No. 18-1298

In the
Supreme Court of the United States

MARIO DION WOODWARD,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

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

BRIEF IN OPPOSITION

STEVE MARSHALL
Alabama Attorney General
Edmund G. LaCour Jr.
Solicitor General
Richard D. Anderson*
Assistant Attorney General
OFFICE OF ALA. ATT'Y GEN.
501 Washington Avenue
Montgomery, AL 36130
(334) 353-2021
randerson@ago.state.al.us
*Counsel of Record

Counsel for State of Alabama

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CAPITAL CASE

QUESTION PRESENTED (REPHRASED)

This petition presents two questions that were rejected by the state court, not only on the merits, but on multiple state law grounds. This Court thus lacks jurisdiction to consider this petition.

In any event, the petition misunderstands this Court's precedents and Alabama law. First, the petition asks whether the Eighth and Fourteenth Amendments prohibit judicial sentencing in capital cases. This Court has repeatedly rejected this argument, including in the denial of Woodward's petition for writ of certiorari on direct appeal.

Second, the petition asks whether the Sixth Amendment, as embodied in *Hurst v. Florida*, 136 S.Ct. 616 (2016), would retroactively bar Woodward's judicially imposed death sentence. But *Hurst* would not warrant reversal even if it were retroactive, and the petition makes no arguments on retroactivity.

The questions presented by the petition are:

1. Does this Court have jurisdiction to consider claims that the state court rejected on state law procedural grounds?

2. Does judicial sentencing violate the Eighth Amendment?

3. Does judicial sentencing violate the Sixth Amendment?

PARTIES

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STATEMENT

A. The Facts of the Case.

Montgomery police officer Keith Houts was on a solo patrol in north Montgomery on September 8, 2006. Shortly after noon, Officer Houts conducted a traffic stop on a silver Impala driven by Mario Dion Woodward. A witness saw the two vehicles slowing and Woodward reaching down for something as they passed beyond her view.

The murder itself was recorded on Officer Houts' dashcam. As Officer Houts approached the Impala, Woodward shot him without warning, hitting him in the jaw. That bullet severed Officer Houts' spinal cord and caused him to collapse to the road. Woodward then extended his arm out of the car and shot Officer Houts four more times. Officer Houts never regained consciousness and died of his wounds two days later.

Woodward immediately fled the scene and began preparing to conceal his guilt and flee the state. Circumstantial evidence pointed to Woodward's responsibility for destruction of the Impala, which was found burned. Woodward obtained a ride to Birmingham from his girlfriend and her friend. Along the way he confessed to both women that he had shot a police officer. He also disposed of a gun by throwing it out of the window. In Birmingham, Woodward burned his clothing and confessed to a third friend that he had shot a police officer during a traffic stop. Woodward then arranged transportation to Atlanta, Georgia, where he was later located and

arrested. At the time of the arrest, Woodward spontaneously exclaimed, "What's going on? I didn't shoot anybody."

B. Proceedings and Disposition Below.

On September 21, 2007, Mario Dion Woodward was indicted in the Montgomery County Circuit Court for the capital murder of Officer Keith Houts of the Montgomery Police Department in violation of Ala. Code §13A-5-40(a)(5) (making "[m]urder of any police office" a "capital offense[]"). (C. 10-11.)

On August 18, 2008, Woodward was tried before a jury in Montgomery County, Alabama. (R. 1.) On August 25, 2008, Woodard was found guilty of capital murder. (R. 1352.)

The penalty phase was held on August 26, 2008. (R. 1359.) At its close, the jury unanimously found the existence of two aggravating circumstances: (1) that Woodward had previously been convicted of another capital offense or a felony involving the use or threat of violence, *see* Ala. Code §13A–5–49(2), and (2) that the capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws, *id.* §13A–5–49(7). *See Woodward*, 2018 WL 1981390 at *45. The jury then recommended, by a vote of 8-4, that Woodward be sentenced to life imprisonment without the possibility of parole. (R. 1702.) The trial court considered the jury's recommendation, along with the other mitigating factors, found that the mitigating circumstances were outweighed by the

aggravating circumstances, and sentenced Woodward to death. (R. 1791-92.)

