

No. 17-9448
CAPITAL CASE

In the
Supreme Court of the United States

◆

BART JOHNSON,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

◆

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

BRIEF IN OPPOSITION

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June 22, 2018

CAPITAL CASE

QUESTIONS PRESENTED

(Restated)

1. Whether the trial court violated *Hurst v. Florida*, 136 S. Ct. 616 (2016), by making a minor misstatement about the weighing of aggravating and mitigating circumstances after repeatedly instructing the jurors that they had to unanimously find the existence of an aggravating circumstance beyond a reasonable doubt before they could consider the death penalty.
2. Whether the Court should consider overruling *Harris v. Alabama*, 513 U.S. 504 (1995), which held Alabama's recently repealed capital sentencing statute to be constitutional even though it did not require jury sentencing in capital cases.
3. Whether the imposition of a death sentence after a non-unanimous advisory jury recommendation of death is unconstitutional, even though this Court has held that the Constitution does not require jury unanimity in criminal cases.
4. Whether it is a violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), to instruct a jury rendering an advisory verdict that its verdict is, in fact, advisory.

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INTRODUCTION

Once again, this Court is confronted with the senseless murder of Office Philip Davis, who was gunned down in the line of duty. Shortly before midnight on December 3, 2009, Officer Davis stopped Bart Johnson for speeding through a construction zone south of Birmingham, Alabama. When Officer Davis presented Johnson with a citation, Johnson shot him in the face at point-blank range and left him to die on the side of the Interstate.

Johnson was convicted of two counts of capital murder in 2011. His crimes were not capital offenses with “overlapping” aggravating circumstances—i.e., aggravators proven to exist by virtue of the guilt-phase verdict. After being instructed on aggravating and mitigating circumstances, the jury recommended 10–2 that Johnson be sentenced to death, and the trial court adopted that recommendation.

After Johnson’s convictions and sentence were upheld on direct appeal, this Court remanded the matter to the Alabama Supreme Court for reconsideration in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016). That court remanded the case to the Alabama Court of Criminal Appeals, which ultimately affirmed because the jury was instructed ***multiple times*** that it could not even consider returning a death recommendation if it failed to unanimously find the existence of an aggravating circumstance.

As the Court of Criminal Appeals discussed, and as will be set forth in detail below, Johnson now attempts to make much of nothing by quoting a single misstatement from the trial court out of context and claiming that the jury believed it could recommend a death sentence without finding an aggravating circumstance. This issue is highly factbound and meritless. The other issues raised in the petition—whether judicial weighing and sentencing in a capital case is unconstitutional after *Hurst*, whether a jury verdict for death must be unanimous, and whether a defendant may be sentenced to death when the jury’s penalty-phase verdict is only a recommendation—do not warrant certiorari, and this Court should deny review.

STATEMENT OF THE CASE

A. The penalty-phase proceedings

The facts of this case were set out in the State’s previous brief in opposition. *See* Brief in Opposition at 2–4, *Johnson v. Alabama*, 15-7091 (Dec. 7, 2015). It is sufficient at this point to state that there was never any question that Johnson killed Officer Davis. The murder was captured on Officer Davis’s dashboard camera: Officer Davis stopping Johnson’s custom-tagged Acura, his encounter with Johnson, Johnson covertly turning off his car’s interior lights and raising the sunshade while Officer Davis wrote the citation, Officer Johnson returning to the Acura and asking Johnson to sign the citation,

Johnson instead shooting Officer Davis in the face and speeding off, and a semi pulling up two minutes later to try to assist the fallen officer lying on the side of I-65. (C. 442–43¹; *see* State’s Ex. 1 (dashboard camera recording).) Indeed, the issue at trial was not whether Johnson killed Officer Davis, but rather whether he was not guilty by reason of mental disease or defect. (C. 445.)

Jury selection commenced on May 2, 2011, and testimony began on May 6. (*See* R. 3.) On May 12, the jury found Johnson guilty of two counts of capital murder: murder of a police officer in the line of duty, and murder committed by or through the use of a deadly weapon fired from within a vehicle. (C. 410, 412; R. 2047–48; *see* ALA. CODE §§ 13A-5-40(a)(5), (a)(18) (1975)).

