NO. 14-8194

CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

COURTNEY LOCKHART,

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. As part of a month-long crime spree, Courtney Lockhart kidnapped a college student, stole her vehicle, forced her to remove her clothing, and killed her as she tried to escape. Applying the multi-factor test from *Ex parte Carroll*, 852 So. 2d 833 (Ala. 2002), the sentencing judge sentenced Lockhart to death. Is Lockhart'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?

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STATEMENT

Courtney Lockhart is a high-school graduate who was dishonorably discharged from the United States Army for, among other things, being absent without leave (AWOL) and assaulting an officer. *See* Pet. App. A 1083. In February and March of 2008, he conducted a string of armed robberies and carjackings in Alabama and Georgia. *See* Pet. App. A 1079-83. Except for the robbery of a convenience store, his methods were always the same. He would approach a female victim from behind as she was entering her vehicle in a parking lot. Pet. App. A 10. He would then threaten her with a pistol, demand her purse, and/or attempt to drive away in her car. *Id.* One of these robberies ended in murder.

One night, Lockhart drove to the Auburn University campus where he watched an 18-year-old university student, Lauren Burk, leave a building alone. Pet. App. A 1063. Lockhart approached Lauren as she was entering her vehicle, pointed his gun at her, forced her into her own car, and drove her away. Pet. App. A 1063. As he was driving Lauren's car, he forced her to remove her clothing. Pet. App. A 1063. He terrorized Lauren—now naked—for approximately 30 minutes as he drove around. Pet. App. A 1063. Eventually, Lauren opened the passenger door and leapt from the moving vehicle. Pet. App. A 1064; 1072. Lockhart shot her in the back as

she was escaping. Pet. App. A 1064. She was injured from the fall, but died from the gunshot wound that Lockhart inflicted. Pet. App. A 1065.

Lockhart continued driving after shooting his victim. He later burned her car, returned to his own car, and began to use his victim's credit and debit cards. Pet. App. A 1065. After he was stopped for speeding several days later, he led police on a high-speed chase, struck and injured a motorcycle police officer, and was eventually apprehended after he fled from his vehicle on foot. Pet. App. A 1066. Lockhart was *Mirandized* and confessed to the murder, as well as many of his other crimes. Pet. App. A 1067.

Lockhart was indicted for capital murder. Under Alabama law, an intentional murder is capital—meaning that the sentence is either death or life-without-parole—if one of several aggravating factors is present. *See* Ala. Code § 13A-5-40. Lockhart was indicted for: (1) murder during the commission of robbery, (2) murder during the commission of attempted rape, and (3) murder during the commission of kidnapping. Pet. App. A 1061. The State went to trial on the first count by itself. Pet. App. A 1062.

Lockhart pleaded not guilty by reason of mental defect or insanity. He presented the testimony of a psychologist who testified that: (1) Lockhart had an IQ of 86, which makes him below average, (2) Lockhart had some

symptoms from being exposed to combat in the military, but he did *not* have Post-Traumatic Stress Disorder (PTSD), and (3) Lockhart is immature and has poor judgment. Pet. App. A 1068. Although the State attempted to introduce evidence of Lockhart's other crimes and his dishonorable conduct in the military, the trial judge excluded that evidence. Pet. App. A at 1062 & B at 27. The jury found Lockhart guilty of capital murder during a robbery. Pet. App. A 1071-1072.

After the guilt phase of trial, the sentencing phase immediately followed. Lockhart presented witness testimony and evidence in an attempt to cast himself as a war hero who was mentally disturbed by combat and the death of his commanding officer. Pet. App. A 1069. The State presented no additional evidence. The jury returned special verdict forms that found the additional aggravating circumstance of murder during the course of a kidnapping, but declining to find that Lockhart committed the murder during an attempted rape or that the murder was especially heinous or cruel. Pet. App. A 1062, 1072. The jury voted 12-0 to recommend a sentence of life without parole. Pet. App. A 1062.

