No. 10-9085
CAPITAL CASE

In the SUPREME COURT of the UNITED STATES

KERRY SPENCER,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for a Writ of Certiorari to the
Alabama Supreme Court

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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April 20, 2011

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Should this Court decline to review Spencer's splitless, fact-bound, and meritless claim that the trial court erred when it failed to charge the jury on heat-of-passion manslaughter and on voluntary intoxication?

2. Should this Court review Spencer's splitless and meritless claim that Alabama's capital murder statute violates *Ring v. Arizona* or his fact-bound claim that the trial judge erred when he overrode the jury's life without parole sentence recommendation?

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STATEMENT OF THE CASE

A. The Proceedings Below

On June 17, 2004, Kerry Spencer shot and murdered Birmingham police officers Carlos Owen, Harley A. Chisholm, III, and Charles R. (Rob) Bennett. He also attempted to murder Birmingham police officer Michael Collins. Pet. App. A, pp. 2-7. On October 1, 2004, Spencer was indicted by the Grand Jury of Jefferson County for the following offenses: the capital murder of Officer Carlos Owen in violation of Ala. Code, §13A-5-40(a)(5); the capital murder of Officer Harley A. Chisholm in violation of Ala. Code, §13A-5-40(a)(5); the capital murder of Officer Rob Bennett in violation of Ala. Code, §13A-5-40(a)(5); the attempted murder of Officer Michael Collins in violation of Ala. Code, §13A-4-2; and, the capital offense of murder of two or more persons pursuant to one scheme or course of conduct in violation of Ala. Code, §13A-5-40(a)(10). On June 19, 2005, the jury found Spencer guilty on all counts of the indictment. A jury sentencing hearing was held on June 20, 2005. After deliberating for several days, the jury recommended a life without parole sentence for Spencer on the capital murder charges.

The trial court conducted its own sentencing hearing on September 7, 2005. After this hearing, the trial court found the existence of the following

aggravating circumstances: (1) the Ala. Code, §13A-5-49(3) aggravating circumstance that Spencer knowingly created a great risk of death to many persons in the commission of this crime; (2) the Ala. Code, §13A-5-49(5) aggravating circumstance that the capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (3) the Ala. Code, §13A-5-49(7) aggravating circumstance that the capital offense was committed to disrupt or hinder the lawful exercise of a government function or the enforcement of laws; and, (4) the Ala. Code, §13A-5-49(9) aggravating circumstance that Spencer intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct. The trial court found the existence of the following mitigating circumstances: (1) the Ala. Code, §13A-5-51(1) mitigating circumstance that Spencer has no significant history of prior criminal activity; and, (2) the Ala. Code, §13A-5-51(7) mitigating circumstance of Spencer's age at the time of the crime. The trial court also considered the non-statutory mitigating evidence of Spencer's background and the jury's life without parole recommendation. After weighing the aggravating and mitigating circumstances, the trial court sentenced Spencer to death.

On April 4, 2008, the Alabama Court of Criminal Appeals affirmed Spencer's convictions but remanded the case with instructions that the trial

court "amend its sentencing order to clarify its findings regarding the nonstatutory mitigating circumstances and judicial override of the jury's recommendation of life imprisonment without parole." *Spencer v. State*, CR-04-2570, 2008 WL 902766, at *32 (Ala. Crim. App. 2008). The trial court entered its amended sentencing order on May 15, 2008, and once again sentenced Spencer to death. On return to remand, the Alabama Court of Criminal Appeals again remanded this case to the trial court for it to "clarify its findings regarding the nonstatutory mitigating circumstances and judicial override of the jury's recommendation of life imprisonment without parole." *Id.* The trial court entered its amended sentencing order on March 30, 2009, and again sentenced Spencer to death. On return to second remand, the Alabama Court of Criminal Appeals affirmed Spencer's convictions and death sentence. *Id.* Spencer then filed a petition for writ of certiorari in the Alabama Supreme Court. The Alabama Supreme Court denied the petition on September 17, 2010.

