NO. 14-8189

CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTIE SCOTT,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED (REPHRASED)

1. Shortly after buying a $100,000 life insurance policy on her six-year-old son, Christie Scott burned him alive. Applying the multi-factor test from *Ex parte Carroll*, 852 So. 2d 833 (Ala. 2002), the sentencing judge sentenced Scott to death. Is Scott's sentence arbitrary and capricious such that it violates the Eighth Amendment?

2. This Court held in *Spaziano v. Florida*, 468 U.S. 447, 460, 104 S. Ct. 3154, 3162 (1984), that "nothing" in the Constitution "requires that the [death] sentence be imposed by a jury." This Court upheld the constitutionality of Alabama's capital sentencing statute in *Harris v. Alabama*, 513 U.S. 504, 115 S. Ct. 1031 (1995). Should this Court overrule *Spaziano* and *Harris* and hold instead that the United States Constitution requires that a death sentence be imposed by a jury?

3. Does Alabama's capital murder statute violate *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002), because it allows the sentencing judge to weigh aggravating circumstances against mitigating circumstances to determine a sentence?

PARTIES

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STATEMENT

Christie Scott murdered her oldest son, Mason, in a house fire. Mason was six years old, autistic, and diagnosed with Attention Deficit and Hyperactivity Disorder, Oppositional Defiant Disorder, and Pervasive Developmental Disorder. Pet. App. Ex. B 3. He was on several medications. Pet. App. Ex. B 3. Scott had been verbally and physically combative with Mason in public places leading up to his death. Pet. App. A 4. She purchased a $100,000 insurance policy on his life shortly before the fire. Pet. App. A 4.

There is rarely direct evidence when murder is committed by arson. "[R]ather, the evidence of arson is usually circumstantial," and "often of a negative character; that is, the criminal agency is shown by the absence of circumstances, conditions, and surroundings indicating that the fire resulted from accidental cause." *People v. Nowack*, 614 N.W.2d 78, 83 (2000). In an arson case, the evidence of guilt usually consists of "presence at the scene, conduct before and after the fire, proof that the fire was intentionally set, and motive." *Belser v. State*, 727 N.E.2d 457, 465 (Ind. App. 2000).

The jury unanimously convicted Scott of three counts of capital murder: (1) murder during arson, (2) murder for pecuniary gain, and (3) murder of a child under 14 years of age. *See* Ala. Code § 13A-5-40(a)(7) &

(9) & (15). More than 70 witnesses testified during the State's case-in-chief. The following is some of the circumstantial evidence that the State presented:

- Scott obtained two life insurance policies on her six-year-old son months before the fire and submitted a third application for life insurance in the amount of $100,000 twelve hours before the fire. Pet. App. A at 4; Pet. App. B at 4-5.

- The level of ADHD medication in Mason's blood reflected that he had been given four times the usual dose. Pet. App. B 3.

- Two experts testified that the fire was not accidental. Pet. App. A 5.

- The hallway smoke detector that would have alerted to the fire had been disabled. Pet. App. B. 2; Pet. App. A 5.

- Scott's statements to law enforcement were inconsistent with the statements of other witnesses. For example, Scott claimed that she attempted to re-enter the burning house through the garage to save her son until a neighbor restrained her; her neighbor denied it. Pet. App. A 3.

- Scott placed some of her jewelry in her mother's house a week before the fire. Pet. App. B 6.

- Scott made unusual comments after the fire, which indicated a lack of remorse that her son had died and concern over being blamed for the fire. Pet. App. A. 4; Pet. App. B 2.

- Scott possessed her cellphone at the time of the fire, but did not use it to call 911. Pet. App. B 2.

- When Scott appeared at her neighbor's house purportedly fleeing from the fire, she did not immediately tell her neighbor that her son was in the burning building. Pet. App. B 2.

- Scott had been researching houses-for-sale shortly before the fire. Pet. App. B 5.

- Scott's previous house burned in a fire that, according to a fire investigator, was intentional. Pet. App. B 5.

