contradictory versions of her involvement" in the children's deaths provided in those same statements (C. 491). In both pleadings, the defense cited *Bruton v. United States*, 391 U.S. 121 (1968), to assert that the portions of Ms. Keaton's interrogations in which she made statements incriminating Mr. DeBlase were inadmissible under the Sixth Amendment. (C. 482, 491-92.) Ms. Keaton was not called as a witness, and thus the trial court, defense counsel, and the State all agreed that admission of her statements would violate Mr. DeBlase's right to confrontation. (*See* R. 1032-33, 1035.)

In a subsequent pretrial hearing, however, defense counsel announced that they would allow the introduction of "the entirety of Heather Keaton's statements, including any reference to John DeBlase, which may tend to incriminate him," and were therefore "waiving any Bruton objection" with respect to her two statements. (R. 1032; *see also* R. 1029-40.) Mr. DeBlase was present for this hearing, but made no statements indicating that he understood or consented to the waiver offered by his counsel, and neither his counsel nor the court asked him if he understood or consented. The State then introduced Ms. Keaton's statements to the jury in its case-in-chief, playing both videos in full as the jury followed along with written transcripts. (R.

2680-81, 2705-07, 2798; *see also* C. 914-87.)

For their part, the defense theory at trial was that John DeBlase had no intention for his children to be killed, but was guilty of manslaughter for recklessly disregarding the risks of Ms. Keaton's abuse. (*See, e.g.*, R. 3866-67, 3908.) Defense counsel also presented evidence that Mr. DeBlase sought medical care for Chase preceding his death. (R. 3644-48, 3655-56.) On November 5, 2014, the jury convicted Mr. DeBlase of all three counts of capital murder. (R. 4014.)

At the penalty phase, the State presented evidence of two aggravating factors: that Mr. DeBlase caused the deaths of two or more people during one course of conduct, and that the deaths were especially heinous, atrocious, or cruel. (R. 4038.) Defense counsel presented as mitigating factors that Mr. DeBlase had no significant criminal history, was an accomplice to an act committed by another person, and acted under the domination of Ms. Keaton. (R. 4336-37, 4421.) The defense called G. Tashbin, Mr. DeBlase's high school football coach, who testified that Mr. DeBlase was "a pleaser" who endured serious punishment during tackling drills in hopes of fitting in with his schoolmates. (R. 4101-05.) Mr. DeBlase's mother, Ann DeBlase, described her son as a "slow learner," and "a follower." (R. 4117-19.) Dr. John Goff, a neuropsychologist, testified that he diagnosed Mr. DeBlase with a schizotypal personality disorder with dependent features; he reported that Mr. DeBlase had trouble maintaining his identity and would go to great lengths to avoid abandonment. (R. 4206-08.) Dr. Goff also testified that Mr. DeBlase had a low IQ, scoring in the 80s. (R. 4210.) On November 19, 2014, the jury recommended a death sentence by a non-unanimous vote of 10-2.

(C. 81.) The trial court held a sentencing hearing on January 8, 2015, and sentenced John DeBlase to death that same day. (R. 4428; *see also* C. 58-79.)

In his brief to the Alabama Court of Criminal Appeals, Mr. DeBlase argued that the admission of Heather Keaton's statements violated his right to confrontation under the Sixth Amendment, and that the court erred by allowing his counsel to waive those rights without any showing that Mr. Dearman had knowingly or intelligently agreed to the waiver. The court found no reversible error, agreeing with an Illinois Supreme Court decision to hold that "'defense counsel may waive a defendant's right of confrontation as long as the defendant does not object and the decision to stipulate is a matter of trial tactics and strategy.'" *DeBlase v. State*, No. CR-14-0482, 2018 WL 6011199, at *46 (Ala. Crim. App. Nov. 16, 2018) (quoting *People v. Campbell*, 802 N.E.2d 1205, 1213 (Ill. 2003)). Mr. DeBlase further argued on appeal that his death sentence is unconstitutional because it is predicated on a non-unanimous jury verdict; the Court of Criminal Appeals affirmed without addressing that claim directly, however, instead simply citing *Ex parte Bohannon*, 222 So. 3d 525 (Ala. 2016), wherein the Alabama Supreme Court approved of Alabama's death penalty sentencing scheme in light of this court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). *See DeBlase*, 2018 WL 6011199, at *68. This petition follows.

