

# Washington University Journal of Law & Policy

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Volume 34 *New Directions in ADR and Clinical Legal Education*

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January 2010

## If It's Constitutional, Then What's the Problem?: The Use of Judicial Override in Alabama Death Sentencing

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### Recommended Citation

Shannon Heery, *If It's Constitutional, Then What's the Problem?: The Use of Judicial Override in Alabama Death Sentencing*, 34 WASH. U. J. L. & POL'Y 347 (2010),  
[https://openscholarship.wustl.edu/law\\_journal\\_law\\_policy/vol34/iss1/11](https://openscholarship.wustl.edu/law_journal_law_policy/vol34/iss1/11)

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If It's Constitutional, Then What's the Problem?:  
The Use of Judicial Override in Alabama  
Death Sentencing

Shannon Heery\*

INTRODUCTION

The United States has a long and unstable history with the death penalty. There are severe disagreements and ever-changing opinions about its existence and use; not even the Supreme Court has been clear or consistent with respect to the death penalty. However, in *Furman v. Georgia*<sup>1</sup> the Court handed down a rule that has remained the basis for death penalty jurisprudence since its creation—the death penalty cannot be imposed in a manner that is arbitrary, discriminatory or capricious.<sup>2</sup> The Court has never carved out an exception to this rule, and yet, as it stands today, Alabama is the exception. Alabama's death penalty sentencing scheme allows judges to overturn juries' life sentences and unilaterally impose a death sentence without a specific standard for doing so, a process known as “judicial override.”<sup>3</sup> This practice raises serious concerns about the constitutionality of Alabama's sentencing scheme.<sup>4</sup>

Alabama has recently been subjected to a number of reviews regarding the structure of its death sentencing. Feeling Alabama is often inequitable when imposing the death penalty, many

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\* J.D. (2010), Washington University School of Law; B.A. (2005), University of North Carolina at Chapel Hill. Thank you to Emily Hughes who provided insight for this Note and supported my intellectual and professional growth, guiding me to my current position as a public defender in New York City. I am very grateful to my parents, Jim and Pat Heery, my brothers, Jim, Chris, and Patrick Heery, and Zach Stendig for their love, support, and encouragement. A very special thank you to the staff of the *Washington University Journal of Law & Policy* for their hard work and dedication to finalizing this Note for publication.

1. 408 U.S. 238 (1972) (per curiam).
2. *Id.*
3. See discussion *infra* Part I.D.4.
4. See discussion *infra* Part I.D.1.

commentators have noted a major reason is its unique use of standardless judicial override.<sup>5</sup> Allowing a judge to impose a sentence of death after a twelve-member jury returns a sentence of life without parole raises serious ethical and legal concerns,<sup>6</sup> especially in light of the Supreme Court holding in *Ring v. Arizona* in 2002.<sup>7</sup> To address these concerns, this note urges the Supreme Court to reconsider Alabama's use of judicial override and find it unconstitutional. The Court should completely disallow the use of judicial override because it cannot effectively provide a method of imposing the death penalty that is not arbitrary in accordance with *Furman v. Georgia*, and because it violates the due process clause. In the alternative, the Court could find the statute unconstitutional as applied and replace it with an articulated clear standard and procedure that judges must follow when overriding a jury verdict of life without parole.

If, however, the Supreme Court does not recognize that Alabama's use of judicial override is unconstitutional, it will be up to the Alabama legislature to take action to fix the inherent problem with the state's death sentencing. Given Alabama's current political climate and legislative trend, it is unlikely that this will yield any results; judicial override will continue to be in full effect in Alabama death sentencing. Legislation should narrow judicial override by providing clear requirements that the judge must satisfy before overriding a jury verdict. In addition, judicial override could be dramatically altered to increase fairness in sentencing by addressing other factors like the political election of judges and the lack of a statewide public defender system.

This Note focuses on the history of Alabama's death sentencing law as a window into the rationale requiring abrupt change. Part I.A addresses the Supreme Court's death penalty jurisprudence following *Furman v. Georgia*. Part I.B follows with Supreme Court opinions regarding judicial override. Part I.C considers *Apprendi v. New Jersey*<sup>8</sup> and *Ring v. Arizona*<sup>9</sup> to demonstrate the increased role of the

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5. See discussion *infra* Part I.D.4.

6. See discussion *infra* Part I.D.3–4.

7. 536 U.S. 584 (2002); see discussion *infra* Part I.C.

8. 530 U.S. 466 (2000).

jury in capital sentencing. Part I.D explores Alabama's current state of judicial override through an examination of (1) its statutory scheme, (2) Alabama cases following *Ring*, (3) Alabama death penalty statistics, and (4) recent public outcry criticizing the system and the responses of state officials. Part II of this note analyzes the Alabama law and proposes changes.

## I. HISTORY: ARRIVAL AT MODERN DAY ALABAMA DEATH SENTENCING SCHEME

### A. *The U.S. Supreme Court and the Death Sentence: The Importance of Balancing Factors*

The U.S. Supreme Court established the modern approach to death sentencing in 1972 with its decision in *Furman v. Georgia*.<sup>10</sup> Finding a number of existing state death penalty statutes unconstitutional,<sup>11</sup> the Court held that for a statute to be constitutional, death sentences must not be imposed in an arbitrary, capricious,<sup>12</sup> or discriminatory<sup>13</sup> manner.

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9. 536 U.S. 584.

10. 408 U.S. 238 (1972) (per curiam). A five-four decision without a controlling opinion, the positions of Justices Stewart and White form the basis for the present day understanding of *Furman*. See *id.* at 306–10 (Stewart, J., concurring); *id.* at 310–14 (White, J., concurring). Justices Brennan and Marshall found the death penalty unconstitutional under all circumstances. See *id.* at 257–306 (Brennan, J., concurring); *id.* at 314–71 (Marshall, J., concurring).

11. *Id.* at 256. *Furman* explicitly struck down Georgia's capital punishment statute (directly at issue in the case), as well as any other state and federal death penalty laws that did not comport with its ruling and were therefore in violation of the Eighth Amendment's cruel and unusual punishment clause. See *id.* at 239–40; see also U.S. CONST. amend. VIII. This effectively created a *de facto* death penalty moratorium while states amended their statutes.

12. "[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman*, 408 U.S. at 310 (Stewart, J., concurring). Cases following *Furman* maintain that the imposition of the death penalty must not be capricious. See, e.g., *Spaziano v. Florida*, 468 U.S. 447, 460 (1984) ("If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." (citing *Zant v. Stephens*, 462 U.S. 862, 873–80 (1983))).

13. "[T]hese discretionary statutes 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." *Furman*, 408 U.S. at 256–57.

In the 1976 *Gregg v. Georgia* opinion, the Court clarified *Furman*, upholding the death penalty as a constitutional punishment provided there were appropriate limitations in its application.<sup>14</sup> Following the concerns voiced in *Furman*, *Gregg* emphasized the need for jurors to have adequate guidelines in their decision-making process, including a consistent method for assessing both the aggravating<sup>15</sup> and the mitigating<sup>16</sup> factors in each case.<sup>17</sup> Though it

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14. *Gregg v. Georgia*, 428 U.S. 153 (1976). The Court in *Gregg* stated:

The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish.

*Id.* at 206.

15. An aggravating factor or circumstance is generally determined by state statute. Alabama codifies its aggravating circumstances as follows:

Aggravating circumstances shall be the following:

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

ALA. CODE § 13A-5-49 (LexisNexis 2005). Black's Law Dictionary defines an aggravating circumstance as "[a] fact or situation that relates to a criminal offense or defendant and that is considered by the court in imposing punishment (esp. a death sentence)." BLACK'S LAW DICTIONARY 277 (9th ed. 2009).

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16. A mitigating factor or circumstance is also generally determined by state statute and is defined as “[a] fact or situation that does not bear on the question of a defendant’s guilt but that is considered by the court in imposing punishment and especially in lessening the severity of a sentence.” BLACK’S LAW DICTIONARY, *supra* note 15, at 277. Significant mitigating factors are generally codified, but the power to consider mitigating circumstances cannot be limited by statute. *See* *Lockett v. Ohio*, 438 U.S. 586, 606 (1978). Therefore, mitigating factors can be anything that might be helpful to a particular defendant (e.g., history of childhood abuse, lack of stability in childhood, learning disabilities). *See generally* *Rompilla v. Beard*, 545 U.S. 374, 381–83, 390–93 (2005); *Wiggins v. Smith*, 539 U.S. 510, 516–17, 534–35 (2003); *Williams v. Taylor*, 529 U.S. 362, 395–99 (2000) (describing mitigating factors and their effect). Alabama’s statutory mitigating circumstances are codified as follows:

Mitigating circumstances shall include, but are not be limited to, the following:

- (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.