B. Statement of the Facts

Spencer confessed to killing three uniformed police officers with a long gun and to shooting another uniformed police officer at the same time. Spencer was living at a crack-house apartment at the time, and shot the officers when they arrived to execute a search warrant on another man who

was also living at the apartment. The Alabama Court of Criminal Appeals set out these facts in considerable detail in the opinion under review. Pet. App. A, pp. 2-7.

REASONS FOR DENYING THE PETITION

It is worth noting at the outset that Spencer has not alleged – let alone proven – any traditional ground for certiorari. He has not, for instance, argued that the decision of the Alabama Court of Criminal Appeals conflicts with the decisions of other state courts, *see* Sup. Ct. R. 10(b), or that this case presents a novel and important question of federal law, *see* Sup Ct. R. 10(c). At bottom, Spencer requests that this Court engage in a fact-bound review of his particular case. This Court should deny the petition.

I. This Court Should Decline To Review Spencer's Claim That The Trial Court Erred When It Failed To Charge The Jury On Heat-Of-Passion Manslaughter And On Voluntary Intoxication.

Spencer contends that the Alabama Court of Criminal Appeals erred when it denied relief on his argument that the trial court erred when it failed to charge the jury on heat-of-passion manslaughter and on voluntary intoxication. Spencer asserts that there was evidence to support these charges and the trial court's failure to give the charges violates this Court's holding in *Beck v. Alabama*, 447 U.S. 625 (1980). The Court should deny cert on this question for at least three reasons.

A. Certiorari Should Be Denied Because The Underlying Issues Are Not Worthy Of This Court's Review.

First, the Court should deny certiorari on this question because Spencer has not alleged that it raises a question on which the lower courts are split, and in the end seeks only fact-bound error correction. Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons. In addition, the demands on this Court's time mandate that it select for review only those truly important cases that will have a wide ranging impact. Spencer has not alleged compelling grounds for this Court to grant certiorari review of this claim. Moreover, the instant claims involve a simple application of established precedent to the facts of this case. For that reason, a decision in this case would be of such narrow scope and limited precedential value that it is not worthy of certiorari consideration.

B. Spencer Was Not Entitled To A Jury Instruction On The Lesser-Included Offense Of Heat-Of-Passion Manslaughter Where The Evidence Did Not Support Such A Charge.

Second, this Court should deny certiorari on this question because the trial court did not err when it refused to charge the jury on the lesser-included offense of heat-of-passion manslaughter. *Beck v. Alabama*, 447 U.S. 625 (1980), only requires that lesser-included charges be given where the evidence warrants it. In this case, Spencer was not entitled to this

instruction under Alabama law, which recognizes only three legal provocations sufficient to reduce murder to manslaughter. These legal provocations are:

> (1) when the accused witnesses his or her spouse in the act of adultery; (2) when the accused is assaulted or faced with an imminent assault on himself; and (3) when the accused witnesses an assault on a family member or close relative.

Rogers v. State, 819 So. 2d 643, 662 (Ala. Crim. App. 2001). The Alabama Court of Criminal Appeals properly found that neither the first nor third legally recognized provocation existed in the instant case. *Spencer v. State*, 2008 WL 902766, at *26. The Alabama Court of Criminal Appeals also held that the evidence did not support a charge on the second legally recognized provocation, finding as follows:

> Even assuming, without finding as true, Spencer's contentions that the officers made remarks during the earlier encounter that caused Spencer to fear that the officers would hurt or kill him, those comments were made hours before the final encounter where the officers were killed. Additionally, the initial arguments were between Woods and officers; Spencer willingly joined in the verbal jousting, and again continued his verbal sparring with a second officer even though the first officer had, according to Spencer, made threatening comments. Further, the first two officers Spencer encountered during the final and fatal engagement were shot repeatedly in the back while attempting to exercise a lawful arrest on Woods. The evidence also indicates that Spencer made statements following the earlier encounters with the officers that if the officers returned he would "bust 'em" (R. 913), and that "they was gonna get" the

> officers if they returned. (R. 1638.) Additionally, Spencer, knowing that the officers had returned because he looked out the window, exacerbated the situation by intentionally grabbing his loaded SKS assault rifle and proceeding toward the commotion in the kitchen. This evidence further militates against any contention that the murders were committed in a sudden passion and thus warranted such a jury instruction. Because the evidence did not support a charge on heat-of-passion manslaughter, the trial court properly rejected Spencer's request for such a charge.