At the time of Johnson’s trial, the ultimate decision as to sentence in a capital case was made by the trial court. The jury heard evidence as to aggravating and mitigating circumstances during a penalty-phase proceeding, then rendered an advisory verdict. If the jury did not unanimously find the existence of at least one aggravating circumstance, then it was obligated to recommend life without parole, and the trial court would likewise be bound to sentence the defendant accordingly. If the jury unanimously found an aggravator, however, then it had to weigh any proven aggravating

1. In accordance with the Alabama courts’ format for records on appeal, citations are as follows:

Transcript on direct appeal:	R.
Clerk’s record on direct appeal:	C.

circumstances against the mitigating circumstances offered by the defense and recommend either death (by at least 10–2) or life without parole (by at least 7–5). The trial court then took the jury’s recommendation into consideration when it conducted its own weighing of the aggravators and mitigators, often adopting the jury’s recommendation but sometimes overriding it.²

While the defense may present anything it chooses in mitigation, aggravating circumstances are limited to those provided in section 13A-5-49 of the Code of Alabama. Many capital offenses in Alabama have “overlapping” aggravating circumstances proven beyond a reasonable doubt by the jury’s guilt-phase verdict; for example, robbery-murder (§ 13A-5-40(a)(2)) has an overlapping aggravator in section 13A-5-49(4) (“The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit . . . robbery[.]”).

Johnson’s case was not one with an overlapping aggravator. Instead, the prosecution argued for the existence of two aggravators: the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody (§ 13A-5-49(5)), and the murder was committed to

2. Judicial override was eliminated by legislation in April 2017. *See* Ala. Laws Act 2017-131. The current capital sentencing scheme is provided in ALA. CODE §§ 13A-5-45, -46, -47 (1975).

disrupt or hinder the lawful exercise of any government function or the enforcement of laws (§ 13A-5-49(7)). While neither aggravating circumstance was an “overlapping” aggravator, the facts of the case made both applicable: Officer Davis attempted to cite Johnson for speeding twenty miles per hour over the limit through a construction zone in the middle of the night, and Johnson shot him in the face and fled rather than take the ticket. (C. 442.) The trial court thoroughly instructed the jury on aggravating circumstances and what the jury had to decide prior to considering a death sentence:

An aggravating circumstance is a circumstance specified by law which indicates or tends to indicate that the defendant should be sentenced to death.

[...]

The issue at this sentence hearing concerns circumstances of aggravation and circumstances of mitigation. You should consider and weigh against each other in deciding what the proper punishment is in each case. In making a recommendation concerning what the punishment should be, you must determine whether an aggravating circumstance exists and if so you must determine whether any mitigating circumstances exist.

In making your determination concerning the existence of aggravating and mitigating circumstances, you should consider the evidence presented at this sentencing hearing. You should also consider any evidence that was presented during the guilt phase of the trial with regards to the existence of any aggravating circumstances or mitigating circumstances.

The law in this state provides a list of aggravating circumstances which may be considered by a jury in recommending punishment. If you are convinced beyond a reasonable doubt from the evidence that such aggravating circumstance exists, the same definition that I gave you earlier concerning reasonable doubt now applies to this matter.

If the jury is not convinced to a reasonable doubt based upon the evidence that one of the aggravating circumstances exists, then the jury must recommend the defendant's punishment be life imprisonment without parole regardless of whether there are any mitigating circumstances.

[...]

Now, as I stated to you, the burden of proof is upon the State of Alabama to convince each of you beyond a reasonable doubt as to the existence of any aggravating circumstance considered by you in determining what punishment is to be recommended in each case. **This means that before you can even consider recommending the defendant's punishment be death in a particular case, each and every one of you must be convinced beyond a reasonable doubt based upon the evidence that an aggravating circumstance exists in that case.**

[...]

You may not consider any aggravating circumstance other than I've instructed you on. **You may not consider an aggravating circumstance unless you are convinced by the evidence beyond a reasonable doubt as to the certainty of the existence of that aggravating circumstance in the particular case.**

If you should find that no aggravating circumstance has been proven beyond a reasonable doubt in one or both cases, you must return a verdict recommending the defendant's punishment be life imprisonment without the possibility of parole in that particular case or cases. In that event you need not concern yourself for the mitigation circumstances in that case—in a particular case or cases.

If you find beyond a reasonable doubt that the aggravating circumstance on which I instruct you does, indeed, exist in one or both cases, then you must proceed to consider and determine the mitigating circumstances of any of these cases in which you found an aggravating circumstance exist.

[...]

Only the aggravating circumstance must be proved beyond a reasonable doubt. I've stated to you many times the burden is upon the State of Alabama to convince you and convince each of you from the evidence beyond a reasonable doubt there does exist an aggravating circumstance in each case.

In order to consider an aggravating circumstance in each case it is necessary that the jury unanimously agree upon its existence in that case or cases. All twelve of you must be convinced beyond a reasonable doubt that an aggravating circumstance exists in order for any of you to consider that aggravating circumstance in determining what the sentence should be.

[...]

There must be a unanimous agreement on the existence of a particular aggravating circumstance in a particular case before it can be considered by any juror in that particular case. There need not be a unanimous agreement on the existence of any particular mitigating circumstance before it can be considered in either case.

(R. 2209–14, 2016–18 (emphasis added).)