REASONS FOR GRANTING THE WRIT

I. Review Should Be Granted to Decide Whether a Court May Admit, in a Capital Case, the Statements of a Nontestifying Codefendant, Acknowledged by All Parties as Violating the Confrontation Clause, Without Evidence of a Knowing and Voluntary Waiver by the Defendant.

This Court has repeatedly held that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970); *see also, e.g.*, *Boykin v. Alabama*, 395 U.S. 238, 244-43 (1969) ("Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality."); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("[C]ourts indulge every reasonable presumption against waiver of constitutional rights . . . ."). In this case, however, the trial court allowed the State to present testimonial, incriminating statements from Mr. DeBlase's nontestifying codefendant, Heather Keaton – in clear violation of his rights under the Confrontation Clause (*see* R. 1032-33, 1035) – without any showing from Mr. DeBlase that he knowingly or voluntarily waived those rights (R. 1032, 2680-81, 2705-07, 2798; *see also* C. 914-87). On appeal, the Alabama Court of Criminal Appeals approved of the trial court's actions here based on a holding that "counsel may waive a defendant's constitutional right to confrontation as part of counsel's trial strategy." *DeBlase v. State*, No. CR-14-0482, 2018 WL 6011199, at *44 (Ala. Crim. App. Nov. 16, 2018); *see also id.* at *43-*46.

As this Court explained in *United States v. Olano*, 507 U.S. 725 (1993),

"[w]hether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake," *id.* at 733; *see also, e.g.*, *Florida v. Nixon*, 543 U.S. 175, 187 (2004) ("certain decisions" – such as "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal" – are sufficiently significant that they "cannot be made for the defendant by a surrogate" (internal quotations omitted)). In its discussion of the Confrontation Clause, however, this Court has not yet addressed "whether the defendant must participate personally in the waiver" of the right to confrontation or "whether the defendant's choice [in agreeing to the waiver] must be particularly informed or voluntary." *Olano*, 507 U.S. at 733; *see Crawford v. Washington*, 541 U.S. 36, 42 n.1 (2004) (expressing "no opinion" on questions of waiver dismissed in lower court).[2] As a result of this lack of clarification, lower courts have come to divergent conclusions on those same questions.

The Sixth Circuit, for example, has held that even where a lawyer attempts "a waiver of the defendant's rights under the Confrontation Clause, [that] waiver [does] not bind [the defendant] in the absence of a showing that he consented." *Carter v. Sowders*, 5 F.3d 975, 981-82 (6th Cir. 1993). "Waiver of the right to confront one's

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[2]Some lower courts have implied that the Court did address this question with its opinion in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), where it noted in a footnote that "[t]he right to confrontation may, of course, be waived, including by failure to object to the offending evidence," *id.* at 314 n.3; *see, e.g.*, *United States v. Robinson*, 617 F.3d 984, 989 (8th Cir. 2010); *People v. Buie*, 817 N.W.2d 33, 40 (Mich. 2012). That passing assertion, however, is dicta.

accuser," the *Carter* court noted, "is evaluated according to the standards for waiving any constitutional right as enunciated in *Johnson v. Zerbst*," *id.* at 980-81, and as a result the right "'may be waived only by voluntary and knowing action,'" *id.* (quoting *Boyd v. Dutton*, 405 U.S. 1, 2-3 (1972)). Similarly, after noting a split among its "sister circuits," the Sixth Circuit has announced that it is "inclined to require that defendants," as opposed to their attorneys, "make a clear waiver of their Sixth Amendment right." *United States v. Williams*, 632 F.3d 129, 133 (4th Cir. 2011).

