No. 14-8194

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2014

COURTNEY LOCKHART,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

BRYAN A. STEVENSON
Counsel of Record
RANDALL S. SUSSKIND
STEPHEN CHU
Equal Justice Initiative
122 Commerce Street
Montgomery, Alabama 36104
bstevenson@eji.org
(334) 269-1803

Counsel for Petitioner

March 16, 2015

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The State's Brief in Opposition largely ignores the outlier status of Alabama's death penalty scheme. The State does not dispute that Alabama is alone in allowing, without restriction, elected judges to reject death-qualified jury sentencing verdicts of life without parole. It does not dispute that there is a clear trend away from override decisions, both with respect to the number of states where override is permitted and with respect to the number of cases where it occurs, even in Alabama. The State does not dispute that arbitrary, unfair, and unregulated imposition of the death penalty violates the Eighth Amendment and evolving standards of decency under this Court's precedents. And the State does not dispute that the Eighth and Sixth Amendments are implicated when judges impose death sentences in an arbitrary manner and based on factual findings that have been rejected by the jury.

What the State does suggest is that the constitutional questions about judicial override can be ignored as long as the judge's ultimate decision is understandable based on the facts of the case. To this end, the State's brief attempts to provide justifications for the judge's order sentencing Mr. Lockhart to death. The State's description of the facts, however, is incomplete, and its attempts to justify the override decision actually reinforce the constitutional questions that this case presents, and thus reinforce the need for a grant of certiorari.

I. The State's Presentation of the Facts in the Case Is Incomplete and Not Responsive to the Eighth Amendment Questions Presented in Mr. Lockhart's Petition.

The death-qualified jury in this case found that Mr. Lockhart was guilty for the murder of Lauren Burk,[1] but it returned a unanimous sentencing verdict of life without parole. The jury made the critical finding that the aggravating circumstances in this case did not outweigh the mitigating circumstances after evaluating both the facts of Mr. Lockhart's crime and the substantial mitigating evidence that he suffered from trauma as a result of his years of combat military service in the Iraq war. The trial judge's decision to override the jury's unanimous verdict raises significant constitutional questions about Alabama's death penalty sentencing scheme.

In its Brief in Opposition, the State would have this Court believe that the request for the death penalty from the victim's family was actually not a significant part of the State's penalty phase case, but instead was merely a "single snippet in the sentencing order taken out of context." (State's Br. Opp'n 10.) The State's argument to *this* Court stands in sharp contrast to the argument it made to the *trial* court, where it argued specifically that the request for the death penalty from the victim's family should be considered as a basis for overriding the jury. (See R. 4621–22 ("[T]he

[1] The State successfully challenged ten potential jurors for cause because of their opinions concerning the death penalty. (R. 1840, 2027, 2057, 2107, 2113, 2274, 2604, 2752, 2758, 2837.)

State will call members of the victim's family in this case, and that is one consideration that the trial court may find . . . ."); see also R. 4595 (asking judge to "consider that [the victim's family] are not recommending leniency").)

The State's argument to this Court is also belied by the evidence presented below. What the State now characterizes as a snippet "taken out of context" was actually the *only* testimony the State introduced at the hearing before the judge – explicit requests from four members of the victim's family that the judge should reject the jury's verdict and sentence Mr. Lockhart to death. (R. 4639 (victim's father: "I am asking for the death penalty for Mr. Lockhart."); see also Pet. for Cert. 12–14.) And both the majority and dissenting opinions from the Alabama Court of Criminal Appeals found that the trial judge did consider the family's opinion about Mr. Lockhart's sentence, disagreeing only as to whether it was a request against leniency or a request for override. Compare Lockhart v. State, No. CR-10-0854, 2013 WL 4710485, at *41–42 (Ala. Crim. App. Aug. 30, 2013) ("[T]he trial court explicitly stated that it considered the statements only for the limited purpose of determining whether the victim's family opposed leniency."), with id. at *77 (Joiner, J., concurring in part and dissenting in part) ("[T]he court relied on those statements as a 'factor . . . weigh[ing] in favor of judicial override.'").

