JUDGE VERSUS JURY: THE CONTINUING VALIDITY OF ALABAMA'S CAPITAL SENTENCING REGIME AFTER *RING V. ARIZONA*

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For the states, complying with the United States Supreme Court's rulings on the death penalty can often seem like the witless endeavor of chasing one's own tail. Since its landmark 1972 ruling in *Furman v. Georgia*,[1] the United States Supreme Court has come almost full circle in its view of the relative responsibilities of judge and jury in determining whether a defendant should be sentenced to death. *Furman* targeted jury discretion as the chief defect of modern capital sentencing, because of the opportunity it afforded for capricious imposition of the death penalty.[2] But, when some states chose to eliminate jury discretion altogether by imposing mandatory death sentences for certain categories of offenses, the Supreme Court said that this system, too, was unconstitutional, for the Eighth Amendment also required case-by-case assessment of all the facts that might mitigate against sentencing the convict to death.[3] Thus, the paradox was first introduced: Capital sentencing was to be governed by objective standards to ensure regularity and consistency of application, while at the same time remaining infinitely sensitive to the circumstances of the particular case.

Many states then went to a bifurcated system, in which the judge conducted a separate hearing, after the jury had returned a verdict of guilt, to determine whether the defendant should be sentenced to life or death. Alabama adopted a modified version of this scheme: the jury heard the evidence at the second hearing and made a sentencing recommendation based on that evidence, but the judge had the discretion to override that recommendation and impose a sentence that he or she deemed fit. The bifurcated system, with the judge hearing evidence and making the sentencing decision alone, was upheld against Eighth Amendment challenge in *Walton v. Ari-*

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1. 408 U.S. 238 (1972).

2. *Furman*, 408 U.S. at 253.

3. Lockett v. Ohio, 438 U.S. 586, 604-05 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976).

zona.[4] Alabama's trifurcated judicial override scheme was upheld against Eighth Amendment challenge in *Harris v. Alabama*.[5]

Just last term, however, in *Ring v. Arizona*,[6] the Supreme Court reversed course and ruled that allowing judges to determine whether a defendant qualified for the death penalty violated a defendant's Sixth Amendment right to a jury trial.[7] The Court overruled *Walton* and left open the question whether judicial override schemes such as Alabama's complied with the Sixth Amendment.[8] As the states scramble to respond to this latest ruling from the Supreme Court, some critics have suggested that *Ring* spells the demise of judicial capital sentencing schemes altogether, including judicial override schemes like Alabama's.[9]

If these critics are correct, then we have indeed come full circle. The combined effect of the Sixth and Eighth Amendments under this most aggressive interpretation of *Ring* would be that a jury must determine both whether the defendant is eligible for the death penalty—based on whether he committed an enumerated capital offense—and whether the defendant deserves the death penalty—based on the particular circumstances of the case. This scheme is not far removed from what Alabama and many other states employed for decades, prior to the Supreme Court's foray into the constitutionality of capital sentencing in *Furman*. The only real difference would be that the death penalty is available in a narrower category of cases—those in which a particular aggravating circumstance is found, in addition to intentional murder. In short, where once the jury was deemed the enemy of fairness in capital sentencing, it has now been declared its friend, to the point that Justice Breyer suggested in his concurring opinion in *Ring* that the *Eighth* Amendment requires a jury to decide whether a capital defendant deserves a sentence of death.[10]

While the irony of this cycle in thought is worth noting, I do not believe that *Ring* should be read as requiring the jury to make all decisions regarding the imposition of the death penalty. Nor is it my intent in this Article to criticize the sometimes shifting direction of the Supreme Court's rulings on capital sentencing over the last thirty years. My purpose here is rather more modest: to defend Alabama's capital sentencing statute against the latest charge that it is unconstitutional. I believe that Alabama's statute survives *Ring* fully intact. The tensions in its capital sentencing jurisprudence not-

4. 497 U.S. 639, 656 (1990).

5. 513 U.S. 504, 515 (1995).

6. 122 S. Ct. 2428 (2002).

7. *Ring*, 122 S. Ct. at 2443.

8. *Id.*

9. *See, e.g.*, Dana Beyerle, *The Legacy of "Ring": Ruling could affect penalty, at* http://www.geocities.com/vladd77/RING_LEGACY.html (June 25, 2002) ("A criminal defense attorney [Bryan Stevenson of the Equal Justice Initiative] said as many as 50 of the 187 death row inmates in Alabama could be affected by Monday's U.S. Supreme Court ruling on capital punishment."); Sen. Hank Sanders, *Senate Sketches #789, at* http://www.aladems.org/789.asp (July 8, 2002).

10. *Ring*, 122 S. Ct. at 2446 (Breyer, J., concurring).

withstanding, I do not believe that the Supreme Court will return full circle to a pure jury capital sentencing regime, as advocated by Justice Breyer.

Instead, my sense is that the Supreme Court is settling in, like a pendulum losing momentum, on an interpretation of the Sixth and Eighth Amendments that permits the division of capital sentencing responsibility between the judge and the jury. So long as the jury makes the essential finding of fact that renders a defendant eligible for the death penalty, the trial court may continue to make the ultimate decision whether the defendant deserves a sentence of death. If the trial court is constitutionally entitled to make this decision by itself, it follows that the court may override a jury's recommendation with respect to that decision, as Alabama law permits.

To make this demonstration, Part I of this Article charts the development of Alabama's capital sentencing regime, along with the United States Supreme Court decisions over the thirty years that have influenced this development. Part II analyzes the United States Supreme Court's recent decisions in *Apprendi v. New Jersey*[11] and in *Ring v. Arizona*,[12] which extended the rule of *Apprendi* to capital cases. Part III considers the validity of Alabama's current regime in light of *Apprendi* and *Ring*. The Article concludes that Alabama's regime should be upheld in its entirety. At worst, it may be deemed invalid in a narrow category of cases that are unlikely to recur with any frequency. The reports of the demise of Alabama's capital sentencing regime are, as they say, premature.

I. THE EVOLUTION OF ALABAMA'S MODERN CAPITAL SENTENCING STATUTE

"The death penalty has always existed in Alabama as a means of punishing those who commit the most serious crimes."[13] Justice Maddox's 1980 opinion for the Alabama Supreme Court in *Beck v. State* contains an excellent synopsis[14] of the evolution of Alabama's capital sentencing practices from 1807—when the Mississippi Territory, of which Alabama was then a part, enacted its first criminal code specifying ten crimes as capital—until 1972, when the United States Supreme Court issued its landmark ruling striking down the death penalty in *Furman v. Georgia*.[15] This Article is chiefly concerned with Alabama's modern capital sentencing statute: the regime as it existed prior to *Furman* and the revisions made to the regime in response to *Furman* and subsequent decisions of the United States Supreme Court.

Since World War II, Alabama's capital sentencing statute has evolved through three basic phases. The old regime, which was part of the 1940 re-

11. 530 U.S. 466 (2000).
12. *Ring*, 122 S. Ct. at 2443.
13. Beck v. State, 396 So. 2d 645, 648 (Ala. 1980).
14. *Beck*, 396 So. 2d at 648-54.
15. 408 U.S. 238 (1972).

compilation of the Alabama Code and which remained in place until *Furman*, assigned sentencing responsibility almost entirely to the jury.[16] In 1975, attempting to comply with *Furman*, Alabama enacted a new capital sentencing statute that split sentencing responsibility between the jury and the judge.[17] This transition regime remained in place for five years, until portions of the 1975 statute were invalidated by the United States Supreme Court in *Beck v. Alabama*.[18] In 1981, Alabama amended its statute again, first judicially and then legislatively, to the form in which it essentially remains today,[19] with the judicial override provision[20] that is now under attack after *Ring*.

A. Alabama's Old Capital Sentencing Regime

Alabama's pre-*Furman* regime was very simple. It permitted the jury, in its discretion, to impose death or a lesser sentence for the commission of a number of crimes: treason,[21] first-degree murder,[22] rape,[23] carnal knowledge of a female older than fourteen by plying her with a substance that prevented her from resisting,[24] carnal knowledge of a female under twelve,[25] carnal knowledge of a married woman by pretending to be her husband,[26] robbery,[27] kidnapping for ransom,[28] attempted kidnapping,[29] both first-degree[30] and second-degree[31] arson, first-degree burglary,[32] and exploding dynamite near an occupied building.[33] The death sentence was mandatory in one situation: when the defendant committed first-degree murder while serving a life sentence.[34]

For decades, Alabama's regime appeared constitutionally unobjectionable. On the infrequent occasions that the Supreme Court did opine on capital sentencing, its rulings all appeared to assume that the death sentence—and more particularly, jury discretion to impose the death sentence—was constitutional.[35]

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16. *See infra* notes 21-33.
17. *See* ALA. CODE §§ 13A-5-30 to -38 (1975), *repealed by* Act of Mar. 31, 1981, 1981 Ala. Acts 81-178, § 20.
18. 447 U.S. 625, 646 (1980).
19. ALA. CODE §§ 13A-5-39 to -59 (1975).
20. *Id.* § 13A-5-47.
21. ALA. CODE tit. 14, § 424 (1940).
22. *Id.* § 318.
23. *Id.* § 395.
24. *Id.* § 397.
25. *Id.* § 398.
26. ALA. CODE tit. 14, § 400 (1940).
27. *Id.* § 415.
28. *Id.* § 7.
29. *Id.* § 8.
30. *Id.* § 23.
31. ALA. CODE tit. 14, § 24 (1940).
32. *Id.* § 85.
33. *Id.* § 123.
34. *Id.* § 319.
35. *See, e.g.*, Witherspoon v. Illinois, 391 U.S. 510, 522 (1968) (holding it unconstitutional to ex-

Then, in 1971, the Supreme Court granted certiorari in two cases—*McGautha v. California* and *Crampton v. Ohio*—which it consolidated for purposes of argument and decision.[36] The petitioners in each case argued that the respondent states had violated due process by giving the juries untrammeled discretion to sentence them to death.[37] At that time, Ohio employed a scheme similar to Alabama's and many other states', making "first-degree murder punishable by death 'unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment.'"[38] California also gave the jury plenary sentencing discretion, except that the jury was required to determine guilt and punishment in two separate proceedings.[39]

By a six-to-three vote, the Supreme Court upheld the sentencing schemes of both Ohio and California.[40] Justice Harlan wrote the majority opinion, joined by Justices Stewart, White, Burger, and Blackmun.[41] Justice Black concurred separately.[42] In his majority opinion, Justice Harlan recounted the history of how jury discretion in capital sentencing had come to be the vogue among the United States and explained why it should be held constitutional.[43]

In England, at common law, the death sentence was apparently mandatory for all grades of homicide, although the King regularly granted pardons and defendants readily invoked the "benefit of clergy" to avoid the death sentence.[44] However, the American colonists disliked the mandatory death sentence.[45] Early state legislatures tried to lessen the severity of the common law by making the death penalty mandatory only for first-degree murder.[46] Still, juries would often "nullify" the verdict in capital cases—i.e., refuse to convict the defendant of first-degree murder, even when the defendant was clearly guilty—when the jury believed that the defendant did not deserve to die.[47] Accordingly, many states "adopted the method of forthrightly granting juries the discretion which they had been exercising in fact,"[48] assigning to the jury the unfettered discretion to determine whether to impose the death penalty.[49]

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clude persons from the jury because they expressed general objections to the death penalty).

36. McGautha v. California, 402 U.S. 183 (1971).
37. *McGautha*, 402 U.S. at 196.
38. *Id.* at 226 (Douglas, J., dissenting) (quoting OHIO REV. CODE ANN. § 2901.01).
39. *Id.* at 187 n.3.
40. *Id.* at 222.
41. *Id.* at 185-222.
42. *McGautha*, 402 U.S. at 225-26.
43. *Id.* at 197-203.
44. *See id.* at 197-98.
45. *See id.* at 198.
46. *See id.*
47. *McGautha*, 402 U.S. at 199-200.
48. *Id.* at 199.
49. *See id.* at 200 nn.11-12 & accompanying text.

Since World War II, however, "academic and professional sources" had begun to attack jury sentencing discretion in capital cases.[50] The concern, echoed by the petitioners in *McGautha*, was that jury discretion was tantamount to jury caprice. Thus, the American Law Institute published a Model Penal Code in 1959 with provisions prescribing standards for sentencing, including aggravating factors that a jury or a judge would be required to find before being able to sentence any defendant to death.[51]

Writing for the Court, Justice Harlan expressed his skepticism whether these sorts of standards would make the application of the death penalty any more consistent from case to case.[52] He noted that the draftsmen of the Model Penal Code had themselves conceded that "the factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula."[53] In Justice Harlan's view, the requirement that the jury or judge first find certain enumerated aggravating factors before proceeding to a decision on whether to impose the death penalty would serve only to redefine "the class of potentially capital murders" and would not necessarily ensure that the death penalty was imposed in a more evenhanded manner within that class of eligibles.[54] "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."[55]

Accordingly, Justice Harlan stated for the Court:

> [W]e find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel.[56]

Justice Harlan concluded:

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50. *Id.* at 202.

51. *Id.* A draft of the Model Penal Code provisions on capital sentencing was appended to the Court's opinion. *McGautha*, 402 U.S. at 222-25.

52. *Id.* at 221.

53. *Id.* at 205 (quoting MODEL PENAL CODE § 201.6 cmt. 3 (Tentative Draft No. 9, 1959) (quoting REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT IN GREAT BRITAIN, 1949-1953, at ¶ 498)).

54. *Id.* at 206 n.16.

55. *Id.* at 204.

56. *McGautha*, 402 U.S. at 207-08.