The Alabama Court of Criminal Appeals affirmed Woodward's capital murder conviction and death sentence on October 9, 2009. *Woodward v. State*, 2011 WL 6278294. The Alabama Supreme Court denied Woodward's petition for writ of certiorari in an unpublished opinion. *Ex parte Woodward*, No. 1111524.

On July 16, 2013, Woodward filed a petition for writ of certiorari in this Court, raising essentially identical claims to those in the present petition. This Court denied certiorari review on November 18, 2013. *Woodward v. Alabama*, 571 U.S. 1045, 134 S. Ct. 405, 187 L. Ed. 2d 449 (2013).

Woodward filed a Rule 32 petition for post-conviction relief on April 14, 2014 and an amended petition on December 22, 2014. Woodward raised numerous ineffective assistance of counsel claims, but did not raise a substantive challenge to Alabama's capital sentencing procedure. On February 11, 2015, the State filed an answer and moved to dismiss all of Woodward's claims.

The Rule 32 Court partially granted the State's motion to dismiss on October 29, 2015, dismissing all claims with the exception of Woodward's claim that trial counsel was ineffective for failing to raise a *Batson* challenge. On February 18, 2016, the Rule 32 court held an evidentiary hearing on Woodward's sole remaining ineffective assistance claim. Subsequently, on February 23, 2016, the Rule 32 court denied relief on this remaining claim.

Woodward appealed to the Alabama Court of Criminal Appeals. There, for the first time in his postconviction proceedings, Woodward claimed that his sentence violated this Court's decisions in *Ring v. Arizona*, 536 U.S. 584 (2002) and *Hurst v. Florida*, 136 S. Ct. 616 (2016). The Court of Criminal Appeals denied the claim on four independent grounds. First, the court held that Woodward's claim was not properly before it because "Woodward did not raise this claim in his original petition or in his amended petition." *Woodward v. State*, No. CR-15-0748, 2018 WL 1981390, at *53 (Ala. Crim. App. Apr. 27, 2018). Second, the court held that the claim was barred by Alabama Rule of Criminal Procedure 32.2(a)(4) because Woodward had previously raised his *Ring* claim on direct appeal. *Id.* at *54. Third, the court denied the claim on the ground that *Hurst* does not apply retroactively on collateral review. *Id.* Finally, the court held "that neither *Hurst* nor *Ring* rendered Alabama's former capital-sentencing scheme" unconstitutional. *Id.*

The Alabama Supreme Court denied reviewed, and this petition followed.

REASONS FOR DENYING THE WRIT

This Court does "not review judgments of state courts that rest on adequate and independent state grounds," and the "reason is … obvious." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). The Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights," and this power "to correct wrong judgments" is not a power "to revise opinions." *Id.* at 125-26. No matter

this Court's views of the questions presented here, "the same judgment would be rendered by the state court" on multiple state-law grounds. *Id.* at 126. The Court thus lacks jurisdiction to consider this petition. *Id*. at 126.

Even if the Court had jurisdiction, Woodward's petition fails to meet this Court's requirement that there be "compelling reasons" for granting certiorari. Woodward presents no split among the circuits and he fails to cite to any genuine conflict between the Alabama courts' rejection of his claims and any decision of this Court. Instead, he presents two constitutional theories that this Court rejected when he presented them in his certiorari petition on direct appeal.

