No. 10 -

In the
Supreme Court of the United States
October Term, 2010

KERRY SPENCER,

Petitioner,

-against-

STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether The Trial Court Violated The Holding In *Beck v. Alabama*, 447 U.S. 625 (1980), By Refusing To Provide The Jury With A Third Option Beyond Conviction Of Capital Murder Or Acquittal, When The Evidence Supported At Least Two Theories For That Option.

2. Whether Petitioner's Death Sentence, Imposed By A Judge Who Concluded That Aggravating Factors Outweighed Mitigating Circumstances Despite A Jury's Finding To The Contrary And Recommendation Of Life Imprisonment, Violates The Sixth, Eighth And Fourteenth Amendments.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court of the United States

State Courts

Statutes

Miscellaneous

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ON PETITION FOR A WRIT OF CERTIORARI TO THE

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Petitioner prays that a writ of certiorari issue to review the judgment of the Alabama Court of Criminal Appeals entered on May 1, 2009, which affirmed the judgment convicting Petitioner of capital murder and sentencing him to death. The Supreme Court of Alabama denied review.

CITATION TO OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appealsaffirming Petitioner's conviction but remanding to the trial court with directions as to sentencing is reported at Spencer v. State (Spencer I), --- So.2d ---, 2008 Ala. Crim. App. LEXIS 74 (2008) (Appendix A). The Alabama Court of Criminal Appeals again remanded with directions on sentencing, reported at Spencer v. State (Spencer II), --- So.2d ---, 2009 Ala. Crim. App. LEXIS 18 (2009). (Appendix B). The Court of Criminal Appeals' final opinion is reported

as Spencer v. State (Spencer III), --- So.2d ---,2009 Ala. Crim. App. LEXIS 42 (2009) (Appendix C).

JURISDICTION

The judgment of the Alabama Court of Criminal Appeals was entered on May 1, 2009. The Supreme Court of Alabama denied review on September 17, 2010.(Appendix D). By order dated December 9, 2010, Justice Thomas extended thetime to file this petition to February 14, 2011.Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), Petitioner asserting deprivation of his rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which in relevant part provides: "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 . . .";

the Eighth Amendment to the Unites States Constitution, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted";

and the Fourteenth Amendment to the United States Constitution, which provides in relevant part: "Nor shall any state deprive any person of life, liberty or property, without due process of law."

This case also concerns provisions of Alabama Statutes, specifically Ala. Code§ 13A-3-2**Error! Reference source not found.**; 13A-3-23; 13A-5-40; 13A-5-41; 13A-5-45 to 13A-5-52; 13A-6-2; 13A-6-3. Relevant portions of these provisions are set forth in Appendix E.

STATEMENT OF THE CASE AND OF THE FACTS

Events Leading Up To The Shooting

On the morning of July 17, 2004 at about 10:35 a.m. Officer Owen reported to dispatch that he was exiting his car to investigate something suspicious at the 1600 block of 18th Street in Ensley, Alabama. (V.23, p.990).[1]Officer Collins, being familiar with the neighborhood, decided to join him.(V.22, p.696-97). He soon found Officer Owen arguing through the screen door with an occupant of the apartment, a man he later learned was Nathaniel Woods, and testified that Woods was shouting "fuck the police." (V.22, p.702, 705-06, 713). Officer Owen was no stranger to this apartment: one neighbor, Carolyn Slaughter, testified that he was known to the apartment as "Curly." (V.23, p.965).[2] As their argument continued, Woods told Owen "You hide behind that badge and gun. … Take that badge and gun off…," a request to which Owen obliged, only to put it back on when Slaughter appeared and convinced him to do so. (V.22, p.709-10; V.23, p.969).

Petitioner Spencer testified that during this initial encounter with the three officers, he was inside the apartment but he saw Owen come to the back door and argue with Woods about stolen cars. (V.26, p.1657). When he approached the window and told Owen to "get his weak ass the fuck on away from here," Owen replied "there's enough body bags for you too." The officer added that he "wish[ed] I had a reason to come in this apartment, I'd show you who was weak," warning that "[w]e gonna get you and when we get you, we're gonna fuck you up." (V.26, p.1658-59). When Woods and Officer Chisholm, who by that point had joined the other officers, started arguing, Spencer told him to "get the fuck away from the apartment." Chisholm, known in the neighborhood as "Robo" cop (V.23, p.904, 969; V.26, p.1665), responded with threats that Spencer said made him fear for his life. (V.26,

[1] References are to the record on appeal, comprising 30 volumes.
[2] Spencer himself testified that some eight months prior to the incident, he and Woods caught Owen trying to break into the apartment through a window. (V.26, p.1655).

p.1664-68). According to Spencer, earlier that morning Owen had banged on the front door looking for "Bubba."(V.26, p.1653-54, 1660-61).Travis Dumas testified that he also heard a sound at the front door and thought he saw Chisholm by the back door. (V.23, p.904-05).

Apparently unable to access the apartment, the three officers left the porch, with Owenand Collins going to the back alley where they ran Woods' name through the system and discovered he had an outstanding warrant. (V.22, p.715). They transmitted this information to Chisholm, who had the dispatcher confirm the existence of the warrant. (V.22, p.712, 717; V.23, p.1075).

The Shooting

After receiving information that the arrest warrant was valid, Officers Collins, Owen, Chisholm, and Bennett returned to the apartment to serve it. Collins and Owen walked around to the back door, where Woods stood behind a screen door. Owen told Woods that they had an outstanding warrant for his arrest from the Fairfield Police Department; Woods disputed the warrant and said that the officers could not enter the apartment. (V.22, p.727-28). Collins radioed Chisholm and asked him to come to the back door and present Woods with the warrant. (Id.). Woods then ran away from the door, and was pursued by Chisholm, followed by Owen and then Collins. (V.22, p.817). A witness to this encounter stated that he did not see anything in the officers' hands as they entered the apartment. (V.26, p.1571). Collins also testified that neither he, Chisholm nor Owen had their weapons drawn as they entered the apartment. (V.22, p.735).