> For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless "boiler-plate" or a statement of the obvious that no jury would need.[57]

This reasoning would foreshadow issues the Court would confront a decade later in *Lockett v. Ohio*[58] and *Eddings v. Oklahoma*.[59]

Justice Harlan's apparent resolution of the issue in *McGautha* proved extremely short-lived. The following term, the Supreme Court heard argument in three more consolidated cases—*Furman v. Georgia*, *Jackson v. Georgia*, and *Branch v. Texas*—in which the petitioners challenged their death sentences as "cruel and unusual" in violation of the Eighth Amendment.[60] The lead case, *Furman v. Georgia*, involved a petitioner who had been sentenced to death for murder.[61] The other two cases, *Jackson v. Georgia* and *Branch v. Texas*, involved petitioners who had been sentenced to death for rape.[62]

On June 29, 1972, a mere thirteen months after its ruling in *McGautha*, the Supreme Court issued a terse per curiam opinion in *Furman*, ruling without explanation that the death sentences in all three consolidated cases were "cruel and unusual."[63] Interestingly, the reversal was due not to the change in composition of the Court that had transpired since *McGautha*—the passing of Justice Black and the resignation and subsequent passing of Justice Harlan—but rather to the apparent change in the views of Justices Stewart and White. Justices Stewart and White had joined Justice Harlan's majority opinion in *McGautha*.[64] They now formed a new majority with Justices Douglas, Brennan, and Marshall, voting to reverse the death sentences in *Furman*.[65] The two new members of the Court—Justices Powell and Rehnquist—voted with Chief Justice Burger and Justice Blackmun against reversal.[66]

Each member of the majority wrote a separate concurring opinion explaining his views on the issue. Justices Brennan and Marshall opined that the death penalty was "cruel and unusual" in all cases[67] and would continue to vote that way for the rest of their careers on the bench.[68] Justices Doug-

57. *Id.* at 208.
58. 438 U.S. 586 (1978).
59. 455 U.S. 104 (1982).
60. Furman v. Georgia, 408 U.S. 238, 239 (1972).
61. *Furman*, 408 U.S. at 239.
62. *Id.*
63. *Id.* at 239-40.
64. *McGautha*, 402 U.S. at 184.
65. *Furman*, 408 U.S. at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring).
66. *Id.* at 414 (Powell, J., concurring); *id.* at 465 (Rehnquist, J., concurring).
67. *Id.* at 305 (Brennan, J., concurring); *Furman*, 408 U.S. at 358-59 (Marshall, J., concurring).
68. *See, e.g.*, Keenan v. California, 490 U.S. 1012, 1012-14 (1989) (Brennan and Marshall, JJ.,

las, Stewart, and White did not go so far, targeting instead the current "system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned."[69] They left open the possibility that a system with appropriate governing standards to guide the discretion of the sentencer would satisfy the Eighth Amendment.

Justices Douglas, Stewart, and White did not formally differentiate between judges and juries, or suggest that the Eighth Amendment favored one over the other as the sentencer.[70] They deemed discretion without standards, whether exercised by a jury or a judge, to be the chief constitutional vice.[71] Nevertheless, reading between the lines of their opinions indicates that what concerned them the most was the stereotypical southern hanging jury, presumably more likely to sentence a black defendant to death than a white defendant in like circumstances, and presumably more prone to favor the rich defendant with the resources to put together an effective defense than the poor defendant. "[T]hese discretionary statutes," said Justice Douglas, while neutral on their face, "are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."[72] Justice Stewart put it even more colorfully: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."[73]

B. Alabama's Transition Regime (1975-'80)

While the precise import of the fragmented ruling in *Furman* was far from clear, one thing that did seem certain was that sentencing regimes like Alabama's, which in most cases gave the jury unfettered discretion to determine whether to sentence a convict to death, no longer passed constitutional muster. Not surprisingly, less than a year after *Furman* the Alabama Supreme Court ruled that all of the statutory provisions in the Alabama Code giving the jury the discretion to impose the death penalty were unconstitutional.[74] As the Alabama Supreme Court interpreted *Furman*, the only capital sentencing provision that remained valid was the one making the

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dissenting from denial of certiorari); Stafford v. Oklahoma, 467 U.S. 1212, 1212 (1984) (Brennan and Marshall, JJ., dissenting from denial of certiorari); King v. Mississippi, 461 U.S. 919, 919-20 (1983) (Brennan and Marshall, JJ., dissenting from denial of certiorari); Coker v. Georgia, 433 U.S. 584, 600 (1977) (Brennan, J., concurring).

69. *Furman*, 408 U.S. at 253 (Douglas, J., concurring).

70. *See id.* at 240 (Douglas, J., concurring); *id.* at 304 (Stewart, J., concurring); *id.* at 310 (White, J., concurring).

71. *See id.*

72. *Furman*, 408 U.S. at 256-57 (Douglas, J., concurring).

73. *Id.* at 309 (Stewart, J., concurring).

74. Hubbard v. State, 274 So. 2d 298 (Ala. 1973) (first-degree murder); Swain v. State, 274 So. 2d 305 (Ala. 1973) (rape).

death sentence mandatory for those who had committed first-degree murder while serving a life sentence.[75]

Like many other states, Alabama responded by enacting a special capital sentencing statute patterned after the ALI's Model Penal Code. Alabama's was entitled the Death Penalty and Life Imprisonment Without Parole Act (referred to as the "Death Penalty Act" or the "1975 Act"). The Death Penalty Act was passed on September 9, 1975, and went into effect on March 7, 1976.[76]

The 1975 Act differed from the old regime in several important respects. First, it eliminated the death penalty for all crimes except intentional murder.[77] This amendment proved prescient, as the United States Supreme Court would rule in 1977 that the death penalty was grossly disproportionate to the crime of rape and therefore cruel and unusual.[78] It is unlikely today that the United States Supreme Court would consider the death penalty to be proportionate to any crime besides murder or treason.

Second, the 1975 Act narrowed the class of capital murderers by listing fourteen discrete "aggravating offenses," which the state had to charge in the indictment, and which the jury had to find during the guilt phase of the trial, in order for the defendant to be eligible for the death penalty.[79] The fourteen "aggravating" or capital offenses were as follows:

> (a) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant;
> (b) Robbery or attempts thereof when the victim is intentionally killed by the defendant;
> (c) Rape when the victim is intentionally killed by the defendant; carnal knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant;
> (d) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant;
> (e) The murder of any police officer, sheriff, deputy, state trooper, or peace officer of any kind, or prison or jail guard, while such prison or jail guard is on duty, or because of some official or job-related act or performance of such officer or guard;
> (f) Any murder committed while the Defendant is under sentence of life imprisonment;

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75. Harris v. State, 352 So. 2d 479, 484 (Ala. 1977). That same year, the Alabama Legislature repealed this provision of the Alabama Code. *See infra* note 85.

76. Death Penalty and Life Imprisonment Without Parole Act, 1975 Ala. Acts 213 (codified at ALA. CODE §§ 13-11-1 to -9 (1975), re-codified at ALA. CODE §§ 13A-5-30 to -38 (1975)), *repealed by* Act of Mar. 31, 1981, 1981 Ala. Acts 81-178, § 20.

77. *See id.* § 2(a)-(n).

78. Coker v. Georgia, 433 U.S. 584, 592 (1977).

79. 1975 Ala. Acts 213, § 2 (originally codified at ALA. CODE § 13-11-2(a) (1975), re-codified at ALA. CODE § 13A-5-31(a) (1975)), *repealed by* 1981 Ala. Acts 81-178, § 20.

> (g) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration, or pursuant to a contract or for hire;
> (h) Indecent molestation, or an attempt to indecently molest a child under the age of 16 years, when the child victim is intentionally killed by the defendant;
> (i) Willful setting off or exploding dynamite or other explosive . . . when a person is intentionally killed by the defendant because of said explosion;
> (j) Murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts;
> (k) Murder in the first degree where the victim is a public official or public figure, and the murder stems from or is caused by or related to his official position, acts, or capacity;
> (*l*) Murder in the first degree committed while Defendant is engaged or participating in the act of unlawfully assuming control of any aircraft . . . ;
> (m) Any murder committed by a Defendant who has been convicted of murder in the first or second degree in the twenty years preceding the crime;
> (n) Murder when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness.[80]

The statute also contained a clause precluding jury consideration of lesser-included offenses when the defendant was charged with an aggravating capital offense.[81] This clause would later prove problematic in *Beck v. Alabama*.[82]

Third, once the jury found the defendant guilty of one of these aggravating offenses, it was required to "fix the punishment at death."[83] The jury no longer had the discretion to impose a lesser punishment.[84]

Death was not automatic, however, except in one category of cases: defendants who had committed first-degree murder while serving a life sentence.[85] In all other cases, sentencing discretion was shifted to the trial

80. *Id.* For a thorough discussion of the various aggravating offenses and their definitions, see Joseph A. Colquitt, *The Death Penalty Laws of Alabama*, 33 ALA. L. REV. 213, 222-35 (1982).

81. 1975 Ala. Acts 213, § 2 ("[O]ffenses so charged with said aggravation shall not include any lesser offenses.").

82. 447 U.S. 625 (1980) (holding it unconstitutional to impose a death sentence when the jury has not been allowed to consider lesser included offenses).

83. 1975 Ala. Acts 213, § 2.

84. *Id.*

85. The 1975 Act did not repeal ALA. CODE tit. 14, § 319 (1940), which made the death sentence mandatory when committed by a life-termer. This provision was re-codified in the 1975 Code at section 13-1-75. But, in 1977, the Alabama Legislature repealed section 13-1-75 when it adopted the new Ala-

court. The trial court had to conduct a separate sentencing hearing "to determine whether or not the court will sentence Defendant to death or to life imprisonment without parole."[86] The trial court was required to base its sentencing decision on the weighing of aggravating and mitigating circumstances,[87] which were enumerated in the statute. The aggravating circumstances were:

> (a) The capital felony was committed by a person under sentence of imprisonment;
> (b) The Defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;
> (c) The Defendant knowingly created a great risk of death to many persons;
> (d) The capital felony was committed while the Defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary, or kidnapping for ransom;
> (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
> (f) The capital felony was committed for pecuniary gain;
> (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;
> (h) The capital felony was especially heinous, atrocious or cruel.[88]

The mitigating circumstances were:

> (a) The Defendant has no significant history of prior criminal activity;
> (b) The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance;
> (c) The victim was a participant in the Defendant's conduct or consented to the act;
> (d) The Defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

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bama Criminal Code. *See* Act of May 16, 1977, 1977 Ala. Acts 607. The new Criminal Code, and the resulting repeal of section 13-1-75, were supposed to take effect on May 17, 1978, but Act of May 2, 1978, 1978 Ala. Acts 770, and Act of May 29, 1979, 1979 Ala. Acts 79-125, extended the effective date of the amendment to January 1, 1980. On January 1, 1980, the new Criminal Code was re-designated as Title 13A of the Code of Alabama, and the provision that had been section 13-1-75 was discarded.

86. 1975 Ala. Acts 213, § 3 (originally codified at ALA. CODE § 13-11-3 (1975), re-codified at ALA. CODE § 13A-5-32 (1975)), *repealed by* 1981 Ala. Acts 81-178, § 20.

87. *Id.* § 4 (originally codified at ALA. CODE § 13-11-4 (1975), re-codified at ALA. CODE § 13A-5-33 (1975)), *repealed by* 1981 Ala. Acts 81-178, § 20.

88. *Id.* § 6 (originally codified at ALA. CODE § 13-11-6 (1975), re-codified at ALA. CODE § 13A-5-35 (1975)), *repealed by* 1981 Ala. Acts 81-178, § 20.

(e) The Defendant acted under extreme duress or under the substantial domination of another person;
(f) The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
(g) The age of the Defendant at the time of the crime.[89]

The statute did not expressly permit consideration of aggravating or mitigating circumstances not listed in the statute, but it did not expressly forbid it, either.

Only a few months later, on July 2, 1976, the United States Supreme Court reentered the fray by issuing five decisions on the death penalty—*Gregg v. Georgia*,[90] *Proffitt v. Florida*,[91] *Jurek v. Texas*,[92] *Woodson v. North Carolina*,[93] and *Roberts v. Louisiana*[94]—the bicentennial quintet. Each of these decisions reviewed the constitutionality of a new capital sentencing statute enacted in the wake of *Furman*. The Court upheld the regimes of Georgia, Florida, and Texas, which resembled Alabama's.[95] The Court struck down the regimes of North Carolina and Louisiana.[96]

Once again, the decisions of the Court were fractured, with no one opinion in any of the five cases garnering a majority of the Court. The key opinion in each of the five cases was written by a plurality consisting of Justices Stewart, Powell, and Stevens (the most recent appointment, replacing Justice Douglas).[97] Because their opinions were in the middle of the Court and supplied the narrowest rationale in support of the Court's judgment in each case, the Stewart-Powell-Stevens plurality came to be viewed as the controlling voice on the constitutionality of the death penalty over the next several years.[98] Several broad principles emerged from their opinions, which remain consistent themes of the Supreme Court's capital sentencing jurisprudence to the present day.

