NO.

In the Supreme Court of the United States

CLAYTON ANTWAIN SHANKLIN,

*Petitioner*,

v.

STATE OF ALABAMA,

*Respondent*.

*On Petition for Writ of Certiorari to the*

*Supreme Court of Alabama*

**PETITION FOR WRIT OF CERTIORARI**

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**QUESTIONS PRESENTED**

1. Does Alabama’s advisory jury death sentencing scheme violate the Sixth Amendment under the recent authority of *Hurst v. Florida*?

2. Is the Sixth Amendment offended by simple- majority guilty verdicts in capital cases?

3. What is the doctrinal import of *Apodaco v. Oregon*?

4. Does Alabama’s disregard of the jury’s historical role in capital sentencing violate the Eighth and Fourteenth Amendments?

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**PETITION FOR A WRIT OF CERTIORARI**

Clayton Antwain Shanklin respectfully petitions this Court for a writ of *certiorari* to review the judgment of the Supreme Court of Alabama.

**OPINIONS BELOW**

The Court of Criminal Appeals of Alabama’s opinion in this case, *Shanklin v. State*, 2014 WL 7236978, is attached as Appendix A. The denial of Shanklin’s motion for rehearing is attached as Appendix B. The denial of Shanklin’s cert petition to the Alabama Supreme Court is attached as Appendix C.

**STATEMENT OF JURISDICTION**

The Court of Criminal Appeals of Alabama issued its opinion in this case on December 19, 2014. Rehearing was denied on May 22, 2015. Shanklin petitioned the Alabama Supreme Court on July 6,

2015; the Alabama Supreme Court denied certiorari on

August 28, 2015.

The jurisdiction of this Court is invoked under 28

U.S.C. § 1257. Shanklin asserted in state court, and

argues here, that the State of Alabama violated his

constitutional rights under the Sixth, Eighth, and

Fourteenth Amendments.

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

1. Amendment VI to the Constitution of the United

States:

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 defense.

2. Amendment VIII to the Constitution of the United

States:

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

3. Amendment XIV, Section 1, to the Constitution of the United States, in part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within this jurisdiction the equal protection of the laws.

4. Alabama Statute: Code of Ala. § 13A-5-47(e)

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 Section 13A-5-46(g). While the jury’s recommendation concerning sentence shall be given consideration, it is not binding upon the court.

**STATEMENT OF THE CASE A. Legal Framework**

Upon being convicted of first-degree murder in Alabama, a person may be sentenced to death so long as the trial judge—but not a unanimous jury, and even against the recommendation of a unanimous jury—find “aggravating circumstances” from a statutorily- enumerated list and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. *See* Ala. Code § 13A-5-47. In a non- binding majority vote, the jury advises on these questions, as well as the ultimate question of life or death, but it is the judge alone who finds the facts necessary for a death sentence, and then decides whether to impose that sentence. § 13A-5-47(e).

Shanklin was indicted for and convicted of one count of murder made capital for intentionally taking the life of Michael Crumpton during the course of a first-degree robbery, see § 13A–5–40(a)(2), Ala. Code

1975; a second count of capital murder for taking the life of Michael during the course of a first-degree burglary, see § 13A–5–40(a)(4), Ala. Code 1975; and one count of attempted murder for attempting to cause

the death of Ashley Crumpton, Michael’s wife. §§

13A–4–2 and 13A–6–2, Ala. Code 1975.

**B. Shanklin’ Jury Unanimously Recommends**

**Life, Not Death**

Following this statutory procedure, the jury in the trial of Shanklin recommended a life sentence by a 12-0 vote.