§ 13A-5-51.

Section 13A-5-52 of the Alabama Code explicitly provides for additional mitigating circumstances to be considered that are not enumerated in section 13A-5-51.

In addition to the mitigating circumstances specified . . . mitigating circumstances shall include any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, and any other relevant mitigating circumstance which the defendant offers as a basis for a sentence of life imprisonment without parole instead of death.

§ 13A-5-52.

17. The Court recognized the importance of bifurcated capital trials and the need for proper identification of “aggravating” and “mitigating” factors during the penalty phase. *Gregg*, 428 U.S. 189–96.

In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

*Id.* at 195.

was the Georgia death penalty statute again at issue, the Court found that the revised version required the jury to balance mitigating and aggravating factors in a manner that led to consistent application of the death sentence.<sup>18</sup>

In light of its landmark decisions in *Furman* and *Gregg*, the Supreme Court continued to define the constitutional standard for implementation of capital punishment by reviewing other state death penalty statutes. In *Woodson v. North Carolina*<sup>19</sup> and *Roberts v. Louisiana*,<sup>20</sup> the Court found that statutes that automatically imposed the death penalty for some cases of murder, without considering aggravating and mitigating circumstances, violated the Eighth Amendment.<sup>21</sup> From these decisions, a consistent theme emerged: the sentencer must weigh the individual aggravating and mitigating

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18. The *Gregg* Court explained:

The new Georgia sentencing procedures, by contrast [to the Georgia statutes at issue in *Furman*], focus the jury's attention on the *particularized nature of the crime* and the *particularized characteristics of the individual defendant*. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled.

*Id.* at 206 (emphasis added).

19. 428 U.S. 280 (1976).

20. 428 U.S. 325 (1976).

21. *Woodson*, 428 U.S. at 304–05; *Roberts*, 428 U.S. at 335–36. The *Woodson* Court determined that automatic imposition of the death penalty would weaken its holding in *Gregg* requiring an assessment of both *aggravating and mitigating* circumstances. *Woodson*, 428 U.S. at 304. The Court explained, “[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” *Id.* (citation omitted).

The Court distinguished *Jurek v. Texas* and *Proffitt v. Florida* from its *Woodson* and *Roberts* decisions, reasoning that the statutes in question in *Jurek* and *Proffitt* did not automatically impose the death sentence, but necessarily took into account mitigating and aggravating factors. *Jurek v. Texas*, 428 U.S. 262, 269 (1976) (examining a Texas statute requiring the jury to answer three questions during penalty phase: (1) Was defendant's conduct deliberate and with reasonable expectation that the death would result? (2) Would defendant probably be a continued threat to society? (3) Was defendant's conduct an unreasonable response to provocation by the deceased? If the jury believes the answer to each question is 'yes,' the death sentence is imposed); *Proffitt v. Florida*, 428 U.S. 242 (1976) (discussing statute in which trial judge must weigh eight statutory aggravating factors against seven statutory mitigating factors to determine sentence).

circumstances,<sup>22</sup> in a measured fashion,<sup>23</sup> to determine the appropriate sentence between life and death.<sup>24</sup>

The following year, the Court determined that a death sentence was never acceptable for the specific crimes of rape, robbery, and felony murder without the intent to kill, because they could not rise to the necessary level of aggravation, and death would therefore be cruel and unusual punishment.<sup>25</sup> These rulings significantly narrowed the scope of the death penalty. Though the Court permitted the death penalty for other crimes,<sup>26</sup> these decisions led to states generally reserving the death penalty for the offense of capital murder.<sup>27</sup>

Although the Supreme Court had clarified that without sufficient aggravating factors there could be no death penalty, it was initially reluctant to accept that a single mitigating characteristic could also mean the death penalty was not allowed for murder.<sup>28</sup> However, in

22. A statute “must also allow the sentencer to consider the individual circumstances of the defendant, his background, and his crime.” *Spaziano v. Florida*, 468 U.S. 447, 460 (1984) (citing *Lockett v. Ohio*, 438 U.S. 586 (1978)); *see also Woodson*, 428 U.S. at 304 (suggesting that sentencing depends on facts and circumstances of the individual and his crime). *See also supra* notes 15–16, for the Alabama statute regarding aggravating and mitigating factors.

23. In 1982, the Court renewed the basis of its *Furman* holding in *Eddings v. Oklahoma* when it noted the importance of the “twin objectives” of “measured, consistent application and fairness to the accused” in the imposition of the death sentence. *Eddings v. Oklahoma*, 455 U.S. 104, 110–11 (1982).

24. *See id.* (stating that the sentencer must consider all relevant mitigating evidence before making death sentence).

25. *See generally Enmund v. Florida*, 458 U.S. 782 (1982) (felony murder without the intent to kill); *Coker v. Georgia*, 433 U.S. 584 (1977) (rape); *Hooks v. Georgia*, 433 U.S. 917 (1977) (per curiam) (robbery). The Court later overturned *Enmund* in *Tison v. Arizona*, which held that felony murder participants who neither kill nor intend to kill but who participate with others in a felony that leads to murder could be sentenced to death if they (1) participate in a “major” way or (2) exhibit a “reckless indifference to human life.” 481 U.S. 137, 163–64 (1987).

26. The death penalty is still available for offenses other than murder. *See generally Death Penalty for Offenses Other Than Murder*, DEATH PENALTY INFO. CTR., <http://www.deathpenalty.org/death-penalty-offenses-other-murder> (last visited Feb. 27, 2010).

27. Capital murders contain specific aggravating circumstances (determined by the state) that heighten the punishment of the murder to include the death penalty. For Alabama’s definition of capital murder under Alabama Code section 13A-5-39 and a list of Alabama statutory capital offenses under Alabama Code section 13A-5-40, *see infra* note 79.

28. *See generally Penry v. Lynaugh*, 492 U.S. 302 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 551 (2005) (upholding the constitutionality of laws permitting the execution of mentally retarded offenders); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (upholding the constitutionality of laws permitting the execution of juvenile offenders); *McCleskey v. Kemp*,



the face of statistical evidence and the underlying *Furman* rationale,<sup>29</sup> the Court found it unconstitutional to apply the death sentence to juveniles<sup>30</sup> and the mentally retarded<sup>31</sup> because each condition alone was a sufficient mitigating factor for first-degree murder.<sup>32</sup>

Aside from these few clear instances where the death penalty was not allowed, the Court continued to individually evaluate the constitutionality of state death penalty statutes to ensure they properly provided for the weighing of aggravating and mitigating factors.<sup>33</sup> The Court continues to uphold the balancing test as imperative to consistency and fairness in capital sentencing, even finding defense counsel who fail to gather and present applicable mitigating evidence to the jury to be in violation of a defendant's right to a fair trial.<sup>34</sup>

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481 U.S. 279 (1987) (upholding the imposition of death penalty despite strong statistical showing of racial bias in those sentenced to death in Georgia).

29. See *supra* notes 10–13 and accompanying text.

30. See *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

31. See *Atkins*, 536 U.S. at 321 (overruling the Court's holding in *Penry*).

32. See *Atkins*, 536 U.S. at 321; *Roper*, 543 U.S. at 568.

33. Compare *Sumner v. Shuman*, 483 U.S. 66, 79–83 (1987) (striking down a Nevada statute automatically imposing the death penalty for prisoners convicted of murder and serving a life sentence without parole), *Godfrey v. Georgia*, 446 U.S. 420, 427–29 (1980) (explaining that aggravating circumstances in a statute authorizing the death penalty must be defined in order to provide meaningful guidance and ensure reliability in sentencing), and *Lockett v. Ohio*, 438 U.S. 586, 606–08 (1978) (holding that the Ohio statute did not permit the type of individualized consideration of mitigating factors required by the Eighth and Fourteenth Amendments because it only specified three and required sentence of death if one of those three was not present), with *Johnson v. Texas*, 509 U.S. 350 (1993) (finding a lack of an explicit instruction by the judge to consider mitigating evidence about the defendant's age did not prevent the jury from considering it), *Boyde v. California*, 494 U.S. 370, 377–79 (1990) (upholding California's jury instruction requiring imposition of the death penalty when aggravating circumstances outweigh mitigating circumstances), and *Blystone v. Pennsylvania*, 494 U.S. 299, 306–09 (1990) (upholding the Pennsylvania law requiring a death penalty when at least one statutory aggravating circumstance and no mitigating circumstances are present).