The back entryway was blocked by Owen and Chisholm subduing Woods, so Collins went around to the front entrance and in the process felt a slap on his side and on his holstered pistol. (V.22, p.734-35). He then radioed a "shots fired" call, and subsequently

radioed a "double-aught" call, the most serious emergency call. (V.22, p.738-39). Collins testified that he felt shots hitting around him as he took cover behind his patrol car and saw Spencer shooting. (V.22, p.740-42).

Spencer testified that as the police entered the apartment, he was awakened by the commotion and rose from the couch, with the rifle he carried with him in his hand. He then looked through the bedroom window, saw police cars, and headed back to the kitchen. (V.26, p.1674, 1678-81). At this point Spencer saw Woods coming from the kitchen, holding his face as if he were in pain. Spencer testified that at this point he saw a gun and immediately began shooting. (V.26, p.1681). He testified that he had no time to contemplate the situation; he decided to fire in a "split second." (V.26, p.1682). Spencer stated that the room, which was usually kept dark, suddenly became brighter, as if a door had been opened, and he turned around to see someone holding a gun. He "automatically" shot at the person. (V.26, p.1675, 1683). Spencer then went to the back door and saw Collins with his weapon out. Collins took cover behind his patrol car, and Spencer testified that he fired at the windshield of the car to keep Collins at bay. (V.26, p.1684-87). Spencer then went to the front door, where the body of the officer he had previously shot was lying on the ground. He testified that he felt an arm jump and touch him, and as he already had the rifle pointed downward, fired again as a reflex. (V.26, p.1688-89).Spencer then left the apartment. (V.26, p.1690). Spencer was later found in the attic of a nearby house and was taken into custody. (V.23, p.1042-44).

Medical Testimony

In a letter admitted into evidence as defense exhibit 2, Dr. Allen Shealy, PhD, a psychologist who examined Spencer and the record in the case, wrote that "most of the

evidence supports the premise that the offense he is charged with occurred under extreme emotional duress in which the defendant feared for his life." (V.18, p.3469).

Dr. Gary Simmons performed a postmortem examination on Bennett, Chisholm and Owen. (V.25, p.1328). With respect to Chisholm, Dr. Simmons testified that while the bullets that likely killed Chisholm traveled through his back, he had been grazed by a bullet to his chest and had stippling on his face which indicated close proximity to the gun. (V.25, p.1331-32, 1336).Dr. Simmons admitted that with enough force a rifle shot to the torso could spin a body around, exposing the back. (V.25, p.1420). With respect to Owen, he testified that at least one of his possibly fatal bullet wounds was to the front of his body, entering his lower left abdomen and exiting his upper right chest. (V.25, p.1396). Regarding Bennett, he testified that both fatal wounds entered the front of his body, one penetrating his vest and traveling through the heart and the other traveling through his brain. (V.25, p.1409-1410, 1413-1414). He also described what is known as a "myoclonic jerk," which can cause random muscle spasms as a body approaches death, making the body jerk in a way that possibly could have explained the touch Spencer felt from Officer Bennett. (V.25, p.1430).

Evidence of Intoxication

Both the State and the defense presented evidence that indicated that Petitioner may have been intoxicated at the time of the incident. State witness Travis Dumas, who assisted with the sales of cocaine that took place in the house, testified that everyone had been "drinking and partying" the night before.(V.23, p.932-33).

Petitioner, testifying in his own defense, admitted that he had a personal cocaine habit and was "doing" about six to seven grams per day. (V.26, p.1647). He would also

smoke marijuana and take a prescription medication cocktail, which included Xanax, Percocet, Morphine, and Valium, described as "mostly downers." (V.26, p.1652). Petitioner would also stay up all night, and sleep all day, and would snort cocaine during the day as well (V.26, p.1652). Following one of these nights, Petitioner fell asleep on the couch in his living room, at around 9 a.m. after taking a Seroquel with a Bud Light to help him doze off. (V.26, p.1674, 1676). According to Petitioner, such a combination brought him "down" and enabled him to fall asleep. (V.26, p.1676).

At a charge conference, the State and the defense requested different versions of an intoxication instruction. (V.3, p.589-91; V.27, p.1742-43).After initially agreeing to give the instruction, the judge changed his mind (V.27, p.1743). The court denied Petitioner's written requests for instructions on self defense, provocation, and manslaughter as a lesser included offense. (V.3, p.594-600; V.4, p.601-12) (Appendix F).

Court's Charge

At the close of trial, the court instructed the jury that they have two options with respect to the counts of intentional murder of Officers Owen, Chisholm and Bennett: they could find Petitioner guilty or not guilty. (V.27, p.1825-28). Counsel specifically objected to the failure to provide instructions on self defense.(V.27, p.1755, 1836-38). The jury returned convictions on all counts. (V.27, p.1845-46).

Penalty Phase

In a short penalty hearing before the jury on June 20, 2005, the State moved to adopt everything introduced during the guilt phase, presenting no additional evidence. (V.27, p.1863).The defense called two members of Petitioner's family who described him as a reserved, non-violent, loving father who felt profound remorse for his actions. (V.27,

p.1864-72). After closing arguments, the judge instructed the jury that punishment depended on whether any of the four aggravating circumstances described by the judge existed beyond a reasonable doubt, and whether aggravating circumstances outweighed mitigating circumstances. (V.28, p.1893-1908). The jury deliberated for more than two days, during which time they sent out two notes and were given clarification instructions and an Allen charge. (V.28, p.1909-19). On June 22, 2005, after announcing its verdicts of life without parole on every capital charge, the jury was released. (V.28, p.1923-24).

On September 9, 2005, a sentencing hearing was held before Judge Tommy Nail pursuant to Ala. Code § 13A-5-47. The State presented three people who described hearing gunshots and fearing for their safety at the time of the shooting, but seeing nothing. (V.28, p.1934-54). The defense objected to these and the State's fourth witness, who testified to Petitioner's outstanding arrest warrants at the time of the shooting, as offering evidence of aggravation that was not presented to the jury. (V.28, p.1955-64, 1992). The State also presented seven family members of the slain officers, who testified about their losses and their hope that Petitioner would be sentenced to death. (V.28, p.1965-91). Petitioner testified for the defense, expressing his remorse and sympathy for the families of the slain, but asserting that he had feared for his life. (V.28, p.1993-96).