**C. Trial Judge Added A Fifth Aggravating Factor to His Decision-Making Matrix at Sentencing When Only Four Such Factors Had Been Presented to The Jury**

The jury had been presented with four possible aggravating factors: sufficiently proved the existence of five aggravating circumstances—namely, (1) that the capital offense was committed by Shanklin while he was under a sentence of imprisonment, see

§ 13A–5–49(1), Ala. Code 1975; (2) that Shanklin had been previously convicted of two felonies involving the use or threat of violence to the person—namely, first- degree assault, see § 13A–5–49(2), Ala. Code 1975; (3) that Shanklin knowingly created a great risk of death to many persons, see § 13A–5–49(3), Ala. Code

1975; (4) that Shanklin committed the capital offense while he was engaged or was an accomplice in the commission of a robbery and a burglary, see

§ 13A–5–49(4), Ala. Code 1975. App. at . However, the trial judge added a fifth aggravating factor to his sentencing decision: he also considered the aggravating circumstance that the murder was especially heinous, atrocious, or cruel’ when compared to other capital murder. App. at . The trial judge found each aggravating factor to have been established. App. at .

**D. Trial Judge Rejects All Mitigating Evidence**

The trial court then considered each of the statutory mitigating circumstances and found none to exist. App. at . The circuit court also considered the non- statutory mitigating evidence Shanklin presented, including: 1) the testimony of Shanklin’s aunt and uncle, Willodean and Jackie Shanklin, that Shanklin was “a humble and loving family member and came from a good family and asked that [Shanklin’s] life be spared” 2) the testimony of Shanklin’s father, Clayton Shanklin, Sr., that Shanklin “had a good childhood and was a good person” and his plea that Shanklin’s “life be spared”; 3) the testimony of Marie Coleman, Shanklin’s wife, that Shanklin “was a loving husband, loving father to his two children, and a loving son and family member” and her plea that Shanklin’s “life be spared”; and 4) that the jury recommended a sentence of life in prison without the possibility of parole. All of these factors were rejected, as well. App. at .

**E. Alabama Court of Criminal Appeals Affirmed With Less Than A Full Paragraph Devoted to Analyzing the Propriety of the District Judge’s Weighing Process**

The Alabama Court of Criminal Appeals summarily affirmed as follows:

As required by § 13A–5–53(b)(3), Ala.Code 1975, this Court must now determine whether Shanklin’s sent enc e is excessive or disproportionate when compared to the penalty imposed in similar cases. In this case, Shanklin was convicted of murder made capital because it was committed during a first-degree robbery and

murder made capital because it was committed during a first-degree burglary. Sentences of death have been imposed for similar crimes in Alabama. *See, e.g., White v. State*, [Ms. CR–09–0662, May 2, 2014] ––– So.3d –––– (Ala.Crim.App.2013) (opinion on return to remand); *Hosch v. State*, [Ms. CR–10–0188, Nov.

8, 2013] ––– So.3d –––– (Ala.Crim.App.2013); *Belisle v. State* , 11 So.3d 256 (Ala.Crim.App.2007); *Flowers v. State*, 922 So.2d

938 (Ala.Crim.App.2005); *Walker v. State*, 932

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695 So.2d 176 (Ala.Crim.App.1996); *Gaddy v.*

*State*, 698 So.2d 1100 (Ala.Crim.App.1995); and

*Bush v. State*, 695 So.2d 70 (Ala.Crim.App.1995).

Therefore, this Court holds that Shanklin’s

death sentence is neither excessive nor

disproportionate.

App. at .

**STATEMENT OF THE FACTS**

Michael and Ashley Crumpton lived in an apartment complex in Cordova, Alabama, with their two young children. App. at . Michael was a drug dealer. App. at . On or about October 5, 2009, someone attempted to break into the Crumpton’s apartment and was apparently unsuccessful. App. at

 . Ashley and Michael kept two pistols in their bedroom, one on the computer stand and another under the bed in Michael’s bag. App. at . In the bag with Michael’s gun, there was also marijuana, some pills, scales, a drug shredder, and over $3,000 in cash. (R. App. at .