First, he argues that judicial sentencing amounts to cruel and unusual punishment. Woodward presented no conflicting decisions or other on point case-law support for this novel theory in 2013, and he has found none in the years since. Second, he relies on this Court's decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016) to argue that the judicial sentencing procedure employed in his case violated the Sixth Amendment. But he entirely ignores *Harris v. Alabama*, 513 U.S. 504 (1995). *Harris* held Alabama's capital sentencing statute to be constitutional, even though it allowed for judicial sentencing. The Court has consistently denied certiorari on the question of whether to overrule

Harris and has continued to deny certiorari on that question even after deciding *Hurst*.[1]

The Court should deny this petition for the same reasons it denied all the others. The Alabama Legislature has ended judicial sentencing going forward, making the issue presented by the petition much less important. But Alabama has also relied on *Harris* to sentence hundreds of murderers, including Woodward. "[T]he States' settled expectations deserve our respect." *Ring v. Arizona*, 536 U.S. 584, 613 (2002) (Kennedy, J., concurring).

In any event, even if the Court wanted to reconsider *Harris*, this would not be the case in which to do it. Woodward has already challenged Alabama's judicial sentencing procedure in this Court once. Woodward's sentence is no more offensive to the Constitution than it was when the Court rejected his challenge to it on direct appeal. Moreover, the sentencing judge in this case imposed a death sentence based on the jury's unanimous finding of two aggravating factors at the guilt phase:

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[1] *See Kirksey v. State*, --- So. 3d ---, 2016 WL 7322330 (Ala. Crim. App. Dec. 16, 2016), *cert denied* 138 S.Ct. 430 (Nov. 6, 2017); *Wimbley v. State*, --- So. 3d ---, 2016 WL 7322334 (Ala. Crim. App. Dec. 16, 2016), *cert denied* 138 S.Ct. 385 (Oct. 30, 2017); *Ex parte Bohannon*, 222 So. 3d 525 (Ala. 2016), *cert. denied* 137 S.Ct. 831 (Jan 23, 2017); *Lockhart v. State*, 2013 WL 4710485 (Ala. Crim. App. 2013), *certiorari denied* 135 S. Ct. 1844 (2015); *Scott v. State*, 2012 WL 4757901 (Ala. Crim. App. 2012), *certiorari denied* 135 S. Ct. 1844 (2015);*Woodward v. State*, 123 So. 3d 989 (Ala. Crim. App. 2011), *certiorari denied* 134 S. Ct. 405 (2013); *Sharifi v. State*, 993 So. 2d 907 (Ala. Crim. App. 2008), *certiorari denied* 129 S. Ct. 491 (2008).

1) that he had been previously convicted of a violent felony, and 2) that he committed capital murder to disrupt or hinder the enforcement of laws. And he did so based on considerations of consistency and proportionality that underscore why judges are the usual parties charged with imposing sentences in other areas of the law. Nothing about that process is inconsistent with the Constitution. The petition for writ of certiorari should be denied.

I. This Court lacks jurisdiction to consider Woodward's claims because they were dismissed on several independent and adequate state law grounds.

This Court "lack[s] jurisdiction to review" "a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Lambrix v. Singletary*, 520 U.S. 518, 522-23 (1997). The reason is simple and fundamental: "Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Id.* at 523 (citing *Herb v. Pitcairn,* 324 U.S. 117, 125-126 (1945)). Because the decision below was based on at least two independent and adequate state law grounds, the Court should dismiss the petition.

First, the Court of Criminal Appeals dismissed Woodward's challenge to Alabama's former capital sentencing regime because "Woodward did not raise this claim in his original petition or in his amended

petition." *Woodward*, 2018 WL 1981390 at *53. Courts have repeatedly recognized that failing to preserve an issue is an independent and adequate state law ground for dismissing a claim. *See, e.g.*, *Boyd v. Comm'r, Alabama Dep't of Corr.*, 697 F.3d 1320, 1336 (11th Cir. 2012); *Ferguson v. Sec'y for Dep't of Corr.*, 580 F.3d 1183, 1212 (11th Cir.2009).