Scott also testified in her defense. As the Alabama Court of Criminal Appeals noted, "[a] good portion of Scott's testimony was inconsistent with the testimony of numerous State witnesses." Pet. App. B 6. "A proper inference the jury can make from disbelieved testimony is that the opposite of the testimony is true." *United States v. Mejia*, 82 F.3d 1032, 1038 (11th Cir. 1996). Thus, when a defendant testifies in his or her own defense, the jury is "permitted to reject that testimony . . . and consider that testimony as substantive evidence of the defendant's guilt." *United States v. Jiminez*, 564 F.3d 1280, 1285 (11th Cir. 2009).

The sentencing phase immediately followed the conviction. Numerous family members and acquaintances of Scott testified about her positive character traits and called on the jury to recommend a sentence of life-without-parole. The jury voted 7-5 to recommend a sentence of life-without-parole.

The trial judge later sentenced Scott to death. The judge considered two aggravating factors—that the murder was for pecuniary gain and was unusually heinous and cruel. Pet. App. A 6. The judge explained that he did

not consider the "emotional testimony" at the penalty phase to outweigh the aggravating circumstances in the case. Pet. App. A 9. He explained that, in this case, the victim's family was *also* the defendant's family. Pet. App. A 9. Thus, there was no reason to weigh the victim's family's request for leniency as a mitigating circumstance. The sentencing judge determined that the aggravating factors outweighed the mitigating circumstances:

> The Court is a great believer in the . . . jury system and following the jury when at all possible. Killing you own child for money by burning him alive is too much to overcome. . . . The only way justice can be served in this case is by a sentence of death.

Pet. App. A. 10.

The Alabama Court of Criminal Appeals affirmed the conviction and sentence. *See* Pet. App. B. The appellate court could not "find error in the circuit court's assignment of little weight to the victim's family's wishes given that they disagreed with the jury's finding of guilt and that they were also Scott's family." Pet. App. B 51. The Supreme Court of Alabama denied certiorari. Pet. App. D.

REASONS FOR DENYING THE WRIT

For the most part, Scott's petition does not even attempt to argue the customary grounds for granting certiorari. There is no split on any of the questions she has presented. And Scott does not argue that the lower court's decision conflicts with this Court's precedents because those precedents directly foreclose her arguments. *See Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154 (1984); *Harris v. Alabama*, 513 U.S. 504, 115 S. Ct. 1031 (1995). Instead, the petition is little more than a plea to revisit constitutional questions that this Court settled several decades ago. There have been no intervening doctrinal developments on these issues, and Scott identifies no other compelling reason to grant certiorari. The Court should not retread this ground; "the States' settled expectations deserve our respect." *Ring v. Arizona*, 536 U.S. 583, 613, 122 S. Ct. 2428, 2445 (2002) (Kennedy, J., concurring). The petition should be denied.

I. The Court should deny certiorari on the first question presented because Scott's sentence is not arbitrary or capricious.

On the first question presented, Scott's arguments are a jumble. In some places, Scott appears to be arguing that the only constitutionally permissible scheme for judicial capital sentencing is Florida's scheme, which this Court upheld in *Spaziano*. *See* Pet. 13 (criticizing the Alabama Supreme Court for "declin[ing] to impose the standard erected by Florida").

But that is precisely the same categorical argument that this Court rejected in *Harris*. *See Harris*, 513 U.S. at 512, 115 S. Ct. at 1036 ("We therefore hold that the Eighth Amendment does not require the State to define the weight the sentencing judge must accord an advisory jury verdict."). In other places, Scott seems to argue, not that Alabama's scheme is categorically unconstitutional, but that it was unconstitutionally applied *to the facts of her case*. *See* Pet. 12-15 (arguing that "it is arbitrary for a judge to override a jury's verdict of life without parole because the victim's family did not ask for the death penalty"). That somewhat different argument is also meritless. It rests on an unsupportable interpretation of the trial court's sentencing order and a contrived comparison with the unrelated sentencing order in *Lockhart v. Alabama* (No. 14-8194). The Court should deny certiorari on the first question presented.

A. Alabama law provides clear and objective standards to determine whether a defendant deserves the death penalty.

Scott's first argument is squarely foreclosed by *Harris*. This Court explained in *Harris* that the weight a judge gives to a jury's advisory verdict is constitutionally irrelevant. Because "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence," it is "not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight." *Harris*,

513 U.S. at 515, 115 S. Ct. at 1037. Unless the Constitution requires jury sentencing in capital cases, (an argument that is addressed in Part II below), the jury's advisory role in the process is a constitutional non-event.