The State is similarly disingenuous in its attempt to persuade this Court that the

trial judge's override was proper because the murder in this case was "part of a pattern of robberies and holdups," without acknowledging that the incidents (the "crime spree," according to the State) were actually unadjudicated and unproven allegations. (See State's Br. Opp'n i, 1, 4, 9–10, 18.) Mr. Lockhart has never been tried, much less convicted, of these other robberies, and because the circumstances of those charges were never established through an adversarial process, any findings about them are inherently unreliable.

The State's suggestion that the judge's override was reasonable because the jury would have voted for death had it known about these allegations and had it known that Mr. Lockhart was dishonorably discharged from the Army (State's Br. Opp'n 10), is not persuasive because, in fact, the jury was well aware of Mr. Lockhart's struggles after Iraq. The jury heard that Mr. Lockhart was incarcerated while in the Army, was discharged, and eventually stripped of all his military benefits, including his pension and his entitlement to medical services through the V.A. (R. 4204–05.) And the jury heard from several friends and relatives that Mr. Lockhart's behavior and personality were entirely different after his return from Iraq. (R. 4178, 4182, 4445–56, 4467–68.) After he was arrested, Mr. Lockhart apologized and said "that nobody would help him when he got back from Iraq." (R. 3713.)

This is not a case where the jury believed that death was an inappropriate punishment because Mr. Lockhart was a "mentally disturbed war hero" or that this tragedy was the result of "happenstance." (State's Br. Opp'n 10.) Rather, the jury recognized that Mr. Lockhart was guilty of murder, but that the circumstances of the crime were best understood in the context of his untreated trauma resulting from his years of combat military service.

Mr. Lockhart's jury vote was unanimous and strongly supported by compelling mitigation. (See Pet. for Cert. 20–21.) The State does not dispute this. The judge used unreliable evidence to undermine the jury's verdict. The State's brief repeats this error. Alabama stands alone in using a capital sentencing scheme that permits the arbitrariness demonstrated in this case, and this Court should grant certiorari to determine whether Mr. Lockhart's Eighth Amendment right was violated by the trial judge's override.

II. The Arguments Made By the State in an Attempt to Justify Mr. Lockhart's Death Sentence Actually Reinforce the Constitutional Questions Presented in This Case.

A comparison between Mr. Lockhart's case and Scott v. Alabama, No. 14-8189, demonstrates that Alabama's death penalty system is one where trial judges can use the opinions of the victim's family to justify a life-to-death override, regardless of the actual recommendation (in favor of death for Mr. Lockhart, against for

Ms. Scott). The State does not dispute that these two judges considered the families' opinions in their sentencing orders.

Rather, the State tries to minimize the impact of this consideration by relying on the fact that the trial judge considered "information known only to the trial court and not to the jury." (State's Br. Opp'n 8, 9, 18.) The State admits that "the *reason* for the sentence of death was . . . 'the amount and severity of the facts known to the Court but unknown to the jury.'" (State's Br. Opp'n 11 (emphasis in original).) These arguments attempting to minimize the Eighth Amendment problems in the case actually raise questions about the Sixth Amendment and the viability of judicial override in light of Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002).

In Apprendi, this Court held that, with the exception of a prior conviction, any fact that increases the penalty beyond the statutory maximum must be proven to a jury beyond a reasonable doubt. 530 U.S. at 490 (citing Almendarez-Torres v. United States, 523 U.S. 224, 230, 243 (1998)). This Court stated:

> [T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.