Second, the Court of Criminal Appeals held that Alabama Rule of Criminal Procedure 32.2(a)(4) barred Woodward's claim because he had already raised it on direct appeal. *See Woodward*, 2018 WL 1981390 at *54. To be sure, some courts have held that "a state court's refusal to re-address the merits of a claim, on the grounds that the claim has already been given full consideration in some previous proceeding, imposes no barrier to federal review" in the habeas context. *Williams v. Alabama*, 791 F.3d 1267, 1274-75 (11th Cir. 2015). But that reasoning has no purchase outside the habeas context, where the "independent and adequate state ground" doctrine turns on concerns of federalism and comity, not jurisdiction. As this Court has explained, "[t]he 'independent and adequate state ground' doctrine is not technically jurisdictional when a federal court considers a state prisoner's petition for habeas corpus pursuant to 28 U.S.C. § 2254, since the federal court is not formally reviewing a judgment," but rather whether the prisoner is being held in violation of federal law. *Lambrix*, 520 U.S. at 523. But when a defendant is seeking review of a state court judgment—as Woodward is here—the Court "lack[s] jurisdiction to review such independently supported judgments on direct appeal." *Id.*

Because this Court's determination of the federal issues raised in Woodward's petition would not alter the judgment below, this Court lacks jurisdiction and should deny the petition.

II. Woodward's sentence does not violate the Eighth Amendment.

A. The "categorical approach" employed in Eighth Amendment claims is inappropriate here.

Woodward argues that his sentence violates the Eighth Amendment's ban on cruel and unusual punishments because Alabama law provided for judicial sentencing at the time that he was convicted and sentenced. At the time, Alabama's capital sentencing process vested ultimate sentencing authority in the trial judge. Ala. Code §13A-5-47 (e). This Court and the Supreme Court of Alabama are in fundamental agreement that Alabama's sentencing process and its judicial override provision do not violate the Constitution. *See, e.g., Harris v. Alabama*, 513 U. S. 504 (1995*); Ex parte Taylor*, 808 So. 2d 1215, 1218 (Ala. 2001); *Ex parte Hodges*, 856 So. 2d 936 (Ala. 2003). Though Woodward fails to so much as acknowledge *Harris* in his petition, he is, at bottom, adopting Justice Steven's dissenting opinion that a judicially imposed death sentence "fails to reflect the community's judgment that death is the appropriate sentence constitutes cruel and unusual punishment under our reasoning in Gregg." *Harris v. Alabama*, 513 U.S. 504 at 525; (Stevens, J.; dissenting.)

Woodward does not, because he cannot, point to any case in which this Court has held that judicial sentencing violates the Eighth Amendment. This Court specifically rejected that argument in *Spaziano v. Fla.*, 468 U.S. 447, 464, 104 S. Ct. 3154, 3164, 82 L. Ed. 2d 340 (1984) ("The fact that a majority of jurisdictions have adopted a different practice, however, does not establish that contemporary standards of decency are offended by the jury override."), *overruled on other grounds* by *Hurst v. Fla.*, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016); *see also Harris*, 513 U. S. at 509-510. *Spaziano* rejected Sixth and Eighth amendment challenges to Florida's capital sentencing procedure. In *Hurst* this Court overruled *Spaziano* "in relevant part." *Hurst*, 136 S. Ct. at 623. The "relevant part," was *Spaziano*'s reasoning that: ""the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Id.* However, this partial reversal left intact this Court's rejection of Spaziano's Eighth Amendment claim. *Id.* Indeed, this Court has also rejected *Woodward's* Eighth Amendment claim by denying certiorari review on direct appeal. *Woodward v. Alabama*, 571 U.S. 1045, 134 S. Ct. 405, 187 L. Ed. 2d 449 (2013) (Sotomayor, J., dissenting) ("I harbor deep concerns about whether this practice offends the ... Eighth Amendment[].").

Nonetheless, Woodward reprises the same awkward analogy between judicial sentencing and the execution of minors and the mentally retarded that this Court rejected in his first petition for writ of

certiorari. Certiorari Petition at 5-10, *Woodward v. Alabama*, 134 S. Ct. 405 (2013) (No. 13-5380). However, in *Atkins v. Virginia*, 536 U.S. 304 (2002), *Roper v. Simmons*, 543 U.S. 551 (2005), and *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008), this Court employed a "categorical approach" that is not appropriate here.