34. The Court established the current standard for determining whether a capital defendant's counsel acted incompetently in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The two-part test for making the determination required: (1) the defendant to show counsel's performance was deficient, causing serious errors so that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) the deficient performance prejudiced the defense, depriving the defendant of a fair trial with reliable results. *Id.* The *Strickland* test was rarely applied until the Court firmly established the importance of mitigating factors in sentencing. See *Williams v. Taylor*, 529 U.S. 362 (2000). In *Wiggins v. Smith*, the Court found a death-row inmate's trial lawyers were inadequate counsel because they failed to investigate their client's severe childhood abuse. 539 U.S. 510, 534–35 (2003). Likewise, in *Rompilla v. Beard*, the Court found counsel ineffective even though they attempted to find

*B. The Supreme Court: Judges as Sentencers and Their Ability to  
Override a Jury Verdict*

Having firmly established the importance of consistency in applying the balancing test of capital sentencing, the Court faced the question of whether state statutes honored this requirement when the judge was permitted to determine the sentence of a capital defendant.<sup>35</sup> Briefly addressing this issue in the 1976 case of *Proffitt v. Florida*, the Court examined part of the post-*Furman* Florida death penalty statute, which allowed judges to make the ultimate sentencing decision (overriding the jury's initial sentence if necessary) but required them to evaluate specifically enumerated aggravating and mitigating factors in the process.<sup>36</sup> The Court stated that while it has recognized that "jury sentencing in a capital case can perform an important societal function[], it has never suggested that jury sentencing is constitutionally required."<sup>37</sup>

The Court expanded upon its holding in *Proffitt* with its *Spaziano v. Florida*<sup>38</sup> decision in 1984. Though the Court decided in *Proffitt* that a judge could make the sentencing decision, the *Spaziano* Court specifically addressed whether it was constitutional for a judge to consider a jury verdict as merely advisory in nature (as defined by the Florida statute). In upholding the Florida statute, the Court provided strongly worded rationale,<sup>39</sup> and concluded that:

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mitigating factors by interviewing the client, his family, and mental health experts, because they missed easily obtainable mitigating evidence present in public record. 545 U.S. 374, 389–93 (2005).

35. See generally *Ring v. Arizona*, 536 U.S. 584 (2002); *Harris v. Alabama*, 513 U.S. 504 (1995); *Schiro v. Indiana*, 493 U.S. 910 (1989); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Proffitt v. Florida*, 428 U.S. 242 (1976).

36. *Proffitt*, 428 U.S. at 253–57. "Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death . . ." FLA. STAT. § 921.141(3) (1976–77); see FLA. STAT. § 921.141(5)–(6) (1976–77) (listing enumerated aggravating and mitigating circumstances a judge must consider); see also *infra* note 84 (describing this process according to Alabama law).

37. *Proffitt*, 428 U.S. at 252 (citation omitted); see also *Barclay v. Florida*, 463 U.S. 939 (1983) (upholding Florida's post-*Furman* statute as applying the death sentence in a consistent manner and therefore not constitutionally violative).

38. *Spaziano*, 468 U.S. at 449; see FLA. STAT. § 921.141(3)–(6).

39. The Court states that "[t]he point is simply that the purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual

[T]he Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we [the Court] cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.<sup>40</sup>

In essence, the *Spaziano* Court concluded that as long as the sentence is consistent and fair, judicial override is not unconstitutional.<sup>41</sup>

Following the Court's assessment and approval of Florida's judicial override scheme,<sup>42</sup> the Court reviewed the constitutionality of Alabama's death penalty statute in *Harris v. Alabama*.<sup>43</sup> Though the Florida and Alabama statutes both allowed for judicial override, the Court needed to evaluate the crucial difference: Florida imposed a standard upon judges for their use of the override provision,<sup>44</sup> whereas Alabama's exercise of judicial override lacked an enumerated standard.<sup>45</sup> Florida required that the sentencing judge

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cases is determined by a judge." *Spaziano*, 468 U.S. at 462–63. Furthermore, the Court articulates its view by stating that:

The fact that a majority of jurisdictions have adopted a different practice . . . does not establish that contemporary standards of decency are offended by the jury override. The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.

*Id.* at 464.

40. *Id.*

41. *Id.*

42. "Judicial override" refers to the ability of a judge to make the final sentencing decision for a capital defendant when the final sentence is not in accord with the jury's recommendation. *See id.* at 463.

43. 513 U.S. 504 (1995).

44. *See Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

45. The Court was careful to avoid imposing *Tedder*:

These statements of approbation . . . do not mean that the *Tedder* standard is constitutionally required. As we stated in *Spaziano* . . . "[o]ur responsibility, however, is not to second-guess the deference accorded the jury's recommendation in a particular case, but to ensure that the result of the process is not arbitrary or discriminatory." We thus made clear that, our praise for *Tedder* notwithstanding, the hallmark of the analysis is not the particular weight a State chooses to place upon the jury's advice, but whether the scheme adequately channels the sentencer's discretion so as to prevent arbitrary results.

give jury recommendations “great weight.”<sup>46</sup> In addition, under *Tedder v. State*, Florida required that before a judge can override a jury verdict, “facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.”<sup>47</sup> Alabama only required that the judge “consider the recommendation of the jury.”<sup>48</sup>

Despite the Court’s implicit approval of Florida’s more rigorous *Tedder* standard, it declined to find the Alabama statute unconstitutional.<sup>49</sup> The Court had previously held the Constitution did not require either “a specific method for balancing mitigating and aggravating factors . . . in capital sentencing proceeding[s],”<sup>50</sup> or “a State to ascribe any specific weight to particular factors . . . to be considered by the sentencer.”<sup>51</sup> Requiring that Alabama adhere to the Florida “great weight” *Tedder* standard “would offend these established principles and place within constitutional ambit micromanagement tasks that properly rest within the State’s discretion to administer its criminal justice system.”<sup>52</sup> The *Harris* court went on to conclude, “the Eighth Amendment does not require the State to define the weight the sentencing judge must accord an advisory jury verdict.”<sup>53</sup> Additionally, the Court found that “[t]he 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 the jury’s recommendation and trusts the judge to give it the proper weight.”<sup>54</sup>

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*Harris*, 513 U.S. at 511 (quoting *Spaziano*, 468 U.S. at 465) (citation omitted); see, e.g., *Judge Override*, EQUAL JUSTICE INITIATIVE, <http://www.eji.org/eji/deathpenalty/override> (last visited Sept. 6, 2010).

46. See *Tedder*, 322 So. 2d at 910.

47. *Id.*

48. ALA. CODE § 13A-5-47(e) (LexisNexis 2005) (providing that “[w]hile the jury’s recommendation shall be given consideration, it is not binding on the court”); see also *Harris v. Alabama*, 513 U.S. 504, 508–09 (1995) (Stevens, J., dissenting).

49. *Harris*, 513 U.S. at 514–15.

50. *Id.* at 512 (quoting *Franklin v. Lynaugh*, 487 U.S. 164 (1988)).

51. *Id.*; see, e.g., *Blystone v. Pennsylvania*, 494 U.S. 299 (1990); *Proffitt v. Florida*, 428 U.S. 242, 257–58 (1984); *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

52. *Harris*, 513 U.S. at 512.

53. *Id.*

54. *Id.* at 515.

The Court commented on other points that arose in *Harris*.<sup>55</sup> First, in response to the defendant's argument that the Alabama law was ineffectual and produced unintended results,<sup>56</sup> the Court found "[a]n ineffectual law is for the state legislature to amend, not for us to annul."<sup>57</sup> Next, the Court addressed defense counsel's presentation of Alabama cases that attempted to demonstrate the inconsistent practice of judicial override.<sup>58</sup> It concluded, "these statements do not indicate that the judges have divergent understandings of the statutory requirement that the jury verdicts be considered; they simply illustrate how different judges have 'considered' the jury's advice. There is no reason to expect that the advisory verdicts will be treated uniformly in every case."<sup>59</sup> Finally, the Court implied that though the above arguments did not pass muster, there might be other constitutional challenges possible for the Alabama statute.<sup>60</sup>

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55. *See id.*

56. *Id.* at 513–14 (defense counsel used statistical evidence to demonstrate judicial override was used predominantly to overturn *life* verdicts by a jury in order to impose *death* verdicts by a judge).

57. *Id.* at 514.