On October 11, 2009, Michael, a cousin, Ashley, and their children were in the apartment watching football. App. at . The adults had been smoking marijuana all day. App. at . Around 8:30 or 9:00 PM that night, Michael sold marijuana to Shanklin’s girlfriend, Tracy Ward. App. at . Tracy testified that it was her idea to buy marijuana from Michael Crumpton that night. App. at . Tracy testified that she had purchased marijuana from Michael several times a week over the course of several years. App. at . She testified that she personally knew at least 20 other people who also bought drugs from Michael. App. at .

Tracy testified that the drug deal on this night was not unusual. Inside the apartment, Tracy and Michael went into the back bedroom and made the transaction. App. at . After purchasing marijuana, Tracy left the apartment and returned to her car. App. at .

Shanklin accompanied Tracy to the apartment complex that night, and he stayed in the car while she went inside to make the deal. App. at . Shanklin did not know and had never met Michael. App. at .

Tracy and Shanklin then smoked the marijuana. App. at . Afterwards, Tracy and Shanklin picked up Kevin Shanklin and returned to the apartment complex. App. at . Tracy testified that when she left them at the apartment complex neither Shanklin nor Kevin Shanklin was in possession of a gun. App. at . After the drop off, Shanklin and Tracy texted each other over 100 times and never mentioned anything about a robbery; rather, they texted about “everyday personal things.” App. at .

Thereafter, two armed intruders broke into the Crumpton’s apartment. In defending against the intrusion, Ashley was shot once in the thigh and Michael was shot four times in the back. By all accounts, the intrusion began minutes before 3:00 a.m. At 2:55 AM the police were called. The first officers on the scene arrived at 3:02 AM. App. at . The paramedics assessed Michael, found no sign of life, and pronounced him dead. Ashley was taken to the hospital. App. at .

A medical examiner for the Alabama Department of Forensic Sciences conducted an autopsy on Michael. She testified that Michael was shot four times in the back, that the fourth bullet caused Michael’s death, and that his death would have been “slow, relatively agonizing.” App. at . Specifically, Michael’s death was described in detail to the jury as follows:

Once the bullet went through the heart and the vena cava, those areas started to bleed. Because the bullet is coming from the back of the heart to the front, the blood left the sac of the heart first of all and went into the right side of his chest. So, we found about a liter of blood in the right side of his chest and the chest wall is fixed relatively. So if you put a liter of blood, and you can just visualize a two liter bottle of soda and half of that amount of volume is in the right side of his chest so his lung is not going to be able to expand well because the blood is going to keep it from expanding. And that means he can’t take a deep breath of air and he is going to get the sensation of smothering or of not being able to breathe. In addition to that, the blood does

collect eventually inside that sac around the heart and that is going to mean that his heart can’t expand and contract when it beats, so he is going to have a sensation that he is not getting enough blood to his brain and to the rest of his body and at the same time he is suffering from not being able to get a good breath of air, so it would be the equivalent of smothering.

App. at .

The State also presented evidence that Michael lived for several minutes after being shot. According to Ashley, they

Both walked to the sofa, the loveseat, and he has his gun in his hand and I asked him just to put it down and he drops the gun on the couch. And I asked him if he was okay, and he looked at me and asked me if I were okay and he said no. And I told him I was fine, I had just been shot in the leg. I went to try to open the front door and my hands were shaking so bad I couldn’t open it so he opened it for me. And I told him I was going to call an ambulance so I ran back down the hallway to get our phone that usually sits on the computer stand.....[Michael]looked pale. He couldn’t breathe and he was just hurting.

App. at .

**REASONS FOR GRANTING THE PETITION**

**I. ALABAMA’S USE OF ADVISORY JURIES IN ITS CAPITAL-SENTENCING SCHEME VIOLATES *HURST;* AS APPLIED, THE ALABAMA DEATH PENALTY STATUTE VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS**

**A. Alabama Statute**

In Alabama, a defendant convicted of capital murder is entitled to an evidentiary hearing on aggravating and mitigating circumstances before a jury. Ala. Code §§13A–5–45, 13A–5–46. At that hearing, the State must prove beyond a reasonable doubt the existence of at least one aggravating circumstance; absent an aggravating circumstance, the defendant can only be sentenced to life imprisonment without parole. §13A–5–45(e),(f). The defendant may present mitigating circumstances, which the State may seek to disprove by a preponderance of the evidence.