After all of this instruction, the court made a slip of the tongue:

The law in this state recognizes that's possible in at least some situations that one or fewer aggravating circumstances might outweigh a large number of mitigating circumstances. The law of this state also recognizes as possible, at least in some situations, that a large number of aggravating circumstances might be outweighed by one or a few mitigating circumstances. In other words, the law contemplates that different circumstances may be given different weights or values in determining a sentence in a particular case.

(R. 2219–20 (emphasis added).) The court evidently took its charge from the Alabama Pattern Jury Instructions, which provide in relevant part:

C. The law of this State recognizes that it is possible, in at least some situations, that **one or a few** aggravating circumstances might outweigh a larger number of mitigating circumstances.

ALABAMA PATTERN JURY INSTRUCTIONS, PENALTY PROCEEDINGS—CAPITAL
CASES at 8 (November 9, 2007),

http://judicial.alabama.gov/docs/library/docs/penalty_phase.pdf.

After this mistake, the court concluded:

Now, if after a full and fair consideration of the particular case you are convinced beyond a reasonable doubt that at least one aggravating circumstance does exist and the aggravating circumstance outweighs the mitigating circumstance or circumstances, your verdict would be as follows—of course by this form it says you desire to return a verdict for death. That’s the one I just mentioned to you: “We, the jury, find the defendant, Bart Wayne Johnson, be punished by death[.]”

[...]

If, after a fair and full consideration of all the evidence in a particular case, you determine that the mitigating circumstances outweigh any aggravating circumstance or circumstances that exist **or that no aggravating circumstance exists or that you are not convinced beyond a reasonable doubt that at least one aggravating circumstance does exist**, your verdict then would be to recommend life imprisonment without parole.

(R. 2222–24 (emphasis added).)

After deliberation began, the jury had questions for the court:

JUROR ALLEN: We had a little misunderstanding between all of us. Does it have to meet both aggravating circumstances or just at least one of the two?

THE COURT: No. It doesn’t have to meet both. You must have at least one aggravating circumstance. So, that’s easy to answer. You

must have at least one, of course, in each case. It applies in both cases.

You must have one aggravating circumstance and you must find—any aggravating circumstance must be found beyond a reasonable doubt. And then you weigh—it's a process of weighing—there's no numerical way that you do that, but you just weigh mitigating circumstances and aggravating circumstances.

Now, do you understand that?

JUROR ALLEN: If you should have two, does that have to be unanimous?

THE COURT: Any time you have an aggravating circumstance, an aggravating circumstance, it must be unanimous and it must be beyond a reasonable doubt.

(R. 2227–28.) The court recharged the jury as to weighing the aggravators and mitigators to be certain that there was no misunderstanding:

I will tell you that the law provides that whether death or life without parole should be imposed upon the defendant depends on whether any aggravating circumstance exists, and if so whether the aggravating circumstance or circumstances outweighs the mitigating circumstances.

Any aggravating circumstance is a circumstance specified by law which indicates or tends to indicate that the defendant should be sentenced to death.

A mitigating circumstance is any circumstance that indicates or tends to indicate that the defendant should be sentenced to life imprisonment without the possibility of parole instead of death.

The issue at this sentence hearing concerns circumstances of aggravation and circumstances of mitigation. You should consider and weigh against each other in deciding what the proper punishment is in each case.

In making a recommendation concerning what the punishment should be, you must determine whether an aggravating circumstance exists and if so you must determine whether any mitigating circumstance exist.

In making your determination concerning the existence of aggravating and mitigating circumstances, you should consider the evidence presented at the sentencing hearing. You should also consider any evidence that was presented during the guilt phase of the trial with regards to the existence of any aggravating circumstances or mitigating circumstances.

The law in this state provides a list of aggravating circumstances which may be considered by a jury in recommending punishment. If you are convinced beyond a reasonable doubt from the evidence that such aggravating circumstance exists, the same definition that I gave you earlier concerning reasonable doubt applies to this matter as well.

If the jury is not convinced to a reasonable doubt based upon the evidence that, one, that an aggravating circumstances exists, then the jury must recommend the defendant's punishment be life without parole regardless of whether there are any mitigating circumstances. In other words, there must be an aggravating circumstance that exists in each case before you can consider the death penalty. Does everybody understand that? At lease [sic] one in each case. You can use the same aggravating circumstances if you find it exists, in each one of those cases.

[...]

As I stated to you, the burden of proof is on the State of Alabama to convince each of you beyond a reasonable doubt the existence of any aggravating circumstance considered by you in determining what punishment will be recommended in each case. **This means that before you can even consider recommending the defendant's punishment be death in a particular case, each and every one of you must be convinced beyond a reasonable doubt, based upon the evidence, that an aggravating circumstance exists in that case.**

Do you understand that? At least one must exist in each case.

[...]