The first principle, a logical extension of *Furman*, was that the discretion of the sentencing body had to be narrowed or channeled in order for the capital sentencing system to satisfy the Eighth Amendment. "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbi-

89. *Id.* § 7 (originally codified at ALA. CODE § 13-11-7 (1975), re-codified at ALA. CODE § 13A-5-36 (1975)), *repealed by* 1981 Ala. Acts 81-178, § 20.
90. 428 U.S. 153 (1976).
91. 428 U.S. 242 (1976).
92. 428 U.S. 262 (1976).
93. 428 U.S. 280 (1976).
94. 428 U.S. 325 (1976).
95. *Gregg*, 428 U.S. at 207; *Proffitt*, 428 U.S. at 259-60; *Jurek*, 428 U.S. at 276.
96. *Woodson*, 428 U.S. at 305; *Roberts*, 428 U.S. at 336.
97. *See supra* notes 90-94.
98. *See* Coleman v. Balkcom, 451 U.S. 949 (1981); Godfrey v. Georgia, 446 U.S. 420 (1980); Bell v. Ohio, 438 U.S. 637 (1978); Gardner v. Florida, 430 U.S. 349 (1977).

trary and capricious action."[99] In *Gregg*, *Proffitt*, and *Jurek*, the plurality voted to uphold the capital sentencing regimes of Georgia, Florida, and Texas, which resembled Alabama's in that they required a second phase of the trial for sentencing, during which the sentencing body would hear evidence in aggravation and mitigation and determine the appropriate sentence.[100]

Georgia satisfied the narrowing requirement as follows: the jury heard aggravating and mitigating evidence during a separate sentencing hearing, and it had to find at least one aggravating circumstance, from a list enumerated by statute, in order for the defendant to be eligible for death.[101] The jury then had to weigh the aggravating circumstance(s) against the mitigating circumstance(s) in order to determine whether to sentence the defendant to death.[102] The jury's decision on sentence was final but subject to appellate review.[103]

Florida followed the same procedure, except that the jury made only an advisory sentencing recommendation.[104] The trial court was required to determine for itself whether there existed at least one aggravating circumstance from a statutory list.[105] The trial court then had to consider whether the aggravating circumstance(s) outweighed the mitigating circumstance(s), such that the defendant should be sentenced to death.[106]

In Texas, like in Georgia, the jury determined the ultimate sentence, but it was not required to find a statutory aggravating circumstance and it did not "weigh" aggravating and mitigating circumstances.[107] Instead, the jury had to find the defendant guilty of one of five discrete categories of capital murder, which roughly corresponded to the aggravating circumstances required by Georgia and Florida.[108] The jury then had to answer three special questions to determine whether the defendant deserved to be sentenced to death.[109] The Stewart-Powell-Stevens plurality found that this system, like Florida's and Georgia's, suitably constrained the discretion of the jury and

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99. *Gregg*, 428 U.S. at 189.
100. *See id.* at 206-07; *Proffitt*, 428 U.S. at 258-60; *Jurek*, 428 U.S. at 276.
101. *Gregg*, 428 U.S. at 164-66.
102. *Id.*
103. *Id.* at 166-67.
104. *Proffitt*, 428 U.S. at 248-49.
105. *Id.* at 250.
106. *Id.*
107. *Jurek*, 428 U.S. at 269-70.
108. *Id.* at 270.
109. *Id.* at 269. The questions were:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Id. (quoting TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Supp. 1975-76)) (quotation marks omitted).

properly permitted the consideration of evidence that might mitigate against a sentence of death.[110]

The second principle in the plurality opinions, somewhat in tension with the first, was that mandatory death sentences were invalid, at least for broad categories of offense like first-degree murder. In *Woodson* and *Roberts*, the Stewart-Powell-Stevens plurality voted with Justices Brennan and Marshall to invalidate the capital sentencing regimes of North Carolina and Louisiana, because they made the death sentence mandatory for first-degree murder.[111] After *Furman*, one might have thought that a statute making the death sentence mandatory for discrete categories of offenses was the best way to bring a capital sentencing regime into compliance with the Eighth Amendment, for it eliminated altogether the sentencing discretion deemed invidious in *Furman*. Nevertheless, the plurality cited the same history of jury nullification that Justice Harlan had recounted in his majority opinion in *McGautha* as a reason why the mandatory death penalty would not necessarily serve this purpose.[112] The plurality postulated that many juries, knowing that a verdict of first-degree murder meant automatic death, would vote against that verdict, even in cases in which it was justified, just to avoid sentencing the defendant to death.[113] Thus, the death penalty might still be capriciously applied, depending on the particular jury's sentiments concerning the death penalty.

In subsequent opinions, the Supreme Court would explain this principle further. In *Lockett v. Ohio*[114] and *Bell v. Ohio*,[115] companion 1978 cases, the Court struck down Ohio's capital sentencing statute because it limited the mitigating circumstances that could be considered by the sentencing court to three: (1) whether the victim had induced or facilitated the murder; (2) whether "duress, coercion, or strong provocation" caused the defendant to commit the murder; and (3) whether the murder was "primarily the product of [the defendant's] psychosis or mental deficiency."[116] The Court held that this regime did "not permit the type of individualized consideration of mitigating factors" required by the Eighth Amendment.[117] Acknowledging that the "signals from this Court have not . . . always been easy to decipher,"[118] the Court declared it now the rule that "the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence

110. *Id.* at 276.
111. *Woodson*, 428 U.S. at 292-306; *Roberts*, 428 U.S. at 336.
112. *Woodson*, 428 U.S. at 297.
113. *Id.* at 302-03.
114. 438 U.S. 586 (1978).
115. 438 U.S. 637 (1978).
116. *Lockett*, 438 U.S. at 593-94 (quoting OHIO REV. CODE ANN. §§ 2929.03-2929.04 (B) (West 1975)).
117. *Id.* at 606.
118. *Id.* at 602.

less than death."[119] "[T]he sentencing judge's 'possession of the fullest information possible concerning the defendant's life and characteristics' is '[h]ighly relevant—*if not essential*—[to the] selection of an appropriate sentence.'"[120] Mandatory sentences like in *Woodson* and *Roberts*, which permitted the sentencer to consider none of this information, were thus plainly unconstitutional.

It is important to note that, in *Woodson*[121] and *Roberts*[122] (and again in *Lockett*[123]), the Court left open the question whether states could make the death sentence mandatory for convicts who committed murder while already serving a life sentence. As noted above, Alabama retained in its 1975 Act the provision making the death penalty mandatory for those who committed murder while under a life sentence.[124] In 1977, in *Harris v. State*,[125] the Alabama Supreme Court ruled that this provision was still constitutional. However, the Court's reasoning was dubious.[126] The Court ruled that the jury was not constitutionally required to consider mitigating circumstances, but that in any event the jury had been able to consider mitigating circumstances in the case at hand, because it had been given the option to convict the defendant of lesser-included offenses.[127] The Court thus premised the constitutionality of the death sentence on the very feature that the plurality had deemed problematic in *Woodson*—jury nullification of an otherwise justified first-degree murder verdict. Not long after *Harris*, however, the Alabama Legislature mooted the whole issue by repealing this one remaining mandatory death penalty provision in the Alabama Criminal Code.[128]

The third principle to emerge from the plurality opinions in 1976—more an idea than a principle—was that judges were preferable to juries as the sentencing authority. In *Gregg*, the plurality cited with favor reform recommendations by the ABA and the ALI, which "assumed that the trial judge would be the sentencing authority."[129] It also premised the need for accurate sentencing information on a concern for the relative inexperience of juries in making so grave a decision as whether to sentence another person to death:

> If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to im-

119. *Id.* at 604.
120. *Id.* at 603 (quoting Williams v. New York, 337 U.S. 241, 247 (1949)) (alteration in original).
121. *Woodson*, 428 U.S. at 287 n.7.
122. *Roberts*, 428 U.S. at 334 n.9; *see also* Roberts v. Louisiana, 431 U.S. 633, 637 n.5 (1977).
123. *Lockett*, 438 U.S. at 605 n.11.
124. *See supra* note 85 & accompanying text.
125. 352 So. 2d 479 (Ala. 1977).
126. *Harris*, 352 So. 2d at 485.
127. *Id.* at 484.
128. *See supra* note 85.
129. *Gregg*, 428 U.S. at 190.

> pose a rational sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.[130]

The plurality acknowledged that "[j]ury sentencing has been considered desirable in capital cases in order 'to maintain a link between contemporary community values and the penal system,'"[131] and it did not distinguish Texas's and Georgia's regimes from Florida's on this ground. (Recall that in Texas and Georgia the jury made the decision whether to impose the death sentence, whereas in Florida the jury made only a recommendation to the judge.) Nevertheless, jury capital sentencing "creates special problems," said the plurality.[132] "Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question."[133] The plurality indicated that it did not trust juries to be dispassionate in performing the twin roles of determining guilt and determining punishment, and it praised Georgia's bifurcated system for addressing this problem by separating the guilt phase from the sentencing phase of the trial.[134] In short, the plurality sent a strong signal that states would remain more assuredly within constitutional safe harbors if they assigned ultimate sentencing responsibility to a judge rather than to a jury.

Between 1976 and 1980, the United States Supreme Court issued a number of decisions that further refined the constitutional rules for capital sentencing. The Court continued to sharpen, and increase the tension between, the two chief principles that had emerged from *Furman* and the bicentennial quintet: first, that the sentencer's discretion had to be narrowed through the consideration of objective sentencing standards;[135] second, that the sentencer's discretion had to be broadened through the receipt and consideration of all evidence that might mitigate against the death sentence.[136] Other than the question about whether it was permissible to impose the mandatory death sentence on those who committed intentional murder while serving a life sentence, which the Alabama Legislature had then mooted by repealing the provision, none of the United States Supreme Court's deci-

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130. *Id.*

131. *Id.* (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968)).

132. *Id.*

133. *Id.*

134. *Gregg*, 428 U.S. at 206-07.

135. *See, e.g.*, Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (requirement that jury find murder to have been "outrageously or wantonly vile, horrible and inhuman" did not adequately channel sentencing discretion so as to satisfy Eighth Amendment).

136. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 608 (1978) ("The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments.").

sions during this five-year period appeared to cast serious doubt on the constitutionality of Alabama's capital sentencing scheme.

Then, in 1980, the United States Supreme Court granted certiorari in *Beck v. Alabama*.[137] This was the first time the Supreme Court had ever reviewed Alabama's capital sentencing statute. In *Beck*, Alabama had charged the petitioner, Gilbert Franklin Beck, with committing intentional murder during a robbery,[138] a capital offense that did not require the defendant to be the triggerman but did require the defendant to have had the "particularized intent" to kill the victim.[139] Furthermore, under Alabama's capital sentencing statute, intent to kill could not be inferred from the commission of the felony alone.[140] Beck claimed that his accomplice had killed the victim while they were robbing the victim's house.[141] Under Beck's version of events, therefore, the state could have charged him with felony murder, a lesser-included, non-capital offense.

Alabama's 1975 Death Penalty Act, however, had what was termed a "preclusion clause," stating that when a defendant was charged with a capital offense, the "offense[] so charged with said aggravation shall not include any lesser offenses."[142] This clause did not permit indictment for a lesser-included offense when the defendant was indicted for a capital offense.[143] The state accordingly charged Beck with robbery-intentional murder only and not with the lesser-included offense of felony murder.[144] At the close of the guilt phase of the trial, the trial court instructed the jury that if it acquitted Beck of robbery-intentional murder, it could not find him guilty of any other offense.[145] He would have to go free.

The jury returned a verdict finding Beck guilty of robbery-intentional murder.[146] As required by the 1975 Act, because the jury had convicted Beck of a capital offense, the jury imposed a sentence of death.[147] The trial court then held the requisite sentencing hearing, during which it weighed the aggravating and mitigating circumstances and agreed that Beck should be sentenced to death.[148]

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137. 447 U.S. 625 (1980).

138. The code provision then in effect that made intentional murder during robbery a capital offense was ALA. CODE § 13-11-2(a)(2) (1975).

139. *Beck*, 447 U.S. at 628 n.2 (citing Ritter v. State, 375 So. 2d 270, 275 (Ala. 1979)).

140. 1975 Ala. Acts 213, § 2 (originally codified at ALA. CODE § 13-11-2(b) (1975)), *repealed by* 1981 Ala. Acts 81-178, § 20. ("Evidence of intent under this section shall not be supplied by the felony-murder doctrine.").

141. *Beck*, 447 U.S. at 629-30.

142. 1975 Ala. Acts 213, § 2 (originally codified at ALA. CODE § 13-11-2(a) (1975)), *repealed by* 1981 Ala. Acts 81-178, § 20.

143. *See* Jacobs v. State, 361 So. 2d 640, 646 (Ala. 1978) (Torbert, C.J., concurring in part and dissenting in part) ("[T]he capital jury in Alabama cannot convict a defendant for a lesser included offense; its only options are guilty, not guilty, or it can refuse to return a verdict or to sentence the defendant to death.").

144. *Beck*, 447 U.S. at 630.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

In the United States Supreme Court, Beck argued that the preclusion clause in Alabama's Death Penalty Act violated due process and the Eighth Amendment, because it may have pressured the jury into convicting him of capital murder, when it might otherwise have been willing to convict him of felony murder, just so that he would not go free for his role in the murder.[149] The state countered that the "apparently mandatory" nature of Alabama's death penalty—the requirement that the jury impose the death sentence for any verdict of capital murder (though the trial court was still able to reduce the sentence at the sentencing hearing)—would have made the jury more inclined to acquit Beck than to convict him, if it thought that Beck had merely committed felony murder.[150] The state also argued that the preclusion clause prevented compromise verdicts, when juries were divided over the issue of guilt, and thereby helped to prevent arbitrariness in the imposition of the death sentence from case to case.[151]

The Supreme Court agreed with Beck. It rejected Alabama's contention that the "apparently mandatory nature of the death penalty" would prevent the jury from convicting defendants of capital murder who deserved to be convicted of a lesser-included offense.[152] The Court said that Alabama was relying upon the same false premise that had led the states of North Carolina and Louisiana to enact the mandatory death penalty statutes that were struck down in *Woodson* and *Roberts*—that a jury, aware of the absolute (or seemingly absolute) consequence of its verdict, would convict a defendant of capital murder only when it was certain that the defendant deserved to be sentenced to death, and in other cases would nullify an otherwise warranted verdict of guilt to keep the defendant from being sentenced to death.[153] The Court endorsed the pronouncements of the Stewart-Powell-Stevens plurality in *Woodson* and in *Roberts* that jury nullification was an inadequate means of ensuring fairness in capital sentencing:

> [O]n the one hand, the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason—its belief that the defendant is guilty of some serious crime and should be punished. On the other hand, the apparently mandatory nature of the death penalty may encourage it to acquit for an equally impermissible reason—that, whatever his crime, the defendant does not deserve death.[154]

The Court also quoted with approval the dissent of Alabama Supreme Court Justice Shores in *Jacobs v. State*, in which the Alabama Supreme Court had voiced serious concerns about whether juries could be trusted to

149. *Beck*, 447 U.S. at 632.
150. *Id.* at 633.
151. *Id.*
152. *Id.* at 642.
153. *Id.*
154. *Beck*, 447 U.S. at 642-43.

assess guilt in an even-handed manner in a regime that put them to an all-or-nothing choice:

> [M]ost, if not all, jurors at this point in our history perhaps equally abhor setting free a defendant where the evidence establishes his guilt of a serious crime. We have no way of knowing what influence either of these factors have on a jury's deliberation, and which of these unappealing alternatives a jury opts for in a particular case is a matter of purest conjecture. We cannot know that one outweighs the other. Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them. The increasing crime rate in this country is a source of concern to all Americans. To expect a jury to ignore this reality and to find a defendant innocent and thereby set him free when the evidence establishes beyond doubt that he is guilty of some violent crime requires of our juries clinical detachment from the reality of human experience . . . .[155]

In sum, the Supreme Court once again invalidated a capital sentencing regime for putting too much trust in juries to be fair in capital sentencing.