Nothing relevant has changed in Alabama's capital sentencing scheme since *Harris*. Just as it did when this Court ruled in *Harris*, Alabama law still "adequately channels the sentencer's discretion so as to prevent arbitrary results." *Id.* at 511, 115 S. Ct. at 1035. Under Alabama law, a judge must determine whether to sentence a person convicted of capital murder by weighing the statutory aggravating circumstances with the mitigating circumstances suggested by the defendant. *See* Ala. Code § 13A-5-47. These circumstances are defined by statute. *See id.* §§ 13A-5-49 & 51. As part of this process, "the trial court shall consider the recommendation of the jury contained in its advisory verdict," even though "it is not binding upon the court." *Id.* § 13A-5-47(e). The judge must enter a written sentencing order that identifies each aggravating and mitigating factor at issue and explains why the judge weighed some factors more heavily than others. *See id.* § 13A-5-47(d). The judge's decision is then reviewed by the Alabama appellate courts, which perform their own weighing of aggravating and mitigating circumstances.

The Supreme Court of Alabama has, through case law, provided further guidance to trial judges on the exercise of their sentencing discretion. The Court has explained that a jury's recommendation of life without parole "is to be treated as a mitigating circumstance." *Ex parte Carroll*, 852 So. 2d 833, 836 (Ala. 2002). "The weight to be given that mitigating circumstance should depend upon the number of jurors recommending a sentence of life imprisonment without parole, and also upon the strength of the factual basis for such a recommendation in the form of information known to the jury" *Id.* The "jury's recommendation may be overridden based upon information known only to the trial court and not to the jury, when such information can properly be used to undermine a mitigating circumstance." *Id.*

These standards are sufficient to provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Gregg v. Georgia*, 428 U.S. 153, 188, 96 S. Ct. 2909, 2932 (1976). By way of comparison, these standards cabin the discretion of sentencing judges much more so than the standards that apply to noncapital sentencing in the federal system. *See, e.g.*, 18 U.S.C. § 3553. To the extent there is any variation between individual cases, that variation reflects "how different judges have 'considered' the jury's advice"; it does

not affect the facial constitutionality of Alabama's scheme. *Harris*, 513 U.S. at 514, 115 S. Ct. at 1037.

B. Scott's contrived comparison to the sentence in *Lockhart v. Alabama* reflects a misreading of both sentencing orders.

The sentencing judge also faithfully applied the law to the facts of Scott's case. The judge did not, as Scott claims, sentence her to death "because the victim's family did not ask for the death penalty." Pet. 14.

Instead, the sentencing judge focused on the aggravated nature of Scott's crime. The sentencing judge explained that Scott was convicted of three counts of capital murder, and he found two statutory aggravating factors—that the murder was committed for pecuniary gain and that it was unusually heinous or cruel. *See* Pet. App. A 6. He determined that the aggravating factors outweighed the mitigating circumstances that were presented at sentencing. Pet. App. A 10. He based that determination on the circumstances of the murder, not the testimony of the victim's family:

> The Court is a great believer in the . . . jury system and following the jury when at all possible. Killing you own child for money by burning him alive is too much to overcome. . . . The only way justice can be served in this case is by a sentence of death.

Pet. App. A 10.

The sentencing judge recognized that the jury had recommended a sentence of life without parole, but he explained in detail why he was

choosing not to follow that recommendation. He noted that the 7-5 recommendation was the "statutory minimum to allow a life without parole recommendation." Pet. App. A 9. And, in contrast, he explained that the jury had found Scott guilty of three counts of capital murder. Pet. App. A 9. Unlike the 7-5 vote for life-without-parole, the vote at the guilt phase was unanimous: "[T]his particular murder fit the definition of three different ways the Alabama legislature has set out to be bad enough to justify Capital Murder. That is a powerful statement." Pet. App. A 9. Finally, the judge considered why 7 members of the jury may have recommended life-without-parole, noting the circumstantial nature of the case and the "very emotional testimony from the Defendant's family asking that [Scott's] life be spared." Pet. App. A 9.