58. Defense counsel offered sentencing reports from various cases to demonstrate the wholly inconsistent and sometimes entirely nonexistent standard for imposing judicial override. *Id.* These cases included judicial rationale that: (1) offered no specification of reasons for rejecting the jury's advice; (2) noted he gave "great weight" to the jury recommendation without elaborating; (3) said there was a "reasonable basis" for override without elaborating; (4) stated the verdict was "unquestionably a bizarre result"; (5) found "if this were not a proper case for the death penalty to be imposed, a proper case can scarcely be imagined." *Id.* Defense counsel intended to show the arbitrary nature of imposition of the death sentence through judicial override. *See id.*

59. *Id.* The Court continued on to say that "[t]he disparate treatment of jury verdicts simply reflects the fact that, in the subjective weighing process, the emphasis given to each decisional criterion must of necessity vary in order to account for the particular circumstances of each case." *Id.* at 515; *see also* *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

60. The *Harris* Court explained:

In any event, *Harris* does not show how the various statements affect her case. She does not bring an equal protection claim, and she does not contest the lower courts' conclusion that her sentence is proportionate to that imposed in similar cases. The sentiments expressed in unrelated cases do not render her punishment violative of the Eighth Amendment.

513 U.S. at 515.

C. Ring v. Arizona: *Increasing the Role of the Jury in Capital Sentencing*

Because the *Harris* decision seemed to clearly legitimize Alabama's judicial override statute, Alabama did little to create a more consistent standard for judicial override.<sup>61</sup> Judges continued to override cases relying upon the same unclear and varied standards that had served as the bases for their prior decisions.<sup>62</sup> However, beginning in 2000 with *Apprendi v. New Jersey*, the Supreme Court started to require a greater role for the jury in sentencing.<sup>63</sup> *Apprendi* found that it is "unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. . . . [S]uch facts must be established by proof beyond a reasonable doubt."<sup>64</sup> Thus, *Apprendi* established that a trial court violates the Sixth Amendment right to a jury trial when it substitutes its judgment of factual findings that increase a defendant's sentence for that of a jury's.<sup>65</sup> Though *Apprendi* did not specify what its holding would mean for capital

61. See generally ALA. CODE §§ 13A-5-39 to -53 (LexisNexis 2005).

62. See, e.g., *Apicella v. State*, 809 So. 2d 841, 865 (Ala. Crim. App. 2000) (holding override permissible when the judge reevaluated the aggravating and mitigating circumstances to find the aggravating circumstance outweighed the mitigating circumstance and that the defendant's behavior "shocked the [c]ourt"), *aff'd sub nom., Ex parte Apicella*, 809 So. 2d 865 (Ala. 2001). For a synopsis of the rationale Alabama judges use in following *Harris*, see Kathryn K. Russell, *The Constitutionality of Jury Override in Alabama Death Penalty Cases*, 46 ALA. L. REV. 5 (1994). Through a study of 81 percent of Alabama capital sentencing orders employing judicial override from 1981–1991, Russell found that judges had a variety of reasons for ignoring advisory jury verdicts. *Id.*

In four . . . cases, the trial court stated that it found that the aggravating circumstances outweighed the mitigating ones to a *moral certainty* . . . . In five . . . cases, the trial court concluded that the heinousness of the crime was pivotal to its decision to override. Three of these cases . . . also cite the deterrence rationale for capital punishment. In [one] case . . . the trial court offered a standard for its decision to override: "The Court finds that there is a *reasonable basis* for enhancing the jury's recommendation of sentence."

*Id.* at 31–32 (alteration in original) (emphasis added) (footnotes omitted).

63. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

64. *Id.* at 490 (quoting *Jones v. United States*, 526 U.S. 227, 252–53 (1999) (Stevens, J., concurring)).

65. See *id.*

cases,<sup>66</sup> three years later the Court clarified that *Apprendi* would apply to capital sentencing in *Ring v. Arizona*.<sup>67</sup>

The *Ring* Court held that “[c]apital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum penalty.”<sup>68</sup> The Court relied on history,<sup>69</sup> the *Apprendi* precedent,<sup>70</sup> and logic<sup>71</sup> when it reasoned that “[i]f it is constitutionally

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66. *See id.* Much of the rationale of *Apprendi* was that judges could not unilaterally decide facts that constituted an element of the crime. *See id.* However, they were still able to make factual determinations regarding sentencing decisions without the jury. *See id.* The Court found that an element of a crime included, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum.” *Id.* This definition did nothing to clear up the lingering question of whether determinations of aggravating and mitigating factors in capital cases should be classified as merely part of the sentencing decision (and therefore able to be decided by a judge alone) or if they were instead considered an element of the crime that must be submitted to the jury for evaluation. *See id.*

However, the *Apprendi* court did at least implicitly suggest that its decision would not apply to capital cases. *See id.*; *see also infra* note 73.

67. 536 U.S. 584, 609 (2002).

68. *Id.* at 589.

69. The *Ring* Court determined:

“If th[e] question had been posed in 1791, when the Sixth Amendment became law,” Justice Stevens said, “the answer would have been clear.” for “[b]y that time, “the English jury’s role in determining critical facts in homicide cases was entrenched. As fact-finder, the jury had the power to determine not only whether the defendant was guilty of homicide but also the degree of the offense. Moreover, *the jury’s role in finding facts that would determine a homicide defendant’s eligibility for capital punishment was particularly well established.* Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations . . . . By the time the Bill of Rights was adopted, the jury’s right to make these determinations was unquestioned.”

*Id.* at 599 (quoting *Walton v. Arizona*, 497 U.S. 639, 710–11 (1990)).

The *Ring* court also noted “[t]he guarantees of [a] jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. . . . If the defendant preferred the common-sense judgment of a jury to the . . . judge, he was to have it.” *Ring*, 536 U.S. at 609 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155–56 (1968)).

70. *See supra* notes 63–66. *See generally Apprendi*, 530 U.S. 466. “We held that *Apprendi*’s sentence violated his right to ‘a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.’” *Ring*, 536 U.S. at 602 (quoting *Apprendi*, 530 U.S. at 477). “A defendant may not be ‘expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.’” *Id.* (quoting *Apprendi*, 530 U.S. at 483 (Scalia, J., concurring)) (“[A]ll the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury.”).

71. “If a State makes an increase in a defendant’s authorized punishment contingent on

impermissible to allow a judge's finding to increase the maximum punishment for carjacking by 10 years, it is not clear why a judge's finding may increase the maximum punishment for murder from imprisonment to death."<sup>72</sup>

*Ring* specifically overruled a prior Supreme Court case, *Walton v. Arizona*,<sup>73</sup> "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."<sup>74</sup> The *Ring* court concluded that "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both."<sup>75</sup>

#### *D. Post-Ring: Alabama Judicial Override in Practice Today*

In the aftermath of *Ring v. Arizona*,<sup>76</sup> the Alabama courts have narrowly interpreted *Ring's* holding so that it has the smallest

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the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602.

The Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders. Entrusting to a judge the finding of facts necessary to support a death sentence might be "an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. . . . The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.

*Id.* at 607 (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)).

72. *Id.* at 601 (quoting *Jones v. United States*, 526 U.S. 227, 272 (1999) (Kennedy, J., dissenting)).

73. 497 U.S. 639 (1990) (holding determination of aggravating factors in capital sentence by trial judge instead of jury is constitutionally permissible). *Apprendi* did not overturn *Walton*, but rather distinguished it by stating "once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether the maximum penalty, rather than a lesser one, ought to be imposed." *Apprendi*, 530 U.S. at 497 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 257 n.2 (1998) (Scalia, J., dissenting)). The *Ring* court addressed this, specifically stating that "we hold that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both." *Ring*, 536 U.S. at 609.

74. *Ring*, 536 U.S. at 609.

75. *Id.*

76. *See id.*



possible impact on Alabama's statutory capital sentencing provisions.<sup>77</sup>

### 1. Alabama Death Sentencing Statutes and Procedure

To sentence a defendant to death, the process must begin in the guilt phase as the jury determines whether the crime is also a capital offense<sup>78</sup> as defined by section 13A-5-40 of the Alabama Code.<sup>79</sup> If

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77. In order to fully grasp the courts' interpretation of *Ring* in light of their statutes, see the applicable Alabama statutes, including ALA. CODE §§ 13A-5-43(a), (d), 13A-5-45, 13A-5-53 (LexisNexis 2005).

78. *Id.* § 13A-5-43(a), (d) (provisions on trial of capital offenses and sentencing).

(a) In the trial of a capital offense the jury shall first hear all the admissible evidence offered on the charge or charges against the defendant. It shall then determine whether the defendant is guilty of the capital offense or offenses with which he is charged . . . .

. . . .

(d) If the defendant is found guilty of a capital offense or offenses with which he is charged, the sentence shall be determined as provided in Sections 13A-5-45 through 13A-5-53.

*Id.*

79. Section 13A-5-39(1) of the Alabama Code defines a capital offense as an offense for which a defendant shall be punished by a sentence of death or life imprisonment without parole. This definition is clarified by section 13A-5-40 of the Alabama Code, which lists capital offenses.