§13A–5–45(g). If the jury finds that the aggravating circumstances do not outweigh the mitigating circumstances, the jury must return a sentence of life- without-parole; if it finds that the aggravating circumstances do outweigh the mitigating circumstances, it must return a sentence of death.

§13A–5–46(e). A life-without-parole verdict requires a vote of a majority of the jurors, while a death verdict requires a vote of at least ten jurors. §13A–5–46(f).

However, the jury’s recommendation is not binding upon the court. §13A–5–47(e). After the jury gives its recommendation, the trial judge then makes his own determination whether the aggravating circumstances outweigh the mitigating circumstances and imposes a

sentence according to his singular preference.

§13A–5–47.

**B. Capital Schemes Using Advisory Juries**

**Cannot Withstand Constitutional Scrutiny**

In *Hurst v. Florida*, the Court made abundantly clear that a death penalty sentencing scheme that used advisory juries could not withstand constitutional scrutiny. 2016 WL 112683, \*9 (January 12, 2016). Shanklin contends that his Court’s opinion in *Hurst* holds that the Sixth Amendment does not allow advisory juries in death penalty cases. Alabama’s system uses just that, and the system must be declared unconstitutional.

In *Hurst*, seven justices held that Florida’s capital sentencing scheme violates the Sixth Amendment in light of *Ring v. Arizona*, 536 U.S. 584 (2002). *Id*. at \*3.1

In doing so, *Hurst* reaffirmed what *Ring* had already said: “The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury’s mere recommendation is not enough.” *Id*.

*Hurst* described the portions of Florida’s statutory sentencing scheme at issue. This description makes clear that the Florida capital sentencing procedure is, in all pertinent parts, virtually identical to Alabama’s.

Like Florida, Alabama employs a hybrid procedure in which the jury renders an advisory verdict with the judge responsible for the ultimate sentencing decision.

1 Concurring in the result, Justice Breyer reasoned that Florida’s scheme violated the Eighth Amendment.

Ala. Code §13A-5-47(e); *Harris v. Alabama*, 513 U.S.

504, 508 (1995). Like Florida, following trial on the

question of guilt or innocence, the sentencing judge

conducts an evidentiary hearing before the jury on the

question of the sentence to be imposed. Ala. Code

§ 13A-5-46(a). Like Florida, the jury is instructed by

the judge, retires to deliberate, and returns an

“advisory verdict.” Ala. Code § 13A-5-46(d).

Like Florida, there is no statutory or constitutional requirement that the jury make specific findings of aggravating or mitigating circumstances during this sentencing phase of the capital case. Ala. Code § 13A-5-

46(e); *Adams v. State*, 955 So. 2d 1037, 1101 (Ala. Crim. App. 2003); *Boyd v. State*, 715 So. 2d 825, 846 (Ala. Crim. App. 1997); *Gaddy v. State*, 698 So. 2d

1100, 1143 (Ala. Crim. App. 1995); *Haney v. State*, 603

So. 2d 368, 387-388 (Ala. Crim. App. 1991).

More importantly, like Florida, the court later makes its own decision, notwithstanding the recommendation of the jury. Ala. Code § 13A-5-47(a). Like Florida, the trial court must set forth written findings if it imposes a death sentence. And like Florida, the jury’s recommendation “is not binding on the court.” Ala. Code § 13A-5-47(e).

In fact, “the jury’s recommendation may be overridden based upon information known only to the trial court and not to the jury when such information can properly be used to undermine a mitigating circumstance.” *Ex parte Carroll*, 852 So. 2d 833, 836 (Ala. 2002). As long as the trial court provides appropriate written justification, the trial court has the discretion to “override” a jury’s recommendation of a

life without parole sentence. *Jackson v. State*, 133 So.

2d 420, 443 (Ala. Crim. App. 2009).