On September 23, 2005, after finding the jury verdicts uninfluenced by prejudice, passion or other arbitrary factors, the judge presented his findings from the guilt and penalty phases. (V.28, p.2044-56). He found three aggravating circumstances and two statutory mitigating circumstances,[3] which he considered along with the jury recommendation of life

[3] In aggravation, the judge found that the offense was committed "for the purpose of avoiding or preventing a lawful arrest" (§13A-5-49[5]), "to disrupt or hinder the lawful exercise of a government function or the enforcement of laws" (§13A-5-49[7]), and Petitioner "intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct" (§13A-5-49[9]). The judge found Petitioner's lack of a

and non-statutory mitigating evidence. (V.28, p.2057-61). The judge sentenced Petitioner to death, overturning the jury's recommendation, after finding "beyond a reasonable doubt and to a moral certainty that the aggravating circumstances outweigh the mitigating circumstances." (V.28, p.2061).The judge issued an amended sentencing order on October 4, 2005,in which he added reference to a fourth statutory aggravating circumstance anda summary of several witnesses' testimony.(V.1, p.80-99).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Petitioner's requests for jury instructions on self defense, heat of passion manslaughter, and intoxication were refused. (See Appendix F) On direct appeal, counsel argued that the failure to (1) instruct the jury on heat of passion manslaughter, and (2) give the jury instructions on intoxication and the overlapping lesser included offense of manslaughter violated Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and this Court's holding in Beck v. Alabama, 447 U.S. 625 (1980) (Pet.'s Br. p.54-55, 72). The Alabama Court of Criminal Appeals rejected this claim. Spencer I,at *35-41, *62-78. In a writ of certiorari to the Alabama Supreme Court, counsel argued that the failure to instruct the jury on heat of passion manslaughter, intoxication and the lesser included offense of manslaughter, violated Petitioner's federal constitutional rights. (Pet.'s Writ of Cert. p.20, 30). The court denied review. (Appendix D)

2. Petitioner challenged the Alabama capital sentencing statute as violating the Sixth Amendment under Ring v. Arizona, 536 U.S. 584 (2002), and Apprendi v. New Jersey, 530 U.S. 466 (2000), in his motions to bar override of the jury's sentencing determination (V.3,

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"significant history of prior criminal activity" (§13A-5-51[1]) and age (§13A-5-51[7]) to be mitigating circumstances.

p.494) and for reconsideration of sentence (V.3, p.533). Both motions were denied. These issues were raised on appeal (Pet. Brief, p.76-83), and denied by the Alabama Criminal Court of Appeals. Spencer I, at*82-85. Finally, petitioner raised these claims on petition to the Alabama Supreme Court. (Pet.'s Writ of Cert., p.36-38).

Petitioner argued that Alabama's standardless override results in arbitrary application of the death penalty in violation of the Eighth Amendment in several motions before the trial court. (V.3, p.494-8, 554).Petitioner also argued before the trial court that the judicial override of his jury's recommendation for life imprisonment violated the Eighth Amendment, urging the court to consider the claim in light of Justice Breyer's opinion in Ring. (V.3, p.495-98). Petitioner raised both claims before the Alabama Court of Criminal Appeals, (Pet.'s Brf. p.79-83), which denied them, Spencer I,at *85-86,and on petition to the Alabama Supreme Court. (Pet.'s Writ of Cert. p.44-50).The Alabama Supreme Court denied the petition. (Appendix D).

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Review To Consider Whether The Trial Court Violated The Holding In Beck v. Alabama, 447 U.S. 625 (1980), By Refusing To Provide The Jury With A Third Option, Which Had Support In The Evidence, Beyond Conviction Of Capital Murder Or Acquittal.

This Court should consider whether the failure to provide the jury with an alternative to either subjecting Petitioner to a death sentence or setting him free violated the mandates of Beck v. Alabama, 447 U.S. 625 (1980). The principle established by this Court in Beck, that in a capital case the court must allow the jury to consider a lesser included offense as an alternative to either convicting or acquitting the defendant of capital murder when there is evidence to support such a charge, was ignored in Petitioner's case, despite ample evidence justifying a lesser verdict. This Court has recognized the importance of such an alternative where the evidence proves that a violent crime took place but raises doubt as to whether capital murder was committed, holding that the risks presented with the failure to give a third option in those cases "…cannot be tolerated in a case in which the defendant's life is at stake." Beck, 447 U.S. at 637; seealsoFletcher v. State, 621 So.2d 1010, 1022 (Ala. Crim. App. 1993).

The trial court had at its disposal evidence that supported at least two theories on which to base a lesser charge: 1) testimony that Petitioner was at the time of the shooting provoked by what he perceived as an imminent threat to his life and 2) testimony that Petitioner was intoxicated at the time of the shooting.[4] In denying the request for a lesser included offense, the court made its own determinations as to the strength and veracity of that evidence, rather than leaving those determinations where they properly belonged, with

[4] An additional basis for a lesser charge could have been Petitioner's resistance to an unlawful arrest to the extent of killing the person attempting the arrest, if necessary to save his own life, or to save himself from serious bodily harm. SeeOdoms v. State, 359 So.2d 1162, 1164 (Ala. Crim. App. 1978).

the jury. Without this constitutionally required third option of convicting Petitioner of a lesser form of murder, the jury, unwilling to find him not guilty when he had admitted to shooting the officers, understandably convicted him of the substantive counts of murder while recommending a sentence of life without parole rather than death on each count.

