No. _____

IN THE

Supreme Court of the United States

MARIO DION WOODWARD,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. The practice of judges imposing the death penalty on individuals whose juries voted for a life sentence is in sharp decline. Nationally, there were 125 life-to-death overrides in the 1980s and 74 in the 1990s. There have been just 27 since 2000; 26 of those were in Alabama, and the one outside Alabama was reversed on appeal. Within Alabama, nearly half of all overrides have occurred in three counties, all with large black populations. Does the increasingly rare and geographically isolated practice of imposing the death penalty through override violate the nation's evolving standards of decency and the Eighth Amendment?

2. In a capital case in Alabama, a determination that aggravation outweighs mitigation is required for a death sentence to be imposed. Where the jury determines that aggravation does not outweigh mitigation, does the trial judge's override of that determination based on evidence not considered by the jury violate the defendant's Sixth Amendment right to a jury under *Ring v. Arizona*, 536 U.S. 584 (2002)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Mario Dion Woodward, who was sentenced to death by a judge after his jury voted for a sentence of life in prison without the possibility of parole, respectfully petitions for a writ of certiorari so this Court can review the judgment of the Alabama Court of Criminal Appeals affirming his death sentence.

OPINIONS BELOW

The Alabama Supreme Court's denial of Mr. Woodward's petition for a writ of certiorari is unpublished. *See* Appendix 92. The opinion of the Alabama Court of Criminal Appeals, as modified on rehearing, is unpublished but is available at 2011 WL 6278294. *See* Appendix 2-75. The trial court's sentencing order is unpublished, *see* Appendix 77-83, as are the jury's verdict forms, *see* Appendix 85-90.

JURISDICTION

The Alabama Court of Criminal Appeals issued its decision on December 16, 2011. *Woodward v. State*, No. CR-08-0145, 2011 WL 6278294 (Ala. Crim. App. Aug. 24, 2012). The same court modified its decision and denied Mr. Woodward's application for rehearing on August 24, 2012. *Id.* The Alabama Supreme Court denied Mr. Woodward's petition for certiorari on April 19, 2013. Appendix 92. This Court has jurisdiction under 28 U.S.C. § 1257(a) (2001).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution provides:

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

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a capital case in which an Alabama jury found, by an eight to four vote, that the aggravating circumstances did not outweigh the mitigating circumstances; accordingly, the jury voted for a sentence of life in prison without the possibility of parole. Appendix 90. The trial judge then "overrode" the jury's weighing determination and imposed the death penalty. R. 1792;[1] Appendix 82. Because judicial override in the United States is increasingly uncommon and confined to Alabama, Mr. Woodward contends that his death sentence violates the Eighth Amendment. In addition, because the trial judge alone made the determination that aggravation outweighed mitigation—a determination necessary for a death sentence under Alabama law—Mr. Woodward contends that he was denied his Sixth Amendment right to a jury.

Mr. Woodward, a black man, was convicted of capital murder in Montgomery, Alabama, in August 2008. R. 1352. The offense involved the 2006 shooting of Officer Keith Houts of the Montgomery Police Department.

At the penalty phase before the jury, both the State and the defense presented evidence. R. 1374-1623. The jury, which included five black members, C. 929-933; R. 735-36, found the existence of two aggravating circumstances: first, that Mr. Woodward committed the murder to hinder the enforcement of laws, and second, that Mr. Woodward previously had been convicted of a violent felony. Appendix 88-89. But the jury also found that the aggravating circumstances did *not*

[1] "R. __" refers to the designated page of the reporter's transcript as certified for Mr. Woodward's appeal. "C. __" refers to the designated page of the clerk's record as certified for the appeal.

outweigh the mitigating circumstances and voted eight to four for a sentence of life in prison without parole. Appendix 90; *see* Ala. Code § 13A-5-46(e)(2) (1975) ("If the jury determines that one or more aggravating circumstances . . . exist but do not outweigh the mitigating circumstances, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole."). The mitigating circumstances included that Mr. Woodward had a traumatic and abusive childhood and was a loving father to his five children. R. 1687.

