No. 10-9085
CAPITAL CASE

IN THE

SUPREME COURT OF THE UNITED STATES

KERRY SPENCER,

Petitioner,

-v.-

STATE OF ALABAMA,

Respondent.

REPLY TO BRIEF IN OPPOSITION

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I. Petitioner's *Beck* Claim Warrants Review by this Court.

A. The Alabama Courts' Failure to Provide the Jury with an Alternative to Conviction of Capital Murder or Acquittal Conflicts with this Court's Precedents (Addressing Point IA of the Brief in Opposition).

Petitioner agrees that his claims relying on Beck v. Alabama, 447 U.S. 625 (1980), involve "a simple application of established precedent to the facts of this case." BIO, at 5. Contrary to Respondent's assertion that such application does not fall within any traditional ground for certiorari, id., however, as the Court is well aware, specifically listed among the reasons for granting review is that a state court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Here, simple application of the holding in Beck requires reversal of Petitioner's conviction.

Nowhere does Respondent acknowledge the rationale behind the Beck principle, namely concern about the risk of an unwarranted conviction when the jury is forced to choose between finding a defendant guilty of a capital offense and declaring him innocent of any wrongdoing. As this Court recently emphasized, denying the jury any alternative to acquittal or conviction of capital murder "…'may encourage the jury to convict for an impermissible reason—its belief that the defendant is guilty of some serious crime and should be punished,' even when there is 'some doubt with respect to an element' of the capital offense." Bobby v. Mitts, 2011 U.S. LEXIS 3368, at *3-4, 2011 WL 1631037, at*1 (U.S., May 2, 2011) (per curiam),quotingBeck, 447 U.S. at 632. SeealsoSpaziano v. Florida, 468 U.S. 447, 455 (1984) (the "goal of the Beck rule" is "to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence");Schad v. Arizona, 501 U.S. 624, 646 (1991) ("Our fundamental concern in Beck was that a jury convinced that the defendant had committed

some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all"). Petitioner's case is a classic example of precisely the kind of distortion wrought by such a binary choice, and the Court should grant review to ensure adherence to the important federal constitutional principle embodied in Beck v. Alabama.

B. Because Evidence in the Record Would Have Supported Conviction of a Lesser Offense, the Jury Should Have Been Given that Option (Addressing Points IB and C of the Brief in Opposition).

Respondent's merits submissionattempts to justify the trial court's refusal to instruct the jury on heat of passion manslaughter or intoxication by asserting that the evidence did not warrant providing lesser included charges. BIO, at 5-7, 8-10. As discussed in detail in the main petition (see pp. 13-19), evidence was introduced at trial demonstrating that Petitioner feared being assaulted by the armed police officers and that he had ingested significant quantities of alcohol and drugs shortly before the shootings. That evidence was sufficient under Alabama law to create a "reasonable theory from the evidence which would support the [lesser included instruction]." Beck, 447 U.S. at 630, n.5 (quotingFulghum v. State, 291 Ala. 71, 75 (1973)). Yet both the trial court and the Alabama Court of Criminal Appeals, rather than assessing whether this evidence warranted instructing the jury on non-capital murder and manslaughter, instead took it upon themselves to consider whether the evidence was sufficient *to persuade them* that Petitioner was guilty only of the lesser offenses. Because the Alabama courts used the wrong standard in justifying an all-or-nothing choice for the jury, certiorari review is warranted.

Regarding the heat of passion defense, the Alabama Court of Criminal Appeals concluded upon its review of the evidence that the only relevant legally recognized

provocation, that Petitioner faced an imminent assault, was not "applicable." Spencer v. State, 2008 Ala. Crim. App. LEXIS 74, at *76-77 (2008). In reaching this conclusion, the appellate court assumed the role of a fact finder. The court argued that: 1) the officers' threatening comments were made hours before the shooting; 2) Petitioner participated in the "verbal jousting" and even said he would "bust 'em" and 3) Petitioner waited for the officers by the window with a gun and eventually shot two of the officers in the back. Id. at *77. Tellingly, as quoted by Respondent (BIO, at 7), the appellate court noted that evidence that Petitioner grabbed a rifle and proceeded towards the kitchen "further militates against any contention that the murders were committed in a sudden passion. . . ."Id. at *77-78. This conclusion bespeaks a weighing of the evidence to assess whether the heat of passion defense should be believed, rather than considering whether *any* evidence had been presented on which a rational juror could support conviction of the lesser charge of manslaughter.

Similarly, the Alabama courts' rejection of Petitioner's claim that a manslaughter charge should have been provided in light of his evidence of intoxication[1] was also inappropriately based on their assessment of the strength of that evidence. Conceding that Alabama law, when the crime requires specific intent, generally requires submission of the lesser chargewhere evidence of intoxication has been presented, Spencer, 2008 Ala. Crim. App. LEXIS at *36, the Alabama Court of Criminal Appeals nonetheless determined: "There was simply insufficient evidence from which a jury could have found beyond a reasonable doubt that Spencer was unable to form the requisite intent to commit capital

[1]Contrary to Respondent's assertion (see BIO, at 7-8), the Alabama court's treatment of the issue regarding intoxication under its plain error doctrine does not argue against review of the federal question by this Court. The court did not rely on an independent state ground for denying relief; rather, it simply applied a stricter standard to evaluate whether the error affected a substantial right or caused prejudice. SeeSpencer, 2008 Ala. Crim. App. LEXIS at *28-29.

murder, because he was experiencing 'a disturbance of mental or physical capacities,' resulting from drug or alcohol use at the time of the murders." Id. at *40-41.