A. Failure to instruct on heat-of-passion manslaughter

Instructing the jury that they may consider heat of passion manslaughter as a lesser included offense would have satisfied the demands of Beck. Under Alabama law, heat of passion manslaughter is defined as causing another person's death "…under circumstances that would constitute murder under Section 13 A-6-2 except, that he causes the death due to a sudden heat of passion caused by provocation recognized by law, and before a reasonable time for the passion to cool and for reason to reassert itself." SeeAla. Code § 13A-6-3. One type of provocation recognized by Alabama courts is "when the accused is assaulted or faces an imminent assault on himself." SeeRogers v. State, 819 So.2d 643, 662 (Ala. Crim. App. 2001). Such provocation must be "…of a nature calculated to influence the passions of the ordinary, reasonable man." Peraita v. State, 897 So.2d 1161, 1198 (Ala. Crim. App. 2003). The Alabama legislature designed §13A-6-3 for juries that, while unable to convict the defendant of intentional murder, are nevertheless unconvinced that the defendant acted in self-defense. SeeWilliams v. State, 675 So.2d 537 (Ala. Crim. App. 1996).

The Alabama courts in Petitioner's case mistakenly focused on whether a case for manslaughter was proven rather than whether there was sufficient evidence for a theory of manslaughter to go to a jury. SeeMiller v. State, 739 So.2d 1143, 1145-46 (Ala. Crim. App. 1999). In denying the request for a lesser included charge predicated on a theory of self-defense, the trial judge relied on his impression of the evidence, arguing "That doesn't

sound like someone who is defending himself to me…it sounds like the person who is the aggressor in the case." (V.27, p.1748).Thus, the court substituted its own fact finding for that of the jury;yet the decision of whether to grant a requested charge should not depend on whether the court is convinced by the evidence for such a charge "but simply whether such evidence was presented." Hunter v. State, 325 So.2d 921, 925 (Ala. 1976).

A defendant is entitled to a lesser charge if such a charge is "…supported by any evidence, however weak, insufficient, or doubtful in credibility…however unsatisfactory and inconclusive to the judicial mind." Burns v. State, 155 So. 561, 562 (Ala. 1934) (Defendant's evidence, however unconvincing to the court, mandated an instruction on the lesser included charge of first degree manslaughter); Chavers v. State, 361 So.2d 1106 (Ala. 1978). When the defendant's requested charge is predicated on a theory that the defendant sensed imminent danger, the question of the reasonableness of defendant's fear is one for the jury. SeeOliver v. State, 17 Ala. 587, 594 (1850); King v. State, 71 Ala. 1 (1881); Domingus v. State, 11 So. 190, 192 (Ala. 1891); Dilburn v. State, 77 So. 983, 984 (Ala. 1918); Byrd v. State, 57 So.2d 388, 391 (Ala. 1952). So long as the defendant puts forward *some* evidence "…that can be reasonably considered as having placed the accused in apparent imminent danger of his life," the weight of such evidence is an issue for the jury. Williams v. State, 938 So.2d 440, 447 (Ala. Crim. App. 2005)quotingLemley v. State, 599 So.2d 64, 74 (Ala. Crim. App. 1992).

Here, the evidence presented at trial was sufficient for a reasonable juror to find Petitioner guilty of heat of passion manslaughter. SeeEx parte Smith, 756 So.2d 957 (Ala. Crim App. 2000). There was testimony that before the officers returned with a warrant for Woods, they had made verbal threats to Woods and Spencer that one could interpret as

putting Spencer in reasonable fear for his life. In affirming the trial court's refusal to instruct the jury on heat of passion manslaughter, the Court of Criminal Appeals asserted that even if Petitioner's testimony that Officer Owen had made earlier threats is true, those threats were made hours before the shooting and Spencer was complicit in this "verbal jousting." SeeSpencer I, at *77. Furthermore, maintained the court, two of the officers were shot in the back. Dr. Gary Simmons, the forensic pathologist for Jefferson County, testified, however, that Officers Chisolm and Owen were fired at from many angles, including their sides, and Officer Bennett was shot through the left eye. Rather than decide whether the evidence was sufficient to convince them that the lesser included charge should be given, the court should have left questions as to the strength and veracity of the evidence supporting such a charge to the jury.

Alabama courts have made it clear that any evidence is sufficient to present to the jury the option of a lesser included offense. Even in capital cases where the only evidence that would justify a lesser included offense comes from the defendant, courts have required the charge to reach the jury. SeeHill v. State, 485 So.2d 808, 809 (Ala. Crim. App. 1986); Jones v. State, 565 So.2d 1157, 1159 (Ala. Crim. App. 1990). By refusing to provide the jury with a third alternative to either acquittal or a possible death sentence, when under Alabama law the evidence was more than sufficient for allowing such alternative to go to a jury, the trial court denied Petitioner his right under Beck to avoid, potentially, a sentence of death.

B. Failure to instruct on intoxication

Another way the trial court could have given the jury the third option required by Beck was through an instruction on intoxication. In Alabama, evidence of intoxication, whether voluntary or involuntary, is admissible whenever it is relevant to negate an element

of the offense charged. Ala. Code §13-3-2(a).. While voluntary intoxication is never a defense to a criminal charge, it may negate the specific intent essential to a malicious killing and reduce intentional murder to manslaughter. McConnico v. State, 51 So.2d. 424, 426 (Ala. Crim. App. 1988). The Alabama courts have recognized that intoxication includes a disturbance of mental or physical capabilities resulting from the introduction of any substance into the body such that where the degree of intoxication is in dispute, it must be presented to the jury for its determination. SeeCrymes v. State, 630 So.2d. 120, 124-25 (Ala. Crim. App. 1993).

