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 ALABAMA COURT OF CRIMINAL APPEALS

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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This reply brief is submitted in further support of Peter Capote's petition for a writ of certiorari.

In response to our petition, Alabama argues that we "misunderstand [*Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 136 S.Ct. 616 (2016)] and the way that Alabama's capital sentencing statute works." Ala. Br. 3. As discussed below, it is Alabama that misunderstands this Court's precedents and the workings of its own capital sentencing scheme.

1. The bright-line rule of *Ring* and *Hurst* is easily stated: "[i]f a state makes an increase in a defendant's authorized punishment 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." *Hurst*, 536 U.S. at 602. What follows inexorably from that rule is this: (1) A defendant convicted of first-degree murder in Alabama cannot receive a death sentence unless a judge determines that the aggravating circumstances outweigh the mitigating circumstances ("the weighing process"). (2) Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment without parole. And (3) thus, the jury must find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances for an Alabama death sentence to survive Sixth Amendment scrutiny.

2. Alabama writes that "[i]n *Ring*, the Court held that although a judge can make the 'selection decision,' the jury must find the existence of any fact that makes a defendant 'eligible' for the death penalty by increasing the range of punishment to include . . . the imposition of the death penalty." Ala. Br. 3. But the

words "selection decision" (or any words with similar effect) do not appear in *Ring*. They are Eighth Amendment words, and *Ring* is a Sixth Amendment decision. Moreover, Ring's claim was "tightly delineated": he contended only that the Sixth Amendment required a jury to find an aggravating circumstance asserted against him. 536 U.S. at 597 n.4. He did not challenge the weighing process. While *Ring*'s contention was "tightly delineated," the Court's holding was not. "Capital defendants," the Court held, "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589 (emphasis added). In Alabama, a determination that the aggravating circumstances exceed the mitigating circumstances is such a finding, and, as a result, Mr. Capote was entitled to have the jury find it.

3. This Court's decision in *Kansas v. Carr*, 136 S.Ct. 633 (2016), which Alabama cites, is not to the contrary. Ala. Br. 5. There, the Court considered whether the Eighth Amendment required capital sentencing courts in Kansas "to affirmatively inform the jury that mitigating circumstances need not be proven beyond a reasonable doubt," *id.* at 642, and the Court concluded that there was no such Eighth Amendment requirement. Nowhere did the Court suggest that the weighing process could be left to the judge if its outcome was essential to the imposition of a sentence of death. That is not surprising. Under Kansas law, "both the existence of aggravating circumstances and the conclusion that they outweigh mitigating circumstances must be proved [to the jury] beyond a reasonable doubt." *Id.* at 643 (emphasis added); *see also State v. Gleason*, 329 P.3d 1102, 1141 (Kan.

2014) ("In Kansas, the death penalty may be imposed only if the jury unanimously finds beyond a reasonable doubt that (1) the aggravating circumstances alleged by the State exist and (2) the existence of such aggravating circumstances is not outweighed by any mitigating circumstances found to exist."). Which is to say that Kansas does what Alabama doesn't, and must.

4. The Kansas scheme belies Alabama's claim that "there is no factual answer to the question whether [aggravating factors] outweigh [mitigating factors]." Ala. Br. 5. Kansas puts that question to the jury and gets an answer; the question is not unanswerable.

5. Moreover, *Cunningham v. California*, 549 U.S. 270 (2007), undermines Alabama's position. There, an "upper-term sentence" could not be imposed unless the judge found to a preponderance of the evidence circumstances in aggravation of the crime after considering "the trial record; the probation officer's report; statements in aggravation . . . submitted by the parties, the victim, or the victim's family and any further evidence introduced at the sentencing hearing." *Id.* at 277. In defending its statutory scheme, California argued that it "simply authorize[d] a sentencing Court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate selection within a statutory prescribed sentencing range." *Id.* at 289. This Court rejected that defense, writing: "that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any

particular case, does not shield a sentencing system from [a Sixth Amendment challenge]." *Id.* at 290. Those words apply with equal force in this case.

6. Alabama argues that we have ignored the "unambiguous holding [of *McKinney v. Arizona*, 140 S.Ct. 702 (2020)] in favor of a tortured argument about an aspect of Arizona's capital sentencing scheme." Ala. Br. 7. But Alabama substitutes an adjective ("tortured") for an analysis. Analysis here turns on two facts, neither of which Alabama disputes. First, in Arizona at the time, a defendant was eligible for a death sentence if the jury found at least one aggravating factor, and the court could impose a life sentence if it found "mitigating circumstances sufficiently substantial to call for leniency." Ariz. Rev. Stat. Ann. § 13-703(E)(1993). Thus, the existence of mitigating facts decreased the punishment that could otherwise by imposed. Second, under the Sixth Amendment, mitigating facts need not be found by the jury. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 n.16 (2000)(noting "the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation"). Alabama may not appreciate that distinction, but it is a settled aspect of Sixth Amendment jurisprudence.

7. Finally, it bears reemphasizing that ours is not a brief for jury sentencing in capital cases. Alabama could constitutionally require a jury to find (i) that an aggravating circumstance exists and (ii) that aggravating circumstances outweigh mitigating circumstances, and give the sentencing judge discretion to impose a life without parole sentence if she thought it just. Such a scheme would authorize a death sentence but not compel one. The judge could still exercise mercy.

What Alabama can't do, and has done, is have a judge find facts without which a capital sentence may not be imposed.

CONCLUSION

For these reasons and those in our initial brief, Peter Capote's petition for a writ of certiorari should be granted.

Respectfully submitted,

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