On remand from *Beck*, the Alabama Supreme Court undertook responsibility to bring Alabama's capital sentencing statute into constitutional compliance. In an opinion authored by Justice Maddox and released on December 19, 1980, the court construed the 1975 Act creatively, so as to conform it to the dictates of the United States Supreme Court.[156]

The Alabama Supreme Court ruled first of all that the preclusion clause could be and would be severed from the death penalty statute.[157] The state would thus be permitted to indict accused capital murderers for lesser-included offenses, and the jury would be able to consider lesser-included offenses in reaching a verdict.

The court ruled second, however, that the clause requiring the jury to "fix" the punishment at death was not severable.[158] Instead of eradicating the clause, the Alabama Supreme Court construed it

> to be permissive and to mean that the jury cannot fix punishment at death until it takes into account the circumstances of the offense together with the character and propensity of the offender, under sentencing procedures which will minimize the risk of an arbitrary and capricious imposition of the death penalty.[159]

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155. *Id.* at 642 (quoting *Jacobs*, 361 So. 2d at 651-52 (Shores, J., dissenting)) (quotation marks omitted).

156. *See* Beck v. State, 396 So. 2d 645 (Ala. 1980), *modified on denial of rehearing* Mar. 6, 1981.

157. *Beck*, 396 So. 2d at 658-59.

158. *Id.* at 660.

159. *Id.*

The court went on to prescribe these new sentencing procedures in considerable detail.[160] In essence, the court rewrote Alabama's capital sentencing statute and converted it from a bifurcated to a trifurcated procedure.[161]

The first phase of the trifurcated scheme was the traditional guilt phase, during which the jury determined whether the defendant had committed one of the fourteen enumerated "aggravating" offenses.[162] The court found that this portion of the 1975 Act satisfied the narrowing requirement of *Furman* and *Gregg* because

> the jury verdict that the defendant was guilty of committing the capital offense would mean that the State had already established at least one aggravating circumstance, even though the legislature did not include an aggravating circumstance in § 13-11-6 to correspond with the "aggravation" made a part of each capital offense by § 13-11-2(a).[163]

The court thus left this portion of the capital sentencing statute intact.[164]

The second phase of the trifurcated scheme was all new—a *jury* sentencing hearing.[165] At this hearing,

> [T]he State would be permitted to offer evidence of any other aggravating circumstance contained in § 13-11-6 [the second set of aggravating circumstances listed in the 1975 Act], which was not "averred in the indictment" but which was proved beyond a reasonable doubt at trial or by the evidence taken at the sentencing hearing.[166]

The defendant would also be permitted "to introduce any matter relating to any mitigating circumstance including those enumerated in Code 1975, § 13-11-7."[167] The jury would then weigh the aggravating and mitigating circumstances and determine whether the defendant deserved to be sentenced to death.[168] "If the jury cannot agree on a sentence of death, the defendant shall be sentenced to life imprisonment without parole."[169]

"If the jury fixes the punishment at death," however, then "the court shall hold a hearing" as already prescribed by the 1975 Act.[170] The trial court would employ the same procedures as before—weighing aggravating

160. *See id.* at 662-64.
161. *See id.* at 664.
162. *Beck*, 396 So. 2d at 663.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Beck*, 396 So. 2d at 663.
168. *Id.*
169. *Id.*
170. *Id.*

versus mitigating circumstances—and would itself determine whether the defendant deserved to be sentenced to death.[171] A defendant would thus receive the death sentence only if both the jury and the judge agreed that he deserved to be sentenced to death.

Or so it appeared. Six years later, in a much-publicized case called *Ex parte Hays*,[172] the Alabama Supreme Court would basically say, "we did not mean what we said in *Beck*." The petitioner in that case, Henry Hays, had been convicted of committing capital murder on March 21, 1981, within the brief six-month window between the Alabama Supreme Court's decision in *Beck* and the Alabama Legislature's passage of the new death penalty statute that took effect on July 1, 1981.[173] He was thus tried under the modified transition regime put in place by the Alabama Supreme Court in *Beck*.

Henry Hays was a leader of the Ku Klux Klan, and was known as the Exalted Cyclops.[174] On the evening of March 20, 1981, he and a fellow Klansman had gone out driving in Mobile County, looking for a black man to lynch in protest of the acquittal of a black murder defendant that had been acquitted that day.[175] They found Michael Donald walking down a secluded street.[176] They pulled up beside Donald, pointed a .22 caliber pistol at him, ordered him into their car, forced him to empty his pockets of his wallet, and then drove him to a remote location near Highway 225 in Baldwin County.[177] There, they choked him and beat him until he was unconscious and then cut his throat three times with a knife to make certain that he was dead.[178] They then returned to Mobile County with Donald's body, where they hung his body from a tree, in conjunction with a Klan cross burning on the grounds of the Mobile County Courthouse.[179]

Hays was convicted of murder made capital because he committed it during a robbery (of Donald's wallet).[180] The jury recommended that Hays be sentenced to life in prison without parole, but the trial court nevertheless sentenced Hays to death.[181] Hays argued on appeal that the trial court was not entitled to override the jury's sentencing recommendation,[182] citing the apparently mandatory language in *Beck*: "If the jury cannot agree on a sentence of death, the defendant shall be sentenced to life imprisonment without parole."[183] Both the jury and the judge had to agree on a sentence of death, and in his case they had not.

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171. *Id.*
172. 518 So. 2d 768 (Ala. 1986).
173. Hays v. State, 518 So. 2d 749, 764-65 (Ala. Crim. App. 1985).
174. *Hays*, 518 So. 2d at 764-65.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 752.
179. *Hays*, 518 So. 2d at 751-52.
180. *Id.* at 751.
181. *Id.*
182. *Id.* at 764-65.
183. *Beck*, 396 So. 2d at 663.

The Alabama Court of Criminal Appeals agreed with Hays and vacated his death sentence,[184] but the Alabama Supreme Court granted certiorari, reversed the Court of Criminal Appeals, and reinstated Hays's death sentence.[185] The Alabama Supreme Court held that the apparently mandatory language quoted above from *Beck*

> means nothing more than that *the jury's* sentence recommendation shall be life without parole if the jury cannot agree on a sentence of death. The language was not intended to be construed as making the judge's ultimate sentence bound by the recommendation of the jury. Indeed, to place such a construction on this language would be contrary to the recognition in this state that the judge, and not the jury, is the final sentencing authority . . . .[186]

The court acknowledged that the 1975 Act had expressly permitted judicial override only when the jury imposed a sentence of death,[187] and the court further acknowledged that *Beck* had generally been understood not to permit judicial override when a jury recommended life.[188] Nevertheless, the court claimed, "this result was not our intention in *Beck*."[189] Rather, "the trial court is empowered to override the jury's sentence recommendation of life without parole which we judicially grafted onto the old death statute as an alternate sentence recommendation."[190]

Even Justice Maddox wrote a special concurrence praising the majority's creative treatment of his opinion in *Beck*.[191] Judicial override, he said, prevented racial bias in capital sentencing, "reinforce[d] the principle that the trial judge is the sentencing authority," and "help[ed] to insure uniformity of sentencing in all death cases."[192] But Justices Almon and Beatty, who had joined Justice Maddox's opinion in *Beck*, wrote a blistering dissent, accusing the *Hays* majority of ex post facto judicial legislation.[193] "It is without dispute that the defendant's conduct was racially motivated, and it may be that the jury verdict was also . . . ."[194] But, "we are merely a court of *law* and at the time this offense was committed the law did not authorize a trial judge to override a jury verdict of life imprisonment and impose the

184. *Hays*, 518 So. 2d at 749.
185. *Ex parte* Hays, 518 So. 2d 768, 769 (Ala. 1986).
186. *Ex parte* Hays, 518 So. 2d at 775.
187. *Id.* (citing ALA. CODE § 13-11-4 (1975)).
188. *Id.* (citing Colquitt, *supra* note 80, at 324).
189. *Id.*
190. *Id.* at 776.
191. *Ex parte* Hays, 518 So. 2d at 777-78 (Maddox, J., concurring).
192. *Id.* at 778.
193. *Id.* at 778-80 (Almon, J., dissenting).
194. *Id.* at 779.

death penalty."[195] The 1975 Act "did not provide for a judicial override, nor d[id] *Beck v. State*."[196]

C. Alabama's Modern Capital Sentencing Regime

In many ways, given the United States Supreme Court's recent rulings in *Apprendi* and in *Ring*, Justice Maddox's modification of Alabama's capital sentencing regime in *Beck v. State*, had it been retained and implemented as written, would have been ingenious. The Alabama Supreme Court might understandably have chosen to sever the clause in the 1975 Act requiring the jury to fix the sentence at death and might have removed the jury from the sentencing procedure altogether. But, it did not. Instead, the court insisted "that the legislature intended to have jury input in the sentencing process."[197] "Throughout Alabama's history," said the court, "juries have always played a major role in capital cases and we are not convinced that a state could constitutionally eliminate jury participation in the sentencing process."[198] The court therefore adopted a regime that gave coequal sentencing responsibility to the jury and to the judge (or at least apparent co-equal sentencing responsibility, given the court's later ruling in *Hays*). Both the jury and the judge had to agree in order to sentence a defendant to death. Neither could override the decision of the other.

Had the trifurcated regime with coequal sentencing responsibility been kept, I believe the United States Supreme Court would never have granted certiorari in *Harris v. Alabama*[199] (to review the judicial override scheme that the Alabama Legislature adopted soon after *Beck*). As will become more clear below, I also believe there would be no serious question today that Alabama's regime satisfies the Sixth Amendment, as explicated in *Apprendi* and in *Ring*, because the modified transition regime devised by Justice Maddox explicitly required the jury to find an aggravating circumstance beyond a reasonable doubt during both the guilt phase and the sentencing phase.

Nonetheless, as foresighted as it may have been, the Alabama Supreme Court's decision in *Beck* is hard to view as anything other than illicit judicial activism. The court basically wrote a new statute when it inserted the jury sentencing phase. Its justification—that "jury participation in the sentencing process" was likely constitutionally required[200]—was overstated, to say the least. As has been discussed, the United States Supreme Court had been casting a jaundiced eye on jury capital sentencing ever since *Furman*. Nothing in the United States Supreme Court's opinion in *Beck v. Alabama* had indicated that the 1975 Act's elimination of jury sentencing discretion

195. *Id.* at 778.
196. *Ex parte* Hays, 518 So. 2d at 778-79.
197. 447 U.S. 625, 659 (1980).
198. *Beck*, 396 So. 2d at 659.
199. 513 U.S. 504 (1995).
200. *Beck*, 396 So. 2d at 659.

was constitutionally problematic. If anything, the criticism in the majority opinion (no longer a plurality, as in the bicentennial quintet) of jury nullification as a source of sentencing caprice seemed to strengthen the impression left by *Furman* and the bicentennial quintet that juries were not the ideal repository of capital sentencing discretion. In its brief in *Beck*, moreover, the state had cited a laundry list of post-*Furman* Supreme Court opinions tending to "establish that jury participation in the sentencing process [wa]s not required" by the United States Constitution.[201] Additionally, the Alabama Supreme Court has since "indicated that the constitutional right to trial by jury" in the Alabama Constitution "does not encompass assessing punishment in capital cases."[202] The proposition that jury participation was a constitutional requirement was thus more imagined than real.

Just a few months after the Alabama Supreme Court's decision in *Beck*, the Alabama Legislature asserted its constitutional prerogative by enacting a new death penalty statute.[203] The new statute was passed on March 31, 1981, and went into effect on July 1, 1981.[204] The 1981 Act is the capital sentencing regime that remains in place today, except for minor modifications over the years.

In detail, Alabama's modern regime works as follows. First, during the traditional guilt phase, the jury must find the defendant guilty of one of eighteen categories of first-degree murder, designated by the statute as "capital."[205] These aggravating offenses are currently codified at Alabama Code section 13A-5-40(a):

> (1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant.
>
> (2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant.
>
> (3) Murder by the defendant during a rape in the first or second degree or an attempt thereof committed by the defendant; or murder by the defendant during sodomy in the first or second degree or an attempt thereof committed by the defendant.
>
> (4) Murder by the defendant during a burglary in the first or second degree or an attempt thereof committed by the defendant.
>
> (5) Murder of any police officer, sheriff, deputy, state trooper, federal law enforcement officer, or any other state or federal peace officer of any kind, or prison or jail guard, while such officer or guard is on duty, regardless of whether the defendant knew or should have known the victim was an officer or guard on duty, or

201. *Id.*

202. *Ex parte* Apicella, 809 So. 2d 865, 873 (Ala. 2001) (citing *Ex parte* Jackson, 672 So. 2d 810 (Ala. 1995) (Houston, J., concurring); *Ex parte* Giles, 632 So. 2d 577 (Ala. 1993)).

203. *See* Act of Mar. 31, 1981, 1981 Ala. Acts 81-178 (codified at ALA. CODE §§ 13A-5-39 to -59 (1975)).

204. *Id.*

205. ALA. CODE § 13A-5-40(a) (1975).

because of some official or job-related act or performance of such officer or guard.

(6) Murder committed while the defendant is under sentence of life imprisonment.

(7) Murder done for a pecuniary or other valuable consideration or pursuant to a contract or for hire.

(8) Murder by the defendant during sexual abuse in the first or second degree or an attempt thereof committed by the defendant.

(9) Murder by the defendant during arson in the first or second degree committed by the defendant; or murder by the defendant by means of explosives or explosion.

(10) Murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct.

(11) Murder by the defendant when the victim is a state or federal public official or former public official and the murder stems from or is caused by or is related to his official position, act, or capacity.

(12) Murder by the defendant during the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewmen thereon or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft.

(13) Murder by a defendant who has been convicted of any other murder in the 20 years preceding the crime; provided that the murder which constitutes the capital crime shall be murder as defined in subsection (b) of this section; and provided further that the prior murder conviction referred to shall include murder in any degree as defined at the time and place of the prior conviction.

(14) Murder when the victim is subpoenaed, or has been subpoenaed, to testify, or the victim had testified, in any preliminary hearing, grand jury proceeding, criminal trial or criminal proceeding of whatever nature, or civil trial or civil proceeding of whatever nature, in any municipal, state, or federal court, when the murder stems from, is caused by, or is related to the capacity or role of the victim as a witness.

(15) Murder when the victim is less than fourteen years of age.