(a) The following are capital offenses:

(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 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.

the jury convicts the defendant of a capital offense under 13A-5-40, the case proceeds to sentencing where the state has the burden of proving the existence of at least one aggravating circumstance<sup>80</sup> beyond a reasonable doubt.<sup>81</sup> Many of the aggravating circumstances

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(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.

*Id.* § 13A-5-40.

80. See *supra* note 15 (listing Alabama's aggravating circumstances under section 13A-5-49 of the Alabama Code).

81. § 13A-5-45(a) to -45(g) (addressing sentence hearing provisions: delays, statements and arguments, admissibility of evidence, burden of proof, mitigating and aggravating circumstances).

(a) Upon 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. The sentence hearing shall be conducted as

required in the penalty phase under section 13A-5-49 overlap with elements required to convict a defendant of a capital offense under section 13A-5-40 in the guilt phase,<sup>82</sup> and therefore this requirement is often already fulfilled by the penalty phase.<sup>83</sup> In accordance with the process outlined in section 13A-5-46, the jury then weighs the

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soon as practicable after the defendant is convicted. Provided, however, if the sentence hearing is to be conducted before the trial judge without a jury or before the trial judge and a jury other than the trial jury, as provided elsewhere in this article, the trial court with the consent of both parties may delay the sentence hearing until it has received the pre-sentence investigation report specified in Section 13A-5-47(b). Otherwise, the sentence hearing shall not be delayed pending receipt of the pre-sentence investigation report.

(b) The state and the defendant shall be allowed to make opening statements and closing arguments at the sentence hearing. The order of those statements and arguments and the order of presentation of the evidence shall be the same as at trial.

(c) At the sentence hearing evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to the aggravating and mitigating circumstances referred to in Sections 13A-5-49, 13A-5-51 and 13A-5-52. Evidence presented at the trial of the case may be considered insofar as it is relevant to the aggravating and mitigating circumstances without the necessity of re-introducing that evidence at the sentence hearing, unless the sentence hearing is conducted before a jury other than the one before which the defendant was tried.

(d) Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Alabama.

(e) At the sentence hearing the state shall have the burden of proving beyond a reasonable doubt the existence of any aggravating circumstances. Provided, however, 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 sentence hearing.

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

(g) The defendant shall be allowed to offer any mitigating circumstance defined in Sections 13A-5-51 and 13A-5-52. When the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence.

*Id.*

82. Compare § 13A-5-49, with § 13A-5-40.

83. See *Ex Parte McGriff*, 908 So. 2d 1024, 1037 (Ala. 2004) (requiring unanimous finding of the statutory aggravating circumstance in the penalty phase). This finding is independent of the finding of the initial aggravating component in the guilt phase.

aggravating and mitigating circumstances to determine whether the sentence will be life without parole or death.<sup>84</sup> The Alabama Code makes clear that this verdict is merely advisory.<sup>85</sup> Once the jury renders its verdict the judge proceeds to make the final sentencing decision in accordance with section 13A-5-47 of the Alabama Code.<sup>86</sup>

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84. § 13A-5-46(a), (d)–(g).

(a) Unless both parties with the consent of the court waive the right to have the sentence hearing conducted before a jury . . . it shall be conducted before a jury which shall return an advisory verdict as provided by subsection (e) of this section. . . .

. . . .

(d) After hearing the evidence and the arguments of both parties at the sentence hearing, the jury shall be instructed on its function and on the relevant law by the trial judge. The jury shall then retire to deliberate concerning the advisory verdict it is to return. (e) After deliberation, the jury shall return an advisory verdict as follows:

(1) If the jury determines that no aggravating circumstances . . . exist, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole;

(2) If the jury determines that one or more aggravating circumstances . . . exist but do not outweigh the mitigating circumstances, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole;

(3) If the jury determines that one or more aggravating circumstances . . . exist and that they outweigh the mitigating circumstances, if any, it shall return an advisory verdict recommending to the trial court that the penalty be death.

. . . .

(f) The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors.

(g) If the jury is unable to reach an advisory verdict recommending a sentence, or for other manifest necessity, the trial court may declare a mistrial of the sentencing hearing.

*Id.* For Alabama's statutory aggravating and mitigating circumstances referred to in the above statute, see *id.* §§ 13A-5-49, –51, –52.

85. *See id.* § 13A-5-46(a).

86. *Id.* § 13A-5-47 (including determination of sentence by court, pre-sentence investigation report, presentation of arguments on aggravating and mitigating circumstances, court to enter written findings, court not bound by sentence recommended by jury).

(a) After the sentence hearing has been conducted, and after the jury has returned an advisory verdict . . . the trial court shall proceed to determine the sentence.

(b) Before making the sentence determination, the trial court shall order and receive a written pre-sentence investigation report. The report shall contain the information prescribed by law or court rule for felony cases generally and any additional information specified by the trial court. No part of the report shall be kept confidential, and the parties shall have the right to respond to it and to present evidence to the court

In *Brownlee v. Haley* the Eleventh Circuit provided a the following procedural synopsis for Alabama capital sentencing after the jury's advisory verdict:<sup>87</sup>

After the jury has returned its advisory verdict at the sentencing phase, the trial judge orders and receives a presentence investigation report, hears further arguments, and may receive additional evidence concerning the aggravating and mitigating factors. Taking into account all of the evidence, including that introduced at trial and in the sentencing proceeding before the jury, the court must then enter written findings with regard to the aggravating and mitigating circumstances. Like the jury, the trial judge must determine whether any aggravating circumstances exist and, if so, whether those aggravating circumstances outweigh any mitigating circumstances that it may find. In reaching its ultimate decision the trial court 'shall consider the

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about any part of the report which is the subject of factual dispute. The report and any evidence submitted in connection with it shall be made part of the record in the case.

(c) Before imposing sentence the trial court shall permit the parties to present arguments concerning the existence of aggravating and mitigating circumstances and the proper sentence to be imposed in the case. The order of the arguments shall be the same as at the trial of a case.

(d) Based upon the evidence presented at trial, the evidence presented during the sentence hearing, and the pre-sentence investigation report and any evidence submitted in connection with it, the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in Section 13A-5-49, each mitigating circumstance enumerated in Section 13A-5-51, and any additional mitigating circumstances offered pursuant to Section 13A-5-52. The trial court shall also enter written findings of facts summarizing the crime and the defendant's participation in it.

(e) In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict . . . . While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

*Id.* § 13A-5-47. For Alabama's statutory aggravating and mitigating circumstances referred to in the above statute, see *id.* §§ 13A-5-49, -51, -52.

87. 306 F.3d 1043 (11th Cir. 2002).

recommendation of the jury contained in the advisory verdict  
 . . . .<sup>88</sup>

## 2. Alabama Cases Post-*Ring*

### a. *Ring*'s Holding Requires Only that the Jury Find an Aggravating Circumstance

Cases decided in the aftermath of *Ring* provide minimal insight into whether Alabama courts' interpretation of their sentencing procedure has changed following *Ring*'s increased reliance on the jury in capital sentencing.<sup>89</sup> The first Alabama case to seriously acknowledge the *Ring* decision was *Brownlee v. Haley* in 2002.<sup>90</sup> The court noted that:

The particular importance of the jury's role in the application of the death sentence has been re-emphasized by the Supreme Court's recent decision in *Ring*, which held the Sixth Amendment does not allow "a sentencing judge, sitting without a jury, to find . . . aggravating circumstance[s] necessary for imposition of the death penalty," and instead "requires that they be found by a jury."<sup>91</sup>

Though the *Brownlee* court correctly stated the *Ring* law, it also made clear that *Ring* did not directly address the Alabama sentencing scheme involving advisory jury verdicts.<sup>92</sup> The court did not take *Ring* as an invitation to reevaluate its sentencing process. It instead

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88. *Brownlee*, 306 F.3d at 1050 (emphasis added).

89. *See Ring v. Arizona*, 536 U.S. 584 (2002).

90. *See generally Brownlee*, 306 F.3d at 1043. The state court mentioned the *Ring* holding in an earlier case, but timing prevented its application. *See Ex parte Carroll*, 852 So. 2d 833, 836 n.1 (Ala. 2002) ("Because we are remanding [for a life sentence] . . . issues as to the continued validity of the conclusions . . . regarding the effect of a jury's recommendation of life imprisonment . . . and the authority of the trial court to override such a sentence and the scope of the appellate court's review must await another day."). The importance of this statement is that the court, though not yet applying *Ring* to the Alabama statutory death penalty scheme, seemed to recognize the potential dramatic effect *Ring* could have on the bulk of its death penalty jurisprudence up to that point. *See generally id.*

91. *Brownlee*, 306 F.3d at 1078 (quoting *Ring*, 536 U.S. at 585).