And most importantly, as in Florida, a capital defendant in Alabama is not sentenced to death unless the trial court has determined that to be the sentence. Ala. Code § 13A-5-47(a). The jury recommendation is advisory only and does not stand as a sentence, let alone a final one. As with Timothy Hurst, in the absence of the trial court’s fact-findings and imposition of sentence, Shanklin would not have received a death sentence.

Shanklin is situated similarly to Mr. Hurst. After the jury recommended a death sentence, he was twice sentenced to death based on a trial judge’s separate, independent determination that the aggravating circumstances outweighed the mitigating ones. 2016

WL 112683, at \*4. *Hurst* now forbids “a judge [to] increase[] ... authorized punishment based on her own factfinding.” *Id*. at \*6. In so holding, the Supreme Court explicitly overruled its decisions in *Hildwin v. Florida*, 490 U.S. 638 (1989) and *Spaziano v. Florida*,

468 U.S. 447 (1984), which concluded that “the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.” *Hurst*, 2016 WL 112683, at \*8. Thus, *Hurst* vitiates the constitutionality of Alabama’s capital sentencing scheme, which also vests in the trial judge sole discretion for determining whether to impose the death penalty.

In *Spaziano*, the Supreme Court held that Florida’s death penalty statute was constitutional even though it permitted judicial override of a jury’s recommended sentence. *Spaziano* did not allege any constitutional

infirmity in his jury sentencing. Rather, he argued that the practice of judicial override itself violated the Eighth Amendment’s proscription against cruel and unusual punishments, the Double Jeopardy Clause, the Sixth Amendment, and the Due Process Clause. *Spaziano*, 468 U.S. at 457. The Florida scheme was upheld, in part, because jury recommendations are accorded “great weight” by the sentencing judge, which the Supreme Court found ensured that death sentences were not arbitrarily applied. *Id*. at 465 (citing *Tedder v. State*, 322 So. 2d 908, 910 (Fla.1975)); *Harris*, 513

U.S. at 511 (citing *Spaziano*, 468 U.S. at 465) (stating that “the hallmark of the analysis is not the particular weight a State chooses to place upon the jury’s advice, but whether the scheme adequately channels the sentencer’s discretion so as to prevent arbitrary results.”)

The constitutionality of Alabama’s current death penalty scheme is dependent entirely upon the continued viability of *Harris*, which itself is dependent entirely upon the survival of Spaziano. *See Ex parte Harrell*, 470 So. 2d 1309, 1317 (Ala. 1985) (“We follow *Spaziano* and hold Alabama’s override provision constitutional.”); *Woodward v. State*, 123 So. 3d 989,

1056 (Ala. Crim. App. 2011), as modified on denial of reh’g (Aug. 24, 2012) (“[T]his Court notes that the Constitution of the United States does not prohibit vesting the final sentencing authority in the circuit court. *See Spaziano v. Florida*, 468 U.S. [447 (1984)]. Further, in *Harris v. Alabama*, the Supreme Court of the United States held that Alabama’s sentencing standard, which (at that time) required only that the judge consider the jury’s advisory opinion, was

‘consistent with established constitutional law.’ 513

U.S. 504, 511 (1995)”).

In *Harris*, this Court considered an argument that Alabama’s advisory jury scheme for capital punishment was “unconstitutional because it does not specify the weight the judge must give to the jury’s recommendation and thus permits arbitrary imposition of the death penalty.” *Harris*, 513 U.S. at 505. In concluding that the scheme was constitutional, this Court relied on its decision in *Spaziano*, in which it had held that Florida’s scheme, upon which “Alabama’s death penalty statute is based,” was constitutional. *Id*. at 508.

Comparing the Alabama and Florida schemes, the *Harris* Court noted that “[t]he two States differ in one important respect,” namely that the Florida Supreme Court has interpreted Florida’s statute to include a requirement that the trial court give “‘great weight’ to the jury’s recommendation and may not override the advisory verdict of life unless ‘the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.’” *Id*. at 509 (citing *Tedder*, 322 So. 2d at 910) (brackets in original). The Court explained, “This distinction between the Alabama and Florida schemes forms the controversy in this case – whether the Eighth Amendment to the Constitution requires the sentencing judge to ascribe any particular weight to the verdict of an advisory jury.” *Id*.