(16) Murder committed by or through the use of a deadly weapon fired or otherwise used from outside a dwelling while the victim is in a dwelling.

(17) Murder committed by or through the use of a deadly weapon while the victim is in a vehicle.

(18) Murder committed by or through the use of a deadly weapon fired or otherwise used within or from a vehicle.[206]

206. *Id.*

As in any criminal trial, the jury must find the defendant guilty of capital murder beyond a reasonable doubt. The jury may find the defendant guilty of a lesser included offense, thereby satisfying *Beck*.[207] (Note that a defendant convicted of murder while serving a life sentence, for which the death sentence used to be automatic, now is subject to the same sentencing procedures as for any other category of capital murder.)[208]

Second, "[u]pon conviction of a defendant for a capital offense, the trial court shall conduct a separate sentence hearing to determine whether the defendant shall be sentenced to life imprisonment without parole or to death."[209] Unless both the defendant and the state consent, this hearing "shall be conducted before a jury."[210] Both the defendant and the state may present evidence "as to any matter that the court deems relevant to sentence," including "any matters relating to the aggravating and mitigating circumstances" listed in the statute.[211] The ten "aggravating circumstances" are currently codified at Alabama Code section 13A-5-49:

> (1) The capital offense was committed by a person under sentence of imprisonment;
> (2) The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person;
> (3) The defendant knowingly created a great risk of death to many persons;
> (4) The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping;
> (5) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
> (6) The capital offense was committed for pecuniary gain;
> (7) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;
> (8) The capital offense was especially heinous, atrocious, or cruel compared to other capital offenses;
> (9) The defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct; or

207. *Id.* § 13A-5-41.
208. *Id.* § 13A-5-40(a)(6).
209. *Id.* § 13A-5-45(a).
210. ALA. CODE § 13A-5-46(a) (1975).
211. *Id.* § 13A-5-45(c).

(10) The capital offense was one of a series of intentional killings committed by the defendant.[212]

Note that this list includes some, but not all, of the "aggravating components"[213] that define capital murder in section 13A-5-40(a). It also includes circumstances not mentioned at all in section 13A-5-40(a). The state bears "the burden of proving beyond a reasonable doubt the existence of any aggravating circumstances" listed in section 13A-5-49.[214] "Unless at least one aggravating circumstance as defined in Section 13A-5-49 exists, the sentence shall be life imprisonment without parole."[215] In short, for a defendant to be sentenced to death, the state must prove beyond a reasonable doubt both an aggravating *component* from the list of murders deemed capital in section 13A-5-40(a) and an aggravating *circumstance* from the list in section 13A-5-49.

The mitigating circumstances are codified at Alabama Code section 13A-5-51:

(1) The defendant has no significant history of prior criminal activity;
(2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;
(3) The victim was a participant in the defendant's conduct or consented to it;
(4) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor;
(5) The defendant acted under extreme duress or under the substantial domination of another person;
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and
(7) The age of the defendant at the time of the crime.[216]

In keeping with United States Supreme Court precedent,[217] this list of mitigating circumstances is not exclusive. The defendant must be allowed to present any evidence that is potentially mitigating.[218]

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212. *Id.* § 13A-5-49.
213. Judge Colquitt has termed the circumstances enumerated in section 13A-5-40(a) "aggravating components," to keep them distinct from the "aggravating circumstances" listed in section 13A-5-49. *See* Colquitt, *supra* note 80, at 222. I will use the same nomenclature here.
214. ALA. CODE § 13A-5-45(e) (1975).
215. *Id.* § 13A-5-45(f).
216. *Id.* § 13A-5-51.
217. *See* Eddings v. Oklahoma, 455 U.S. 104, 110-17 (1982); Bell v. Ohio, 438 U.S. 637, 642 (1978); Lockett v. Ohio, 438 U.S. 586, 604-05 (1978).
218. ALA. CODE § 13A-5-51 (1975) ("Mitigating circumstances shall include, but not be limited to, the following.").

At the conclusion of the sentencing hearing, the jury retires to deliberate over its "advisory verdict."[219] The jury has three options:

> (1) If the jury determines that no aggravating circumstances as defined in Section 13A-5-49 exist, it shall return an advisory verdict recommending . . . life imprisonment without parole.[220]
> (2) If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exist but do not outweigh the mitigating circumstances, it shall return an advisory verdict recommending . . . life imprisonment without parole.[221]
> (3) If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exist and that they outweigh the mitigating circumstances, if any, it shall return an advisory verdict recommending . . . death.[222]

At least ten jurors must vote to recommend a sentence of death.[223]

During the third and final phase, the trial court considers whether to adopt the jury's advisory verdict.[224] The judge is directed to follow the same deliberations as did the jury in reaching its recommendation.[225] To sentence the defendant to death, the trial court must find the existence of at least one aggravating circumstance listed in section 13A-5-49[226] and must then determine that the aggravating circumstances outweigh the mitigating.[227]

Alabama's modern capital sentencing regime thus resembles Florida's trifurcated judicial override regime,[228] which has been reviewed and upheld against constitutional challenge in a number of Supreme Court cases.[229] (Delaware[230] and Indiana, until recently,[231] also employ judicial override regimes.) In its broad outlines, Alabama's regime plainly meets the two chief requirements of the Supreme Court's Eighth Amendment jurisprudence. First, it narrows sentencing discretion, by requiring either the jury or the judge to find at least one aggravating circumstance from a list enumerated by statute. Indeed, it arguably meets this requirement twice, by requiring the finding both of an aggravating component (one of the eighteen cate-

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219. *Id.* § 13A-5-46(d).
220. *Id.* § 13A-5-46(e)(1).
221. *Id.* § 13A-5-46(e)(2).
222. *Id.* § 13A-5-46(e)(3).
223. ALA. CODE § 13A-5-46(f) (1975).
224. *Id.* § 13A-5-47(a).
225. *Id.* § 13A-5-47(e).
226. *Id.* § 13A-5-45(g).
227. *Id.* § 13A-5-47(e).
228. *See* FLA. STAT. ANN. § 921.141 (West 2001).
229. Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984); Proffitt v. Florida, 428 U.S. 242 (1976).
230. *See* DEL. CODE ANN. tit. 11, § 4209 (2001).
231. *See* IND. CODE ANN. § 35-50-2-9 (West 1998). The Indiana legislature amended this provision, P.L. 117-2002, § 2, to eliminate the trial court's ability to override a jury's sentencing recommendation in a capital case. The amendment is effective for all defendants sentenced after June 30, 2002.

gories of the capital murder listed in section 13A-5-40(a)) and of an aggravating circumstance (one of the ten circumstances listed in section 13A-5-49). Second, Alabama's modern capital sentencing regime permits the sentencer, again either the jury or the judge, to consider the full panoply of potentially mitigating circumstances and make a particularized determination of whether the defendant deserves the death penalty.

Alabama's new regime was nevertheless criticized by commentators and litigants for "fail[ing] to offer guidance to trial courts seeking to employ the override."[232] As noted, the 1981 Act required the trial court to follow the same deliberative process as the jury—i.e., to determine for itself whether an aggravating circumstance existed and whether the aggravating circumstance(s) outweighed the mitigating.[233] "While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court."[234] The 1981 Act did not require the trial court to accord the jury's recommendation any particular weight, although the Alabama Supreme Court has recently ruled that the trial court must treat a jury recommendation of life without parole as a mitigating circumstance.[235]

Based on Supreme Court precedent alone, the criticism of this arrangement was difficult to understand. It falsely assumed that the Eighth Amendment required jury involvement in capital sentencing, much less that the jury's view be given any weight. In *Walton v. Arizona*,[236] a 1990 decision, the Supreme Court upheld Arizona's capital sentencing regime, which committed the sentencing decision entirely to the trial court, without any input from the jury, against Eighth Amendment challenge.[237] "Any argument," the Court declared, "that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court."[238]

Furthermore, as noted, the United States Supreme Court has repeatedly upheld Florida's judicial override scheme against constitutional challenge, both before and after Alabama's adoption of judicial override in the 1981 Act.[239] Florida permitted the trial court to override a jury sentencing recommendation whenever it believed that "the facts suggesting a sentence of death [were] so clear and convincing that virtually no reasonable person

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232. Katheryn K. Russell, *The Constitutionality of Jury Override in Alabama Death Penalty Cases*, 46 ALA. L. REV. 5, 39 (1994).

233. *Id.* at 25.

234. ALA. CODE § 13A-5-47(e) (1975).

235. ALA. CODE § 13A-5-47(e) (1975); *Ex parte* Carroll, No. 1010546, 2002 WL 1729557, at *3 (Ala. July 26, 2002, as modified on rehearing, Sept. 20, 2002).

236. 497 U.S. 639 (1990).

237. *Walton*, 497 U.S. at 655-56.

238. *Id.* at 647 (quoting Clemons v. Mississippi, 494 U.S. 738, 745 (1990)) (internal quotation marks omitted); *see also Proffitt*, 428 U.S. at 252 (plurality opinion of Stewart, Powell, and Stevens, JJ.) (the Supreme Court "has never suggested that jury sentencing is constitutionally required"); *Spaziano*, 468 U.S. at 460 ("[T]here certainly is nothing in the safeguards necessitated by the Court's recognition of the qualitative difference of the death penalty that *requires* that the sentence be imposed by a jury.").

239. *See Hildwin*, 490 U.S. at 640-41; *Spaziano*, 468 U.S. at 465-67; *Proffitt*, 428 U.S. at 259-60.

could differ."[240] This was a tough-sounding standard, but one easily overcome by any trial judge convinced, after deliberations like those required in Alabama, that a defendant truly deserved the death penalty.

Finally, in 1995, the United States Supreme Court laid these criticisms to rest by granting certiorari in *Harris v. Alabama*[241] and upholding the constitutionality of Alabama's judicial override scheme.[242] Writing for an eight-member majority, Justice O'Connor said: "The Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus 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."[243] "We . . . hold that the Eighth Amendment does not require the State to define the weight the sentencing judge must accord an advisory jury verdict."[244]

II. THE RECENT IMPACT OF THE SIXTH AMENDMENT ON CAPITAL SENTENCING JURISPRUDENCE

If there is one truism of modern capital sentencing jurisprudence, it is that no legal issue is ever really settled. Alabama's legislative response to *Furman*, its judicial and then legislative response to *Beck*, and the United States Supreme Court's subsequent rulings in *Walton* and *Harris* did not close the book on the constitutionality of Alabama's capital sentencing statute. To that point, most of the Supreme Court's rulings on the constitutionality of the death penalty had applied the Cruel and Unusual Punishment Clause of the Eighth Amendment. The Court was soon to bring another constitutional source into play—the right to jury trial in the Sixth Amendment.

A. The Supreme Court's Ruling in Apprendi v. New Jersey *on the Difference between Elements and Sentencing Factors*

In 1999, the United States Supreme Court granted certiorari in a case that on its surface had nothing to do with capital sentencing. In *Apprendi v. New Jersey*,[245] the petitioner, Charles Apprendi, was accused of firing his .22 caliber firearm into the home of an African-American family.[246] He was indicted for second-degree possession of a firearm for an unlawful purpose, a crime that in New Jersey brought a prison term of five to ten years.[247] New Jersey's hate crime statute had a sentence-enhancing provision that ex-

240. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); *see also* Chavez v. State, 534 N.E.2d 731, 735 (Ind. 1989) ("In order to sentence a defendant to death after the jury has recommended against death, the facts justifying a death sentence should be so clear and convincing that virtually no reasonable person could disagree that death was appropriate in light of the offender and his crime.").

241. 513 U.S. 504 (1995).

242. *Harris*, 513 U.S. at 515.

243. *Id.*

244. *Id.* at 512.

245. 530 U.S. 466 (2000).

246. *Apprendi*, 530 U.S. at 469.

247. *Id.* at 470.

tended the defendant's prison term if the judge (not the jury) found by a preponderance of the evidence that the defendant had "acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity."[248]

Apprendi pleaded guilty.[249] The trial court then conducted an evidentiary hearing to determine whether Apprendi had a hateful purpose for firing his gun into the African-American family's home.[250] Apprendi put a psychologist and seven character witnesses on the stand to testify that he was not a racist.[251] He also took the stand himself to claim the shots he fired were "an unintended consequence of overindulgence in alcohol" and not due to any racial bias.[252] Apprendi also refuted the testimony of a police officer that he had admitted that he did not want an African-American family living in his neighborhood.[253]

The trial court found the police officer more credible than Apprendi and discredited the testimony of Apprendi's character witnesses and his psychologist.[254] The court found, by a preponderance of the evidence, that Apprendi had intended to intimidate the African-American family because of their race.[255] Applying the enhancement provision of New Jersey's hate crime statute, the court sentenced Apprendi to twelve years in prison, two years beyond the statutory maximum term for second-degree possession of a firearm for an unlawful purpose.[256]

The Supreme Court held that the trial court had violated the Sixth Amendment by making factual findings that increased Apprendi's sentence beyond the statutory maximum for the offense with which he had been charged and to which he had pleaded guilty.[257] The Sixth Amendment "indisputably entitle[s] a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'"[258] The question, then, was what constituted an "element of the crime," as opposed to a "sentencing factor," which the trial court had traditionally been permitted to find without the aid of the jury in imposing a sentence. After reviewing common law history and a long line of Fifth and Sixth Amendment precedent, the Supreme Court concluded that an element of a crime was "any fact" (other than a prior conviction—preserving an exception set forth in *Almendarez-Torres v. United States*[259]) "that increases

248. *Id.* at 468-69 (quoting N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999-2000)).
249. *Id.* at 469-70.
250. *Id.* at 470-71.
251. *Apprendi*, 530 U.S. at 470-71.
252. *Id.*
253. *Id.* at 469-71.
254. *Id.*
255. *Id.* at 471.
256. *Apprendi*, 530 U.S. at 474.
257. *Id.* at 469-70, 474.
258. *Id.* at 477 (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995)).
259. 523 U.S. 224 (1998).

the penalty for a crime beyond the prescribed statutory maximum."[260] Under the Fifth and Sixth Amendments, these facts "must be submitted to a jury, and proved beyond a reasonable doubt."[261] Thus, had the trial court in *Apprendi* used its finding of Apprendi's hateful motive to impose a sentence *within* the five-to-ten year statutory range, the sentence would have been constitutional. However, because the court used its finding to impose a sentence *beyond* the five-to-ten year range, the sentence was not constitutional, as Apprendi was entitled to have a jury determine, beyond a reasonable doubt, any fact that increased the maximum penalty to which he was subject for the crime for which he had been indicted.[262]

This holding, though appealing in its simplicity and in its natural connection to one of the core purposes of the Sixth Amendment, had one serious logical flaw. It appeared to make the question whether a fact was an element or a sentencing factor turn entirely on the formalism of how the statute was drafted. In her dissent in *Apprendi*, Justice O'Connor posed the problem as follows: Could New Jersey cure the sentencing scheme deemed unconstitutional by the majority merely by re-drafting its weapons possession statute to have a range of punishment from five to twenty years, instead of five to ten, and then permit the trial court to make the exact same determination about whether Apprendi had acted with a hateful motive and impose the exact same sentence of twelve years?[263] By the reasoning of the majority, "apparently" New Jersey could.[264] Justice Stevens, the author of the majority opinion, acknowledged that in theory this was the case. A state could "extend[] all statutory maximum sentences to, for example, 50 years" and then "giv[e] judges guided discretion as to a few specially selected factors within that range,"[265] such as whether the defendant committed an assault, or a burglary, or a kidnapping, or even a murder. Nevertheless, said Justice Stevens, "structural democratic constraints" make the possibility of such constitutional gamesmanship "remote."[266] Furthermore, if a state were to attempt such a blatant end run around the spirit of the Sixth Amendment, "we would be required to question whether the revision was constitutional under this Court's prior decisions."[267] In other words, "just you try it."