Consequently, the Alabama Court of Criminal Appeals has consistently held that an intoxication charge should be given "if 'there is an evidentiary foundation in the record sufficient for the jury to entertain a reasonable doubt' on the element of intent." Fletcher v. State, 621 So.2d 1010, 1019 (Ala. Crim. App.,1993) (quotingCoon v. State, 494 So.2d 184, 187 (Ala. Crim. App. 1986). SeealsoOwen v. State,611 So.2d 1126, 1128 (Ala.Crim.App.1992) (where, in prosecution for capital offense of murder of a police officer, evidence showed that defendant had consumed as many as eight beers in the two hours prior to the offense, trial court committed reversible error in refusing to instruct the jury on intoxication).[5]

The evidence of intoxication sufficient to warrant an intoxication instruction "*may* include evidence that the defendant's mental capacity has been diminished by intoxicants, but it need not do so in all cases. *The charge may also be warranted if the record contains evidence of the recent use of intoxicants of such nature or quantity to support the inference that their ingestion*

[5] In fact, in Alabama, the failure to give the jury an instruction on intoxication has been held to constitute plain error. SeeFletcher, 610 So.2d at 1022 ("Because we have determined that the failure to instruct the jury on intoxication was plain error, we need not address the question of whether the failure to give the manslaughter instruction was also plain error.").

was sufficient to affect defendant's ability to form the necessary criminal intent." Fletcher, 621 So.2d at 1020 (citing People v. Rodriguez, 76 N.Y.2d 918, (1990) (emphasis in original).

Courts in Alabama have also determined that "voluntary intoxication and manslaughter as a lesser included offense of intentional murder are interrelated and often overlapping subjects." Fletcher, 621 So.2d at 1019. Thus "when the crime charged is intentional murder and there is evidence of intoxication, the trial judge *should* instruct the jury on the lesser included offense of manslaughter" even if the evidence is weak, insufficient, or doubtful in credibility or where the defendant denies the charge.Id. (internal quotations and citations omitted, emphasis added);seealsoPilley v. State, 930 So.2d 550, 562 (Ala. Crim. App. 2005) (lesser-included offense of manslaughter must be given where there is evidence of intoxication and the charged offense involves specific intent, such as capital murder);Parker v. State, 587 So.2d 1072, 1083, 1087 (Ala. Crim. App.1991) (where, in prosecution for capital offense of murder for hire, there was evidence that the defendant had "shot up 3cc of Talwin," trial court instructed the jury on several lesser included offenses, including manslaughter), *aff'd*, 610 So.2d 1181 (Ala.1992). Therefore, under Alabama law, Petitioner was entitled to an instruction on intoxication and the lesser included offense of manslaughter.

The evidence to support the lesser charge based on intoxication was more than sufficient to permit the jury to consider that option. Petitioner ingested numerous types and amounts of pills including, but not limited to, Morphine, Percocet, Valium and Xanax, in addition to cocaine.(V.26, p.1647, 1652). As a result, Petitioner usually stayed up the whole night and slept during the day. (V. 26, p.1652). In line with this behavior, Petitioner spent the night before the incident getting high and finally fell asleep around 9a.m. the next day

with the aid of Seroquel and a Bud Light beer. (V. 26, p.1674, 1676). By his testimony, Petitioner had proffered evidence that could negate his intent such that question of his intoxication should have been given to the jury for its determination. It was not for the trial judge to decide that sufficient time had elapsed between taking the drugs and alcohol, and the shooting, to negate a finding of intoxication. SeeSpencer IIIat *6. Just as in Fletcher, 621 So.2d at 1018-19,the trial judge's refusal to give the intoxication instruction because he did not get the impression from the evidence that the defendant was so intoxicated that he did not know what he was doing was error because intoxication is a proper subject to be considered by the jury in deciding the question of intent.

The evidence presented by Petitioner, which in fact prompted the State to request an intoxication instruction (V. 3, p.589), was sufficient to require the jury to consider the lesser charge.SeeHammond v. State, 776 So.2d 884, 887 (Ala. Crim. App. 1998) ("In order to determine whether the evidence is sufficient to necessitate an instruction and allow the jury to consider the defense, 'we must accept the testimony most favorable to the defendant.' ... proper written requested instructions must be given 'which are supported by any evidence, however weak, insufficient, or doubtful in credibility.') (internal citations omitted). While there may have not been overwhelming evidence of intoxication, there was enough such that the jury should have been instructed accordingly and, pursuant to Beck, given the lesser included manslaughter charge.

II. Petitioner's Death Sentence, Imposed By A Judge Who Concluded That Aggravating Factors Outweighed Mitigating Circumstances Despite A Jury's Finding To The Contrary And Recommendation Of Life Imprisonment, Violates The Sixth, Eighth And Fourteenth Amendments.

A. A sentencing scheme which allows a death sentence to be imposed based on a judge's determination that aggravation outweighs mitigation and without an explicit jury finding of a statutory aggravating circumstance violates the Sixth and Fourteenth Amendments as interpreted by this Court in *Apprendi*and *Ring*.

Alabama's capital sentencing scheme delegates responsibilities to the court which, under this Court's decisions in Ringand Apprendi, must belong to the jury. This Court's decisions in Ring and Apprendi guarantee jury determinations of "any fact that increases the penalty for a crime beyond the prescribed statutory maximum."Ring v. Arizona, 536 U.S. 584, 602 (2002);Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). The Alabama statute prohibits a death sentence unless at least one statutory aggravating circumstance exists, *and* aggravating circumstances outweigh mitigating circumstances. Ala. Code §§ 13A-5-45(f), 13A-5-46(e)(3), 13A-5-47(e). Therefore, both determinations must be made by a jury to comply with the requirements of the Sixth Amendment.

The Supreme Court of Alabama rejected the claim that weighing aggravation and mitigation constituted a "factual determination" to be made by a jury. Ex Parte Waldrop, 859 So.2d 1181, 1189 (Ala. 2002). Although this Court has repeatedly "held that state courts are the ultimate expositors of state law," Mullaney v. Wilbur, 421 U.S. 684, 691 (1975), it also acknowledged that when the state court interpretation "appears to be an 'obvious subterfuge to evade consideration of a federal issue,'" federal courts are not bound by state court constructions in "extreme circumstances." Id.at 691 n.11 (citation omitted). The Alabama Supreme Court's twisting post-Apprendi interpretation of the Alabama capital punishment statutes appears to be such a subterfuge.