A reasonable doubt about an aggravating circumstance may arise from all the evidence or part of the evidence or either from lack of evidence or even from a failure of the evidence in this case. You may not consider any aggravating circumstance other than those two that I mentioned to you. **You may not consider an aggravating circumstance unless you are convinced by the evidence beyond a reasonable doubt as a certainty of existence of that aggravating circumstance in a particular case.**

Of course, if you find that no aggravating circumstance has been proven beyond a reasonable doubt in any case then you must return a verdict in that case recommending the defendant's punishment be fixed at life imprisonment without possibility of parole in that particular case. In that event of course you would not concern yourself with the reasons for mitigating circumstances in that case or cases.

If you find beyond a reasonable doubt that the aggravating circumstance on which I instruct you does, indeed, exist in one or more cases then you must proceed to consider and determine the mitigating circumstances in that case or cases that you found that the aggravating circumstance existed.

[...]

In order to consider an aggravating circumstance in each case, it is necessary that you unanimously agree upon its existence in that case or cases. All twelve of you must be convinced beyond a reasonable doubt that an aggravating circumstance exists in order for any of you to consider the aggravating circumstance in determining what the sentence should be.

(R. 2235–40, 2243 (emphasis added).) Unfortunately, the court repeated its earlier mistake in the second charge:

The process of weighing aggravating and mitigating circumstances against each other in each case in order to determine proper punishment in each case is not a mechanical process. Your weighing all the circumstances against each other should not

consist of merely adding up the number of aggravating circumstances or mitigating circumstances and comparing that number to the total number of mitigating circumstances or aggravating circumstances. That would be improper. **The law in this state recognizes it's possible that in some situations one or fewer aggravating circumstances might outweigh a larger number of mitigating circumstances.** The law of this state also recognizes it's possible, at least in some situations, that a large number of aggravating circumstances might be outweighed by one or a few mitigating circumstances.

(R. 2244 (emphasis added).) Notably, neither side objected to this charge:

THE COURT: Okay. Does that satisfy the state?

[PROSECUTION]: Well done.

THE COURT: Satisfied by the defendant?

[DEFENSE]: I thought it was well done, too.

(R. 2247.)

The jury recommended 10–2 that the court sentence Johnson to death. (C. 407, 411; R. 2250–51.) The jury was not asked to submit a special verdict form stating which aggravating circumstances it found to exist. The court agreed with the sentencing recommendation, found that both aggravating circumstances existed, and sentenced Johnson accordingly on June 16. (C. 429; Sent. R. 43, 45.³)

3. The record numbers the sentencing proceedings separately from the trial. The sentencing transcript is found in Volume 16 of the direct appeal record.

B. Direct appeal

On direct appeal with new counsel, Johnson argued that the State failed to prove the existence of an aggravating circumstance and claimed that the trial court erred in imposing the death penalty without a unanimous jury recommendation for death, as there was neither an overlapping aggravator nor a special verdict form stating which aggravators were found. He did not raise a claim concerning the trial court's "one or fewer" slip-up.

In affirming Johnson's convictions and sentence, the Court of Criminal Appeals found that the evidence supported both aggravating circumstances, *Johnson v. State*, CR-10-1606, 2014 WL 2061147, at *43–44 (Ala. Crim. App. May 20, 2014). The court further found that the jury's 10–2 death recommendation satisfied the requirements of *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), explaining:

[T]o satisfy the requirements of *Ring* and *Apprendi*, it is not necessary that the guilt-phase verdict establish the existence of an aggravating circumstance, that the jury return a unanimous sentencing recommendation, or that the jury specify which aggravating circumstance or circumstances it found to exist. Instead, under Alabama's capital-sentencing scheme, *Ring* and *Apprendi* require only that the jury unanimously find beyond a reasonable doubt that at least one aggravating circumstance exists.

In the present case, the trial court instructed the jury on the two aggravating circumstances it could consider, and the court repeatedly instructed the jury that it could not even consider recommending the death penalty unless it first unanimously found beyond a reasonable doubt that at least one of those aggravating circumstances existed. "It is well settled that jurors are presumed

to follow, not disregard, the trial court’s instructions.” *Brooks v. State*, 973 So. 2d 380, 409 (Ala. Crim. App. 2007). We find that, because the jury recommended by a vote of 10–2 that Johnson be sentenced to death, it is clear that the jury unanimously found the existence of at least one aggravating circumstance. *See Pilley*, 930 So. 2d at 567–68 (finding that a jury vote of 10–2 recommending the death penalty demonstrated that the jury unanimously found the existence of a proffered aggravating circumstance because the trial court had specifically instructed the jury that it could not proceed to a vote on whether to impose the death penalty unless it had already unanimously agreed that an aggravating circumstance existed); *see also Ex parte McNabb*, 887 So. 2d 998, 1004–06 (Ala. 2004) (same). Therefore, the imposition of Johnson’s death sentence did not violate *Ring*.

Id. at 50–51 (internal citations edited or omitted).

