No. 20-1136
CAPITAL CASE

In the
Supreme Court of the United States

PETER CAPOTE,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

In 2016, Thomas Hubbard was the leader of the Almighty Imperial Gangsters. The gang's members included Hubbard, Peter Capote, Benjamin Young, De'Vontae Bates, Austin Hammonds, Michael Blackburn, and Trey Hamm. On February 28, Hubbard's residence was burglarized, and Hamm's Xbox videogame console was taken. Hubbard told the gang he was going to find out who had burglarized his home and kill that person.

In the days following the burglary, Hammonds and Bates learned that Ki-Jana Freeman was selling an Xbox in an online marketplace. The pair suggested to Hammonds that Freeman might have stolen Hamm's Xbox. The gang held a meeting and decided that Freeman would be killed if they determined that he was, in fact, the person who had stolen Hamm's Xbox. To this end, Hammonds messaged Freeman on Facebook about the Xbox, but the pair never met to conduct a transaction. However, Hammonds represented to Hubbard that he met with Freeman and that the Xbox in question was indeed Hamm's. Hammonds alleged at trial that he later told Hubbard that Freeman did not have the stolen Xbox, but Hubbard continued with his plan to kill Freeman anyway.

On March 1, Bates contacted Freeman to buy acid. The two agreed to meet that night at the Spring Creek Apartments. However, Bates did not go to the apartment complex. Rather, Capote, Young, Hubbard, and Hamm went to the complex in a white truck and waited for Freeman to arrive. Bates sent a text message to Freeman asking

for his location and vehicle description, then relayed Freeman's response to his fellow gang members waiting in the truck.

When Freeman arrived in his blue Ford Mustang, he parked near a dumpster. Freeman pulled his truck behind Freeman's Mustang. Young and Capote got out of the truck and began firing their weapons at the Mustang, then jumped back in the truck and left. Freeman was shot multiple times and was pronounced dead after arriving at the hospital. Tyler Blythe, Freeman's passenger, was shot thirteen times but survived.

The jury convicted Capote of capital murder for the killing of Freeman with a deadly weapon while Freeman was in a vehicle. ALA. CODE § 13A-5-40(a)(17). During the penalty phase, the jury unanimously found one aggravating circumstance: that Capote was "previously convicted of a felony involving the use or threat of violence to a person" as he had a prior Illinois conviction for aggravated battery. *Id.* § 13A-5-49(2). By a ten to two vote, the jury recommended a sentence of death, and the trial court subsequently accepted that recommendation.

The Alabama Court of Criminal Appeals affirmed Capote's conviction and death sentence. The Alabama Supreme Court denied leave to appeal.

REASONS FOR DENYING THE WRIT

I. Capote's Sentence Does Not Violate the Sixth Amendment.

Capote's first argument for granting certiorari is based on the claim that his sentence violates the Sixth Amendment because, at the time of his sentencing, Alabama's death penalty scheme required the judge to weigh the aggravating and

mitigating circumstances before determining sentence. *See* ALA. CODE 13A-5-47(e). He relies on *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 136 S. Ct. 616 (2016), to support his argument, but Capote misunderstands these decisions and the way that Alabama's capital sentencing statute works.

A. *Ring* and *Hurst* require the jury to find the existence of aggravating factors that make a defendant eligible for the death penalty.

This Court has clearly distinguished two determinations to be made in capital sentencing: "the eligibility decision and the selection decision." *Tuilaepa v. California*, 512 U.S. 967, 970–71 (1994). "To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment." *Id.* (citing *Coker v. Georgia*, 433 U.S. 584 (1977)). That includes a finding of an "'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase." *Id.* at 972. But the Court has recognized "a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence." *Id.* That question involves whether the aggravating factors outweigh any mitigating factors.

The Court visited the issue of capital sentencing in *Ring v. Arizona*, 536 U.S. 584 (2002), and applied the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to death penalty cases. In *Ring*, the Court held that although a judge can make the "selection decision," the jury must find the existence of any fact that makes the defendant "eligible" for the death penalty by increasing the range of punishment to include the imposition of the range of punishment to include the imposition of the death penalty. 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. 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. Only the jury can.

Hurst did not add anything of substance to *Ring*. In *Hurst*, the State of Florida prosecuted a defendant for first-degree murder, which carried a maximum sentence of life without parole. *Hurst*, 136. S. Ct. at 620. Florida did not ask a jury to find the existence of any aggravating circumstance at the guilt phase. *Id.* At the sentencing phase, the jury also did not find the existence of any particular aggravating circumstance. The jury merely returned a non-unanimous advisory sentencing recommendation of seven to find in favor of death. *Id.* Because the jury found no aggravating factor at the guilt or sentencing phase, the judge should have imposed a life without parole sentence. Instead, the judge found an aggravating circumstance herself and imposed a death sentence, making both the eligibility and selection determinations. *Id.* Applying *Ring*, the Court held the resulting death sentence unconstitutional because "the judge alone [found] the existence of an aggravating circumstance" that expanded the range of punishment to include the death penalty. *Id.* at 624.