As required by Alabama law, the judge explained why he did not consider this "emotional testimony" to outweigh the aggravating circumstances in the case. The Supreme Court of Alabama has held that a request by the *victim's* family that the defendant be sentenced to life without parole is a mitigating circumstance that is entitled to weight. *See Carroll*, 852 So. 2d at 836. Accordingly, the sentencing judge had to explain why he was according Scott's family's request for life-without-parole less weight than the aggravating factors. He explained that, unlike in most murders, the

victim's family was *also* the defendant's family. Thus, the underlying reason for weighing the victim's family's request for leniency in favor of mitigation did not apply here because there was no one "willing to stand up for the victim." Pet. App. A 9. The sentencing judge reiterated, however, that the *reason* for the sentence of death was the three counts of capital murder and the aggravating circumstances, not the testimony of Scott's family: "Killing your own child for money by burning him alive is too much to overcome." Pet. App. A 10.

Thus, the purported conflict that Scott sets up between the sentencing order in this case and the sentencing order in *Lockhart v. State* is based on a straw man. We address the judge's reasoning in Lockhart's case in more detail in our brief in opposition to that petition. Just as the judge here did not sentence Scott to death because the victim's family *favored* leniency, the judge in Lockhart's case did not sentence him to death because the victim's family *opposed* leniency.

* * *

The Court should deny certiorari on the first question. Scott's case has nothing in common with *Lockhart*, and everything in common with other cases in which defendants have been sentenced to death for committing similar crimes. For example, in *Blackmon v. State*, 7 So. 3d 397 (Ala. Crim.

App. 2005), the defendant was sentenced to death when she killed her two-year old daughter. Similarly, in *Gobble v. State*, 104 So. 3d 920 (Ala. Crim. App. 2010), the defendant was convicted of capital murder and sentenced to death for murdering her child. And, in *Dunaway v. State*, -- So. 3d. --- 2009 WL 4980320 (Ala. Crim. App. 2009), the defendant killed his girlfriend and her child in an arson and was sentenced to death. As the sentencing judge explained, the sentence here is in line with sentences in similar cases and "other Defendants have been sentenced to death for murders that are less heinous, atrocious, and cruel than this murder." Pet. App. A 10.

II. The Court should deny certiorari on the second question presented because the Constitution permits judicial sentencing.

The real meat of Scott's petition comes in the second question presented. That question asks whether the Constitution requires that death sentences be imposed by a jury, even though all other sentences are imposed by judges. As explained above, this Court's precedents already answer that question.

It is not time for the Court to reconsider those precedents. The Court should consider overruling precedents only when they have been "thoroughly undermined by intervening decisions and . . . no significant reliance interests are at stake that might justify adhering to their result." *Alleyne v. United States*, 133 S. Ct. 2151, 2166 (2013) (Sotomayor, J.,

concurring). But no intervening events undermine *Spaziano* or *Harris*, and they have been extensively relied on by the States. Just as it did in *Woodward v. Alabama*, 134 S. Ct. 405 (2013), the Court should deny the petition on this question. It should do so for five reasons.

A. Nothing has changed since *Spaziano* and *Harris*.

First, there have been no significant changes since *Spaziano* and *Harris*. In *Spaziano v. Florida*, this Court rejected the argument "that the capital sentencing decision is one that, in all cases, should be made by a jury." 468 U.S. at 458, 104 S. Ct. at 3161. The Court explained:

> In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

Id. at 464, 104 S. Ct. at 3164. This Court revisited the issue of judicial sentencing in *Harris v. Alabama*, 513 U.S. 504, 115 S. Ct. 1031 (1995). There, this Court examined Alabama's system of judicial sentencing and held that: "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence." *Id.* at 515, 115 S. Ct. at 1037.

Nothing has changed to call these precedents into question. Scott notes that, at present, three states—Alabama, Delaware, and Florida—provide for judicial sentencing in capital murder cases after an advisory jury

issues a sentencing recommendation. This number is *precisely* the same as it was when this Court decided *Spaziano* in 1984. 468 U.S. at 463 n. 9, 104 S. Ct. at 3164. Moreover, there has been no consistent movement in the intervening years: Indiana, which allowed judicial sentencing in 1984, amended its capital punishment procedures in 2002 to place final sentencing authority in the jury, but, in 2003, Delaware amended its capital punishment procedures to *allow* judicial sentencing. 11 Del. C. § 4209. If the societal consensus is "evolving" on this issue, the direction of that evolution is not yet clear.