Id.

There was no rational basis for instructing the jury on the lesser-included offense of heat-of-provocation manslaughter. Certiorari should, therefore, be denied on this claim.

C. Certiorari Should Be Denied On Spencer's Claim That He Was Entitled To A Jury Instruction On Intoxication Because The Claim Does Not Present A Federal Question And Is Also Without Merit

Third, this Court should deny certiorari on this question to the extent that Spencer is arguing that he was entitled to a jury instruction on intoxication. Spencer did not raise this claim at trial. The Alabama Court of Criminal Appeals, therefore, only addressed the claim pursuant to the State's plain error rule set forth in Rule 45A of the Alabama Rules of Appellate Procedure. *Spencer*, 2008 WL 902766, at *11. Pursuant to this review, the Alabama Court of Criminal Appeals determined that no plain error occurred. *Id.*, at *11-13. The application of Alabama's plain error rule is a matter of

state law. A state may apply its own appellate rules of procedure and may defeat a claim based on that independent state law. This Court should, therefore, deny certiorari on Spencer's claim because it was decided under an independent state law rule and does not present a federal question under 28 U.S.C. §1257(a).

In addition, certiorari should be denied because this claim is without merit. The evidence in this case did not support a jury charge on intoxication. There is no *Beck v. Alabama,* 447 U.S. 625 (1980), violation with respect to this charge. Under Alabama law, the inclusion of a jury charge on voluntary intoxication is unnecessary and the inclusion of a charge for a lesser-included offense based on negated intent is unwarranted without substantial evidence indicating that at the time of the crime the defendant was extremely intoxicated. *Ex parte McWhorter*, 781 So. 2d 330, 342-343 (Ala. 2000); *Smith v. State*, 756 So. 2d 892, 905-907 (Ala. Crim. App. 1997). For a jury to consider the issue of whether a defendant's level of intoxication rises to the level to negate a requisite intent, there must be sufficient evidence to support a reasonable theory of an extreme level of intoxication. *McWhorter*, 781 So. 2d at 342-343. A jury typically must consider whether a defendant was so intoxicated, at the time of the charged offense, that his mental state amounted to insanity, therefore finding that his

extreme intoxication negated the requisite intent, as charged in the indictment. *Crosslin v. State*, 446 So. 2d 675, 681-682 (Ala. Crim. App. 1985). A voluntary intoxication charge is not necessary, when the evidence of intoxication is weak and does not support a reasonable theory of negated intent. *McWhorter*, 781 So. 2d at 343.

While Spencer testified that he had snorted a little powder and had swallowed a Seraquil with a Bud light beer that morning and that he was high when he was arrested, the defense presented no evidence that Spencer was intoxicated or high when the crime occurred, much less that Spencer was intoxicated to the point of insanity. In fact, the record indicates that Spencer had been asleep for the three hours before he murdered Officers Owen, Chisholm, and Bennett. (R. 1598, 1605, 1672) As the Alabama Court of Criminal Appeals found: "Spencer failed to establish any evidentiary foundation of intoxication that would warrant an instruction on intoxication." *Spencer*, 2008 WL 902766, at *13.

In addition, Spencer's actions during this crime show that he was not intoxicated to the point of insanity. When Spencer heard a commotion outside, he went to the bedroom window to see what was going on. (R. 1679-1680) When Spencer saw the officers in the apartment, he started shooting and did not stop shooting until all the officers were down. (R.

1683) He walked to the back door of the apartment and saw Officer Collins. He shot at Officer Collins to make sure that he was not a threat to him. (R. 1686-1687) When he left the apartment, he went to a house down the street where he hid in the attic to avoid the police. Spencer's actions during the murders of the police officers clearly reveal that he was not functioning as someone who was intoxicated to the point of insanity but as someone who understood what he was doing and was aware of the consequences of his actions. The trial court, therefore, did not err when it failed to give a voluntary intoxication charge to the jury. Certiorari should, therefore, be denied on this claim.