This conclusion of course turns the inquiry on its head. It was the prosecution's burden to prove beyond a reasonable doubt that Petitioner formed the requisite intent, despite his ingestion of drugs and alcohol, and if the jury *had* a reasonable doubt based on the evidence of intoxication, a manslaughter verdict would have been warranted. Accordingly, the evidence of intoxication mandated submission of that charge to the jury, and failure to provide the option of a manslaughter charge violated this Court's precedents.

II. Petitioner Properly Presented his Penalty Phase Claims at the Trial Court, and Alabama's Death Penalty Statute Fails to Conform with this Court's Decisions in *Ring v. Arizona* and *Cunningham v. California*.

A. Petitioner's Penalty Phase Claims Were Properly Preserved at the Trial Level and Present a Federal Question (Addressing Point IIA of Brief in Opposition).

Contrary to Respondent's assertions (BIO, at 11), Petitioner raised all three penalty phase claims in the trial court. Petitioner's claim that the Alabama capital sentencing statute violates Ring v. Arizona, 536 U.S. 584 (2002), was presented to the trial court in the Motion Barring Imposition of the Death Penalty in the Absence of a Unanimous Jury Vote (V.3, p.490-92), Motion to Bar Override of the Jury's Sentencing Determination (V.3, p.500-03), and again in the Motion for Reconsideration of Sentence (V.3, p.533-36). The claim that standardless override is improper was raised to the trial court in the Motion to Bar Override of the Jury's Sentencing Determination (V.3, p.494-98) and in the Motion for Reconsideration of Sentence (V.3, p.533-36). Finally, the claim that judicial override violates the Eighth Amendment was raised simultaneously with the previous claims in the Motion to Bar Override of the Jury's Sentencing Determination (V.3, p.495-500). Respondent's characterization of these claims as unpreserved at the trial level is demonstrably incorrect.

Relying on this mischaracterization, Respondent contends that the Alabama Court of Criminal Appeals analyzed these claims under Alabama's plain error rule (Rule 45A of the Alabama Rules of Appellate Procedure), concluding the claims were defeated based on an "adequate and independent state ground." BIO, at 11. TheAlabama Court of Criminal Appeals addresses Petitioner's Ring claim in sections VII and VIII of its opinion. Nowhere in these sections does the court mention that the claim was not presented to the trial court,

nor does it invoke Rule 45A or the plain error doctrine. Spencer, 2008 Ala. Crim. App. LEXIS at *82-86.Petitioner properly presented the federal law claims regarding his death sentence on which he seeks this Court's review to the Alabama courts.

B. Findings by the Judge, and not a Jury, that a Statutory Aggravating Factor had been Proven Beyond a Reasonable Doubt, and that Aggravating Circumstances Outweigh Mitigating Circumstances, Violate Petitioner's Sixth Amendment Rights as Established by this Court's Holdings in *Apprendi*, *Ring*, and *Cunningham*(Addressing Point IIC of Brief in Opposition).

Respondent simply relies on the Alabama Supreme Court's decision in Ex parte Waldrop, 859 So.2d 1181 (Ala. 2002), in asserting that Alabama's procedures comply with this Court's holdings in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring. BIO, at 12-16. Petitioner submits, however, that the state court's attempts to distinguish the Apprendi/Ring line of cases cannot be sustained. First, as demonstrated in the main petition (see p. 23), the jury in Petitioner's case did *not* find that a statutory aggravating circumstance was established beyond a reasonable doubt. Second, even if it had, a jury's finding of a statutory aggravating factor, while in form exposing the defendant to a possible death sentence, does not, in reality, make the defendant eligible for death. The *effect* of the Alabama statute is that no death sentence may be imposed unless the additional finding is made that aggravating factors outweigh mitigating circumstances. Accordingly, that finding must be made by a jury to comply with the Sixth Amendment.Cunninghamv. California, 549 U.S. 270, 290(2007)(citingBlakely v. Washington, 542 U.S. 296, 305 (2004) ("If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied")).

Nor does it matter that Respondent, following the Alabama Supreme Court, Ex parte Waldrop, 859 So.2d at 1189, characterizes the required finding that aggravating must

outweigh mitigating circumstances as "not a factual determination" but rather a "moral or legal judgment." BIO, at 14-15. No matter how the finding is described, under Alabama law, without that finding, no death sentence may be imposed. Accordingly, the finding must be made by a jury. See Cunningham, 549 U.S. at 290, 294 (where higher sentence could not be imposed until judge found "circumstance in aggravation," the scheme violated the Sixth Amendment under Apprendi and Ring). Petitioner's Sixth Amendment rights were violated because the judge inflicted "punishment that the jury's verdict alone [did] not allow." Blakely, 542 U.S. at 304.

Here, the sentencing judge made the decision that statutory aggravating factors had been established, andthat they outweighed the mitigating circumstances, despite the life recommendation of the jury. Because both determinations are required for Petitioner to be eligible for the death penalty, this Court should grant review to consider whether his death sentence was imposed in violation of his rights under the Sixth and Fourteenth Amendments.

CONCLUSION

For the reasons stated above, as well as those stated in the main petition, Petitioner respectfully prays that a writ of certiorari be granted to review the judgment of the Alabama Court of Criminal Appeals.

Dated: May 6, 2011

Respectfully submitted,

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