Scott attempts to buttress her argument by citing statistics about individual sentences. Pet. 21-22. But those statistics have not meaningfully changed either. As this Court pointed out in *Harris*, judicial override has always been a relatively rare event and invoked to impose a death sentence where the jury recommended life-without-parole. *Harris*, 513 U.S. at 513-14, 115 S. Ct. at 1036-37. The Court reasoned, however, that "[e]ven assuming that these statistics reflect a true view of capital sentencing in Alabama, they say little about whether the scheme is constitutional." *Id.* Instead, "[t]hat question turns not solely on a numerical tabulation of actual death sentences as compared to a hypothetical alternative, but rather on whether the penalties imposed are the product of properly guided discretion

and not of arbitrary whim." *Id.* Again, nothing meaningful has changed in these figures since the Court's 8-1 decision in *Harris*.

B. States have relied on *Spaziano* and *Harris*.

Second, the States of Florida and Alabama have relied on this Court's decisions in *Spaziano* and *Harris* to sentence hundreds of murderers in the intervening decades. Some of those murderers have likely already been executed. Others are presently on death row. "[T]he States' settled expectations deserve our respect." *Ring*, 536 U.S. at 613, 122 S. Ct. at 2445 (Kennedy, J., concurring). The Court should hesitate before re-testing the constitutionality of "reforms designed to reduce unfairness in sentencing." *Id.* (Kennedy, J., concurring). And it should decline to consider overruling precedents where "significant reliance interests are at stake that might justify adhering to their result." *Alleyne*, 133 S. Ct. at 2166 (Sotomayor, J., concurring).

C. The "societal consensus" component of the Eighth Amendment has no bearing on this procedural question.

Third, the Eighth Amendment provides a uniquely poor vehicle through which to determine whether there is a constitutional right to jury sentencing in capital cases. In *Coker v. Georgia*, 433 U.S. 584, 97 S. Ct. 2861 (1977), *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005), and similar cases, this Court found that "capital punishment—though not

unconstitutional *per se*—is categorically too harsh a penalty to apply to certain types of crimes and certain classes of offenders." *Graham v. Florida*, 560 U.S. 48, 100, 130 S. Ct. 2011, 2045 (2010) (Thomas, J., dissenting). As this Court explained in *Graham*, "[t]he classification" it uses under the Eighth Amendment "consists of two subsets, one considering the nature of the offense, the other considering the characteristics of the offender." *Id*. at 60, 130 S. Ct. at 2022. This framework does not fit Scott's challenge to judicial sentencing.

Scott does not fall within either of the subsets recognized by this Court's Eighth Amendment jurisprudence. Scott was convicted of capital murder, a crime for which the death penalty is constitutionally permissible. Consequently, a consideration of the nature of her offense is inapposite. And, unlike age or mental status, a jury's life recommendation is not an objective "characteristic of the offender." Rather, the jury's recommendation reflects its subjective opinion regarding the appropriate sentence based on the limited evidence available to it. Thus, Scott's claim does not fall within the second classification of cases either. Instead, to reach this claim under the Eighth Amendment, the Court would need to create a third category that focuses on societal consensus about *procedure*. To accept Scott's reasoning would thus have uncertain effects in other areas

of criminal and sentencing procedure, in which one or more States are an outlier. *Cf. Spaziano*, 468 U.S. at 464, 104 S. Ct. at 3164 ("The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.").

D. *Spaziano* and *Harris* were rightly decided.

Fourth, the Court should not grant certiorari on this question because *Spaziano* and *Harris* were rightly decided. Even if one accepts the argument that the jury plays a uniquely valuable role in capital sentencing, "it does not follow that the sentence must be imposed by a jury." *Spaziano*, 468 U.S. at 462, 104 S. Ct. at 3163. "[D]espite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individual." *Id*. at 459, 104 S. Ct. at 3161. If judges can be trusted with this task with respect to life-without-parole sentences and sentences for terms of years, then there is no reason that judges cannot be trusted with this task for capital sentences.