II. Alabama's Capital Murder Statute Does Not Violate *Ring v. Arizona*, And The Trial Judge Did Not Err When He Overrode The Jury's Life Without Parole Sentence Recommendation.

Spencer makes three erroneous arguments concerning the imposition of the death penalty in his case: (1) that Alabama's death penalty violates this Court's holding in *Ring v. Arizona*, 536 U.S. 584 (2002); (2) that the trial court's override of the death penalty was improper; and (3) that allowing an override by an elected judge violates his Eight Amendment right to have a jury determine the ultimate punishment. As set forth below, none of these arguments is worthy of this Court's certiorari review.

A. Certioraris Should Be Denied Because These Arguments Do Not Present A Federal Question.

As an initial matter, the lower courts' ruling on each of these grounds is supported by an adequate and independent state ground. Spencer did not raise these arguments at his trial. The Alabama Court of Criminal Appeals, therefore, only addressed them pursuant to the State's plain error rule set forth in Rule 45A of the Alabama Rules of Appellate Procedure. The application of Alabama's plain error rule is a matter of state law. A state may apply it own appellate rules of procedure and may defeat a claim based on that independent state law. This Court should, therefore, deny certiorari on Spencer's arguments because they were decided under an independent state law rule and do not present a federal question under 28 U.S.C. §1257(a).

B. Certiorari Should Be Denied Because The Arguments Are Not Worthy Of This Court's Review.

The law on these matters is well-settled and there is no split in the States concerning Spencer's arguments. Spencer has not alleged compelling grounds for this Court to grant certiorari review of his arguments. Moreover, the instant arguments involve a simple application of established precedent to the facts of Spencer's case. For that reason, a decision in this

case would be of such narrow scope and limited precedential value that it is not worthy of certiorari consideration.

C. Alabama's Death Penalty Statute Does Not Violate Ring v. Arizona.

Third, this Court should deny cert on the *Ring* argument because Spencer has no plausible basis for that claim. Spencer argues that Alabama's death penalty statute violates this Court's holding in *Ring v. Arizona*, 536 U.S. 584 (2002), because the jury does not determine whether at least one aggravating circumstance exists and does not determine whether the aggravating circumstances outweigh the mitigating circumstances. Spencer is wrong on this front.

Ring v. Arizona does not invalidate Alabama's death penalty statute. First, it is constitutional for the judge to make the final sentencing determination in sentencing Spencer to death. In *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002), the Supreme Court of Alabama held that Alabama's capital scheme is constitutional and in compliance with *Ring*. In *Ring v. Arizona*, this Court extended the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to death penalty cases. In so doing, it overruled part of *Walton v. Arizona*, 497 U.S. 639 (1990). This 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.

In *Waldrop*, the Supreme Court of Alabama addressed the effect of *Ring* on the constitutionality of Alabama's sentencing scheme. *Waldrop*, 859 So. 2d 1189. In *Waldrop*, the defendant had been convicted of two counts of murder during the course of a robbery in the first degree, in violation of Ala. Code, §13A-5-40(a)(2). *Id.* The Supreme Court of Alabama explained that "[b]ecause the jury convicted Waldrop of two counts of murder during robbery in the first degree...the statutory aggravating circumstance of committing a capital offense while engaged in the commission of a robbery, Ala. Code 1975, §13A-5-49(4), was 'proven beyond a reasonable doubt.'" *Id.* (citing Ala. Code, §13A-5-45(e); Ala. Code, §13A-5-50)). The court further emphasized that "[o]nly one aggravating circumstance must exist in order to impose a sentence of death." *Id.* (citing Ala. Code, §13A-5-45(f)).