92. "[B]ut the Supreme Court did not address the constitutionality of the Alabama and Florida systems, 'in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations.'" *Id.*

concluded there was “no need to address the many complicated issues raised by *Ring* because Brownlee’s sentence was improperly rendered under [other] longstanding principles.”<sup>93</sup>

Six months later, in *Ex parte Waldrop*, the state supreme court recognized that the statutory scheme creates a *Ring* problem.<sup>94</sup> Many of the section 13A-5-49 aggravating circumstances required to impose a sentence of death in the penalty phase restate the section 13A-5-40 elements of a capital offense, which have already been found to exist in the guilt phase.<sup>95</sup> The court found that at least in cases where an aggravating circumstance was part of the murder charge,<sup>96</sup> *Ring*, “as applied to the Alabama statutory scheme, forecloses the trial court from imposing a death sentence unless the jury has unanimously found beyond a reasonable doubt the existence of at least one § 13A-5-49 aggravating circumstance.”<sup>97</sup>

In *Ex parte McNabb*, the Alabama Supreme Court extended their *Waldrop* holding to cases where an aggravating circumstance is not already included as an element of the capital offense.<sup>98</sup> Thus, the court found that if an aggravating circumstance was not already identified during the guilt phase, *Ring* required the jury to unanimously find beyond a reasonable doubt at least one statutory aggravating circumstance in the sentencing phase.<sup>99</sup>

Though this decision seemed to recognize an obvious requirement of *Ring*—a factual finding by the jury is required to raise a sentence

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93. *Id.* The court also made one final statement about *Ring*: “Plainly, however, *Ring* reinforces our earlier holdings regarding the central role of the jury in the capital sentencing process.” *Id.* at 1078–79. The court implies that Alabama had correctly addressed the role of the jury and *Ring* would have no effect on its interpretation of capital sentencing going forward. *Id.* at 1079.

94. 859 So. 2d 1181, 1184 (Ala. 2003).

95. *Id.* at 1187–88; see *supra* notes 82–83 and accompanying text.

96. See ALA. CODE § 13A-5-45(e) (LexisNexis 2005) (“[A]ny aggravating circumstance[s] which the verdict convicting the defendant establishes was proven . . . at trial shall be considered as proven . . . for purposes of the sentence hearing.”).

97. *Ex parte McGriff*, 908 So. 2d 1024, 1037 (Ala. 2004) (interpreting *Waldrop*, 859 So. 2d at 1187–88, 1190). While this holding appeared to provide extra *Ring* assurances, in *Ex parte McGriff*, the court clarified that “if the indictment charges the defendant with a capital offense which . . . already includes one of the . . . aggravating circumstances, . . . then a guilty verdict on that charge in the guilt phase of the trial satisfies the requirement of *Ring*, as applied to the Alabama statutory scheme.” *Id.* at 1037; see also §§ 13A-5-40, –49.

98. 887 So. 2d 998 (Ala. 2004).

99. See *id.* at 1006; see also *McGriff*, 908 So. 2d at 1037.

to death—the *McNabb* court complicated its holding by inferring that the jury had found an aggravating circumstance despite the fact that the jury had made no such explicit finding.<sup>100</sup> The Alabama Supreme Court reasoned that the lower court properly instructed the jurors that they must unanimously find the existence of a statutory aggravating circumstance before they could consider death, and the jurors most likely adhered to that instruction.<sup>101</sup> Using circular logic, the court found that because the jury considered death, it must have found the necessary aggravating circumstance,<sup>102</sup> and the judge could permissibly override the jury’s advisory verdict of life imprisonment while still conforming to the constitutional standards of *Ring*.<sup>103</sup>

*Ex parte McGriff* applied and clarified the *McNabb* holding.<sup>104</sup> The *McGriff* court found that because the defendant was charged with a capital murder that did not by its definition include an aggravating circumstance, the trial court could not impose a death sentence “unless, during the penalty phase of the trial, the jury unanimously finds beyond a reasonable doubt the existence of the aggravating circumstance proffered by the State.”<sup>105</sup> The court’s opinion openly articulated for the first time that *Ring* created the possibility of binding the judge to the jury’s advisory verdict.<sup>106</sup> The court noted

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100. *McGriff*, 908 So. 2d at 1038–39 (citing *McNabb*, 887 So. 2d at 1006).

101. *Id.*

102. *Id.*

103. *See id.* at 1039; *see also* *Ring v. Arizona*, 536 U.S. 584 (2002).

104. *McGriff*, 908 So. 2d at 1039.

*Ex parte McNabb* recognizes that *Ring*, as applied to the Alabama statutory scheme, forecloses the trial court from imposing a death sentence for this kind of capital offense—one defined by a subsection of § 13A-5-40(a) which does not include an aggravating circumstance as part of the definition of the offense—unless, in the sentencing phase of the trial, the jury has unanimously found beyond a reasonable doubt the existence of at least one aggravating circumstance.

*Id.* at 1037.

105. *Id.* at 1038 (citing *McNabb*, 887 So. 2d 1024).

106. *McGriff* went on to state:

Section 13A-5-46(e)(1) reads: “If the jury determines that no aggravating circumstances as defined in section 13A-5-49 exist, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole.” *Ring* requires that this subsection be applied in these terms: If the jury determines that no aggravating circumstance as defined in § 13A-5-49 exists, the jury must return a verdict, *binding on the trial court*, assessing the penalty of life imprisonment without parole.



that significant confusion arose from the *McNabb* court's inference that the jury had met the *Ring* standard without clearly finding aggravating circumstances.<sup>107</sup> To remedy this, *McGriff* recommended the use of specific instructions,<sup>108</sup> and went so far as to suggest a prospective direction "that the count of the jurors' votes on the issue of the existence of an aggravating circumstance be expressly recorded on the verdict form."<sup>109</sup>

Despite *McGriff*'s call for additional procedures to safeguard against *Ring* violations under the statutory scheme,<sup>110</sup> the Alabama courts have done little to hone a consistent method for *Ring*'s application to their death sentencing statutes. Instead, the current trend is to uphold the Alabama sentencing scheme against constitutional challenges without any modification or further consideration.<sup>111</sup>

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*Id.* (emphasis added).

107. *Id.*; see *Ex parte McNabb*, 887 So. 2d 998, 1038 (Ala. 2004).

*Ex Parte McNabb* held that even a non-unanimous death recommendation by the jury proved that the jury, including the jurors who voted against the death recommendation, had unanimously found a proffered aggravating circumstance, even though it was not included within the [statutory] definition of the particular . . . indictment, because the trial court had expressly instructed the jury that they could not proceed to a vote on a death recommendation unless they had already unanimously agreed that the aggravating circumstance existed. [*McNabb*] did not decide whether or how a court could deduce from a *life* recommendation whether or not the jurors had unanimously found the existence of at least one aggravating circumstance. The significance of this question is that a life recommendation based on a unanimous finding beyond a reasonable doubt that an aggravating circumstance existed, followed by a conclusion that the aggravating circumstance did not outweigh one or more mitigating circumstances would be subject to an override by the trial court imposing a death sentence, while a life recommendation based on a lack of a unanimous finding beyond a reasonable doubt that an aggravating circumstance existed would not be subject to such an override. Moreover the Alabama death penalty statutory scheme does not specify, and this Court has not yet decided, how many jurors' votes would be necessary to a determination by the jury that no aggravating circumstances . . . exist.

*McGriff*, 908 So. 2d at 1038–39 (citations omitted).

108. See *McGriff*, 908 So. 2d at 1038.

109. *Id.* at 1039.

110. See *id.* at 1038–39.

111. See *infra* Part I.D.2.b.

b. Alabama Courts Recite the ‘Override is Constitutional’ Refrain

i. *Ring* Does Not Affect Override: Alabama Procedure Does Not Violate Defendants’ Sixth Amendment Rights under *Ring*

*Tomlin v. State*<sup>112</sup> was one of the first Alabama cases following the *Ring* decision, and though portions of its interpretation of *Ring* were overturned,<sup>113</sup> much of the court’s *Ring* rationale survives as the basis for Alabama courts’ current approach to *Ring*.<sup>114</sup> *Tomlin v. State* explicitly stated that the *Ring* holding was narrow, finding only that the Arizona statutory sentencing scheme was unconstitutional.<sup>115</sup> The *Tomlin* court further stated that *Ring* essentially had no bearing on its statutory scheme because it did not specifically address whether judicial sentencing in a capital case is constitutional or whether judicial override is constitutional.<sup>116</sup> Finally, *Tomlin* noted that *Ring* also left to the individual states to determine whether any violation of *Ring* could be harmless.<sup>117</sup>

The *Tomlin* court relied heavily upon the *Harris* decision and likened Alabama’s override provision to Florida’s *Tedder* standard regarding override.<sup>118</sup> Relying heavily upon this comparison, without further evaluation or exploration into the Alabama statute

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112. 909 So. 2d 213 (Ala. Crim. App. 2002), *rev’d*, *Ex parte Tomlin*, 909 So. 2d 283 (Ala. 2003).