On August 21, 2015, the Alabama Supreme Court denied certiorari. *Ex parte Johnson*, No. 1140770 (Ala. Aug. 21, 2015). This Court denied certiorari on January 11, 2016. *Johnson v. Alabama*, 136 S. Ct. 857 (2016) (mem.).⁴

C. *Hurst* remand

The day after certiorari was denied in Johnson’s case, the Court decided *Hurst v. Florida*, 136 S. Ct. 616 (2016), ruling that Florida’s capital sentencing scheme was unconstitutional because the judge, not the jury, made the critical findings necessary to impose the death penalty.

Johnson petitioned the Court for rehearing based on *Hurst*, and the Court granted certiorari, vacating its previous order and remanding the matter

4. The sole issue raised was whether the trial court erred by denying a change of venue in light of the pretrial media coverage.

to the Alabama Supreme Court. *Johnson v. Alabama*, 136 S. Ct. 1837 (2016) (mem.). The case ultimately returned to the Court of Criminal Appeals, which received supplemental briefing on the *Hurst* question. On October 13, 2017, that court affirmed, finding that Johnson’s death sentence did not violate *Hurst*. *Johnson v. State*, CR-10-1606 (Ala. Crim. App. Oct. 13, 2017). In particular, the court noted the trial court’s lengthy and thorough charge explaining the necessity of the jury’s unanimously finding an aggravating circumstance beyond a reasonable doubt before it could consider the death penalty. As for the claim Johnson now makes in this Court regarding the trial court’s “one or fewer” slip-up, the Court of Criminal Appeals dismissed it as meritless:

[T]he quoted excerpt Johnson uses to support his argument is taken out of context and presented in a way that is misleading. A review of the entirety of the jury instructions reveals that the quoted passage appeared after the trial court clearly explained to the jurors that they must unanimously find the existence of an aggravating circumstance before considering whether to recommend death. The trial court then proceeded to explain that, if the jury found that one or more aggravating circumstances existed, it was to then proceed to weigh those circumstances against any mitigating factors it found. . . .

Contrary to Johnson’s argument, this instruction did not suggest that the jury could recommend death even if it did not find any aggravating circumstances to exist. Rather, it explained that the weighing process was not a mere tallying system and that various aggravating or mitigating circumstances might have different weights.

Because the trial court instructed the jury that it could not proceed to consider recommending the death penalty unless it first found a particular aggravating circumstance to exist, the fact that

the jury proceeded to the weighing process and voted on whether to impose the death penalty or a sentence of life imprisonment without parole demonstrates that it found at least one particular aggravating circumstance to exist in each case. Accordingly, *Hurst* was satisfied because the jury made the finding necessary to make Johnson eligible for the death penalty. *See Ex parte Bohannon*, 222 So. 3d at 533 (“Because in Alabama a jury, not a judge, makes the finding of the existence of an aggravating circumstance that makes a capital defendant eligible for a sentence of death, Alabama’s capital-sentencing scheme is not unconstitutional on this basis.”).

Id. at 13–15 (citations edited or omitted).

The Alabama Supreme Court denied certiorari, *Ex parte Johnson*, No. 1170273 (Ala. Feb. 23, 2018), and the matter is once again before this Court.

REASONS THE PETITION SHOULD BE DENIED

No issue in Johnson's petition is worthy of certiorari.

The first issue, concerning the trial court's misstatement during the penalty-phase charge, is entirely factbound and meritless, and Johnson has offered nothing that would compel this Court to grant review.

The second issue is yet another attempt by a death-sentenced defendant to convince this Court to invalidate Alabama's capital sentencing scheme after *Hurst*. This Court held Alabama's capital punishment statute to be constitutional in *Harris v. Alabama*, 513 U.S. 504 (1995), despite the fact that it allowed judicial sentencing. This Court has consistently declined to consider petitions seeking to overrule or limit *Harris* in light of *Hurst*. For example, in *Bohannon v. Alabama*, 137 S. Ct. 831 (2017) (mem.), the Court denied certiorari when the Alabama Supreme Court held in *Ex parte Bohannon*, 222 So. 3d 525 (Ala. 2016), that Alabama's capital scheme remained constitutional after *Hurst*. Johnson has presented no compelling argument for this Court to reverse that case or to grant relief in his, particularly considering how thoroughly the jury was instructed that it could not ever consider the death penalty without first unanimously finding the existence of an aggravating circumstance beyond a reasonable doubt. Moreover, Alabama has changed its capital sentencing statute to provide for jury sentencing going forward—making this issue a moot point in every case except existing cases like

Johnson's. The Court should not grant certiorari to consider overruling a longstanding precedent, *Harris v. Alabama*, when such overruling would have no prospective effect on any future cases because of a change in state law.

The third issue asks this Court to decide whether a unanimous penalty-phase jury verdict is required to sentence a defendant to death. Johnson points to no circuit split on the issue, and indeed, he admits that a plurality of the Court found that the Sixth Amendment does not require jury unanimity even where it requires a jury factfinding. *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972). That other states have different rules concerning capital sentencing does not render Alabama's scheme unconstitutional, nor does it present a reason for this Court to grant certiorari.