A more practical problem created by *Apprendi* was its impact on capital sentencing statutes that made the death sentence contingent upon the finding of an aggravating circumstance. Was the aggravating circumstance an element of the crime that had to be proven to a jury, or was the death sentence already the statutory maximum for the given capital offense, such that the aggravating circumstance was merely a sentencing factor that the trial court

260. *Apprendi*, 530 U.S. at 490.
261. *Id.*
262. *Id.* at 496-98.
263. *Id.* at 540 (O'Connor, J., dissenting).
264. *Id.*
265. *Apprendi*, 530 U.S. at 490 n.16.
266. *Id.*
267. *Id.*

could use to determine an appropriate sentence *within* the statutory range—typically, between life in prison or death? As Justice O'Connor also pointed out in her dissent in *Apprendi*, the Court had previously upheld Arizona's capital sentencing statute in *Walton*, which committed the sentencing decision, including the finding of aggravating circumstances, entirely to the trial court.[268] Had *Apprendi* overruled *Walton*? In a word, yes.

B. The Supreme Court's Extension of Apprendi *to Capital Cases in* Ring v. Arizona

The following term, the Supreme Court granted certiorari in *Ring v. Arizona*[269] and ruled that *Apprendi* had indeed invalidated Arizona's capital sentencing scheme and overruled *Walton*.[270] Arizona's capital sentencing scheme worked as follows. After the jury found the defendant guilty of capital murder, the jury was dismissed and the trial judge conducted the sentencing hearing alone.[271] The judge alone heard the evidence of aggravating and mitigating circumstances presented by the state and the defendant.[272] The judge alone determined whether the defendant had committed at least one aggravator.[273] If the defendant had committed an aggravator, the judge next determined whether that aggravator, in combination with any other aggravators the defendant might also have committed, outweighed the mitigating circumstances presented on the defendant's behalf.[274] The jury had no role in this entire process.[275]

The Supreme Court reasoned that the first determination made by the Arizona judge—whether the defendant had committed an aggravator—was a factual finding without which the defendant could not be sentenced to death.[276] It was, therefore, functionally the equivalent of an element of the crime of capital murder, which under the Sixth Amendment had to be found by a jury. Arizona argued, unsuccessfully, that the jury's determination that Ring was guilty of first-degree murder had already established death as the maximum available penalty, satisfying *Apprendi*, because the statute elsewhere made clear that one of the possible sentences for first-degree murder was death.[277] The Supreme Court rejected this argument because of the danger that it would reduce the rule of *Apprendi* to an empty formalism.[278] A statute could declare that any unlawful killing carried a maximum penalty of death and leave the determination of whether the defendant had committed

268. *Id.* at 536 (O'Connor, J., dissenting).
269. 122 S. Ct. 2428 (2002).
270. *Ring*, 122 S. Ct. at 2436.
271. *Id.* at 2434-36.
272. *Id.*
273. *Id.*
274. *Id.*
275. *Ring*, 122 S. Ct. at 2434-36.
276. *Id.* at 2436.
277. *Id.* at 2440.
278. *Id.* at 2441.

manslaughter, or reckless homicide, or first-degree murder to the judge at sentencing.

The Supreme Court did not reach the issue whether the weighing process, done by the judge in Arizona and in many other states, including Alabama, must also be done by the jury. It did not clarify how it had determined that Arizona had drafted its statute with the intent to make the maximum penalty for first-degree murder only life in prison. In most states, the finding of an aggravating circumstance was a requirement imposed in response to the Supreme Court's rulings in *Furman* and the bicentennial quintet, to guide the sentencer's discretion. It would therefore be difficult to charge that Arizona or any other state had engaged in constitutional gamesmanship by saying that the statutory maximum penalty for first-degree murder was death, and that the finding of an aggravating circumstance and the weighing of aggravators and mitigators were merely sentencing factors to help determine what sentence to impose within the range of life in prison to death.

III. THE CONSTITUTIONALITY OF ALABAMA'S JUDICIAL OVERRIDE REGIME AFTER *RING*

Needless to say, *Ring* has unsettled numerous states' capital sentencing regimes. After all the signals the Supreme Court had sent since *Furman* about the dangers of jury capital sentencing, the Supreme Court has now declared that juries must be involved in the capital sentencing process, at least to some extent.[279] The question is how much.

A. Findings that Must Be Made by the Jury under Ring

At the outset, let me defend the assertion that I made at the beginning of this Article that I do not believe the Supreme Court will come full circle and say that the jury must make all of the decisions that lead to a death sentence. I do not believe any other Justices will join the view, which Justice Breyer expressed in *Ring*, that "jury sentencing in capital cases is mandated by the Eighth Amendment."[280] Justice Breyer lobbied Justice Stevens to join him, both at oral argument and in his concurring opinion in *Ring*, saying that he now agreed with Justice Stevens's dissent in *Harris v. Alabama*.[281] Justice Breyer characterized Justice Stevens as having said in *Harris* and in other cases that the "special procedural safeguards" of the Eighth Amendment "include a requirement that a *jury* impose any sentence of death."[282] Justice Breyer surely overstated Justice Stevens's position on the issue, given that Justice Stevens did not join him in *Ring*. In his *Harris* dissent, Justice Ste-

279. *See id.* at 2432, 2443.

280. *Ring*, 122 S. Ct. at 2446 (Breyer, J., concurring).

281. *Id.*

282. *Id.* (citing *Harris*, 513 U.S. at 515-26 (Stevens, J., dissenting)).

vens said he believed Alabama's judicial override was unconstitutional because of the "complete absence of standards to guide the judge's consideration of the jury's verdict."[283] He did not say that the judge could not review the jury's verdict at all or that the judge should be required to accept the jury's verdict without alteration.

The fairest reading of *Ring* is that it does not require a jury to perform the ultimate task of imposing the death sentence and it does not repudiate the numerous statements by the Supreme Court over the last thirty years which indicate that judges may perform capital sentencing.[284] The Court made clear in *Ring* that the petitioner's claim was "tightly delineated."[285] The petitioner did not "argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty."[286] In his concurring opinion, joined by Justice Thomas, Justice Scalia went out of his way to emphasize that *Ring* "ha[d] nothing to do with jury sentencing,"[287] suggesting that any attempt to stretch *Ring* to invalidate judicial sentencing would lose those two Justices' votes. Likewise, Justice Kennedy's concurring opinion was hardly a ringing[288] endorsement of an aggressive interpretation of the majority's Sixth Amendment rationale, given his statement that he still believed *Apprendi* was wrongly decided.[289] Justice Kennedy voted with the majority to make certain that *Apprendi* would be applied consistently in capital and non-capital cases, but he emphasized that *Apprendi* should not be further extended "without caution, for the States' settled expectations deserve our respect."[290]

I believe that *Ring* means what it says it means—no more, no less. As held in *Apprendi*, the trial judge cannot make a finding of "any fact on which the legislature conditions an increase in their maximum punishment"[291]—only the jury can.[292] A death penalty statute thus violates the Sixth Amendment "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."[293] However, "once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum pen-

283. *Harris*, 513 U.S. at 515-16 (Stevens, J., dissenting).

284. *See, e.g.*, *Proffitt*, 428 U.S. at 252 (plurality opinion) (this Court "has never suggested that jury sentencing is constitutionally required"); *Spaziano*, 468 U.S. at 460 ("[T]here certainly is nothing in the safeguards necessitated by the Court's recognition of the qualitative difference of the death penalty that *requires* that the sentence be imposed by a jury."); *accord* Clemons v. Mississippi, 494 U.S. 738 (1990); Harris v. Alabama, 513 U.S. 504 (1995); Hildwin v. Florida, 490 U.S. 638 (1989); Dobbert v. Florida, 432 U.S. 282 (1977).

285. *Ring*, 122 S. Ct. at 2437 n.4.

286. *Id.*

287. *Id.* at 2445 (Scalia, J., concurring, joined by Thomas, J.).

288. Pun fully intended.

289. *Ring*, 122 S. Ct. at 2445 (Kennedy, J., concurring).

290. *Id.*

291. *Id.* at 2432.

292. *Id.* at 2443.

293. *Id.* at 2430.

alty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed."[294]

The only question, then, as far as Alabama is concerned, is what constitutes "a fact on which the legislature [has] condition[ed] an increase" [295] in the punishment for capital murder? More specifically, what is "an aggravating circumstance necessary for imposition of the death penalty"?[296] After *Ring*, it is clear that the jury must make this finding. If it does not, the defendant cannot receive the death sentence. However, if it does, then the judge can make whatever other findings the statute and the Constitution require and decide whether to sentence the defendant to death. Additionally, if the judge can make those findings, it logically follows that he or she may override the jury's findings on the same subject without violating the Sixth Amendment.

As applied to Alabama's capital sentencing statute, the question breaks down into two parts. First, assuming that the jury has found the defendant guilty of capital murder and has found at least one of the aggravating circumstances listed in section 13A-5-49,[297] is the weighing of aggravating and mitigating circumstances required by sections 13A-5-46(d)[298] and 13A-5-47(e)[299] also a finding of fact on which the Alabama Legislature has conditioned an increase in the punishment for capital murder, such that the jury must perform the weighing and the judge may not override a jury's recommendation of life?

Second, are the aggravating components in section 13A-5-40[300] enough to make the defendant eligible for death, such that a jury need only find the defendant guilty of capital murder under section 13A-5-40 in order for the defendant to be eligible for death? Or must the jury also find one of the aggravating circumstances in section 13A-5-49?

In Subpart B below, I argue that the answer to the first question is no. The weighing of aggravating and mitigating circumstances is not a finding of fact that can in any meaningful sense be considered an element of the crime of capital murder or a prerequisite to raising the sentencing ceiling to death.

In Subpart C below, I argue that the answer to the second question is yes. The aggravating components in section 13A-5-40 are the "aggravating circumstances," in Eighth Amendment parlance, that accomplish the narrowing required by *Furman* and the bicentennial quintet. The aggravating circumstances of section 13A-5-49 are constitutionally redundant. While the Alabama Legislature has conditioned the ultimate imposition of the death

294. *Ring*, 122 S. Ct. at 2440 (quoting *Apprendi*, 530 U.S. at 497 (quoting Almendarez-Torres v. United States, 523 U.S. 224, 257 n.2 (1998) (Scalia, J., dissenting))).

295. *Id.* at 2432.

296. *Id.* at 2430.

297. ALA. CODE § 13A-5-49 (1975).

298. *Id.* § 13A-5-46(d).

299. *Id.* § 13A-5-47(e).

300. *Id.* § 13A-5-40.

penalty on the finding of an additional aggravating circumstance in section 13A-5-49, the language and history of the capital sentencing statute indicate that the Legislature understood that the defendant would become death-eligible upon conviction of one of the eighteen categories of capital murder. The remaining procedures in the statute were put in place to guide sentencing discretion, not to introduce new elements to the crime of capital murder.

B. Weighing Aggravating and Mitigating Circumstances under Ring

The rule of *Apprendi* and *Ring* is that defendants are "entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."[301] When a defendant is already eligible for the death penalty, no subsequent finding or evaluation of fact can possibly increase his sentence, for the obvious reason that there is no penalty greater than death. The judge and jury may subsequently find different aggravating and mitigating circumstances to exist, or they may reach different conclusions when weighing the aggravating and mitigating circumstances. Under *Apprendi* and *Ring*, these eventualities are all constitutionally permissible, because they do not increase the maximum sentence.[302]

In my view, therefore, *Ring* is limited by its terms to the finding of a single aggravating circumstance—a fact that the state deems necessary to make the defendant eligible for death and that the Supreme Court has deemed to be the functional equivalent of an element of the crime of capital murder. *Ring* does not extend to the finding of additional aggravators, or to the finding of mitigators, or to the weighing of aggravators and mitigators and the resulting decision whether to sentence the defendant to death. Once the jury finds that aggravating circumstance that renders the defendant death-eligible, the trial judge may make any additional findings and perform any additional legal calculus that state law permits or requires, without violating the Sixth Amendment. "Those States that leave the ultimate life-or-death decision to the judge may continue to do so . . . ."[303] Four points support this conclusion.

First, the weighing of aggravating and mitigating circumstances is not a "finding of fact" in any meaningful sense. Rather, it is a judgment about the legal and moral significance of an entire collection of facts. It thus cannot be a "fact on which the legislature conditions an increase in [a defendant's] maximum punishment."[304] Nor, can it be "the determination of *a* fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone."[305]

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301. *Ring*, 122 S. Ct. at 2432; *accord Apprendi*, 530 U.S. at 483.
302. *Cf. Ring*, 122 S. Ct. at 2439-40; *Apprendi*, 530 U.S. at 495-96.
303. *Ring*, 122 S. Ct. at 2445 (Scalia, J., joined by Thomas, J., concurring).
304. *Id.* at 2432.
305. *Apprendi*, 530 U.S. at 483 (first emphasis added).