Before Ring, Alabama repeatedly interpreted its statute as requiring a weighing determination before death was available. Beck v. State, 396 So.2d 645, 663 (Ala. 1980) ("a capital sentencing system must allow the sentencing authority to consider mitigating circumstances...the jury must weigh the aggravating and mitigating circumstances in determining whether to fix the punishment at death"); Roberts v. State, 735 So.2d 1244, 1266 (Ala. Crim. App. 1997), ("the trial court shall … weigh the aggravating and mitigating circumstances it finds to exist, [and] determine the sentence"). In addition, Alabama's Attorney General Troy King recently and publicly described a judge's lawful duty: "in sentencing a capital defendant to death, a judge must determine that the aggravating circumstances outweigh the mitigating circumstances." Wendy Halloran, Judicial Override Allowed In Alabama, But Still Controversial, WHNT News 19, http://www.whnt.com/news/whnt-judicial-override-alabama-032410,0,7266580.story (hereinafter cited as Halloran).

Despite the court's decision in Waldrop, relabeling does not alter the impact of the weighing determination on a capital defendant's eligibility for death. Waldrop, 859 So.2d at 1189.Apprendi requires that a statute be reviewed for its effect, not merely its form, to prevent states from circumventing constitutional protections "merely be redefining the elements that constitute different crimes." Apprendi, 530 U.S. at 485-494. However the Supreme Court of Alabama describes or labels the weighing process, it is required to impose the death penalty. Therefore, it is the sole province of the jury because any "factfinding necessary to put [a defendant] to death" falls within the Sixth Amendment right to trial by jury. Ring, 536 U.S. at 609; Apprendi, 530 U.S. at 499 (Scalia, J., concurring).

The Supreme Court of Alabama, in Waldrop, additionally defended the statute by pointing to the requirement that "at least one statutory aggravating circumstance…must exist in order for a defendant convicted of a capital offense to be sentenced to death." Waldrop, 859 So.2d at 1187; Ala. Code § 13A-5-45. The statute does not explicitly require that a jury find this circumstance, and by labeling the jury verdict "advisory," the statute permits this finding to be made by a judge. Ala. Code § 13A-5-46(e). After requiring an advisory verdict of life when the jury determines there are no aggravating circumstances, the trial court is directed to make "findings concerning the existence or nonexistence of each aggravating circumstance," and determine whether they outweigh the statutory and non-statutory mitigating circumstances it has found to exist. Ala. Code § 13A-5-46(e)(1). When a jury has not found a statutory aggravating circumstance beyond a reasonable doubt, "the findings reflected in the jury's verdict alone" demonstrably do *not* expose a defendant "to a range of punishment that ha[s] as its maximum the death penalty." Waldrop, 859 So.2d at 1188. This situation is identical to that rejected in Ring as violating the constitutional principles. SeeRing, 536 U.S. at 603.

The jury in Petitioner's case did not explicitly find any statutory aggravating circumstance, as required by statute. (V.4, p.685). The element of capital murder which was "double counted" is not identical to the corresponding statutory aggravating circumstance.[6] Petitioner was convicted of capital murder under Ala. Code § 13A-5-40[7] but the corresponding statutory aggravating circumstance includes only those offenses where "the defendant intentionally caused the death" of multiple people. Ala. Code § 13A-5-49(9).

[6] Ala. Code § 13A-5-45(e) states 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 sentencing hearing."

[7] Ala. Code § 13A-5-40 provides that "murder wherein two or more persons are *murdered* by the defendant by one act or pursuant to one scheme or course of conduct" is a capital offense.

The aggravating circumstance specifies an intent requirement which the capital offense does not, and therefore, proof beyond a reasonable doubt of one is not equivalent to proof of the other. Petitioner's jury did not specifically find any statutory aggravating circumstance, as required by the Alabama capital sentencing scheme and this Court's decisions. Ala. Code § 13A-5-45(f); Ring, 536 U.S. at 609. Therefore, this Court should consider whether Petitioner's sentence was imposed in violation of the Sixth Amendment.

B. Unguided by any standards, the trial court's override of the jury recommendation of life in Petitioner's case rendered Petitioner's death sentence arbitrary and unconstitutional.

This Court should consider whether the judicial override of the jury's recommendation of life rendered Petitioner's death sentence arbitrary and unconstitutional under the Eighth and Fourteenth Amendments. Alabama's statutory provision providing for judicial override of a jury sentence recommendation lacks the standards necessary to ensure that a sentence is not imposed arbitrarily. Ala. Code § 13A-5-47(e). It is the only state where virtually unrestricted judicial override still plays a major role in capital cases.[8] The trial court in Petitioner's case failed to adequately explain its override of the jury recommendation, resulting in two remands from the appellate court. Unguided by any standards, the judge's override rendered Petitioner's death sentence arbitrary and unconstitutional.

Alabama is one of only three states that allow judicial override of jury sentencing recommendations in capital cases.[9] Further, after this Court's decision in Ring,two of the four states that permitted judicial overrides amended their statutes.[10]Of the remaining states

[8] Since 1976, more than 80 people have been sentenced to death by judges in Alabama even though their juries decided that death was not the appropriate punishment. SeeHalloran, supra p. 21.
[9] Thirty five states and the federal government currently have capital sentencing provisions. Of those, only Alabama, Florida and Delaware allow judicial override of jury sentencing decisions.
[10] Indiana amended its statute to remove the provision, providing instead that the jury recommendation is binding. Ind. Code Ann. § 35-50-2-9 (West 2010). The legislature of Delaware amended its statute by adding

with judicial override, only Alabama provides no standards by which the trial court should consider the jury recommendation. In Florida, courts have held that a jury recommendation should be given "great weight." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); See Fla. Stat. Ann. § 921.141(3) (West 2010). "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So.2d at 910. In Delaware, after the jury unanimously finds at least one aggravating factor, the judge, without considering additional evidence, must decide by a preponderance of the evidence that death is the appropriate sentence. Del. Code Ann. tit. 11 §§ 4209(c)(3)(a). It is rarely used and when it has been utilized it has predominantly been to override in favor of life.[11] In contrast, Alabama made no changes to its statute post-Ringand is the only state to routinely use judicial overrides of a jury recommendation of life without providing any standards by which to consider the jury recommendation.