B. Neither *Ring* nor *Hurst* suggest that judicial weighing is unconstitutional, and there is no split on this issue.

Capote erroneously argues that his trial judge's sentencing decision violated the Sixth Amendment. In so doing, he conflates the eligibility and selection decisions,

i.e., (1) whether an aggravating circumstance exists and (2) whether the aggravating circumstances outweigh the mitigating circumstances. The first is a question of fact that may be submitted to a jury. The second, as the Alabama Supreme Court has held, is a not a question of fact, but rather is "a moral or legal judgment that takes into account a theoretically limitless set of facts." *Ex parte Bohannon*, 222 So. 3d 525, 530 (Ala. 2016) (quoting *Ex parte Waldrop*, 859 So. 2d 1181, 1189 (Ala. 2002)). For example, there is no factual answer to the question of whether a defendant's difficult childhood "outweighs" the heinousness of his crime. Instead, that analysis reflects the kind of prudential sentencing determination that judges make every day in non-capital sentencing.

The Alabama Supreme Court's reasoning on this point is in harmony with this Court's case law. After deciding *Hurst*, this Court wrote that whether aggravating factors outweigh mitigating circumstances is not a factual question. The Court explained that the "ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy." *Kansas v. Carr*, 577 U.S. 108, 119 (2016). Because this is not a factual question, the Court reasoned that "[i]t would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it." *Id.* This past year, the Court noted that, pursuant to *Ring* and *Hurst*, "a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range." *McKinney v. Arizona*, 140 S. Ct. 702, 707 (2020).

Lower courts have almost uniformly held that a judge may perform the "weighing" of factors and arrive at an appropriate sentence without violating the Sixth Amendment.[1] Although the Delaware Supreme Court and Colorado Supreme Court have held that the respective weight of aggravating and mitigating factors is a "fact," that question is ultimately one of state law. At the very least, it is so bound up in state law that it is impossible to say that there is a split between these state courts instead of a difference of opinion about how to interpret their similar state laws. And even if those pre-*McKinney* decisions represented a split, it is a split that was resolved last year by *McKinney*.

1. *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*, 126 F.3d 516, 534 (N.M. 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*, 866 A.2d 351, 360 (Pa. 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."); *State v. Gales*, 658 N.W.2d 604, 628–29 (Neb. 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*, 835 A.2d 1105, 1158 (Md. 2003) ("[T]he weighing process never was intended to be a component of a 'fact finding' process").

II. *McKinney v. Arizona* Bars Capote's Argument for Certiorari.

Capote's next question presented is essentially a bare request to reconsider the Court's decision in *McKinney*, which unambiguously answers Capote's first question presented with a resounding "no."[2] In *McKinney*, this Court again rejected the notion that the weighing conducted during the selection phase of a capital proceeding must be done by a jury. Indeed, the Court unambiguously held that "*Ring* and *Hurst* did not require jury weighing of aggravating and mitigating circumstances[.]"[3] In trying to create ambiguity where none exists, Capote ignores *McKinney*'s unambiguous holding in favor of a tortured argument about an aspect of Arizona's capital sentencing scheme that was not even at issue.[4]

There is no question that the sole aggravating circumstance in this case—that Capote had previously been convicted of a felony involving the use or threat of violence—was unanimously found by the jury. Thus, as with *McKinney*, the sole question is whether the process of weighing aggravation and mitigation is one that must be carried out by a jury. By answering that question with an unambiguous "no," *McKinney* defeats Capote's Sixth Amendment claim and demonstrates that certiorari

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2. Capote contends that he seeks only "clarification" of *McKinney*, but that notion is belied by his own statement that "we believe" that the *McKinney* decision "sweeps too broadly." Pet. 12.
3. 140 S. Ct. at 708.
4. Capote's argument focuses on whether a judge might constitutionally be permitted to find the existence of a "mitigating fact [that] decreased . . . punishment[.]" Pet. 13. But *McKinney* did not address the *finding* of the aggravating and mitigating circumstances that Arizona Supreme Court considered. Rather, it exclusively addressed whether Arizona was required to have a jury weigh them. 140 S. Ct. at 707. The Court's answer to that question was, of course, "no." *Id.*

is not warranted in this matter. As this Court has made clear, the bottom line is that *Ring* and *Hurst* apply to the eligibility decision, not the selection decision. Therefore, there is no clarification needed from this Court.

CONCLUSION

For the foregoing reasons, the State asks this Court to deny certiorari.