The trial judge later disagreed with the jury's advisory sentence and sentenced Lockhart to death. In a 28-page single-spaced sentencing order, the judge explained why he disagreed with the jury. He concluded that the

kidnapping weighed heavily in favor of the death penalty: "[The victim] was alone, unarmed, and she was chosen by Lockhart at random. The kidnapping is even more egregious because she was taken from a college campus, a place where students should feel safe, and forced into her own car. Lockhart forced her to undress and held her at gunpoint in order to prevent her escape." Pet. App. A 1072. The Court also emphasized that the jury was unaware of Lockhart's crime spree and the true nature of Lockhart's military service. *See* Pet. App. A 1079-1086. "Although the jury heard testimony regarding Lockhart's service, the jury was unaware of the full extent of Lockhart's military disciplinary record." Pet. App. A 1083-84. The Court reasoned that, "had the jury been aware of the additional facts known to the Court, their sentencing recommendation would likely have differed." Pet. App. A 1086.

The Alabama Court of Criminal Appeals affirmed Lockhart's conviction and sentence. *See* Pet. App. B. The Supreme Court of Alabama denied Lockhart's petition for writ of certiorari. *See* Pet. App. D.

REASONS FOR DENYING THE WRIT

For the most part, Lockhart's petition does not even attempt to argue the customary grounds for granting certiorari. There is no split on any of the questions he has presented. And Lockhart does not argue that the lower court's decision conflicts with this Court's precedents because those precedents directly foreclose his 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 Lockhart 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. 584, 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 Lockhart's sentence is not arbitrary or capricious.

On the first question presented, Lockhart's arguments are a jumble. In some places, Lockhart 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. 11 (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, Lockhart seems to argue, not that Alabama's scheme is categorically unconstitutional, but that it was unconstitutionally applied *to the facts of his 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 asked 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 *Scott v. Alabama* (14-8189). 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.

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

The sentencing judge also faithfully applied the law to the facts of Lockhart's case. The judge did not, as Lockhart claims, sentence him to death "because the victim's family asked for the death penalty." Pet. 12. Instead, the sentencing judge explained that additional evidence undermined the weight of the mitigating circumstances that were presented to the jury. *See* Pet. App. A 1079.

The judge relied extensively on two kinds of evidence that undermined the weight of the mitigating circumstances presented to the jury. First, at the sentencing phase before the jury, Lockhart relied extensively on his military service. But the pre-sentence investigation report revealed that Lockhart was absent-without-leave (AWOL), assaulted a fellow soldier with a concealed weapon, and was dishonorably discharged. *See* Pet. App. A 1077. *See also* Pet. App. A 1084 ("Although the jury heard testimony regarding Lockhart's service, the jury was unaware of Lockhart's military disciplinary record."). Second, at the sentencing phase before the jury, no one informed them about Lockhart's crime spree before and after the murder. The judge, however, knew that Lockhart had: (1) robbed a

convenience store, which included shooting a gun at the convenience store clerk, Pet. App. A 1079, (2) robbed four women in four different parking lots across two states, in addition to the victim here, Pet. App. A 1081, and (3), on one occasion, pointed a gun at the head of a three-year-old child to compel the victim to turn over her purse, Pet. App. A 1082 n. 27.

The sentencing judge reasonably concluded that these facts undermined the mitigating circumstances reflected by the jury's advisory verdict. In front of the jury, Lockhart presented himself as a mentally disturbed war hero who, by happenstance, came upon the victim and foolishly shot her. In fact, however, he was dishonorably discharged after going absent without leave and assaulting a fellow soldier. And the murder was no happenstance—it was part of a pattern of robberies and holdups that started before the murder and continued well afterward. The sentencing judge reasonably concluded that "had the jury been aware of the additional facts known to the Court, their sentencing recommendation would likely have differed." Pet. App. A 1086.

To make his sentence look aberrational, Lockhart takes a single snippet in the sentencing order out of context, but nothing about the sentencing judge's decision was arbitrary or capricious. 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. Here, however, the victim's family did *not* ask for leniency. That led the sentencing judge to comment that, in comparison with *Carroll*, the preferences of the victim's family did not weigh in favor of following the jury's advisory verdict. Pet. App. A 1078. The sentencing judge expressly considered the family's "unsworn statements only to show that the family opposed leniency." Pet. App. A 1078 n. 20. In other words, the sentencing judge was simply making the observation that, in this case, unlike in *Carroll*, the victims did not support life-without-parole. The sentencing judge reiterated again and again, however, that the *reason* for the sentence of death was not the wishes of the victim's family but "the amount and severity of the facts known to the Court but unknown to the jury." Pet. App. A 1087.