Without adequate safeguards, sentencing under Alabama's statutory scheme is subject to arbitrariness. Although this Court has held thatAlabama courts need not apply a particular weight to jury sentencing verdicts, the Court insisted that the baseline requirement of any sentencing scheme must be to protect against arbitrariness.Harris v. Alabama, 513

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the requirement that a unanimous jury find beyond a reasonable doubt that at least one aggravating circumstance exist as a pre-condition to the judicial imposition of the death sentence. Del. Code Ann. tit. 11, § 4209(d)(1).

[11] A National Association of Criminal Defense Lawyers' Death Penalty Counsel found that "[i]n Delaware, judges have never overridden a jury's decision to give life, but have on a few occasions commuted a sentence of death to life. … And while Florida judges use override more harshly to impose death, only 5 percent of Florida's death row is composed of inmates sent there by override . . . In [] Florida . . . there are written, court-mandated restrictions on override power." Chris Adams, *Condemned to Die Alone: Injustice on Death Row in Alabama*, 25-NOV CHAMPION 12, 13 n.13 (2001) (citing Robin DeMonia, *Judges Say 'Death' More*, THE BIRMINGHAM NEWS, September 3, 2000; Ala. Code § 13A-5-47(e)(1975)).

U.S. 504, 511 (1995). Indeed this Court has stated that the hallmark of the analysis of a capital sentencing statute is "whether the scheme adequately channels the sentencer's discretion so as to prevent arbitrary results." Id.; seealso Spaziano v. Florida, 468 U.S. 447, 465 (1984); Proffitt v. Florida, 428 U.S. 242, 252-3 (1976). Alabama provides no protective measure against arbitrariness and judges have unfettered discretion to override the jury. The result of this statutory scheme is the haphazard and inconsistent application of judicial overrides in contradiction to the constitutional requirement that there be a measured, consistent application of the death penalty. Eddings v. Oklahoma, 455 U.S. 104, 110-11 (1982).

The trial court imposed petitioner's death sentence after the jury recommended life on all four counts of capital murder. The court's order lacked significant findings, requiring the Court of Criminal Appeals to remand twice for clarification.[12] The Court of Criminal Appeals, noting the deficit in the sentencing order, stated "although the trial court referenced the jury's recommendation … [the] order did not state that the trial court found the jury's recommendation to be a mitigating circumstance and did not contain written findings concerning what weight that jury recommendation was given, or the reasons why it overrode the jury's recommendation." Spencer I at *90-91 (Appendix A).The Court of Criminal Appeals further noted that the trial court did not enter specific findings as to the existence or nonexistence of nonstatutory mitigating circumstances. Id. It remanded the case instructing the trial court to "reweigh the aggravating and mitigating circumstances and resentence Spencer." Id. at *92.[13]

[12] As noted above, the trial court had already amended its sentencing order once before the remand from the Court of Appeals.

[13] This is not the first case where Petitioner's trial judge, Judge Nail, had capital matters remanded for further consideration. In another case where Judge Nail presided over a post-conviction hearing challenging another

In its second remand, the Court of Criminal Appeals,acknowledging that a trial court need not specify each proposed nonstatutory mitigating, piece of evidence offered, considered and found not to be mitigating, nonetheless remanded the case.[14]Spencer II, at *5, 10. The Court of Criminal Appeals ordered that the trial court "clarify its findings regarding the nonstatutory mitigating circumstances and judicial override of the jury's recommendation of life imprisonment without parole." Id.

The absence of any meaningful mechanism in Alabama for regulating capital sentencing roles of jury and judge placed Petitioner at risk of haphazard treatment of the jury's life recommendation. SeeMaynard v. Cartwright, 486 U.S. 356, 363 (1988). Petitioner's death sentence was the product of arbitrary whim rather than properly guided discretion. Harris, 513 U.S. at 514. As illustrated by the multiple remands here, without any guidance from the statute, trial courts are permitted to approach the override in an inconsistent manner. This Court should grant review to consider whether the judicial override of the jury's recommendation of life in Petitioner's case was arbitrary and unconstitutional under the Eighth and Fourteenth Amendments.

C. The imposition of the death penalty – overriding the jury's recommendation of life imprisonment – by an elected judge violated Petitioner's Eighth Amendment right to have the jury determine whether the ultimate punishment was warranted.

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judge's decision to override a jury recommendation for life, Nail's summary dismissal was reversed and remanded because "[t]he trial court's legal conclusions about this claim were incorrect . . . ." Apicella v. State, 945 So.2d 485, 491 (Ala. Crim. App. 2006).

[14] The court rejected the statement in the trial court's amended order that Spencer's own testimony was the "sum total of the non-statutory mitigating evidence offered by the defendant," stating that there was additional mitigating evidence offered as well as evidence regarding Spencer's capacity and automatic reflex in shooting one officer already down. Spencer II, at *5-11.

This Court should consider whether the override of a jury's determination that a defendant deserves life-imprisonment-without-parole by an elected judge to impose a death sentence comports with the Constitution. "This Court has held that the Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty." Ring, 536 U.S. at 614 (Breyer, J., concurring) (citing Gregg v. Georgia, 428 U.S. 153 (1976)). Those procedural safeguards should "include a requirement that a *jury* impose any sentence of death." Id. (citing Harris v. Alabama, 513 U.S. 504, 515-526 (1995) (Stevens, J., dissenting))(emphasis in original). Jurors, not elected judges, are more properly entrusted with expressing "the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." Gregg, 428 U.S. at 184.

After considering and weighing the aggravating and mitigating factors as required by Alabama statute, Ala. Code § 13A-5-46(e), Petitioner's jury determined that he did not deserve the ultimate penalty of death despite multiple police officer victims. This conclusion might well have followed from the jury's assessment that Petitioner's culpability did not fully extend to capital murder. As explained in Point I, the jury was not given the option of finding him guilty of a non-capital crime. After the jury determined that life-imprisonment-without-parole was the deserved punishment, the judge received several letters (V.3, p.481-89), and hundreds of petition signatures (V.18, p.3470-3503), from members of the community urging him not to override the jury's recommendation.