Applying these observations, the Alabama Supreme Court concluded that "in Waldrop's case, the jury, and not the trial judge, determined the existence of the 'aggravating circumstance necessary for imposition of the

death penalty.'" *Id.* (citations omitted). The court further explained that "the findings reflected in the jury's verdict alone exposed Waldrop to a range of punishment that had as its maximum the death penalty. This is all *Ring* and *Apprendi* require." *Id.* Thus, the court upheld Alabama's capital sentencing scheme in cases where the capital offense corresponds to an aggravating circumstance. *See also Stallworth v. State*, 868 So. 2d 1128, 1141 ("Here, the jury's verdict in the guilt phase found Stallworth guilty of two counts of robbery/murder. Robbery is an aggravating circumstance. This verdict made Stallworth eligible for the death penalty.").

As is the case here, when a capital offense corresponds to an aggravating circumstance, the jury's guilty verdict necessarily establishes the existence of the aggravating circumstance beyond a reasonable doubt. Ala. Code, §13A-5-45(e). As long as the jury finds the facts that are necessary to establish death as the maximum available sentence, *Ring* is satisfied. *Ring* has nothing to say about how or by whom the sentence is ultimately determined.

In addition, the court in *Waldrop*, thoroughly reviewed and rejected the defendant's contention that the jury must determine whether the aggravating circumstances outweigh the mitigating circumstances. *Waldrop*, 859 So. 2d at 1188-1190. The court explained that "the weighing process is

not a factual determination or an element of an offense; instead, it is a moral or legal judgment that takes into account a theoretically limitless set of facts and that cannot be reduced to a scientific formula or the discovery of a discrete, observable datum." *Id.* at 1189. Based on its determination that the weighing of the aggravating and mitigating circumstances is neither a finding of fact nor an element of the offense, the court concluded that "*Ring* and *Apprendi* do not require that a jury weigh the aggravating circumstances and mitigating circumstances[]" and rejected the appellant's claim. *Id.* at 1190.

During the guilt phase of Spencer's trial, the jury found that he had committed capital murder of two persons by one act or pursuant to one scheme or course of conduct, in violation of Ala. Code, §13A-5-40(a)(10). This capital offense corresponds to the aggravating circumstance that "[t]he defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct." Ala. Code, §13A-5-49(9). "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); Ala. Code §13A-5-50. Thus, by finding Spencer guilty of capital murder of two people during one act or pursuant to one

scheme or course of conduct, the jury found the existence of an aggravating circumstance beyond a reasonable doubt.

In sum, the jury found that Spencer committed the intentional murder of two persons in one act or pursuant to one scheme or course of conduct – an offense that, under Alabama law, has a corresponding aggravating circumstance. Thus, the jury found that the aggravating circumstance existed beyond a reasonable doubt. Therefore, under *Waldrop,* Spencer is eligible for the death penalty. Spencer's death sentence satisfies the requirements of *Ring v. Arizona*, and Spencer's contentions to the contrary are without merit.

D. Alabama's Jury Override Provision Is Not Standardless.

Spencer also erroneously argues that Alabama's provision allowing for judicial override lacks the standards necessary to ensure that a sentence is not imposed arbitrarily. Alabama's jury override provision is not standardless and thus not subject to castigation as arbitrary and capricious. Ala. Code, §13A-45-47(e) provides:

> 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.

In Alabama, [t]he trial court and not the jury is the sentencing authority." *Freeman v. State*, 555 So. 2d 196, 213 (Ala. Crim. App. 1988), *aff'd*, 555 So. 2d 215 (Ala. 1989), *cert. denied*, 496 U.S. 912 (1990). "The trial court is authorized to reject the jury's recommendation of life without parole when imposing sentence and to impose a death sentence." *Id; Accord Tarver (Robert) v. State*, 500 So. 2d 1232, 1251 (Ala. Crim. App.), *aff'd*, 500 So. 2d 1256 (Ala. 1986), *cert denied*, 482 U.S. 920 (1987); *Tarver (Bobby) v. State*, 553 So. 2d 631, 633 (Ala. Crim. App.), *aff'd*, 553 So. 2d 633 (Ala. 1989), *cert. denied*, 496 U.S. 932 (1990); *Thompson v. State*, 542 So. 2d 1286, 1300 (Ala. Crim. App.), *aff'd*, 542 So. 2d 1300 (Ala), *cert. denied*, 493 U.S. 874 (1988). The constitutionality of Alabama's statutory sentencing scheme was approved by this Court in *Profitt v. Florida*, 428 U.S. 242, 252 (1976), and jury verdict override provisions were specifically found constitutionally permissible in *Spaziano v. Florida*, 468 U.S. 447, 457-467 (1984).