Thus, the purported conflict that Lockhart sets up between the sentencing order in this case and the sentencing order in *Scott v. Alabama* (14-8189) is based on a straw man. We address the judge's reasoning in Scott's case in more detail in our brief in opposition to that petition. Just as the judge here did not sentence Lockhart to death because the victim's family *opposed* leniency, the judge in Scott's case did not sentence her to death because the victim's family *supported* leniency.

* * *

The Court should deny certiorari on the first question. Lockhart's case has nothing in common with *Scott*, and everything in common with other cases in which defendants have been sentenced to death for committing similar crimes. In *Baker v. State*, 906 So. 2d 210 (Ala. Crim. App. 2001), for example, the defendant was sentenced to death "for intentionally murdering [the victim] with a gun during the course of kidnapping her." *Id.* at 275. In *Bryant v. State*, 951 So. 2d 732 (Ala. Crim. App. 2003), the defendant was sentenced to death when he kidnapped and murdered a victim for the purpose of stealing the victim's car. Similarly, in *Eggers v. State*, 914 So. 2d 883 (Ala. Crim. App. 2004), the defendant was sentenced to death when he murdered his victim, after kidnapping her to steal her car and other belongings. There are many, many more cases in which defendants have been sentenced to death in Alabama for kidnapping and/or robbing their victims during the murder. As the sentencing judge explained, "there is little question that when compared to other cases with similar facts, a sentence of death is not in any way a disproportionate sentence." Pet. App. A 1086.

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

The real meat of Lockhart'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. Lockhart 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.

Lockhart attempts to buttress his 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 Lockhart's challenge to judicial sentencing.

Lockhart does not fall within either of the subsets recognized by this Court's Eighth Amendment jurisprudence. Lockhart was convicted of capital murder, a crime for which the death penalty is constitutionally permissible. Consequently, a consideration of the nature of his 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, Lockhart'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 Lockhart'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 sentencing judge did not disagree with the jury's recommendation because the sentencing judge believed he was a better barometer of community values. Instead, he 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. The judge had excluded this evidence when the prosecution tried to present it during the guilt phase of the case, Pet. App. A at 1062 & B at 27, and the prosecution had no reason to present it at the penalty phase because the jury's sentencing recommendation was only advisory. If the Court were to revisit *Spaziano* and *Harris*, it should not do so in a case, like this one,

where the jury did not hear all the relevant evidence. 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*.

Lockhart 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, he 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

[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

determination; it is a legal and prudential one. *Cf.* 18 U.S.C. § 3553 (listing factors to be considered at federal sentencing).

Lockhart erroneously argues that "a conflict exists because other state supreme courts, reviewing indistinguishable weighing provisions, have held that pursuant to *Ring*, such provisions require a jury's factual determination." Pet. 27. But he has not shown a legitimate split of authority. He 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

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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 (2003) ("the weighing process never was intended to be a component of a 'fact finding' process").

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 Lockhart guilty of capital murder during a robbery, the jury found the aggravating factor that made him eligible for a capital sentence. Moreover, on a special verdict form, the jury also specifically found that Lockhart murdered the victim during the course of a kidnapping. *See* Pet. App. A 1071-72. Under Alabama law, those aggravating circumstances make Lockhart eligible for a capital sentence, and they are the factors that the court weighed in this case. *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 Lockhart committed this crime as part of a robbery, he became death-eligible at the conclusion of the guilt phase of trial. The jury later found that Lockhart committed the murder in the course of a kidnapping as well. 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 Lockhart's petition.

Respectfully submitted,

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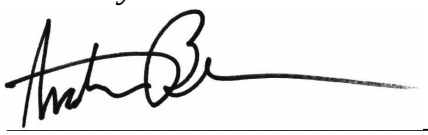

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