A good number of circuit courts have held to the contrary, however, finding that "defense counsel may waive a defendant's Sixth Amendment right to confrontation where the decision is one of trial tactics or strategy that might be considered sound," *United States v. Plitman*, 194 F.3d 59, 63 (2d Cir. 1999), even where the only observable participation from the defendant is his silent "acquiesce[nce]," *United States v. Robinson*, 617 F.3d 984, 989-90 (8th Cir. 2010); *see also, e.g.*, *United States v. Ceballos*, 789 F.3d 607, 613 (5th Cir. 2015) (right to confrontation properly waived by "counsel's unchallenged stipulation to the admission of the testimony" at issue); *United States v. Gamba*, 541 F.3d 895, 900 (9th Cir. 2008) ("[C]ounsel may waive the accused's Sixth Amendment right to cross-examination and confrontation as a matter of trial tactics or strategy."); *United States v. Cooper*, 243 F.3d 411, 418 (7th Cir. 2001) (attorney may waive right to confrontation "so long as the defendant does not dissent" and so long as "attorney's decision was a legitimate trial tactic or part of a prudent trial strategy" (quotation marks omitted)). In *Plitman*, the Second Circuit reasoned that because the right to confrontation is implicated in "strategic and tactical matters" – as

opposed to "personal" rights like those involved in "matters like pleading guilty, waiving a jury trial, pursuing an appeal, and deciding to testify" – it can be waived by counsel in pursuit of strategic or tactical purposes. 194 F.3d at 63. According to this reasoning, the right to confrontation may be waived where there is "no indication that [the] defendant disagreed with or objected to counsel's decision," and the waiver "was a matter of prudent trial strategy," *id.* (quotation marks omitted).

State courts – including the Alabama Supreme Court – have also approved of this limiting interpretation of the right to confrontation. *See Lokos v. State*, 179 So. 2d 714, 725 (Ala. 1965) (approving of waiver of counsel where record "certainly show[ed] no protest" on part of defendant and "procedure followed was to [his] advantage"), *judgment vacated on other grounds*, *Lokos v. Alabama*, 408 U.S. 935 (1972); *see also, e.g.*, *People v. Buie*, 817 N.W.2d 33, 44 (Mich. 2012) ("[T]he right of confrontation is not a right that must be personally waived by the defendant . . . ."); *State v. Pasqualone*, 903 N.E.2d 270, 277 (Ohio 2009) ("[W]e hold that an attorney may waive a client's Sixth Amendment right to confrontation in the appropriate situation."); *Commonwealth v. Amirault*, 677 N.E.2d 652, 673 n.23 (Mass. 1997) (right to confrontation not on "very short list of rights . . . that must be waived personally by a defendant and cannot be waived by his counsel"). In this case, the Court of Criminal Appeals relied extensively on *People v. Campbell*, 802 N.E.2d 1205 (Ill. 2003), wherein the Illinois Supreme Court noted that "'a majority of the courts that have addressed the issue have held that counsel in a criminal case may waive his client's sixth amendment [*sic*] right of confrontation by stipulating to the admission of evidence,'"

id. at 1210. In arriving at this conclusion, the Illinois court appeared to rely primarily on the expectation that waivers by counsel of the right to confrontation would typically be part of a "legitimate trial tactic or part of a prudent trial strategy." *Id.* at 1211.

These decisions fail to provide a substantive explanation for why the right to confrontation should be regarded as solely "strategic and tactical," *Plitman*, 194 F.3d at 63, rather than "'fundamental' and personal to the defendant, waivable only by the defendant," *Brown v. Artuz*, 124 F.3d 73, 77 (2nd Cir. 1997). This Court has made clear that both the right to confrontation and the right to counsel, for example, are "bedrock procedural" guarantees in our criminal trials. *See Crawford*, 541 U.S. at 42 (noting that Confrontation Clause provides "bedrock procedural guarantee"); *Teague v. Lane*, 489 U.S. 288, 311 (1989) (noting that right to counsel is "one of the *bedrock procedural elements*" of fair trial). Yet, in order to accept a defendant's waiver of his right to counsel, a trial court must receive that waiver from the defendant directly, with evidence on the record indicating that the defendant "'knows what he is doing and his choice is made with eyes open.'" *Faretta v. California*, 422 U.S. 806, 835 (1975) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)); *see also Indiana v. Edwards*, 554 U.S. 164, 170 (2008). Nothing in this Court's caselaw establishes why the right to confrontation, a similarly "bedrock" constitutional right in American law, would not receive a similar level of protection.