113. *See Ex parte Tomlin*, 909 So. 2d 283 (Ala. 2003).

114. *See, e.g.*, *Moody v. State*, 888 So. 2d 532, 602–04 (Ala. Crim. App. 2003) (“We pretermitted discussion of Moody’s other arguments . . . concerning *Ring*’s impact on his sentence of death, because our discussion of the issues above is dispositive of Moody’s other claims. Moody’s sentence of death does not violate the holding of *Ring*.”).

115. *Tomlin*, 909 So. 2d at 281.

116. *Id.*

117. “We therefore rejected the contention that ‘placing the responsibility on a trial judge to impose the sentence in a capital case is so fundamentally at odds with contemporary standards of fairness and decency that Florida must be required to alter its scheme and give final authority to the jury to make the life-or-death decision. *Id.* at 281–83 (quoting *Harris v. Alabama*, 513 U.S. 504, 508–13 (1995)); *see also* *Walton v. Arizona*, 497 U.S. 639 (1990); *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990).”

118. *See supra* notes 44, 46–47 and accompanying text.

specifically, it concluded that the Alabama statute was constitutional.<sup>119</sup>

Following in the natural footsteps of *Tomlin*, *Hooks v. State*,<sup>120</sup> a more recent case, takes the position of completely ignoring the *Ring* claim. *Hooks* dismisses the claim without analysis as already having been considered and not needing to be considered again.<sup>121</sup>

ii. Alabama Procedure Withstands Other Constitutional Attacks: Alternative Claims of Constitutional Violations Dismissed Without Consideration

*Hooks v. State* took a similar approach to alternative constitutional attacks the defendant made on the Alabama sentencing scheme.<sup>122</sup> The defendant argued that the Alabama statute violated the Due Process Clause of the Fourteenth Amendment because it was unconstitutional on its face and as applied to him.<sup>123</sup> He reasoned that the statute “results in the arbitrary application of the death penalty based on political pressures.”<sup>124</sup> The defendant also raised a Fourteenth Amendment Equal Protection Clause claim.<sup>125</sup> Though the *Hooks* court found much of the claim barred because it was not properly preserved for appeal, it resolutely noted that “we have repeatedly upheld Alabama’s capital-murder sentencing scheme against constitutional attacks.”<sup>126</sup> A number of cases preceding this decision dealt with the issue in a similar manner, summarily

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119. “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.” *Tomlin*, 909 So. 2d at 283.

120. 21 So. 3d 772 (Ala. Crim. App. 2008).

121. *Id.*; see also *Brownfield v. State*, No. CR-04-0743, 2007 WL 1229388 (Ala. Crim. App. 2007) (“[T]his court noted that both this Court and the Alabama Supreme Court have repeatedly held that the United States Supreme Court in *Ring* did not invalidate Alabama’s death penalty statute.”).

122. *Hooks*, 21 So. 3d 772.

123. *Id.* at 795.

124. *Id.*

125. *Id.*

126. *Id.* at 792. The court’s brief constitutional analysis was expanded in a single footnote stating that “[t]his statute has withstood constitutional challenge.” *Id.* at 795 n.17.

It is particularly interesting that the courts seem to ignore the Equal Protection claim despite the *Harris* court’s suggestion that an Equal Protection challenge might be effective. See *supra* note 60.

concluding that any constitutional attacks on the Alabama sentencing statute are invalid.<sup>127</sup>

- c. Despite Declaration that Alabama's Process is Constitutional, Procedural Questions are Not Clearly Defined by Alabama Courts.
  - i. The Process of Weighing Aggravating and Mitigating Circumstances by the Judge: What Does the Jury Verdict Even Mean?

Under Alabama Code Section 13A-5-47, a court *must* give some consideration to the jury's recommendation.<sup>128</sup> Courts have been unclear, however, regarding the weight and value of that consideration in the judicial override decision. Some courts have not said whether any weight was given to the jury verdict in their ultimate decision.<sup>129</sup> Other courts that have considered the jury recommendation as a factor lack clarity as to exactly how it is incorporated. In *Ex parte Carroll*, the court found that a jury recommendation must be treated as a mitigating circumstance, and that a jury's ten-to-two vote for life imprisonment demonstrated "overwhelming support" for such a sentence.<sup>130</sup> The *Carroll* court also determined that the weight given to a jury recommendation

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127. See, e.g., *Spencer v. State*, No. CR-04-2570, 2008 WL 902766 (Ala. Crim. App. Apr. 4, 2008) (finding that constitutional attacks on the Alabama sentencing statute are invalid); *Clark v. State*, 896 So. 2d 584, 642 (Ala. Crim. App. 2003) ("[B]oth the death penalty in general and Alabama's capital-murder statute in particular have been upheld against a variety of constitutional attacks.").

For other examples of cases upholding the Alabama statute's constitutionality post-*Ring*, see *Ex parte Hodges*, 856 So. 2d 936, 942 (Ala. 2003); *Ex parte Waldrop*, 859 So. 2d 1181, 1191 (Ala. 2002); *Ferguson v. State*, 13 So. 3d 418, 425-32 (Ala. Crim. App. 2008); *Harris v. State*, 2 So. 3d 880, 926-27 (Ala. Crim. App. 2007); *Stallworth v. State*, 868 So. 2d 1128, 1178 (Ala. Crim. App. 2001) (opinion on return to second remand); *Clark v. State*, 896 So. 2d 584, 596 (Ala. Crim. App. 2000).

128. See ALA. CODE § 13A-5-47 (2009) (quoted in *supra* note 86).

129. See *Harris v. Alabama*, 513 U.S. 504, 514-15 (1995); see also *supra* note 59.

130. 852 So. 2d 833, 837 (Ala. 2002). *Carroll* arose before *Ring* was decided. *Id.* The judge is able to assess facts outside the purview of the jury. See *id.* at 835-37; see also *infra* Part I.D.2.c.iii.

should depend upon the “strength of the factual basis for such a recommendation in the form of information known to the jury.”<sup>131</sup>

In *Ex parte Tomlin*, the court rejected a standard of “serious consideration” in favor of what they deemed a higher standard of “great weight” for cases where there was a unanimous jury verdict against death.<sup>132</sup> Relying on *Carroll’s* assessment that a ten-to-two verdict was “overwhelming support,” the court reasoned that a unanimous recommendation “provides even more ‘overwhelming support’ of such a sentence and, therefore, must be afforded great weight.”<sup>133</sup> It also found that the weight given to a jury’s recommendation “should depend upon the number of jurors recommending a [life] sentence.”<sup>134</sup> However, the court did not define or provide further interpretation of the “great weight” standard, and it is still unclear whether all courts follow this standard when taking the jury verdict into account.<sup>135</sup>

#### ii. Does the Judge Need a Reason to Override?

Alabama Code Section 13A-5-47 is silent as to whether the judge needs a reason to override a jury verdict.<sup>136</sup> In fact, by its language, a judge must always perform an independent assessment of the jury verdict even when the overwhelming evidence is for a life verdict, weighing the mitigating and aggravating circumstances.<sup>137</sup> After assessing the jury verdict the judge is free to override it, even if the jury was wholly correct in its assessment of the factors.<sup>138</sup>

Despite a holding in *Ex parte Taylor* that a judge must set out specific reasons for overriding a jury recommendation,<sup>139</sup> courts do not always openly state their reasons. When courts do give reasons

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131. *Carroll*, 852 So. 2d at 836.

132. *Ex parte Tomlin*, 909 So. 2d 283, 286 (Ala. 2003).

133. *Id.* at 287.

134. *Id.* at 286 (citing *Carroll*, 852 So. 2d at 836).

135. *See id.*

136. *See* ALA. CODE § 13A-5-47 (2009) (quoted in *supra* note 86).

137. *See id.*

138. It is particularly concerning that the judge has this ability since judges are not given a formula for weighing the aggravating and mitigating circumstances under Section 13A-5-47, but the jury *is* given a formula to follow in their assessment under Section 13A-5-46(d)–(g). *See supra* notes 84, 86.