Ultimately, the Court concluded that the “great weight” requirement grafted onto the statute by the Florida Supreme Court was not constitutionally mandated, and later expressions of approval of that

requirement in subsequent cases upholding Florida’s death penalty scheme did not render Alabama’s nearly identical scheme invalid. *Id*. at 509-12. The *Harris* Court concluded its opinion by explaining, “The Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury’s recommendation and trusts the judge to give it the proper weight.” *Id*. at 515. This holding is obviously no longer good law. *See Ring*, 536 U.S. at 589.

This Court’s ruling in *Hurst* directly challenges these holdings in *Harris* where this Court described “Alabama’s capital sentencing scheme” as “much like that of Florida.” *Harris*, 513 U.S. at 508. It was correct.

The conclusion of *Hurst* is clear and simple: “Florida’s sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.” 2016 WL

112683, at \*9. Alabama’s sentencing scheme is identical to Florida’s in that regard. In Alabama, a defendant may not be sentenced to death until and unless a judge finds the existence of an aggravating circumstance. Therefore, under *Hurst*, Alabama’s death sentencing scheme is unconstitutional, and this Court’s decision in *Harris v. Alabama* must be overruled.

**C. Alabama Holds A Near Monopoly On Judicial Overrides Of J u ry Recommendations**

Of the thirty-three States that currently authorize capital punishment, only three States—Alabama, Delaware, and Florida—permit the trial judge to override the jury’s sentencing decision. Twenty-one (21)

years have passed since *Harris* was decided, and over time the rate of judicial overrides has dropped significantly across the country. In the 1980’s, there were 125 life-to-death overrides: 89 in Florida, 30 in Alabama, and 6 in Indiana. In the 1990’s, there were

74: 26 in Florida, 44 in Alabama, and 4 in Indiana. Since 2000, by contrast, there have been only 27 life-to- death overrides, 26 of which were by Alabama judges. Michael Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011 MICH. STATE L. REV.

793, 818 (2011) (listing overrides in Indiana); *id*., at

828 (listing overrides in Florida); *id*., at 825–827

(listing overrides in Alabama). Accordingly, Alabama is

the only jurisdiction where judges routinely override

jury verdicts of life to impose capital punishment.

Two decades have passed since this last considered Alabama’s capital sentencing scheme. Now, Alabama stands alone: No other State routinely overrides jury verdicts of life to impose death. And *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny have made clear the sanctity of the jury’s role in our system of criminal justice. While *Harris v. Alabama* may have upheld the Alabama scheme twenty-one years ago, given these developments in death-penalty sentencing and the law since then, Shanklin submits that it is time for this Court to reconsider that decision. *Cf. Roper v. Simmons*, 543 U.S. 551, 555 (2005) (reconsidering after 16 years the issue decided in *Stanford v. Kentucky*, 492 U.S. 361 (1989)); *Atkins v. Virginia*, 536 U.S. 304, 307 (2002) (reconsidering after

13 years the issue decided in *Penry v. Lynaugh*, 492

U.S. 302 (1989).

**II. THE SIXTH AMENDMENT IS OFFENDED BY SIMPLE- MAJORITY GUILTY VERDICTS IN CAPITAL CASES; THE ALABAMA DISTRICT JUDGE’S COMPLETE DISREGARD OF THE UNANIMOUS JURY FINDING FOR A LIFE RISES TO THE LEVEL OF CONSTITUTIONAL REPUGNANCY**

**A. Shanklin’s Punishment Could Not Be**

**Imposed in Federal Court**

In *Duncan v. Louisiana*, this Court stated, “The guarantee of a jury trial “reflect[s] … a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges” and by “[p]roviding an accused with the right to be tried by a jury of his peers,” the Framers “gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.” 391 U.S. 145, 156 (1968).