In light of the jury's vote, defense counsel moved to bar the death penalty pursuant to the Sixth and Eighth Amendments. *See* C. 866-875. The trial court denied the motion. R. 1745-46.

A month after the jury phase, the trial judge, who faced an election two years later, held a judicial sentencing proceeding. *See* Ala. Code § 13A-5-47(e) (explaining that the trial judge must consider the jury's vote but conduct its own weighing). There, the State presented additional evidence in support of a death sentence. C. 1209-98; R. 1711-1745. Specifically, the State presented recordings and transcripts of telephone calls Mr. Woodward made from jail, C. 1214-67, and used them to argue that Mr. Woodward was involved in the drug trade and thus was bad father, R. 1769-70. The trial judge then made his own determination that aggravation outweighed mitigation and imposed a death sentence, thereby overriding the jury. Appendix 82. In his sentencing order, the judge relied in part on "information which the jury did not hear," including the recordings and transcripts. *Id.*

On appeal, Mr. Woodward argued that the trial judge's override of the jury's life recommendation violated his rights under the Sixth and Eighth Amendments. The Alabama Court of Criminal Appeals affirmed. *Woodward v. State*, No. CR-08-0145, 2011 WL 6278294, at *57-60 (Ala. Crim. App. Aug. 24, 2012). Mr. Woodward then raised the same arguments in the Alabama Supreme Court, which denied certiorari. Appendix 92. This petition follows.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD REVIEW THE INCREASINGLY RARE AND GEOGRAPHICALLY ISOLATED PRACTICE OF IMPOSING THE DEATH PENALTY ON INDIVIDUALS WHOSE JURIES VOTED FOR A LIFE SENTENCE.

This Court rejected challenges to judicial override in *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Harris v. Alabama*, 513 U.S. 504 (1995). But since *Spaziano* and *Harris*, the practice has become rare and geographically isolated. Nationally, there were 125 life-to-death overrides in the 1980s and 74 in the 1990s.[2] There have been just 27 since 2000; 26 of those were in Alabama, and the one outside Alabama was reversed on appeal.[3] Within Alabama, nearly half of all life-to-death overrides have been imposed in three counties, all with large black populations.

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[2] *See* Michael L. Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011 Mich. St. L. Rev. 793, 794 (2011) (explaining that only Alabama, Delaware, Florida, and Indiana have employed override statutes since the reinstatement of the death penalty in the 1970s); Equal Justice Initiative, *The Death Penalty in Alabama: Judge Override* 24-26 (2011), http://www.eji.org/files/Override_Report.pdf (listing the Alabama overrides); Radelet, *supra*, at 798 (explaining that there has been just one life-to-death override case in Delaware, and it was after 2000); Radelet, *supra*, at 819, 828 (listing the Florida overrides); Radelet, *supra*, at 818 (listing the Indiana overrides).

[3] *See supra* note 2 (providing statistics until 2011). Undersigned counsel are aware of two life-to-death overrides since the publication of the 2011 documents cited in note 1. *See* Jim Mustian,

This Court has relied on state legislation, sentencing rates, execution rates, and its own judgment in prohibiting the death penalty for certain categories of individuals under the Eighth Amendment. *See e.g. Atkins v. Virginia*, 536 U.S. 304, 312-317 (2002) (mentally retarded offenders); *Roper v. Simmons*, 543 U.S. 551, 564-67 (2005) (juvenile offenders); *Kennedy v. Louisiana*, 554 U.S. 407, 422-26, 433-34 (2008) (offenders convicted of a raping a child where death did not result). The categories in those cases were based largely on characteristics intrinsic to the offender or the offense. But there is no reason for the Court to limit its categorical analysis to such contours. *See Miller v. Alabama*, 132 S. Ct. 2455, 2477-79 (2012) (Roberts, C.J., dissenting) (applying the Court's categorical analysis in addressing mandatory life without parole, a sentencing practice defined not by the sentence itself but instead by its procedural protections).