530 U.S. at 496. Here, the evidence of Mr. Lockhart's other conduct was not in the form of prior convictions. Rather, the judge relied on interrogation tapes, pre-trial suppression hearings, and a pre-sentence report, none of which provide sufficient procedural safeguards to protect Mr. Lockhart's rights to confrontation and due process.[2]

Under Ring, if "an increase in a defendant's authorized punishment [is] contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." 536 U.S. at 602. Mr. Lockhart would not have been sentenced to death without the trial judge considering **facts** not before the jury. As the State concedes, the sentencing judge "disagreed with the jury's recommendation because he knew facts about the character of the defendant and the nature of his crime that the jury did not." (State's Br. Opp'n 18.) Thus, by acknowledging that the judge overrode the jury's verdict based on "[a]dditional facts unknown to the jury" (see C. 1079), and by arguing that these additional facts were critical to the judge's decision, the State validates the arguments Mr. Lockhart made in his certiorari petition that his death sentence was imposed in violation of Ring and

[2] Further, the pre-trial hearings were limited to issues of suppression and 404(b), and the defense was not on notice that testimony from those hearings would be used to sentence him to death. See Lankford v. Idaho, 500 U.S. 110 (1991) (holding that due process rights violated because defendant received inadequate notice that sentencing hearing could result in death penalty).

Apprendi. (See Pet. for Cert. at 23–27; Amicus Br. at 6–8.) At a minimum, the State's arguments reveal that there are significant unresolved questions about whether judicial override was proper in this case under the Sixth Amendment.[3]

III. The State Does Not Adequately Respond to Mr. Lockhart's Argument that a Death Sentence Is Not Possible Under Alabama Law Unless There Is a Finding that the Aggravating Circumstances Outweigh the Mitigating Circumstances.

The State's brief highlights the conflict that is ripe for this Court's adjudication: where a State conditions the death penalty on a finding that aggravation outweighs the mitigation, must that finding be determined by a jury? Alabama law requires the finding of an aggravating circumstance and a determination that the aggravating circumstances outweigh the mitigating circumstances before a death sentence can be imposed. Ala. Code § 13A-5-46(e)(1), (2); § 13A-5-47(d), (e). The State, citing Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002), asserts that only the first finding is subject to Ring and, alone, makes a defendant eligible for the death penalty. (State's Br. Opp'n 22–24.) But the State does not explain why the second finding, which a capital sentence is also contingent upon, is exempt from the requirements of

[3] This Court recently granted certiorari in Hurst v. Florida, No. 14-7505, to consider whether Florida's death penalty sentencing scheme violates the Sixth and Eighth Amendments in light of Ring. As in Hurst, there can be no confidence in Mr. Lockhart's case that the factual determination that made him eligible for the death penalty was unanimously found by a jury beyond a reasonable doubt.

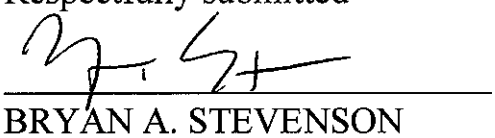
Ring. (See Amicus Br. 9–14.)

Moreover, the State's arguments about why there is not a conflict between Alabama and other jurisdictions is not persuasive. In both Woldt v. People, 64 P.3d 256, 265 (Colo. 2003), and State v. Whitfield, 107 S.W.3d 253, 259 (Mo. 2003), the courts examined their states' death penalty statutes to determine that weighing aggravation and mitigation was a necessary "step" before a death sentence can be imposed. Thus, the courts held that Ring required the weighing "step" to be determined by a jury. Woldt, 64 P.3d at 265–66; Whitfield, 107 S.W.3d at 261. Alabama's sentencing scheme similarly requires weighing before a death sentence may be imposed. Its status as a hybrid jury-judge sentencing state does not diminish the necessity that the factfinder decide that aggravation outweighs mitigation. Thus, because a defendant may not be sentenced to death without this "step," the holding from the Alabama Supreme Court is in conflict with courts from Colorado and Missouri. This Court should grant certiorari to determine whether the Sixth Amendment requirements under Ring and Apprendi are applicable.

CONCLUSION

For these reasons, Mr. Lockhart prays that this Court grant a writ of certiorari to review whether the trial judge's decision to override an unanimous jury verdict for life without parole offends the Sixth, Eighth, and Fourteenth Amendments.

Respectfully submitted



BRYAN A. STEVENSON
Counsel of Record
RANDALL S. SUSSKIND
STEPHEN CHU
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
bstevenson@eji.org
rsusskind@eji.org
schu@eji.org
(334) 269-1803

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