The Sixth and Fourteenth Amendments fulfill these purposes in slightly different ways in federal and state cases, respectively. In federal cases, the Supreme Court has long held that jury unanimity is “one of the indispensable features” of federal criminal trials. *Johnson v. Louisiana*, 406 U.S. 366, 369–71 (1972) (Powell, J., concurring); *Hawaii v. Mankichi*, 190 U.S.

197, 211-212 (1903) (Sixth Amendment requires that all convictions for non-petty offenses be by a unanimous jury verdict). In practice, this means that “a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element [of the crime].” *Richardson v. United States*, 526 U.S. 813, 817 (1999). It necessarily follows that Shanklin’s sentence could not constitutionally have been imposed in federal court even had there been

a majority vote by the jury (which there was not) rather than the unanimous vote he did receive.

**III. THE IMPORT OF *APODACA V. OREGON***

Shanklin recognizes that the standard is somewhat different- but no more tolerant of a simple-majority rule- in state cases. This distinction results from this Court’s splintered ruling in *Apodaca v. Oregon*, 406

U.S. 404 (1972), involving Oregon’s “ten of twelve” rule.

Four justices of the *Apodaca* plurality reached a conclusion at least partly in conflict with the historical rules requiring unanimous jury verdicts, finding that Congress omitted the unanimity requirement from the Sixth Amendment’s final text for “substantive effect,” and that unanimity was not integral to the jury’s role as a safeguard against the overzealous prosecutor or biased judge. *Id*. at 409-10. But the plurality then focused its analysis on the Oregon statute under challenge, which allowed conviction upon 10-2 or 11-1 verdicts. *Id*. at 411. Ultimately, the plurality “perceive[d] no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one.” *Id*.

For several reasons, *Apodaca* plurality’s conclusions pose no obstacle to this Court now finding a historical basis for interpreting the Sixth Amendment to require unanimity in state death penalty judgments. First, only four justices believed that the Sixth Amendment jury right did not encompass unanimity. *Id*. at 410. But five found that the right contemplated unanimous juries. *Id*. at 414 (Stewart, J., dissenting); *Johnson*, 406 U.S. at 381 (Douglas, J., dissenting). Justice Powell was among these five with regard to federal criminal trials,

*id*. at 371 (Powell, J. concurring), but he held to the solitary view that “there is no sound basis for interpreting the Fourteenth Amendment to require blind adherence by the States to all details of the federal Sixth Amendment standards.” *Id*. at 375. The Court has since called Justice Powell’s analysis into question. *See McDonald v. City of Chicago, Ill*., 561

U.S. 742, 766 n.14 (2010) (identifying *Apodaca* as the sole exception in a long line of cases holding that incorporated Bill of Rights protections are to be enforced under the Fourteenth Amendment equally against the states and the federal government and noting the decision was “the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation”).

Second, as the plurality acknowledged, it was not deciding a capital case, 406 U.S. at 406 n.1 (quoting Oregon Constitution limiting non-unanimous juries to non-capital cases), much less one involving fact finding that would make a person eligible for execution. That makes a “significant constitutional difference,” *Beck v. Alabama*, 447 U.S. 625, 637 (1980), because the Court has cautioned against “procedural rules that tended to diminish the reliability of the sentencing determination.” *Id*. at 638.

Third, not even the plurality entirely denigrated the important role of unanimity in the jury right. Again, it merely saw “no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one.” *Apodaca*, 406

U.S. at 411. Alabama law, by contrast, permits executions even when the entire jury recommends a sentence of life rather than death.

Fourth, the *Apodaca* plurality’s conclusions about the history of the Sixth Amendment and the Framer’s understanding of the jury right were simply incorrect. The plurality acknowledged but then rejected the possibility that Congress “eliminated references to unanimity” not for substantive effect, but “because [it was] thought already to be implicit in the very concept of jury.” *Apodaca*, 406 U.S. at 409-10 (emphasis added).