The point of the Court's categorical approach in the capital context is to limit the death penalty to those *most* deserving of execution. *Roper*, 543 U.S. at 568. An examination of judicial override is particularly appropriate for that approach because the individuals at issue are those whom juries have determined are not *at all* deserving of execution.

As explained below, the relevant factors weigh in favor of banning the death penalty in cases in which the jury voted for life.

Gregory Lance Henderson sentenced to death for running over sheriff's deputy, Columbus Ledger-Enquirer, September 20, 2012 (Gregory Henderson); James Phillips, *Shanklin sentenced to death in 2009 murder*, Daily Mountain Eagle, April 5, 2012 (Clayton Shanklin). Those are included in the count in the text. The one override case outside Alabama since 2000 was *Garden v. State*, 844 A.2d 311 (Del. 2004). The death sentence in *Garden* was reversed on appeal. *Id.* at 318.

A. Legislation

Only three states—Alabama, Delaware, and Florida—allow judges to override jury votes for life in capital cases.[4] In the remaining 47 states and in federal cases, a judge cannot override a jury's determination that a capital defendant should be sentenced to life instead of death. That number is higher than the number of states that banned the practices at issue in *Atkins* (30 states), *Roper* (30 states), and *Kennedy* (45 states). *See Kennedy*, 554 U.S. at 426. Moreover, states are moving away from judicial override, not toward it. Indiana, which previously allowed judicial override, reversed course in 2002 and made the votes of capital juries binding on judges. *See* Ind. Code Ann. § 35-50-2-9(e) (2003).

B. Sentencing Rates

Since *Spaziano* and *Harris*, judicial override has been in sharp decline in the states that allow it. In the 1980s, there were 125 life-to-death judicial overrides: 89 in Florida, 30 in Alabama, and 6 in Indiana. In the 1990s, there were 74: 26 in Florida, 44 in Alabama, and 4 in Indiana. Since 2000, there have been 27, all but one of which occurred in Alabama.[5]

Even within Alabama, the geographic isolation of override is stark. Just three of the state's 67 counties—Jefferson, Mobile, and Montgomery—account for nearly half of all life-to-death overrides.[6] All three of those counties have large

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[4] *See* Ala. Code § 13A-5-47(e) (1975); Del. Code Ann. tit. 11, § 4209(d) (1953); Fla. Stat. Ann. § 921.141(2)-(3) (1973).

[5] *See supra* note 2.

[6] Equal Justice Initiative, *The Death Penalty in Alabama: Judge Override* 17, 24-26 (2011), http://www.eji.org/files/Override_Report.pdf.

black populations,[7] and Alabama overrides disproportionately involve black defendants and white victims.[8] Those realities weigh heavily in favor of a national prohibition. *See Graham v. Florida*, 130 S. Ct. 2011, 2024 (2010) (prohibiting life without parole sentences for juvenile nonhomicide offenders in part because such sentences were imposed rarely and more often than not in a single state).

C. Executions

Even despite the frequent use of judicial override in the 1980s and 1990s, few override cases have resulted in executions. Since the reinstatement of the death penalty in the 1970s, just thirteen of the 1,338 executions nationwide—less than one percent—involved defendants whose juries voted for life. Nine of the thirteen occurred in Alabama; the other four occurred in Florida.[9] Those numbers further

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[7] According to Census data, Jefferson County's population is 42.0 percent black, Mobile County's population is 34.6 percent black, and Montgomery County's population is 54.7 percent black. Alabama's statewide population is 26.2 percent black. *See* Dept. of Commerce, Census Bureau, *Community Facts*, http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml (insert county and state and follow 2010 Census link) (last visited July 16, 2013).