The chief problem with Woodward's argument is that he ignores the fact that his claim does not fall into the "classification of cases" to which the categorical approach is applicable. As this Court explained in *Graham*: "[t]he classification … consists of two subsets, one considering the nature of the offense, the other considering the characteristics of the offender." *Id*. at 2022. Woodward's challenge to judicial sentencing does not fall within either of these subsets.

First, Woodward was convicted of capital murder, a crime for which the death penalty is constitutionally permissible. Consequently, a consideration of the nature of his offense is inapposite. Second, unlike age or mental status, a jury's life recommendation is not an objective "characteristic of the offender." Rather, the jury's recommendation reflects their subjective opinion regarding the appropriate sentence. Thus, Woodward's claim does not fall within the second classification of cases for which the categorical approach is appropriate.

Instead, Woodward asks this Court to essentially create a third subset for the "categorical approach" in

order to reach a purely procedural issue: whether a judge may act as the final sentencing authority. Thus, the real question is whether it is constitutionally permissible for a trial judge to pass sentence in a capital case. Woodward's attempt to pass off this long-decided issue as a novel categorical claim is not a sufficient basis for certiorari review.

B. The statistics cited by Woodward are not material to the constitutionality of judicial sentencing.

Woodward also buttresses his "categorical" arguments with statistics and an argument that judicial sentencing should be prohibited. (Petition, pp. 14-16.) But as this Court pointed out in *Harris*, such statistics say little about whether Alabama's capital sentencing system is constitutional:

> Even assuming that these statistics reflect a true view of capital sentencing in Alabama, they say little about whether the scheme is constitutional. That question turns not solely on a numerical tabulation of actual death sentences as compared to a hypothetical alternative, but rather on whether the penalties imposed are the product of properly guided discretion and not of arbitrary whim. If the Alabama statute indeed has not had the effect that we or its drafters had anticipated, such unintended results would be of little constitutional consequence. An ineffectual law is for the state legislature to amend, not for us to annul.

Harris, 513 U.S. at 513-514. That same analysis applies to the argument made by Woodward and requires that this Court reject his argument. Alabama's use of elected judges as the sentencing authority in capital cases is a policy determination by the Alabama legislature which does not involve constitutional concerns. Certiorari should not, therefore, be granted on this argument.

III. Woodward's sentence does not violate the Sixth Amendment.

Woodward also reprises the argument from his first certiorari petition that his sentence violates the Sixth Amendment because the judge was allowed to determine whether to sentence him to either death or life-without parole. He relies on two decisions to support this argument: *Ring v. Arizona*, 536 U.S. 584 (2002) and *Hurst v. Florida*, 136 S. Ct. 616 (2016). Woodward misunderstands *Ring*, *Hurst*, and the way that Alabama's capital sentencing statute works. Woodward's petition should be denied, just as it was when he raised his Sixth Amendment challenge in his first certiorari petition. Certiorari Petition at 10-14, *Woodward v. Alabama*, 134 S. Ct. 405 (2013) (No. 13-5380).

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

This Court has clearly distinguished two separate determinations to be made in capital sentencing: "the eligibility decision and the selection decision."

Tuilaepa v. California, 512 U.S. 967, 970–971 (1994). "To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment." *Id.* (citing *Coker v. Georgia*, 433 U.S. 584 (1977)). That includes a finding of an "'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase." *Tuilaepa*, 512 U.S. at 972. But the Court has recognized "a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence." *Id.* That question involves whether the aggravating factors outweigh any mitigating factors.

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

The Court revisited the issue of capital sentencing in *Ring v. Arizona*, 536 U.S. 584 (2002), and applied the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to death penalty cases. In *Ring*, the

Court held that, although a judge can make the "selection decision," the jury must find the existence of any fact that makes the defendant "eligible" for the death penalty by increasing the range of punishment to include the imposition of the death penalty. The Court held that Arizona's death penalty statute violated the Sixth Amendment right to a jury trial "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 585. Thus, the trial judge cannot make a finding of "any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589. Only the jury can.