Finally, the fourth issue is nothing novel: whether it is a violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), to instruct a jury rendering an advisory penalty-phase verdict that its verdict is advisory. As this Court explained in *Romano v. Oklahoma*:

Caldwell [is] relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision. Thus, [t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law.

512 U.S. 1, 9 (2004) (quotation and citations omitted). At the time of Johnson's trial, the jury's penalty-phase verdict was a recommendation, and the jury was

properly advised of that fact, in accordance with *Romano*. Moreover, this Court recently denied certiorari in cases raising similar *Caldwell* claims. *See Guardado v. Jones*, 138 S. Ct. 1131, 1132–34 (2018) (mem.) (Sotomayor, J., dissenting); *Middleton v. Florida*, 138 S. Ct. 829, 829–30 (2018) (mem.) (Sotomayor, J., dissenting). There is no reason for this Court to grant certiorari now to consider a question the Court has already resolved.

I. Certiorari is unwarranted because the jurors were repeatedly instructed that they could not consider a death sentence without first unanimously finding that an aggravating circumstance existed beyond a reasonable doubt.

Johnson first contends that this Court should grant certiorari because his jury was instructed that it could recommend a death sentence without finding an aggravating circumstance. This claim is factbound and meritless.

As discussed above, the trial court repeatedly stressed to the jury during both penalty-phase charges that it could not consider a death recommendation without unanimously finding the existence of an aggravating circumstance beyond a reasonable doubt. (*See* R. 2209–14, 2016–18, 2222–24, 2227–28, 2235–40, 2243.) Twice—once during each charge—the trial court accidentally said “one or fewer aggravating circumstances” instead of “one or a few aggravating circumstances,” the intended pattern instruction, when discussing the weighing of aggravators and mitigators. (*See* R. 2219–20, 2244.) Despite this minor mistake, both the prosecution and defense said that they were satisfied after the second charge; defense counsel went so far as to state, “I thought it was well done, too.” (R. 2247.)

The Court of Criminal Appeals correctly deemed this issue meritless. Noting that Johnson “concede[d] that the trial court instructed the jury that it must find at least one aggravating circumstance in order to recommend a sentence of death,” the court explained that the brief excerpt Johnson used to

support this claim “is taken out of context and presented in a way that is misleading,” and that “[a] review of the entirety of the jury instructions reveals that the quoted passage appeared after the trial court clearly explained to the jurors that they must unanimously find the existence of an aggravating circumstance before considering whether to recommend death.” *Johnson*, CR-10-1606, at 13. The passage in question also related to the **weighing** of aggravating and mitigating circumstances, not to the necessity of an aggravator’s existence. *Id.* at 14. Indeed, “[c]ontrary to Johnson’s argument, this instruction did not suggest that the jury could recommend death even if it did not find any aggravating circumstances to exist. Rather, it explained that the weighing process was not a mere tallying system and that various aggravating or mitigating circumstances might have different weights.” *Id.*

Thus, the Court of Criminal Appeals correctly found that *Hurst* was satisfied in this case. *Id.* at 15. The jurors were instructed that they could not consider a death recommendation without unanimously finding an aggravator to exist, and jurors are presumed to follow the instructions given by the trial court. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (“A jury is presumed to follow its instructions. Similarly, a jury is presumed to understand a judge’s answer to its question.” (citations omitted)).

That the jury returned a non-unanimous death recommendation is immaterial to this calculus. One aggravating circumstance was all that was needed to expose Johnson to the death penalty, and as the jury **must** have found at least one prior to considering the death penalty, *Apprendi*, *Ring*, and *Hurst* were satisfied.⁵ See *Ex parte Bohannon*, 222 So. 3d at 533 (“Because in Alabama a jury, not a judge, makes the finding of the existence of an aggravating circumstance that makes a capital defendant eligible for a sentence of death, Alabama’s capital-sentencing scheme is not unconstitutional on this basis.”), *cert. denied*, *Bohannon v. Alabama*, 137. S. Ct. 831 (2017) (mem.).

Despite Johnson’s protestations to the contrary, the fact is that his jury was amply instructed about the necessity of unanimously finding an aggravating circumstance beyond a reasonable doubt before considering the possibility of the death penalty. That the court made a minor misstatement—so minor, in fact, that no party objected—does not create a *Hurst* violation, and certiorari is unwarranted.

5. It bears repeating that although the two aggravators presented for the jury’s consideration did not “overlap” with the offense, the facts of the case provided more than sufficient support for their existence. Johnson shot Officer Davis during a traffic stop and fled rather than take a speeding ticket. The aggravating circumstance were that the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody (§ 13A-5-49(5)), and that the murder was committed to disrupt or hinder the lawful exercise of any government function or the enforcement of laws (§ 13A-5-49(7)).