[8] *See* Equal Justice Initiative, *The Death Penalty in Alabama: Judge Override* 18 (2011), http://www.eji.org/files/Override_Report.pdf ("Each year in Alabama, less than 35% of all murders involve white victims, yet 75% (73) of the cases where judges overrode jury life verdicts to impose death involved white victims. While just 6% of all murders in Alabama involve black defendants and white victims, in 31% of Alabama override cases, the trial judge condemned a person of color to death for killing someone white.").

[9] Undersigned counsel determined the number of individuals executed despite a jury vote for life by reviewing the cases of everyone executed in Alabama, Delaware, Florida, and Indiana. The individuals executed despite jury votes for life are as follows: 1. Michael Lindsey, *Lindsey v. State*, 456 So. 2d 383, 385 (Ala. Crim. App. 1983); 2. Henry Hays, *Ex parte Hays*, 518 So. 2d 768, 771 (Ala. 1986); 3. Steven Thompson, *Thompson v. State*, 542 So. 2d 1286, 1288 (Ala. Crim. App. 1988); 4. Robert Tarver, *Tarver v. State*, 500 So. 2d 1232, 1241 (Ala. Crim. App. 1986); 5. Anthony Johnson, *Johnson v. State*, 521 So. 2d 1006, 1007 (Ala. Crim. App. 1986); 6. Willie McNair, *McNair v. State*, 653 So. 2d 343, 344 (Ala. Crim. App. 1993); 7. John Parker, *Parker v. State*, 587 So. 2d 1072, 1076 (Ala. Crim. App. 1991); 8. Leroy White, *White v. State*, 587 So. 2d 1218, 1231 (Ala. Crim. App. 1990); 9. William Boyd, *Boyd v. State*, 542 So. 2d 1247, 1249 (Ala. Crim. App. 1988); 10. Ernest Dobbert, *Dobbert v. State*, 409 So. 2d 1053, 1054 (Fla. 1982); 11. Beauford White, *White v. State*, 403 So. 2d 331, 334 (Fla. 1981); 12. Bobby Francis, *Francis v. State*, 473 So. 2d 672, 674 (Fla. 1985); 13. Bernard Bolender, *Bolender v. State*, 658 So. 2d 82, 83 (Fla. 1995).

suggest that the death penalty through override violates the nation's evolving standards of decency. *See Roper*, 543 U.S. at 564-65 (prohibiting the death penalty for juvenile offenders in part because juvenile executions were rare and limited to a few states).

D. The Court's Judgment

In conducting its independent assessment, this Court should focus not only on the importance of juries, but also on the political and racial implications of judicial override.

More than ninety percent of judicial overrides in Alabama involve a jury vote for life and a judge-imposed death sentence; less than ten percent involve the reverse.[10] Those percentages were similar at the time of *Harris*, and this Court described the imbalance as "surprising." *Harris*, 513 U.S. at 513. But two decades later, there is nothing surprising about it. Life-to-death overrides are predictable. They happen in counties with large black populations.[11] They happen when the defendants are black and the victims are white.[12] They happen when the judges plan to run for reelection and the cases have political implications.[13]

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[10] Equal Justice Initiative, *The Death Penalty in Alabama: Judge Override* 4, 7 (2011), http://www.eji.org/files/Override_Report.pdf.

[11] *See supra* notes 6 and 7 (documenting that Jefferson, Mobile, and Montgomery counties, all of which have large black populations, account for nearly half of all life-to-death overrides in Alabama).

[12] *See supra* note 8 (explaining that life-to-death overrides disproportionately involve black defendants and white victims).