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

unconstitutional because "the judge alone [found] the existence of an aggravating circumstance" that expanded the range of punishment to include the death penalty. *Id.* at 624.

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

Alabama's sentencing practices, and what happened in Woodward's case, differ from the procedures that Florida followed in *Hurst*. As Justice Scalia explained in his concurrence in *Ring*, "[w]hat today's decision says is that the jury must find the existence of the fact that an aggravating factor existed." *Ring*, 536 U.S. at 612. "Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase." *Id.* at 612–13 (Scalia, J., concurring).

For most cases, Alabama has chosen the second and most "logical" option—to secure a jury determination of aggravating circumstances at the guilt phase. Alabama law provides that "any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing." ALA. CODE § 13A-5-45 (e). The elements of capital murder in Alabama largely track aggravating circumstances. For

example, committing an intentional murder "during a robbery in the first degree or an attempt thereof" is a capital offense. ALA. CODE § 13A-5-40 (a)(2). This same finding is an aggravating factor at sentencing. See ALA. CODE § 13A-5-49 (4) ("[t]he capital offense was committed while the defendant was engaged [in] . . . robbery").

Unlike in *Hurst*, the jury found all that it needed to find to allow the judge to sentence Woodward to death. In *Hurst*, Florida argued that the jury's non-unanimous and non-specific advisory sentencing recommendation was a fact-finding that satisfied *Ring*. *Hurst*, 136 S. Ct. at 622. The Court rejected that argument and held that "the advisory recommendation by the jury" is not "the necessary factual finding that *Ring* requires." *Id.*

But, in this case, the State is relying on a unanimous jury finding at the guilt phase to satisfy *Ring*, not an advisory sentencing recommendation. In the present case, the jury made unanimous and specific findings of fact that two aggravating factors existed: 1) that Woodward had been previously convicted of a violent felony, and 2) that Woodward committed capital murder to disrupt or hinder the enforcement of laws. (C. 1000.) These jury findings of aggravating factors made Woodward eligible for a death sentence, and they are the only aggravating circumstances that the judge considered in determining whether to impose a death sentence. *Id.*

Under Alabama law, these jury findings—not the judge's later sentencing decision—exposed Woodward to a range of punishment that had as its

maximum the death penalty. The Alabama Supreme Court has held that, under Alabama law, "[o]nly one aggravating circumstance must exist in order to impose a sentence of death." *Ex parte Bohannon*, 222 So. 3d 525, 528 (Ala. 2016) (quoting *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002)).

In addition to these jury-found factors, the sentencing judge also considered additional evidence that diminished the weight of the mitigating circumstances in this case. (C. 1003.) But, in any event, these factors did not increase Woodward's statutory range of punishment because that range was already set by the jury's finding that two aggravating circumstances existed. *See Waldrop*, 859 So. 2d at 1187.

C. Neither *Ring* nor *Hurst* suggest that judicial sentencing is unconstitutional.

Woodward erroneously argues that the judge's sentencing decision violated the Sixth Amendment. Woodward's petition confuses two separate issues: (1) whether an aggravating circumstance exists and (2) whether the aggravating circumstances outweigh the mitigating circumstances. The first issue is a fact-finding that may be submitted to a jury. The second, as the Alabama Supreme Court has held, is not a fact-finding. Instead, it is "a moral or legal judgment that takes into account a theoretically limitless set of facts." *Ex parte Bohannon*, 222 So.3d at 530 (quoting *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002)). For example, there is no factual answer to the question of whether a defendant's difficult childhood "outweighs" the heinousness of his crime.

Instead, that analysis reflects the kind of prudential sentencing determination that judges make every day in non-capital sentencing.