The Alabama Supreme Court has recently reached this very conclusion in *Ex parte Waldrop*.[306] In *Waldrop*, the trial court had overridden the jury's recommendation of life without parole and sentenced the petitioner, Bobby Wayne Waldrop, to death.[307] Waldrop argued, among other things, that his sentencing process was unconstitutional, because *Ring* required the jury to weigh aggravating and mitigating circumstances and thus did not permit the trial court to reweigh them and impose a different sentence.[308] The Alabama Supreme Court, in an opinion authored by Justice Jean Brown, curtly rejected Waldrop's claim.[309] "[T]he weighing process is not a factual determination. In fact, the relative 'weight' of aggravating circumstances and mitigating circumstances is not susceptible to any quantum of proof."[310] "Thus, the weighing process is not . . . an element of an offense; instead, it is a moral or legal judgment that takes into account a theoretically limitless set of facts and that cannot be reduced to a scientific formula or the discovery of a discrete, observable datum."[311] It does not therefore fit within the rule of *Apprendi* and *Ring*.[312]

The Alabama Supreme Court's conclusion is supported by Eleventh Circuit precedent interpreting the Due Process Clause of the Fourteenth Amendment. In *Ford v. Strickland*[313] and *Foster v. Strickland*[314]—a pair of 1983 Eleventh Circuit decisions—two capital defendants each argued that "the conclusion that aggravating circumstances outweigh any mitigating circumstances" was a fact "'necessary to constitute the crime of' capital murder"[315] and, therefore, had to be proven beyond a reasonable doubt under the rule of *In re Winship*.[316] The Eleventh Circuit rejected this argument in both cases, holding that it "confuses proof of facts with the weighing process undertaken by the sentencing jury and judge."[317] "[T]he latter process," held the court, "is not a fact susceptible of proof under any standard."[318] The court stated:

> While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponder-

306. No. 1001194, 2002 WL 31630710 (Ala. Nov. 22, 2002).
307. *Waldrop*, 2002 WL 31630710, at *2.
308. *Id.* at *3.
309. *Id.* at *6-*7.
310. *Id.* at *6.
311. *Id.* (citing California v. Ramos, 463 U.S. 992, 1008 (1983)).
312. *Waldrop*, 2002 WL 31630710, at *7. The Florida and Delaware Supreme Courts have likewise upheld their judicial override regimes against Sixth Amendment challenge after *Ring*, ruling that once the jury found the aggravating circumstance that rendered the defendant death-eligible, the judge was entitled to weigh the aggravating and mitigating circumstances, with or without the concurrence of the jury. Brice v. State, 815 A.2d 314 (Del. 2003); Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002).
313. 696 F.2d 804 (11th Cir. 1983).
314. 707 F.2d 1339 (11th Cir. 1983).
315. *Foster*, 707 F.2d at 1345; *Ford*, 696 F.2d at 817-19.
316. 397 U.S. 358, 364 (1970).
317. *Ford*, 696 F.2d at 818.
318. *Id.* at 819; *accord Foster*, 707 F.2d at 1345.

> ance standard, the relative *weight* is not. The process of weighing circumstances is a matter for judge and jury, and, unlike facts, is not susceptible to proof by either party.[319]

Second, the same day that it released its opinion in *Ring*, the Supreme Court issued a ruling in *Harris v. United States*,[320] clarifying the distinction between elements and sentencing factors for purposes of the Fifth and Sixth Amendments. The Court began its opinion with the reminder that "not all facts affecting the defendant's punishment are elements."[321] In general, said the Court, "[t]he Constitution permits legislatures to make the distinction between elements and sentencing factors."[322] When the factor in question is not one that raised the statutory maximum penalty, as in *Apprendi* and *Ring*, the question of whether the factor is an "element" that triggers Fifth and Sixth Amendment protections is one of legislative intent.

I see no indication in the language and structure of Alabama's capital sentencing statute that the Alabama Legislature intended the weighing of aggravating and mitigating circumstances to be an "element" of the crime of capital murder, as opposed to a sentencing factor. In *Harris*, the Supreme Court ruled that the "brandishing" factor in the federal drug trafficking statute[323] was not an element of the crime, even though it appeared in the same subsection as the definition of the crime itself.[324] Here, the weighing provision of Alabama's capital sentencing regime appears in a separate, nonconsecutive code section[325] from the definition of capital murder.[326] In *Harris*, moreover, the Court deemed significant the lack of a congressional "tradition" of treating "brandishing" as an element of other crimes.[327] Capital sentencing legislation has no tradition of treating the weighing of aggravators and mitigators as an element of the crime. Indeed, given the Eleventh Circuit's observation that the weighing process "is not a fact susceptible of proof under any standard,"[328] it is hard to see how the Alabama Legislature could have made the weighing process an element of capital murder, even had it meant to do so.

Third, treating the weighing of aggravating and mitigating circumstances as a "finding of fact" or as an "element" of the crime of capital mur-

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319. *Ford*, 696 F.2d at 818 (internal citations omitted); *Foster*, 707 F.2d at 1345; *accord* Gray v. Lucas, 685 F.2d 139, 140-41 (5th Cir. 1982) ("The reasonable doubt standard simply has no application to the weighing of aggravating and mitigating circumstances."); Parks v. Brown, 840 F.2d 1496, 1507 (10th Cir. 1987) ("This, to us, is not a burden of proof matter."), *rev'd on other grounds*, 860 F.2d 1545 (10th Cir. 1988) (per curiam), *rev'd on other grounds*, Saffle v. Parks, 495 U.S. 924 (1990); Sonnier v. Maggio, 720 F.2d 401, 408 (5th Cir. 1983).

320. 122 S. Ct. 2406 (2002).

321. *Harris*, 122 S. Ct. at 2410.

322. *Id.*

323. 18 U.S.C. § 924(c)(1)(A) (2000).

324. *Harris*, 122 S. Ct. at 2414.

325. 1981 Ala. Acts 178, § 10 (codified at ALA. CODE § 13A-5-48 (1975)).

326. *Id.* § 2 (codified with subsequent amendments at ALA. CODE § 13A-5-40 (1975)).

327. *Harris*, 122 S. Ct. at 2412.

328. Ford v. Strickland, 696 F.2d 804, 819 (11th Cir. 1983).

der would furthermore undermine the Eighth Amendment purpose for requiring such an exercise in the first place—to give individualized attention and full potential mitigating effect to the unique circumstances of each particular capital defendant. *Ring* concerns the eligibility phase of capital sentencing. As the Stewart-Powell-Stevens plurality explained in *Gregg*, the purpose of the eligibility phase is to channel the discretion of the sentencer "so as to minimize the risk of wholly arbitrary and capricious" application of the death penalty, in violation of the Eighth Amendment.[329] The Supreme Court has accordingly ruled that the Eighth Amendment requires the finding of at least one aggravating circumstance—a circumstance that "genuinely narrow[s] the class of persons eligible for the death penalty" and "reasonably justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[330]

The selection phase of capital sentencing serves a different purpose. Whereas the eligibility phase seeks to constrain the discretion of the sentencer, the selection phase seeks to expand it, by requiring the sentencer to make an "individualized consideration" of all potentially mitigating evidence that might be presented by the defendant.[331] Arbitrariness is no longer the primary concern; full opportunity for mercy becomes paramount. "To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors."[332]

In short, the "eligibility" phase establishes death as the maximum penalty and the "selection" phase in turn ensures consideration of any and all evidence that might justify sparing the defendant's life. The Eighth Amendment does not mandate a particular procedure for achieving this mandate,[333] but many states, including Alabama, have chosen to achieve it by requiring the sentencer to "weigh" aggravating against mitigating circumstances.[334] The Supreme Court has approved this process so long as it serves the purpose of the selection phase of ensuring that the sentencer is

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329. *Gregg*, 428 U.S. at 189 (joint opinion of Stewart, Powell, and Stevens, JJ.).

330. Zant v. Stephens, 462 U.S. 862, 877 (1983).

331. Lockett v. Ohio, 438 U.S. 586, 606 (1978); *accord Zant*, 462 U.S. at 878-79; Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982).

332. *Lockett*, 438 U.S. at 608.

333. *Zant*, 462 U.S. at 890.

334. *See* ALA. CODE § 13A-5-46 (1975). Other states that employ weighing are Arkansas (ARK. CODE ANN. § 5-4-603 (Michie 1987)); California (CAL. PENAL CODE § 190.3 (West 1999)); Connecticut (CONN. GEN. STAT. § 53a-46a (2001)); Kansas (KAN. STAT. ANN. § 21-4624 (1995)); Maryland (2002 Md. Laws 26); Mississippi (MISS. CODE ANN. § 99-19-101 (1999)); Missouri (MO. REV. STAT. § 565.030, 565.032, 565.035 (1999)); Nevada (NEV. REV. STAT. 175.552, 175.554, 175.556 (1995)); New Hampshire (N.H. REV. STAT. ANN. § 630:5 (1996)); New Jersey (N.J. STAT. ANN. § 2C:11-3 (West 1995)); New Mexico (N.M. STAT. ANN. § 31-20A-2 (Michie 1978)); New York (N.Y. CRIM. PROC. LAW § 400.27(11)(a) (McKinney 1995)); North Carolina (N.C. GEN. STAT. § 15A-2000(b) (1995)); Ohio (OHIO REV. CODE ANN. § 2929.03(D)(2) (West 1996)); Oklahoma (OKLA. STAT. ANN. tit. 21 § 701.11 (West 2002)); Pennsylvania (42 PA. CONS. STAT. ANN. § 9711(c)(1) (West 1998)); Tennessee (TENN. CODE ANN. § 39-13-204(g)(1) (1989)); Utah (UTAH CODE ANN. § 76-3-207(b) (1953)); and Washington (WASH. REV. CODE ANN. § 10.95.060(3) (West 2002); *see also* State v. Brown, 940 P.2d 546 (Wash. 1997).

able to consider all relevant mitigating evidence.[335] It therefore makes little sense to refer to the weighing process as a discrete "finding of fact" or as an "element" of the crime of capital murder. It is truly the exercise of discretion.[336]

Finally, if the jury were required by *Ring* not only to find the existence of the aggravating circumstance but also to weigh aggravating and mitigating circumstances, we would indeed have come almost full circle back to the regime that was deemed invidious by the Supreme Court in *Furman*. The only real difference would be that the death sentence is available in a narrower category of cases—those in which the jury found a statutory aggravating circumstance in addition to convicting the defendant of murder. The "guidance" supposedly added by the requirement that the jury weigh aggravating and mitigating circumstances is minimal, especially given the Supreme Court's insistence that a defendant be permitted to introduce any evidence during the sentencing hearing that is potentially mitigating. As discussed above, the balancing of circumstances can in no way be reduced to a formula—indeed, the Alabama Legislature has expressly declared that "weighing the aggravating and mitigating circumstances . . . shall not be defined to mean a mere tallying of aggravating and mitigating circumstances for the purpose of numerical comparison."[337] It is thus inevitably discretionary, and if the Sixth Amendment requires it to be performed by a jury, what is so different about this regime from the one struck down in *Furman*?

For all these reasons, I submit that an Alabama judge may override an Alabama jury's weighing of aggravating and circumstances without offending the Sixth Amendment.

C. The Significance of a Verdict of Capital Murder after Ring

The next question is what constitutes the "aggravating circumstance necessary for imposition of the death penalty" under *Ring*.[338] As explained above, Alabama's capital sentencing statute has two sets of aggravating circumstances. The first set is the eighteen "aggravating components" listed in section 13A-5-40(a), which define capital murder.[339] The jury must find

335. *Eddings*, 455 U.S. at 114-15; *see also Zant*, 462 U.S. at 875 (acknowledging that, under *Gregg v. Georgia*, the sentencer has "unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty"); *id.* at 902 (Rehnquist, J., concurring in the judgment) ("[S]entencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does.").

336. *Cf.* McGautha v. California, 402 U.S. 183, 207 (1971) (aggravating and mitigating circumstances "do no more than suggest some subjects for the jury to consider during its deliberations, and they bear witness to the intractable nature of the problem of 'standards' which the history of capital punishment has from the beginning reflected").

337. ALA. CODE § 13A-5-48 (1975).

338. *Ring*, 122 S. Ct. at 2443.

339. ALA. CODE § 13A-5-40(a) (1975).

the existence of at least one of these eighteen aggravating components, beyond a reasonable doubt, in order to convict the defendant of capital murder and thus render him eligible for the death penalty at all.[340] However, Alabama also requires either the jury or the judge to find the existence of at least one of a second set of aggravating circumstances—the ten "aggravating circumstances" listed in section 13A-5-49—in order for the defendant to receive the death sentence.[341] Which of these two findings is the one that is "necessary for imposition of the death penalty" under *Ring*? Is the first finding, a conviction of capital murder, enough to set death as the statutory maximum penalty and to permit the trial court on its own to make the second finding and also to weigh the aggravating and mitigating circumstances? Or must the jury also make the second finding?

The question is not merely theoretical, because of the oddity in Alabama's capital sentencing statute that the aggravating components in section 13A-5-40(a) do not all correspond to aggravating circumstances in section 13A-5-49.[342] Some do, but there are circumstances in both lists that do not appear in the other.

In a case in which a defendant is charged with a category of capital murder in section 13A-5-40(a) that corresponds to an aggravating circumstance in section 13A-5-49, the question does not arise. The typical example is murder committed during a robbery, which is an aggravating component in section 13A-5-40(a)(2) and an aggravating circumstance in section 13A-5-49(4). A verdict of guilty on the charge of capital murder would mean that the jury has also found an aggravating circumstance beyond a reasonable doubt, rendering the defendant death-eligible under *Ring*. Indeed, the Alabama capital sentencing statute specifically provides that "any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentencing hearing."[343] In *Waldrop*, therefore, in which the petitioner had been convicted of robbery-intentional murder in violation of section 13A-5-40(a)(2), the Alabama Supreme Court held that the jury's verdict of guilt established the aggravating circumstance in section 13A-5-49(4), bringing Waldrop's death sentence into compliance with *Apprendi* and *Ring*.[344] Like Waldrop, the vast majority of inmates on Alabama's death row were convicted of a type of capital murder that corresponds to an aggravating circumstance in section 13A-5-49. Waldrop thus makes clear that most of the death sentences currently in effect in Alabama comply with the Sixth Amendment.