II. Certiorari is unwarranted because Alabama’s capital sentencing scheme remains constitutional after *Hurst*, and this is a bad vehicle to address the question in any event.

Second, Johnson claims that this Court should grant certiorari to “resolve the conflict between the state courts” concerning whether a jury must make unanimous findings as to the existence of all aggravating circumstances and the weighing of those circumstances. This claim is a backdoor attempt to have this Court consider reversing its longstanding precedent in *Harris v. Alabama*, 513 U.S. 504 (1995). There, this Court rejected the argument that Alabama’s capital sentencing statute was unconstitutional because it allowed judges instead of juries to impose a capital sentence. Alabama has relied on *Harris* to sentence hundreds of murderers since 1995. “[T]he States’ settled expectations deserve our respect.” *Ring v. Arizona*, 536 U.S. 584, 613 (2002) (Kennedy, J., concurring).

The Court has consistently declined to grant a petition to address whether to overrule *Harris* in light of *Hurst*. As the Court declined to do so in *Bohannon v. Alabama*, 137 S. Ct. 831 (2017) (mem.)—an appeal from the Alabama Supreme Court’s decision finding that Alabama’s capital scheme was constitutional after *Ring* and remained so post-*Hurst*—and has continued to decline to consider the issue in every subsequent certiorari petition raising the issue, there is no need for the Court to grant certiorari in Johnson’s case.

Alabama’s capital punishment system is constitutional under *Hurst*. In *Ring*, the Court applied the rule of *Apprendi* to death penalty cases, holding 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, 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 the jury can.

Hurst did not add anything of substance to *Ring*. In *Hurst*, Florida prosecuted a defendant for first-degree murder. *Hurst*, 136 S. Ct. at 620. The jury did not unanimously find the existence of an aggravating circumstance at either the guilt or penalty phase of trial. Instead, it returned an advisory recommendation of 7–5 in favor of death. *Id.* Because the jury found no aggravating circumstance, the trial court 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 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.

In *Ex parte Bohannon*, the Alabama Supreme Court considered *Ring*, *Hurst*, and its prior decision in *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002), then found that Alabama’s capital scheme remained constitutional. First, the court noted that “*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.” 222 So. 3d at 532. “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.* As for the claim that *Hurst* requires that the jury weigh the aggravating and mitigating circumstances, the court explained that “*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.” *Id.* Finally, the court concluded that *Hurst* does not hold that “the Sixth Amendment requires that a jury **impose** a capital sentence.” *Id.* at 533. Indeed, Alabama’s capital sentencing scheme at the time of Bohannon’s trial—and Johnson’s—was in line with Justice Scalia’s concurrence in *Ring*:

What today's decision says is that the jury must find the existence of the **fact** that an aggravating factor existed. 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.

Ring, 536 U.S. at 612–13 (Scalia, J., concurring).

Johnson's case does not bear the infirmity present in *Hurst*. As laid out in detail above, Johnson's jury was repeatedly instructed that it could not consider the death penalty without unanimously finding the existence of an aggravating circumstance. The jury deliberated for hours, asked questions, was charged a second time, and ultimately returned a 10–2 death recommendation. Thus, the jury had to have found an aggravating circumstance. This is all that *Ring* and *Hurst* require. That the trial court found the existence of both aggravators before **accepting the jury's recommendation** does not lessen the fact that the jury found the fact necessary for the imposition of the death penalty.

The Court should also reject certiorari on this issue for three additional reasons. First, this is not an override case—both jury and judge weighed the aggravators and mitigators and decided that Johnson deserved to die for murdering Officer Davis over a speeding ticket. Second, there is no meaningful dispute that the evidence established the existence of an aggravating factor in this case. Johnson is on video shooting a police officer in the middle of a traffic

stop; the evidence established beyond any shadow of a doubt the charged aggravating circumstance that “the murder was committed to disrupt or hinder the lawful exercise of any government function or the enforcement of laws,” ALA. CODE § 13A-5-49(7)) (1975). Third, the statutory procedure under which Johnson was sentenced has been repealed. Going forward, Alabama law requires jury sentencing in capital cases. The Court should not call into question a longstanding precedent like *Harris v. Alabama* in a case where the judge and jury voted to impose the death penalty, the aggravating factors were established by a video of a murder such that any error was harmless, and this Court’s decision on the question would have no prospective effect because the applicable statute has been repealed.

III. Certiorari is unwarranted because the Constitution does not require jury unanimity.

Third, Johnson contends that this Court should grant certiorari to determine whether a unanimous penalty-phase verdict is required to sentence a defendant to death. He points to no circuit split warranting certiorari, instead merely noting that Alabama is among the minority of states that do not require unanimity as to punishment. And, like many of his other arguments, his request that this Court grant certiorari would require the Court to consider overruling longstanding and well-established law.