Indeed, some insight to the contrary can be gleaned from this Court's discussion of rights for which it *has* found waiver to be "a tactical decision that is well suited for the attorney's own decision." *Gonzalez v. United States*, 553 U.S. 242, 250 (2008). At

their core, these cases tend to allow waiver-by-attorney where the rights are issue relate to the administration of criminal proceedings; when and how cases move forward given various regulations. In *Gonzalez*, for example, this Court held that a defendant's attorney may waive the statutory right to have an Article III judge, rather than a magistrate judge, preside over jury selection, *id.* at 248-53, relying in large part on the fact that the appellant had conceded that "a magistrate judge is capable of competent and impartial performance of the judicial tasks involved in jury examination and selection," *id.* at 251, and an assertion that "the choice to [demand an Article III judge] reflects considerations more significant to the realm of the attorney than to the accused," *id.* at 253. In *New York v. Hill*, 528 U.S. 110 (2000), this Court similarly held that counsel may waive a defendant's right to object to delay in violation of the Interstate Agreement on Detainers, *id.* at 114-16, based fundamentally on a finding that "[s]cheduling matters are plainly among those for which agreement by counsel generally controls," *id.* at 115.

By contrast, the Confrontation Clause addresses core constitutional concerns regarding the types of evidence that may be employed against a criminal defendant and how the State should proceed in collecting that evidence. *See Crawford*, 541 U.S. at 50-51. Much as Mr. DeBlase was entitled to counsel, he was also entitled to a criminal trial in which he was able to confront the witnesses against him. *Id.* at 50-53. Despite these protections, however, Mr. DeBlase was convicted and sentenced to death based in part on the incriminating statements of his nontestifying codefendant, which she gave as she knowingly faced her own capital murder charges. (*See* C. 914-87.)

Such statements have been found by this Court to be "devastating" to a defendant on trial, *Bruton v. United States*, 391 U.S. 123, 132 (1968), and in this case they undoubtedly prejudiced Mr. DeBlase by presenting his jury with insinuations and accusations that are made nowhere else in the record (C. 918-19, 925, 933, 963). Such a fundamental divergence from the commands of the Sixth Amendment cannot be permitted without "voluntary and knowing action" by the defendant. *Carter*, 5 F.3d at 980-81.

This Court should grant certiorari review in this case to address whether a trial court may admit evidence in violation of the Confrontation Clause based solely on a waiver offered by defense counsel, and without evidence that the defendant himself knowingly or voluntarily consented to that waiver, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

II. This Court Should Hold This Petition in Light of *Ramos v. Louisiana* in Order to Clarify Whether a Death Sentence May Be Constitutionally Imposed in the Absence of a Unanimous Jury Verdict in Favor of Death.

This Court should also hold Mr. DeBlase's petition in light of this Court's consideration of *Ramos v. Louisiana*, No. 18-5924, where this Court will determine whether the Fourteenth Amendment ensures that the Sixth Amendment's guarantee of a unanimous jury verdict protects criminal defendants in state court proceedings. Mr. DeBlase was sentenced to death after his jury returned a non-unanimous verdict recommending death by a vote of ten-to-two – the minimum number of death votes permissible under Alabama law. *See DeBlase v. State*, No. CR-14-0482, 2018 WL 6011199, at *1 (Ala. Crim. App. Nov. 16, 2018); *see also* Ala. Code § 13A-5-46(f) ("The

decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors."). On appeal, Mr. DeBlase argued that the imposition of a death sentence in his case, after the jury returned a non-unanimous sentencing verdict, was unconstitutional. In its decision, the Court of Criminal Appeals failed to directly address that claim, and instead cited Alabama precedent rejecting the application of this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), to Alabama's capital sentencing scheme. *DeBlase*, 2018 WL 6011199, at *68 (citing *Ex parte Bohannon*, 222 So. 3d 525 (Ala. 2016)).