[13] *See Harris*, 513 U.S. at 519-20 (Stevens, J., dissenting) ("The Framers of our Constitution 'knew from history and experience that it was necessary to protect . . . against judges too responsive to the voice of higher authority.' . . . The 'higher authority' to whom present-day capital judges may be 'too responsive' is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty. Alabama trial judges face partisan election every six years. The danger that they will bend to political pressures when

Mr. Woodward's trial had all those elements—a black defendant, a white victim from the Montgomery Police Department, a life jury with five black jurors, and a judge who faced reelection in two years. Those elements should not trump "the conscience of the community on the ultimate question of life or death." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

For those reasons, this Court should grant certiorari and prohibit the practice of imposing the death penalty on individuals whose juries voted for life under the Eighth and Fourteenth Amendments.

II. THIS COURT SHOULD ADDRESS WHETHER THE DETERMINATION THAT AGGRAVATION OUTWEIGHS MITIGATION IS SUBJECT TO THE SIXTH AMENDMENT JURY RIGHT UNDER *RING V. ARIZONA*, 536 U.S. 584 (2002).

The trial judge in this case, sitting without a jury, made the determination that the aggravating circumstances outweighed the mitigating circumstances—a determination necessary for the imposition of a death sentence under Alabama law. In doing so, the trial judge violated Mr. Woodward's Sixth Amendment right to a jury.

In *Ring v. Arizona*, 536 U.S. 584 (2002), this Court held that "[c]apital defendants . . . are entitled to a jury determination on any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589. *See*

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pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III.") (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)); Paul Brace & Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 Am. J. Pol. Sci. 360, 367-71 (2008) (demonstrating that judicial elections influence judicial decision-making in capital cases).

also Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (stating the same principle in the noncapital context).

Under Alabama law, there are two penalty phase determinations necessary for the imposition of a death sentence: first, that an aggravating circumstance exists, and second, that the aggravating circumstances outweigh the mitigating circumstances. *See* Ala. Code § 13A-5-46(e)(2); Ala. Code § 13A-5-47(e). The Alabama Supreme Court has held that while the first of those two determinations is subject to *Ring*, *Ex parte McGriff*, 908 So. 2d 1024, 1037-38 (Ala. 2004), the second is not, for the following reason:

> [T]he relative "weight" of aggravating circumstances and mitigating circumstances is not susceptible to any quantum of proof. . . .
>
> Thus, 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.

Ex parte Waldrop, 859 So. 2d 1181, 1189 (Ala. 2002).

Certiorari is appropriate on this issue for three reasons.

First, the Alabama Supreme Court's reasoning in *Ex parte Waldrop* conflicts with this Court's case law. The crux of the Alabama Supreme Court's reasoning is that *Ring* applies only to determinations of that are "susceptible to [a] quantum of proof" and can be "reduced to a scientific formula or the discovery of a discrete, observable datum." *Ex parte Waldrop*, 859 So. 2d at 1189. But many aggravating circumstances would fail that test. One of the aggravating circumstances found by the trial judge in *Ring* was that the offense was committed in an "especially

heinous, cruel or depraved manner." *Ring*, 536 U.S. at 595. The question of whether an offense is "especially heinous" is no more susceptible to a quantum of proof or reducible to a scientific formula than the question of whether aggravation outweighs mitigation. Therefore, the Alabama Supreme Court's basis for declining to apply *Ring* is incompatible with *Ring* itself.

Second, lower courts across the country are in conflict on the question of whether the weighing of aggravation and mitigation is subject to *Ring*'s jury guarantee. Under Colorado law at the time of *Ring*, a finding that aggravation outweighed mitigation was required for a death sentence to be imposed. In one case, a panel of judges sitting without a jury made that finding and imposed the death penalty. *Woldt v. People*, 64 P.3d 256, 258 (Colo. 2003). The Colorado Supreme Court reversed, stating as follows:

> Because the Sixth Amendment requires that a jury find any facts necessary to make a defendant eligible for the death penalty, and the first three steps of section 16–11–103 [which include the weighing step] required judges to make findings of fact that render a defendant eligible for death, the statute under which Woldt . . . received [his] death sentence[] is unconstitutional . . . .