But then the prosecution attacked the validity of the jury's recommendation. The prosecutor argued that the "guilt phase was followed by an emotional sentencing phase" and noted that "several members of the majority female jury (9 females 3 males) appeared

distressed and emotional." (V.3, p.511). A capital punishment scheme that entrusts the decision of guilt or innocence to a jury yet distrusts that same jury's sentencing determination and prohibits it from making the ultimate decision for life or death with the same presumed dispassionate, unprejudiced mind "sacrifice[s] the legitimacy of jury verdicts." Harris, 513 U.S. at 522 (Stevens, J., dissenting). Furthermore, the guilt phase was not the dispassionate antithesis of the "emotional" sentencing hearing alleged by the government: during the penalty phase before the jury the prosecutor apologized to the jury for getting "a little emotional" the previous day, on the final day of the guilt phase. (V.27, p.1890).

In a sentencing letter to the judge recommending the court override the jury's recommendation for life-imprisonment-without-parole, the prosecution noted that the ultimate decision was bestowed upon the judge to avoid "emotion, prejudice, fear, bias, or personal agendas." (V.3, p.514). But of course judges may well have a personal agenda: to be re-elected.

Alabama is the only state that has both partisan judicial elections and allows for judicial override of jury sentencing decisions in capital cases.[15] Judges are more likely to impose death over the will of the jury, not as an expression of community concern of a given defendant's culpability, but as a means to re-election. "The danger that [judges] will bend to political pressures [in a political climate where judges must constantly profess their fealty to the death penalty] when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III." Harris, 513 U.S. at 521 (Stevens, J., dissenting). The election of a pro-capital punishment judge does not reflect

[15] American Bar Association, The Alabama Death Penalty Assessment Report, at 228, http://www.abanet.org/moratorium/assessmentproject/alabama/report.pdf (last visited February 8, 2011).

community sentiment about a particular defendant but at best indicates an undifferentiated, abstract public preference for capital punishment. In contrast, jurors have no responsibility but to consult their own conscience and consider the defendant before them; when the case ends they are able to return home and fear no reprisals. In short, jurors need not anticipate reducing their decision to a campaign soundbite. "A jury verdict expresses a collective judgment that we may fairly presume to reflect the considered view of the community." Id. at 518-19.

Capital punishment is frequently an issue in Alabama judicial elections. "Almost all of Alabama's elected state appellate court judges campaign on their strong support for the death penalty and many promise to facilitate and expedite executions in order to win votes."[16] For example:

- Some trial judges routinely override jury recommendations for life imprisonment, including Judge McRae who has overridden five jury recommendations for life to impose the death penalty, though he has never overridden a jury recommendation for death.[17] One day after overriding a jury's recommendation for life, Judge McRae featured the override in his campaign advertisements, touting his record on sentencing defendants to death and mentioning the newly-sentenced defendant by name. In another judicial campaign he used a television advertisement in which the narrator mentioned the judge had presided over some of the "most heinous murder trials" and names of defendants the judge had sentenced to death appeared on the screen.[18]

- An incumbent candidate for the Alabama Supreme Court ran a television ad with surveillance camera footage from a murder that had been committed in a convenience store. The narration said "a 68-year-old woman, working alone, was robbed, raped, stabbed 17 times, and murdered. Without blinking an eye, Judge Kenneth Ingram sentenced the killer to die." The victim's daughter later appeared

[16] Equal Justice Initiative, The Death Penalty in Alabama, http://eji.org/eji/files/02.03.11%20Death%20Penalty%20in%20Alabama%20Fact%20Sheet.pdf (last visited February 8, 2011).
[17] Equal Justice Initiative, Judge Override, http://www.eji.org/eji/deathpenalty/override (last visited February 8, 2011).
[18] American Bar Association, supra note 15, at 226.

> and attested, "It was my mother who was killed, and Judge Ingram gave us justice. Thank heaven Judge Ingram is on the Supreme Court."[19]

Alabama judges should not determine the ultimate sentence because they are elected, must seek re-election, and overwhelmingly tend to override juries in favor of capital punishment. SeeHarris, 513 U.S. at 521 (Stevens, J., dissenting). As the prosecutor of Petitioner's case admitted, approximately 20% of those on death row in Alabama are there because of judicial overrides of jury sentences recommending life imprisonment. (V.3, p.514). Alabama jury recommendations for life have been overridden by judges in more than eighty cases since Gregg.[20] Yet Alabama judges had overridden jury recommendations for death only five times at the time of Harris v. Alabama, 513 U.S. at 513, and recent reports indicate that number has not increased by much, if at all. (V.3, p.569).

This Court should consider whether the primary justification for capital punishment, retribution, is best served when the ultimate decision for capital punishment is made by an elected judge overriding the considered judgment of the defendant's jury to the contrary. This Court has recognized that retribution provides the main justification for capital punishment. Ring, 536 U.S. at 614-15 (Breyer, J., concurring); Gregg, 428 U.S. at 183 ("[C]apital punishment is an expression of society's moral outrage at particularly offensive conduct."). "Studies of deterrence are, at most, inconclusive." Ring, 536 U.S. at 615. Rehabilitation plays no role in the capital punishment context and "incapacitation is largely irrelevant, at least when the alternative of life imprisonment without possibility of parole is available." Harris, 513 U.S. at 517 (Stevens, J., dissenting).

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[19]Id. at 227.
[20]See Halloran, supra.

The jury is uniquely able to represent the morality of the community: "a jury that must choose between life imprisonment and capital punishment can do little more–and must do nothing less–than express the conscience of the community on the ultimate question of life or death." Witherspoon v. Illinois, 391 U.S. 510, 519 (1968). This Court should consider whether Petitioner's sentence violated this vital link "between contemporary community values and the penal system – a link without which the determination of punishment could hardly reflect the evolving standards of decency that mark the progress of a maturing society." Id. at n.15 (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari be granted to review the judgment of the Alabama Court of Criminal Appeals.

Dated: February 14, 2011 Respectfully submitted,

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