Moreover, the Alabama capital sentencing statute does not permit a trial judge to override a jury recommendation of life without parole on the basis of arbitrary factors. A trial judge in Alabama is required to determine what statutory aggravating circumstances exist; to consider all evidence offered in mitigation and to determine what mitigating circumstances exist;

to weigh those aggravating circumstances that exist with those mitigating circumstances that exist; and to enter written findings in sentencing a defendant to death. The Alabama appellate courts are then required to review those findings and independently weigh the aggravating and mitigating circumstances and to independently determine whether death is the appropriate sentence in a case pursuant to Ala. Code, §13A-5-53. Simply because Alabama does not have a defined standard of review where a trial judge overrides a sentence recommendation in sentencing a defendant to death does not mean that a death sentence is arbitrarily imposed.

Spencer also erroneously argues that, because Alabama is in the minority regarding its method of allowing the trial judge to override a jury's life without parole recommendation, jury override must be unconstitutional. The State knows of no authority and Spencer has cited none, supporting this line of reasoning. In fact, the "'Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.'" *Harris v. Alabama*, 513 U.S. 504 (1995), *quoting, Spaziano v. Florida*, 468 U.S. 447, 464.

In any case, this Court rejected the precise claim Spencer now argues. *Harris, supra.* In an eight to one decision, this Court held that "the Eighth Amendment does not require the State to define the weight the sentencing

judge must accord to an advisory verdict." *Id.* The State could cite many more excerpts from that opinion that directly refute the claim Spencer now asserts. However, because that was the sole issue determined in the case, the entire opinion is relevant. The State would merely point the Court's attention to the full opinion in assessing Spencer's claim.

Spencer also appears to argue that his sentence was imposed arbitrarily because the Alabama Court of Criminal Appeals had to twice remand his case to the trial court for it to made proper findings. However, the fact that the Alabama Court of Criminal Appeals twice remanded this case shows that the Alabama capital statute is not standardless. In fact, in Spencer's case, the appellate court made sure that the standards set forth in the capital murder statute were met. Spencer's contrary argument is without merit.

E. Allowing An Elected Judge To Override The Jury's Life Without Parole Sentence Recommendation Does Not Violate The Eighth Amendment.

Spencer also erroneously contends that Alabama's sentencing scheme is unconstitutional because elected judges determine the ultimate sentence. This Court has also rejected that proposition. In *Harris v. Alabama*, 513 U.S. 504, 513-514 (1994), this Court stated the following concerning its role in how a State implements capital punishment:

> What purpose is served by capital punishment and how a State should implement its capital punishment scheme-to the extent that those questions involve only policy issues-are matters over which we, as judges, have no jurisdiction. Our power of judicial review legitimately extends only to determine whether the policy choices of the community, expressed through its legislative enactments, comport with the Constitution. As we have noted elsewhere, "while we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators." *Gregg v. Georgia,* 428 U.S. 153, 174-175, 96 S.Ct. 2909, 2925-2926, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

This Court then considered and rejected an argument similar to the one made here – that Alabama judges are more likely to override a life without parole sentence recommendation than a death recommendation. *Id.*, at 513-514. This Court stated the following when it rejected this argument:

> 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.

That same analysis applies to the argument made by Spencer 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.[1]

Certiorari should, therefore, not be granted on this argument.

CONCLUSION

For the foregoing reasons, this Court should deny Spencer's petition for writ of certiorari.

Respectfully submitted,

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[1] In addition, Spencer offered no proof at trial or in his brief to this Court that the imposition of the death penalty by an elected judge is unconstitutional.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2011, I did serve a copy of the foregoing on the attorney for the Petitioner, by placing same in the United States mail, first class, postage prepaid and addressed as follows:

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