However, when the defendant is charged with a category of capital murder in section 13A-5-40(a) that does not correspond to an aggravating

340. *Id.* § 13A-5-45(e).

341. *Id.* § 13A-5-45(f).

342. *Compare* ALA. CODE § 13A-5-40(a) (1975), *with* ALA. CODE § 13A-5-49 (1975).

343. ALA. CODE § 13A-5-45(e) (1975).

344. *Ex parte* Waldrop, No. 1001194, 2002 WL 31630710, at *4-*5 (Ala. Nov. 22, 2002).

circumstance in section 13A-5-49 (e.g., the intentional killing of a person under the age of fourteen), the verdict of guilt does not establish the aggravating circumstance in section 13A-5-49 beyond a reasonable doubt. If the jury is required to find both the aggravating component in section 13A-5-40(a) and the aggravating circumstance in section 13A-5-49 in order for the defendant to be death-eligible, then the trial court might be prohibited by *Ring* from overriding a jury recommendation of life without parole, at least where it was clear that the jury did not find any of the aggravating circumstances listed in section 13A-5-49.[345] Only if the aggravating component—the fact that the victim is under the age of fourteen—is deemed to be the "aggravating circumstance necessary for imposition of the death penalty" under *Ring* could the trial court override the jury's sentencing recommendation. Sooner or later, a case of this nature will arise, in which (a) the defendant was convicted of a type of capital murder that does not correspond to an aggravating circumstance in section 13A-5-49, (b) the jury recommended life without parole, but (c) the trial judge overrode the jury's recommendation and sentenced the defendant to death. At that point, the Alabama courts will have to address the question.[346]

The correct answer (in my admittedly biased view as an advocate for the State of Alabama) is that the jury need only find the defendant guilty of capital murder under section 13A-5-40(a). A conviction of capital murder under Alabama law renders a defendant eligible for the death penalty, with or without the finding of an aggravating circumstance in section 13A-5-49. The aggravating circumstances in section 13A-5-49 are constitutionally superfluous (although they are certainly a vital component of the Alabama Legislature's attempt to establish fair capital sentencing procedures and should not be demeaned on that front). The eighteen aggravating components in section 13A-5-40 satisfy the narrowing requirement of the Eighth Amendment on their own, and by their designation as "capital" offenses in

345. Depending on how the jury is instructed, it is possible that the jury could return a recommendation of life without parole indicating that the jury did find the existence of an aggravating circumstance but concluded that the aggravating circumstances did not outweigh the mitigating. If a trial court strictly follows Alabama pattern jury instructions, it will inform the jury that it must first find unanimously and beyond a reasonable doubt the existence of an aggravating circumstance before it can even consider the death penalty. With such an instruction, a jury verdict form that came back with, say, a ten-to-two recommendation of life without parole would mean that the jury must have first found the existence of an aggravating circumstance, because no juror would have been entitled to vote for the death penalty otherwise.

346. The opportunity may come sooner. On April 4, 2003, the Alabama Supreme Court granted certiorari in *Ex parte Tomlin*, No. 1020375. Phillip Wayne Tomlin was convicted of intentionally murdering two people in 1977 during a single course of conduct, a capital offense under the 1975 Act. The jury did not find any other aggravating circumstances and recommended that Tomlin be sentenced to life without parole. The trial court overrode the jury's recommendation and sentenced Tomlin to death. The Alabama Court of Criminal Appeals affirmed the conviction and sentence, ruling that the jury's finding of the aggravating component in the definition of the capital crime—the killing of two or more persons—was enough to satisfy *Ring*. In its order granting certiorari, the Alabama Supreme Court asked for briefing on the question whether "the trial court erred in sentencing Phillip Wayne Tomlin to death in the absence of any finding of an 'aggravating circumstance [] enumerated in § 13-11-6' as required by § 13-11-4(1), Ala. Code 1975 (later repealed)."

the Alabama Code, it is clear that these eighteen offenses were intended to carry with them a maximum sentence of death. If a defendant, therefore, is convicted of one of the eighteen offenses listed in section 13A-5-40, he has been found by a jury beyond a reasonable doubt to have committed a crime whose maximum sentence is death. The trial court may conduct the remainder of the sentencing process, with or without the aid or concurrence of the jury, in full compliance with *Ring*.

This argument finds support in the language and the history of Alabama's capital sentencing statute. First, as noted, the Alabama Legislature designated the eighteen offenses in section 13A-5-40 as "capital." Section 13A-5-40 is entitled "Capital offenses," and the first sentence of the first subsection states: "The following are capital offenses . . . ."[347] The plain meaning of "capital" is "punishable by death." *Black's Law Dictionary* defines "capital" as "[p]unishable by execution; involving the death penalty."[348] Read in conjunction with section 13A-5-39(a),[349] which provides that a "capital offense" is one "for which a defendant shall be punished by a sentence of death or life imprisonment without parole," section 13A-5-40 appears to state that the maximum punishment upon conviction of any of the listed offenses is death.[350]

This conclusion is reinforced by contrasting Alabama's sentencing statute with the Arizona statute struck down in *Ring*. Arizona had a plain-vanilla first-degree murder statute, with no accompanying list of discrete categories of first-degree murder explicitly labeled "capital."[351] The most serious category of homicide under Arizona law was "first degree."[352] Arizona's own supreme court had declared that the maximum punishment for a verdict of guilty of first-degree murder, without further sentencing procedures, was life without parole.[353]

Second, the evolution of Alabama's capital sentencing statute so laboriously set forth above confirms that the aggravating components listed in section 13A-5-40(a) were meant to be the "aggravating circumstances" that met the narrowing requirement of the Eighth Amendment and made the defendant death-eligible for purposes of the Sixth Amendment. Alabama has always had a discrete list of capital offenses. In the 1975 Act, in response to *Furman*, the Alabama Legislature made an even more detailed list of fourteen aggravating offenses for which the jury was required to "fix the punishment at death." Like the modern statute, the 1975 Act included a separate list of "aggravating circumstances," which the trial court was to weigh against mitigating circumstances in determining whether to retain the

347. ALA. CODE § 13A-5-40 (1975).
348. BLACK'S LAW DICTIONARY 200 (7th ed. 1999).
349. ALA. CODE § 13A-5-39 (1975).
350. *Id.* § 13A-5-40.
351. *See* ARIZ. REV. STAT. § 13-1105 (2001).
352. *Id.*
353. State v. Ring, 25 P.3d 1139, 1151 (Ariz. 2001) ("In Arizona, a defendant cannot be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings.").

death sentence. But, the 1975 Act contained no requirement that the jury or the trial court find any one of these "aggravating circumstances" in order to sentence the defendant to death. They were sentencing factors, not elements of the capital crimes.

After the Supreme Court struck down the preclusion clause in the 1975 Act in *Beck v. Alabama*, Justice Maddox rewrote the statute on behalf of the Alabama Supreme Court to conform it to the dictates of the United States Supreme Court. His analysis of the statute, and of the changes he made, was telling. "In Alabama," he said,

> the aggravating circumstances constitute an element of the capital offense and are required to be "averred in the indictment," (Code 1975, § 13-11-2), and must be proved beyond a reasonable doubt. Consequently, *the jury verdict that the defendant was guilty of committing the capital offense would mean that the State had already established at least one aggravating circumstance*, even though the legislature did not include an aggravating circumstance in § 13-11-6 to correspond with the "aggravation" made a part of each capital offense by § 13-11-2(a).[354]

In other words, the definition of the fourteen capital offenses in the first part of the 1975 Act already included the aggravating circumstance—or the aggravating component, as Judge Colquitt would term it—that accomplished the narrowing required by *Furman* and the bicentennial quintet.

A year later, the Alabama Supreme Court would reaffirm this interpretation of Alabama's capital sentencing statute in *Ex parte Kyzer*.[355] The petitioner, Dudley Wayne Kyzer, had been convicted of first-degree murder "wherein two or more human beings are intentionally killed by the defendant by one or a series of acts"[356] and had been sentenced to death by Judge Colquitt, operating under the transition sentencing regime in the 1975 Act. Judge Colquitt had found as an aggravating circumstance that the murder was "especially heinous, atrocious or cruel."[357] On certiorari review, however, the Alabama Supreme Court held that this statutory aggravating circumstance was too vague,[358] given the United States Supreme Court's recent decision in *Godfrey v. Georgia*.[359] The question that the court then had to consider was whether the death sentence could still be affirmed, on the theory that the conviction of capital murder itself constituted an aggravating

354. Beck v. State, 396 So. 2d 645, 663 (Ala. 1980) (citing ALA. CODE § 13-11-2 (1975)) (emphasis added).

355. 399 So. 2d 330 (Ala. 1981).

356. *Kyzer*, 399 So. 2d at 332 (quoting ALA. CODE § 13-11-2(a)(10) (1975)) (internal quotation marks omitted).

357. *Id.* at 333 (citing ALA. CODE § 13-11-6(8) (1975)).

358. *Id.* at 334 (noting that "there is nothing in the words 'especially heinous, atrocious, or cruel' which implies any inherent restraint on the arbitrary and capricious imposition of the death penalty").

359. 446 U.S. 420, 432 (1980) (rejecting as too vague the aggravating circumstance that a murder was "outrageously or wantonly vile, horrible or inhuman").

circumstance for purposes of the sentencing statute. The question was complicated by the fact that the aggravating component of Kyzer's conviction—murder of multiple persons—did not correspond to one of the aggravating circumstances enumerated in the second part of the statute.[360]

Writing for the court again, Justice Maddox held that the death sentence could be affirmed.[361] "Applying traditional rules of statutory construction, we are convinced that the legislature intended to punish capitally defendants found guilty of offenses listed in § 13-11-2."[362] The Legislature could not have performed "a completely useless act by creating a capital offense for which the defendant could not ultimately receive the death penalty."[363] The definition of a capital offense thus carried within it an aggravating circumstance, or component, that met the narrowing requirement of the Eighth Amendment.

Against this backdrop, a mere three months after *Beck*, the Alabama Legislature amended the capital sentencing statute to the form in which it essentially remains today. The Legislature expanded the list of fourteen capital offenses to eighteen, in the new section 13A-5-40(a) of the Alabama Code. It is fair to presume that the Legislature understood the new section 13A-5-40(a) to carry with it Justice Maddox's premise in *Beck*: that these capital offenses included aggravating circumstances within their definition that satisfied the narrowing requirement of the Eighth Amendment. The 1981 Act also included a new requirement that the jury or the judge find at least one aggravating circumstance from the list in section 13A-5-49, but that requirement would have been superfluous for purposes of the Eighth Amendment, because the requisite narrowing had already occurred in section 13A-5-40(a). By the same thinking, section 13A-5-49 would be superfluous for purposes of the Sixth Amendment, because the conviction of an offense deemed capital, which includes the aggravating circumstance within its definition, would naturally be the point at which the defendant became "eligible" for the death penalty and at which death became the available maximum. This arrangement neatly fits the suggestion of Justice Scalia in his concurring opinion in *Ring* that the "aggravating-factor determination" required by the Eighth Amendment "logically belongs anyway [] in the guilt phase" of the trial.[364]

Skeptics will naturally retort that the aggravating circumstances in section 13A-5-49 are called "aggravating circumstances," after all, and section 13A-5-45(f) requires that at least one of them be found in order for the defendant to receive the death sentence.[365] If the Alabama Legislature made the finding of a circumstance in section 13A-5-49 a prerequisite to imposi-

360. *See* ALA. CODE § 13-11-6 (1975).

361. *Kyzer*, 399 So. 2d at 333.

362. *Id.* at 338.

363. *Id.* at 337.

364. *Ring*, 122 S. Ct. at 2445 (Scalia, J., joined by Thomas, J., concurring).

365. ALA. CODE § 13A-5-45(f) (1975) ("Unless at least one aggravating circumstance as defined in Section 13A-5-49 exists, the sentence shall be life imprisonment without parole.").

tion of the death sentence, why is it not a finding that must be made by a jury under *Ring*? The problem with this argument is that it conflates the question of whether the death penalty *may* be imposed with the question whether it *should* be. The Alabama Legislature has also made clear that no defendant may be sentenced unless the aggravating circumstances outweigh the mitigating, but, as argued above, the weighing process cannot for that reason alone be considered an element of capital murder. Otherwise, any factual finding that contributes to the ultimate sentencing decision would have to be made by the jury, and the trial court would not be permitted any sentencing discretion. Because *Apprendi* and *Ring* are logically joined at the waist, this interpretation of the Sixth Amendment would literally entail the end of judicial sentencing altogether. Such a result cannot be squared with the Supreme Court's observation in *Apprendi* that "nothing in th[e] history [of criminal sentencing in this country] suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute."[366]

Bottom line, as Justice Maddox reasoned in *Beck* and again in *Kyzer*, it is difficult to imagine that the Alabama Legislature would have not intended the conviction of a crime called "capital" to mean, at the very least, that a convict is eligible for the death penalty. The Legislature has required additional process to determine whether a convict is deserving of the death penalty, including the finding of one of the aggravating circumstances in section 13A-5-49, but the question with which *Apprendi* and *Ring* are concerned is eligibility, not deserts. For all these reasons, a jury's determination, beyond a reasonable doubt, that a defendant has committed one of the eighteen capital offenses enumerated in section 13A-5-40(a) should be sufficient to sustain a death sentence against challenge under the Sixth Amendment.

CONCLUSION

In conclusion, the United States Supreme Court has not come full circle to its pre-*Furman* jurisprudence of allowing the jury substantial control over the capital sentencing process. The Court has struck a balance, requiring the jury to make the discrete finding of fact that renders a defendant eligible for the death penalty, but permitting the judge to perform the largely discretionary function of weighing aggravating and mitigating circumstances and determining whether the defendant deserves to be sentenced to death. Alabama's judicial override scheme fits this model by including an aggravating component in its definition of capital murder that meets the narrowing requirement of the Eighth Amendment and establishes death as the statutory maximum for purposes of the Sixth Amendment as well. Alabama's capital

366. *Apprendi*, 530 U.S. at 481.

sentencing statute therefore satisfies the Sixth Amendment, as explicated in *Ring v. Arizona*, in all respects.