Fifth, since *Apodaca*, this Court has repeatedly assumed the applicability of the unanimity rule to state criminal prosecutions. *See Apprendi*, 530 U.S. at 477 (noting requirement of facts “confirmed by the unanimous suffrage of twelve of [accused’s] equals and neighbours” and quoting Blackstone); *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (quoting *Apprendi* and Blackstone); *Southern Union Co. v. United States*, U.S. , 132 S. Ct. 2344, 2355 (2012) (same).

**IV. ALABAMA’S DISREGARD OF THE JURY’S HISTORICAL ROLE IN CAPITAL SENTENCING VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS**

**A. Introduction**

In a concurring opinion in *Ring*, Justice Breyer concluded that “the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death.” 536 U.S. at 614; *see also Woodward v. Alabama*, 134 S. Ct. 405, 406-410 (2013) (Sotomayor, J., dissenting from denial of certiorari). Even if a simple majority were permissible for jury verdicts in non-capital cases, it is prohibited by the Eighth and Fourteenth Amendments in capital cases

because it “‘risks erroneous imposition of the death sentence.” *Mills v. Maryland*, 486 U.S. 367, 375 (1988). In Shanklin’s case, there was nothing close to a “simple majority” vote in either direction; to the complete opposite, the unanimous jury vote was for life rather than death.

This Court has held that “there is a significant constitutional difference between the death penalty and lesser punishments,” *Beck v. Alabama*, 447 U.S.

625, 637 (1980):

Death is a different kind of punishment from any other which may be imposed in this country.

… From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action.

*Id*. at 637-638 (quoting *Gardner v. Florida*, 430 U.S.

349, 357-358 (1977) (opinion of Stevens, J.)) (brackets

omitted); *see also, e.g., Gregg v. Georgia*, 428 U.S. 153

181-188 (1976) (joint opinion); *id*. at 231-241 (Marshall,

J., dissenting); *Woodson v. North Carolina*, 428 U.S.

280, 305 (1976) (joint opinion). It is therefore “‘of vital

importance to the defendant and to the community that

any decision to impose the death sentence be, and

appear to be, based on reason rather than caprice or

emotion.’ ” *Beck*, 447 U.S. at 637-638. The imposition of

the death penalty in Shanklin’s case could not have

been more capriciously determined: the untethered

whim of one elected state district swept away a

unanimous jury decision for a life sentence.

This Court has repeatedly invalidated under the Eighth and Fourteenth Amendments “procedural rules that tended to diminish the reliability of the sentencing determination.” *Beck*, 447 U.S. at 638 (quotation marks omitted); *see, e.g., Woodson,* 428 U.S. at 301-305 (joint opinion) (States may not impose mandatory death sentences); *Roberts v. Louisiana*, 428 U.S. 325, 335-336 (1976) (joint opinion) (same); *Beck*, 447 U.S. at 638-646 (States must permit juries to consider lesser-included non-capital offense); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality) (States may not constrain sentencer’s consideration of relevant mitigating circumstances). By contrast, Alabama’s capital sentencing scheme violates the Eighth Amendment because it 1) deprives the jury of the ability to “‘express the conscious of the community on the ultimate question of life or death.”” *Ring*, 536 U.S. at 615-16 (Breyer, J. concurring) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)); (2) fails to produce the reliable outcomes this Court’s jurisprudence requires, *see, e.g., Beck*, 447 U.S. at 638; and (3) falls far outside the consensus practice of death-penalty jurisdictions by not entrusting a jury with the authority to sentence a defendant such as Shanklin to life rather than death. *See, e.g., Hall v. Florida*, U.S. , 134 S. Ct. 1986, 1992 (2014).

**CONCLUSION**

Shanklin respectfully asks this honorable Court to accept jurisdiction in this case and issue a Writ of Certiorari to the Supreme Court of Alabama.

Dated: January 25, 2016, Winter Park, Florida.

Respectfully submitted,

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