E. This case is a poor vehicle for reconsidering these precedents.

Finally, even if the Court were disposed to revisit *Spaziano* and *Harris*, this case would make a poor vehicle to do so. The jury vote in favor of life-without-parole was a bare majority. It was the lowest possible vote to

recommend a life-without-parole sentence under Alabama law. Had the law required the jury to be unanimous or had the jury's sentencing recommendation been binding, it is impossible to know how the vote would have gone. If the Court were to revisit *Spaziano* and *Harris*, it should not do so in a case like this one, where the jury supported life-without-parole by a bare majority. The Court should deny the petition for certiorari on the second question presented.

III. The Court should deny certiorari on the third question presented because there is no split of authority and because Alabama's sentencing statute does not violate *Ring v. Arizona*.

Scott argues that Alabama's death penalty sentencing procedures violate this Court's holding in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002). Specifically, she argues that a jury makes a "factfinding" when it weighs the aggravating circumstances with the mitigating circumstances and arrives at an advisory sentence. Unlike the other questions presented, this issue has been litigated in Alabama and elsewhere, and no split of authority has developed. Instead, the courts have uniformly applied *Ring v. Arizona* to allow a judge to perform the "weighing" of factors and to impose a sentence in a capital case. This argument is not worthy of this Court's review.

A. There is no split.

As an initial matter, the law on this issue is well-settled and there is no split. Federal courts and state courts across the country have held that a judge may determine how much weight to give aggravating and mitigating factors without violating *Ring*.[1] This weighing process is not a factual determination; it is a legal and prudential one. *Cf.* 18 U.S.C. § 3553 (listing factors to be considered at federal sentencing).

Scott erroneously argues that "a conflict exists because other state supreme courts, reviewing indistinguishable weighing provisions, have held

[1] *Lee v. Commissioner, Alabama Dep't of Corrections*, 726 F.3d 1172, 11-98 (11th Cir. 2013) ("*Ring* does not foreclose the ability of the trial judge to find the aggravating circumstances outweigh the mitigating circumstances."); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); *United States v. Purkey*, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); *Higgs v. United States*, 711 F.Supp.2d 479, 540 (D. Md. 2010) ("Whether the aggravating factors presented by the prosecution outweigh the mitigating factors presented by the defense is a normative question rather than a factual one."); *State v. Fry*, 138 N.M. 700, 126 P.3d 516, 534 (2005) ("[T]he weighing of aggravating and mitigating circumstances is thus not a 'fact that increases the penalty for a crime beyond the prescribed statutory maximum.'"); *Commonwealth v. Roney*, 581 Pa. 587, 866 A.2d 351, 360 (2005) ("[B]ecause the weighing of the evidence is a function distinct from fact-finding, Apprendi does not apply here."); *Ritchie v. State*, 809 N.E.2d 258, 266 (Ind. 2004) ("In *Bivins v. State*, 642 N.E.2d 928, 946 (Ind. 1994), we concluded, as a matter of state law, that '[t]he determination of the weight to be accorded the aggravating and mitigating circumstances is not a 'fact' which must be proved beyond a reasonable doubt but is a balancing process.' Apprendi and its progeny do not change this conclusion."); *Brice v. State*, 815 A.2d 314, 322 (Del. 2003) (*Ring* does not apply to the weighing phase because weighing "does not increase the punishment."); *Nebraska v. Gales*, 265 Neb. 598, 658 N.W.2d 604, 627-29 (2003) ("[W]e do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review be undertaken by a jury"); *Oken v. State*, 378 Md. 179, 835 A.2d 1105, 1158 (2002) ("the weighing process never was intended to be a component of a 'fact finding' process").

that pursuant to *Ring*, such provisions require a jury's factual determination." Pet. 28. But she has not shown a legitimate split of authority. She cites cases from Colorado and Missouri that are allegedly in conflict with the Alabama courts. But they are readily distinguishable.