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

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[2] *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); *United States v. Purkey*, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); *Higgs v. United States*, 711 F. Supp. 2d 479, 540 (D. Md. 2010) ("Whether the aggravating factors presented by the prosecution outweigh the mitigating factors presented by the defense is a *normative* question rather than a *factual* one."); *State v. Fry*, 126 P.3d 516, 534 (N.M. 2005) ("[T]he weighing of aggravating and mitigating circumstances is thus not a 'fact that increases

Unless there is something materially different about capital sentencing for the purposes of the Sixth Amendment, then a jury's advisory sentencing recommendation is a constitutional non-event. Weighing aggravating and mitigating circumstances in a death penalty case is no different in kind than weighing "the nature and circumstances of the offense and the history and characteristics of the defendant" in a non-capital case. 18 U.S.C. § 3553. The Constitution provides the right to a trial by jury, not a sentencing by jury.

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the penalty for a crime beyond the prescribed statutory maximum.'"); *Commonwealth v. Roney*, 866 A.2d 351, 360 (Pa. 2005) ("[B]ecause the weighing of the evidence is a function distinct from fact-finding, *Apprendi* does not apply here."); *Ritchie v. State*, 809 N.E.2d 258, 266 (Ind. 2004) ("In *Bivins v. State*, 642 N.E.2d 928, 946 (Ind. 1994), we concluded, as a matter of state law, that '[t]he determination of the weight to be accorded the aggravating and mitigating circumstances is not a 'fact' which must be proved beyond a reasonable doubt but is a balancing process.' *Apprendi* and its progeny do not change this conclusion."); *Brice v. State*, 815 A.2d 314, 322 (Del. 2003) (*Ring* does not apply to the weighing phase because weighing "does not increase the punishment."); *State v. Gales*, 658 N.W.2d 604, 628–29 (Neb. 2003) ("[W]e do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review be undertaken by a jury"); *Oken v. State*, 835 A.2d 1105, 1158 (Md. 2003) ("the weighing process never was intended to be a component of a 'fact finding' process").

IV. Retroactivity and other issues makes this case a uniquely bad vehicle.

In addition to the reasons listed above, there are other reasons that the Court should not grant certiorari in this case.

First, as noted in Woodward's petition, this case raises questions about retroactivity, not substance. Although the questions presented in the petition necessarily turn on whether *Hurst* is retroactive, Pet. at i, 10, the body of the petition includes no real argument on that point. Likewise, although granting the relief Woodward seeks would require this Court to overrule *Harris*, the petition fails to address *Harris* at all, much less whether such a decision would be retroactive. In any event, *Hurst* is merely an application or refinement of *Ring* and this Court has already held that *Ring* is not retroactive. *See Schriro v. Summerlin*, 542 U.S. 348 (2004). It would be passing strange if the Court were to hold that *Hurst* is retroactive, even though *Ring* was not.

Second, no lower court has ever addressed the retroactivity questions that would be central to this petition. If the Court were going to consider overruling *Harris*, it should do so on direct appeal. Then, if it did overrule *Harris*, it could allow the lower courts to evaluate in the first instance whether its decision should be applied retroactively. It is very rare for this Court to address a legal issue that has never been addressed before by any lower court. But that is what it would have to do if it took this case.

Third, as the petitioner admits, the Alabama Legislature has modified Alabama law so that state judges no longer have the authority to sentence defendants to death without a jury vote in support of that sentence. This new law does not "apply retroactively to any defendant who has previously been convicted of capital murder and sentenced to death." Ala. Code § 13A-5-47.1. But it nonetheless resolves this issue going forward. The Court should not expend its resources on evaluating whether to overrule an existing precedent when, even if it did so, its decision would not have any prospective effect.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

STEVE MARSHALL
Alabama Attorney General
Edmund G. LaCour Jr.
Solicitor General
Richard D. Anderson*
Assistant Attorney General
OFFICE OF ALA. ATT'Y GEN.
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
randerson@ago.state.al.us

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**Counsel of Record*