Id. at 266-67. The Missouri Supreme Court followed the Colorado Supreme Court's decision in *Woldt*. *See State v. Whitfield*, 107 S.W.3d 253, 259 (Mo. 2003) ("In step 3 the jury is required to determine whether the evidence in mitigation outweighs the evidence in aggravation . . . . If it does, the defendant is not eligible for death, and the jury must return a sentence of life imprisonment. While the State once more argues that this merely calls for the jury to offer its subjective and discretionary opinion rather than to make a factual finding, this Court again disagrees."). The

Alabama Supreme Court, the Delaware Supreme Court, and the Indiana Supreme Court have reached the opposite conclusion, holding that even though a determination that aggravation outweighs mitigation is required for a death sentence, a judge can make that determination without violating *Ring*. *See Ex parte Waldrop*, 859 So. 2d at 1189; *Brice v. State*, 815 A.2d 314, 322 (Del. 2003); *Ritchie v. State*, 809 N.E.2d 258, 266 (Ind. 2004). Also, other state supreme courts have held that the weighing determination is not subject to *Ring*'s reasonable doubt requirement; however, in those states, defendants have a right to a jury for the weighing determination.[14] This Court should grant certiorari to resolve the split among the lower courts.

Third, even if *Ring* did not apply to weighing in other states, it would apply in Alabama due to the expansive nature of the state's judicial sentencing proceedings. The Alabama courts held for the first time in this case that such proceedings can involve the presentation of additional evidence. *See Woodward*, 2011 WL 6278294, at *35-37.[15] Thus, if the jury declines to find that aggravation outweighs mitigation, the judge can use new facts presented at the judicial sentencing proceeding to reach a different conclusion and thus authorize the death penalty. That is precisely what happened in this case. The trial judge based his

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[14] *See People v. Thomas*, 53 Cal. 4th 771, 835 (Cal. 2012); *People v. Thompson*, 853 N.E.2d 378, 407-08 (Ill. 2006); *Miles v. State*, 28 A.3d 667, 673 (Md. 2011); *Nunnery v. State*, 263 P.3d 235, 250-51 (Nev. 2011); *State v. Fry*, 126 P.3d 516, 533-34 (N.M. 2005); *Commonwealth v. Roney*, 866 A.2d 351, 360 (Pa. 2005).

[15] Prior to its decision in this case, the Alabama Court of Criminal Appeals had held that the statutory provision governing judicial sentencing proceedings "does not provide for the presentation of additional . . . evidence at sentencing by the trial court." *Boyd v. State*, 746 So. 2d 364, 398 (Ala. Crim. App. 1999). But in its decision in this case, the court abandoned the rule of *Boyd*. *Woodward*, 2011 WL 6278294, at *36 n.10.

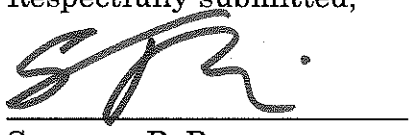
determination that aggravation outweighed mitigation in large part on "information which the jury did not hear." Appendix 82. This was not a situation in which the judge made additional fact-finding in the course of exercising discretion within established limits. This was a situation in which the death penalty was not *authorized* until the judge made an additional determination based on new facts.[16]

For those reasons, the judge violated *Ring* and the Sixth and Fourteenth Amendments.

CONCLUSION

Because this case presents critical questions regarding the constitutionality of judicial override and Mr. Woodward's death sentence, this Court should grant certiorari.

Respectfully submitted,



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[16] "[E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things." *Alleyne v. United States*, 133 S. Ct. 2151, 2163 (2013). The weighing determination in Alabama is the former, not the latter.

CERTIFICATE OF SERVICE

I, Stephen B. Bright, hereby declare that on July 16, 2013, I served this Petition for Writ of Certiorari, including the appendix, on the State of Alabama by depositing an envelope containing the petition in the United States mail, with first-class postage prepaid, addressed as follows:

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