1. Colorado: The Colorado statute at issue in *Woldt v. Colorado*, 64 P.3d 256 (Colo. 2003), was indistinguishable from the statute in *Ring*. In fact, the Court in *Ring* specifically noted that its decision would invalidate Colorado's statute. *See Ring*, 536 U.S. at 608 n. 6, 122 S. Ct. at 2442 ("Other than Arizona, only four States commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges.") As with Arizona's statute (and unlike Alabama's), Colorado's statute conditioned death eligibility on several "steps" carried out by the fact finder. *Woldt*, 64 P.3d at 264. Under *Ring*, each of those "steps" must be determined by a jury. *Id.* at 266. Because Colorado's sentencing scheme allowed judges to make those determinations, the Colorado Supreme Court found that it violated the Constitution. *Id.*

2. Missouri: The Missouri statute in *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003), was also indistinguishable from the statute in *Ring*. The Court in *Ring* explained that, unlike Alabama, Missouri "commit[s] both capital sentencing factfinding and the ultimate sentencing decision entirely

to judges." *See Ring*, 536 U.S. at 608 n. 6, 122 S. Ct. at 2442. Like Colorado and Arizona, Missouri's capital sentencing statute sets forth several "steps" that must be "determined against defendant before a death sentence can be imposed." *Whitfield*, 107 S.W.3d at 258. The statutes at issue in *Whitfield* stand in marked contrast to Alabama law, which conditions the imposition of the death penalty on a jury's finding of the existence of a single aggravating circumstance. Ala. Code § 13A-5-45(f).

B. The weight of aggravating and mitigating circumstances is not a "fact-finding" that must be made by a jury.

The lower courts are also correct that Alabama's sentencing scheme does not violate *Ring*. By finding Scott guilty of capital murder, the jury also found the aggravating factors that made her eligible for a capital sentence. The jury found Scott guilty of murdering a child under the age of 14, guilty of murder during the commission of an arson, and guilty of murder for pecuniary gain. Under Alabama law, those factors make Scott eligible for a capital sentence. *See* Ala. Code § 13A-5-47(d).

This process is entirely consistent with *Ring.* In *Ring v. Arizona*, this Court extended the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), to death penalty cases. In so doing, it overruled part of *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047 (1990). The Court held that Arizona's death penalty statute violated the Sixth Amendment right to a jury

trial "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 585, 122 S. Ct. at 2430. Thus, the trial judge cannot make a finding of "any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589, 122 S. Ct. at 2432. Only the jury can.

Both the Supreme Court of Alabama and the Eleventh Circuit have held Alabama's sentencing structure to be consistent with *Ring*. In *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002), the Supreme Court of Alabama addressed the effect of *Ring* on the constitutionality of Alabama's sentencing scheme. There, the defendant had been convicted of two counts of murder during the course of a robbery in the first degree, in violation of Ala. Code § 13A-5-40(a)(2). *Id.* at 1184. The Supreme Court of Alabama explained that "[b]ecause the jury convicted Waldrop of two counts of murder during robbery in the first degree...the statutory aggravating circumstance of committing a capital offense while engaged in the commission of a robbery, Ala. Code 1975, § 13A-5-49(4), was 'proven beyond a reasonable doubt.'" *Id.* at 1188. (citing Ala. Code § 13A-5-45(e); Ala. Code § 13A-5-50)). The court explained that "[o]nly one aggravating circumstance must exist in order to impose a sentence of death." *Id.* (citing Ala. Code § 13A-5-45(f)).

The court reasoned that, because "the findings reflected in the jury's verdict alone exposed Waldrop to a range of punishment that had as its maximum the death penalty," the State had done "all *Ring* and *Apprendi* require." *Id.* The Eleventh Circuit agreed with this reasoning on federal habeas review in *Lee v. Commissioner, Alabama Dep't of Corrections*, 726 F.3d 1172, 1197-98 (11th Cir. 2013).

The Supreme Court of Alabama's and the Eleventh Circuit's rulings are correct. As Justice Scalia explained in his *Ring* concurrence, "[w]hat today's decision says is that the jury must find the existence of the fact that an aggravating factor existed." *Ring*, 536 U.S. at 612, 122 S. Ct. at 2445. "Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase." *Id.* at 612-13, 122 S. Ct. at 2445 (Scalia, J., concurring). Alabama has chosen the second and most "logical" option. Because the jury found beyond a reasonable doubt that Scott intentionally murdered a child under 14 years of age, committed the murder during an arson, and committed the murder for pecuniary gain, Scott became death eligible at the conclusion of the guilt

phase of trial. The judge's decision to impose a death sentence, instead of the lesser sentence of life-without-parole, was not a fact-finding.

CONCLUSION

For the foregoing reasons, this Court should deny Scott's petition.

Respectfully submitted,

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