In *State v. Ramos*, 231 So. 3d 44 (La. Ct. App. 2017), the Louisiana Fourth Circuit Court of Appeals affirmed the conviction of a criminal defendant by a ten-to-two verdict, noting that "under current jurisprudence from the U.S. Supreme Court, non-unanimous twelve-person jury verdicts are constitutional." 231 So. 3d at 53-54 (citing *Apodaca v. Oregon*, 406 U.S. 404 (1972)). While the Louisiana court was correct insofar as a plurality of this Court has found that the Sixth Amendment does not require jury unanimity in a non-capital state case involving a twelve-person jury, *Apodaca*, 406 U.S. at 406, this Court has also found that non-unanimity in a six-person jury does violate the Sixth Amendment, *Burch v. Louisiana*, 441 U.S. 130, 137-38 (1979), and that a unanimous verdict of guilt is a legitimate requirement for a death case given "the severity of the punishment," *Johnson v. Louisiana*, 406 U.S. 356, 364-65 (1972). This Court has long recognized that, in federal proceedings, the Sixth Amendment requires unanimity in both guilt/innocence verdicts and in capital sentencing verdicts, *see Andres v. United States*, 333 U.S. 740, 749 (1948); in *Ramos*,

it finally considers whether that guarantee extends to the state courts.

Mr. DeBlase's death sentence is directly implicated by the possibility of relief to the petitioner in *Ramos*. As the petitioner in *Ramos* repeatedly noted, this Court has long recognized that a "jury's decision upon *both guilt and whether the punishment of death should be imposed* must be unanimous." *Andres*, 333 U.S. at 749 (emphasis added); *see* Brief for Pet. at 16, *Ramos v. Louisiana*, No. 18-5924 (U.S. June 11, 2019); Record of Proceedings at 31, *Ramos v. Louisiana*, No. 18-5924 (U.S. Oct. 7, 2019). As a result, if the Sixth Amendment's unanimity requirement were incorporated into state proceedings, as Mr. Ramos argues must happen, Mr. DeBlase's current death sentence would violate that requirement and therefore be unconstitutional.

The Sixth Amendment interests implicated in these proceedings strike at the core values of the American criminal justice system. As this Court explained in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the unanimity requirement "extends down centuries into the common law," *id.* at 477. "'[T]o guard against a spirit of oppression and tyranny on the part of rulers,'" it continued,

> and 'as the great bulwark of [our] civil and political liberties,' 2 J. Story, Commentaries on the Constitution of the U.S. 540-541 (4th ed. 1873), trial by jury has been understood to require that 'the truth of every accusation . . . should afterwards be confirmed *by the unanimous suffrage of twelve of [the defendant's] equals and neighbours* . . . .' 4 W. Blackstone, Commentaries on the Laws of Eng. 343 (1769).

Id. (emphasis changed); *see also*, *e.g.*, *Thompson v. Utah*, 170 U.S. 343, 353 (1898), *overruled on other grounds by*, *Collins v. Youngblood*, 497 U.S. 37 (1990). The Sixth Amendment's unanimity requirements plays a key role in its overall function of

protecting defendants against overprosecution, *see Ballew v. Georgia*, 435 U.S. 223, 229-30 (1978); "promot[ing] group deliberation," *id.*; guaranteeing that outcomes are controlled by a "representative cross-section of the community," *id.*; and fostering public confidence in those outcomes, *see Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017); *see also* Brief for Pet. at 27-33, *Ramos*. These principles are borne out by social science, as well; studies have shown that jurors operating under a unanimity requirement deliberate for longer, consider more information, and ultimately express more confidence in the justness of their decisions. *See, e.g.*, Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1272-76 (2000).

In addition to the Sixth Amendment concerns implicated in *Ramos*, Mr. DeBlase's case raises important questions under the Eighth Amendment. This Court has consistently held that "there is a significant constitutional difference between the death penalty and lesser punishments." *Beck v. Alabama*, 447 U.S. 625, 637 (1980); *see also Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."). In particular, the Eighth Amendment demands that administration of the death penalty reflect "'the evolving standards of decency that mark the progress of a maturing society.'" *Kennedy v. Louisiana*, 554 U.S. 407, 446 (2008) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). "[T]his principle requires that use of the death penalty be restrained," this Court has explained, and "must be reserved for the worst of crimes and limited in its instances of application." *Id.* at 446-47. These restraints include

"heightened reliability . . . in the determination whether the death penalty is appropriate," *Sumner v. Shuman*, 483 U.S. 66, 72 (1987), and a requirement that the class of people sentenced to death is narrowed to include only the most culpable individuals, *Zant v. Stephens*, 462 U.S. 862, 876-77 (1983). To hold that the death penalty may be imposed where the jury has returned anything less than a unanimous verdict in favor of death violates these Eighth Amendment principles.