At the outset, this case is a poor vehicle for the question presented. As discussed above, Alabama’s constitutional capital sentencing scheme at the time of Johnson’s trial made the jury’s penalty-phase determination a **non-binding recommendation** to the trial court. While the trial court was obligated to consider the jury’s recommendation, the court could override it after considering a presentence investigation report and additional testimony from the prosecution and defense, then weighing the aggravating and mitigating circumstances. Thus, because the trial court was the sentencer in a capital case, the fact that the jury’s recommendation was not unanimous was ultimately immaterial.

Moreover, as Johnson admits, a plurality of the Court found that the Sixth Amendment does **not** require jury unanimity even where the constitution requires a jury factfinding. In *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972), the Court upheld a criminal conviction that was based on a 10–2 jury vote. Thus, even if the Court were to overrule *Harris v. Alabama* and hold that jury sentencing is required in the death penalty context, the 10–2 jury vote here satisfied that standard unless the Court also reconsiders *Apodaca*. Accordingly, to even consider reversing the lower courts on this issue, this Court would have to jettison two longstanding precedents.

IV. Certiorari is unwarranted because informing jurors rendering an advisory penalty-phase verdict that their verdict is advisory does not violate *Caldwell v. Mississippi*.

Last, Johnson contends that this Court should grant certiorari to “further clarify” whether it is a violation of *Caldwell v. Mississippi* to instruct a jury rendering an advisory penalty-phase verdict that its verdict is, in fact, advisory. This contention is meritless, and Johnson has pointed to no circuit split or other legitimate reason for certiorari to be granted.

In *Caldwell*, a plurality of the Court held that “it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.” 472 U.S. at 328–29. In that case, the prosecution had informed the jury that its decision would be automatically reviewed by the Mississippi Supreme Court, thereby limiting the jurors’ responsibility for rendering a death sentence and shifting the responsibility to the appellate court.

Nine years later, in *Romano v. Oklahoma*, the Court considered the *Caldwell* rule in a different context. An Oklahoma defendant objected when a copy of his judgment and death sentence from his first capital trial was introduced during the penalty phase of his second capital trial. The defendant argued that introducing the first conviction violated *Caldwell* because it

reduced the second jury's sense of responsibility for its sentencing verdict. 512

U.S. at 3, 5. The Court disagreed:

[W]e have since read *Caldwell* as “relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.” *Darden v. Wainwright*, 477 U.S. 168, 184 n.15 (1986). Thus, “[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law.” *Dugger v. Adams*, 489 U.S. 401, 407 (1989); see also *Sawyer v. Smith*, 497 U.S. 227, 233 (1990).

Id. at 9 (citations edited). Following *Caldwell*, *Dugger*, and *Romano*, the Eleventh Circuit Court of Appeals has held that “references to and descriptions of the jury’s sentencing verdict . . . as an advisory one, as a recommendation to the judge, and of the judge as the final sentencing authority are not error under *Caldwell*” when they “accurately characterize the jury’s and judge’s sentencing roles under [state] law.” *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997); see *Belcher v. Sec’y, Dep’t of Corrs.*, 427 F. App’x 692 (11th Cir. 2011) (quoting *Davis*); *Carr v. Schofield*, 364 F.3d 1246, 1258 (11th Cir. 2004) (same).

At the time of Johnson’s trial, the jury’s penalty-phase verdict was properly described as advisory. Section 13A-5-46(a) of the Code of Alabama provided that the penalty-phase jury “shall return an advisory verdict,” while subsection (e) repeatedly described the verdict as an “advisory” verdict “recommending to the trial court” a penalty. Section 13A-5-47 then provided the procedure for the trial court’s post-trial sentencing hearing, including

ordering a presentence investigation report and taking additional testimony; subsection (e) stated:

In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to Section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.⁶

Thus, the prosecution in Johnson's case did not err in stating to the jury, "You have the unique opportunity now of making a recommendation to this Court about an appropriate punishment[.]" (R. 2179.) While the trial court also correctly referred to the jury's decision as a recommendation throughout the penalty-phase charge, the court also reminded the jury of the gravity of its choice:

You should hear and consider the views of your fellow jurors. Before you vote you should carefully weigh, sift, consider all the evidence and in all the evidence realizing that a human life is at stake. You should render your very best judgment on the sole issues which are before you. The issue is whether the defendant should be sentenced to life without parole or death in a particular case.

(R. 2221–22.)

6. The versions of these statutes in effect at the time of Johnson's trial are found in Ala. Laws Act 2017-131, including the textual edits made for the current versions.

Because the trial court correctly informed the jury that its verdict was a recommendation, yet still impressed upon the jury the weight of its decision, there was no *Caldwell* violation in this case. Johnson's jury was given accurate instructions, and nothing in this claim merits certiorari.

CONCLUSION

This Court should deny certiorari.

Respectfully submitted,

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