Moreover, when assessing the constitutionality of a particular criminal punishment practice under the Eighth Amendment, this Court has consistently looked to whether state legislative and sentencing trends evince a national consensus against it. *See, e.g.*, *Kennedy*, 554 U.S. at 422-26; *Roper v. Simmons*, 543 U.S. 551, 564-67 (2005); *Atkins v. Virginia*, 536 U.S. 304, 312-17 (2002). Accordingly, it must be noted that Alabama is the only state nation-wide – out of 29 death penalty states and the federal and military justice systems – that allows a death sentence to be predicated on a non-unanimous jury verdict. Until 2016, Alabama was one of only three states – alongside Florida and Delaware – to maintain a "hybrid" capital sentencing scheme in which the jury returns an "advisory verdict" that need not be unanimous and may be overridden by the trial judge. *Ring v. Arizona*, 536 U.S. 584, 608 n.6 (2002).[3] After this Court struck down Florida's death penalty sentencing scheme as violating the Sixth Amendment in *Hurst*, however, both the Florida and Delaware supreme courts

[3]This Court also identified Indiana's scheme as a "hybrid system," but that state has since eliminated its provision allowing for judicial override in capital sentencing proceedings. *See* Ind. Code § 35-50-2-9(e).

mandated that jury sentencing verdicts in those states be final – and unanimous. *See Hurst v. State*, 202 So. 3d 40, 59 (Fla. 2016) (per curiam) (on remand from this Court, finding that non-unanimous jury recommendations of death violate Sixth and Eighth Amendments); *Rauf v. State*, 145 A.3d 430, 433-34 (Del. 2016) (per curiam) (capital sentencing law unconstitutional in part because it authorizes non-unanimous verdict). After the Alabama Supreme Court declined to take similar action, *see Ex parte Bohannon*, 222 So. 3d 525 (Ala. 2016), the state legislature eliminated judicial override while leaving intact the state's provisions permitting non-unanimous sentencing verdicts, *see* S.B. 16, Reg. Sess. 2017 (Ala. 2017). As a result, Alabama is now the only state in the country that allows a death sentence to be premised on a non-unanimous jury verdict.

Given that the "'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures,'" *Atkins*, 536 U.S. at 312 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) *abrogated on other grounds by Atkins*, 536 U.S. at 321), Alabama's outlier status in this respect is evidence that its unusual practices are contrary to a national consensus. *See also Burch*, 441 U.S. at 138 (in Sixth Amendment context, noting that only two states allowed non-unanimous jury verdicts in six-person jury cases and finding that "this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not"). Under this Court's Sixth and Eighth Amendment jurisprudence, that is powerful evidence that Alabama's practices in this respect are indeed outside the line "delimiting . . . between those jury

practices that are constitutionally permissible and those that are not." *Burch*, 441 U.S. at 138.

Mr. DeBlase's ability to challenge the constitutionality of his death sentence on the basis of *Ramos* is directly connected to the timing of this Court's decision. If this Court refuses to hold Mr. DeBlase's petition pending the decision in *Ramos*, Mr. DeBlase will face significant procedural obstacles to challenging the constitutionality of the non-unanimous jury verdict in his case based on that decision. *See Green v. Fisher*, 565 U.S. 34, 38 (2011) ("clearly established Federal law" limited to this Court's precedents at time of state court decision on direct appeal); *see also id.* at 41 (petitioner missed "obvious means of asserting his claim," including filing petition for writ of certiorari requesting remand in light of intervening decision). Accordingly, this Court should hold Mr. DeBlase's petition in the light of the possibility that *Ramos* will have a significant impact on the question of whether the Constitution prohibits imposition of a death sentence in a case where the jury has not returned a unanimous verdict in favor of death.

CONCLUSION

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

Respectfully submitted,

s/ Rachel P. Judge
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