139. 808 So. 2d 1215, 1219 (Ala. 2001); *see also supra* note 86.

for overriding a jury's verdict, they are extremely varied and utterly inconsistent, failing to provide a defendant with any guess as to why a particular judge might override his jury verdict for life.<sup>140</sup>

In addition, courts have imposed the death sentence by judicial override in cases with a wide array of facts, often without explanation for the judge's decision to override aside from citing the aggravating circumstances. The great variety of circumstances indicate how unclear it might be to a defendant whether a judge will impose a death sentence in his case after the jury voted for life.<sup>141</sup>

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140. See *Harris v. Alabama*, 513 U.S. 504, 514 (1995) (enumerating cases citing these reasons); see also *Flowers v. State*, 922 So. 2d 938 (Ala. Crim. App. 2005); *Turner v. State*, 924 So. 2d 737, 795 (Ala. Crim. App. 2002).

141. The following cases are examples of varying facts leading to judicial override and imposition of a death sentence that were upheld by the appellate courts; it is apparent that some courts focused more heavily on aggravating factors while others attempted to provide a full picture of the facts presented. *Woods v. State*, 13 So. 3d 1, 37 (Ala. Crim. App. 2007) (finding that the judicial override was valid because the defendant knowingly created a great risk of death to many persons in the commission of the offense, the offense was committed for the purpose of preventing a lawful arrest, the offense was committed to hinder the enforcement of the laws, the defendant intentionally caused the death of two or more persons, and no statutory or nonstatutory mitigating circumstances existed); *Flowers*, 922 So. 2d at 960–61 (finding that the statutory aggravating circumstances that murder had been committed during the course of a kidnapping and robbery and that murder had been especially heinous, atrocious, or cruel as compared to other capital murders outweighed the statutory mitigating circumstances that defendant had no significant history of prior criminal activity and that defendant had been eighteen years old at time of murder and the non-statutory mitigating circumstances that defendant lacked stable home life, that his mother had died when he was sixteen years of age, that he had little formal education, and that he abused drugs); *Turner*, 924 So. 2d at 790–91 (holding that defendant's lack of prior criminal activity and testimony from his relatives that defendant had been a "nice" boy growing up did not outweigh aggravating factors that murder was committed during rape and robbery and murder was especially heinous, atrocious or cruel as compared to other capital murders); *Brownlee v. State*, 545 So. 2d 151, 165 (Ala. Crim. App. 1988) (upholding trial court's findings of no mitigating circumstances and three aggravating circumstances: the capital offense was committed by a person under sentence of imprisonment, the defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person, and the capital offense was committed while the defendant was engaged in the commission of a robbery); *Hooks v. State*, 534 So. 2d 329, 366 (Ala. Crim. App. 1987) (supporting trial court's finding that aggravating circumstances of homicide committed during a robbery outweighed mitigating circumstances of emotional and psychiatric problems, expression of remorse in confession, and father's love for defendant).

iii. Can the Judge Consider Information Not Considered by the Jury Despite Potentially Violating the Core Idea of *Ring*?

*McNabb* and *McGriff* demonstrated that *Ring* required juries to find an aggravating circumstance at least beyond a reasonable doubt.<sup>142</sup> Alabama courts, however, clarified that *Ring* does not have an effect on the override procedure.<sup>143</sup> Under their interpretation of *Ring*, the fact that the judge takes information into consideration that the jury is not able to see and evaluate is not problematic.<sup>144</sup> The Alabama Supreme Court recognized that a judge may consider aggravating and mitigating evidence not presented to the jury.<sup>145</sup> “[T]he jury’s recommendation may be overridden based upon

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142. See *supra* notes 98–109 and accompanying text.

143. See, e.g., *Carroll*, 852 So. 2d at 836; *Flowers*, 922 So. 2d at 959.

144. In an old case regarding judicial override, Justice Murphy wrote an apropos dissent, finding the judge’s use of inadmissible information an unconstitutional process and highlighting the importance of the jury’s decision. See *Williams v. New York*, 337 U.S. 241, 253 (1949) (Murphy, J., dissenting). Justice Murphy makes compelling points regarding the use of information outside of the jury:

[I]n spite of the shocking character of the crime of which they found him guilty, [the jurors] were unwilling to decree that [the defendant’s] life should be taken. In our criminal courts the jury sits as the representative of the community; its voice is that of the society against which the crime was committed. A judge, even though vested with statutory authority to do so, should hesitate indeed to increase the severity of such a community expression.

He should be willing to increase it, moreover, only with the most scrupulous regard for the rights of the defendant. The record before us indicates that the judge exercised his discretion to deprive a man of his life, in reliance on material made available to him in a probation report, consisting almost entirely of evidence that would have been inadmissible at the trial. Some, such as allegations of prior crimes, was irrelevant. Much was incompetent as hearsay. All was damaging, and none was subject to scrutiny by the defendant.

Due process of law includes at least the idea that a person accused of crime shall be accorded a fair hearing through all the stages of the proceedings against him. I agree with the Court as to the value and humaneness of liberal use of probation reports as developed by modern penologists, but, in a capital case, against the unanimous recommendation of a jury, where the report would concededly not have been admissible at the trial, and was not subject to examination by the defendant, I am forced to conclude that the high commands of due process were not obeyed.

*Id.*

145. *Carroll*, 852 So. 2d at 835–37.

information known only to the trial court and not to the jury, when such information can properly be used to undermine a mitigating circumstance.”<sup>146</sup>

Based on recent Alabama case law’s interpretation of its death-sentencing procedure, *Ring* is inconsequential and the statutory scheme is constitutional, despite having no standard for evaluating the jury verdict, no articulated reason for the override decision, and the fact that the judge can consider additional information not given to the jury in making his determination to override a jury verdict of life.<sup>147</sup> The courts’ failure to further consider these varied and unclear procedural issues demonstrates the lack of consistency in Alabama’s sentencing procedure.

#### d. Is Appellate Review Effective in Enacting a Standard?

Despite the state courts’ unwillingness to explore the overall constitutionality of the Alabama sentencing process,<sup>148</sup> some small changes are being made to create more consistency at the appellate level pursuant to Alabama Code Section 13A-5-53, which provides the standard for appellate review of death sentences.<sup>149</sup> As an

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146. *Id.*

147. *See supra* Part I.D.2.b.

148. *See supra* Part I.D.2.b–c.

149. Alabama Code requires that appellate courts automatically review cases where the death penalty is imposed for the propriety of the death sentence. ALA. CODE § 13A-5-53 (2009) (addressing appellate review of death sentence, scope, remand, and specific determinations to be made by court).

This review shall include the determination of whether any error adversely affecting the rights of the defendant was made in the sentence proceedings, whether the trial court’s findings concerning the aggravating and mitigating circumstances were supported by the evidence, and whether death was the proper sentence in the case. If the court determines that an error adversely affecting the rights of the defendant was made in the sentence proceedings or that one or more of the trial court’s findings concerning aggravating and mitigating circumstances were not supported by the evidence, it shall remand the case for new proceedings to the extent necessary to correct the error or errors. If the appellate court finds that no error adversely affecting the rights of the defendant was made in the sentence proceedings and that the trial court’s findings concerning aggravating and mitigating circumstances were supported by the evidence, it shall proceed to review the propriety of the decision that death was the proper sentence.

*Id.* The Alabama Court of Criminal Appeals is expected to consider:



example, in *Spencer v. State*<sup>150</sup> the Criminal Court of Appeals reviewed the trial court's opinion for plain error, assessing in depth the trial judge's sentencing order overriding the jury's recommendation of life without parole.<sup>151</sup> The appellate court found that the trial court had adequately reviewed statutory aggravating and mitigating circumstances, but it had failed to definitively find nonstatutory mitigating circumstances required by the statute.<sup>152</sup> Relying on recent precedent noting a lack of clearly identified mitigating factors,<sup>153</sup> the *Spencer* court found that trial courts must "specifically identify in [their] sentencing order[s] those nonstatutory mitigating circumstances that [they found] to exist."<sup>154</sup>

Though *Spencer v. State* correctly found that prior case law requires specific findings of weight given to the jury's recommendation and the reason for the judicial override, the problem remains the same: there is no articulated standard for either requirement. Therefore, regardless of attempts at higher scrutiny by appellate courts, Alabama courts on the whole still refuse to articulate

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(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether an independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death was the proper sentence; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(c) The Court of Criminal Appeals shall explicitly address each of the three questions specified in subsection (b) of this section in every case it reviews in which a sentence of death has been imposed.

*Id.*

150. No. CR-04-2570, 2008 WL 902766 (Ala. Crim. App. Apr. 4, 2008).

151. *Id.* at \*30. The sentencing report should always be reviewed, according to section 13A-5-53 of the Alabama code. *See* § 13A-5-53 (quoted in *supra* note 149).

152. *Spencer*, 2008 WL 902766, at \*30. For a list of mitigating circumstances, see *supra* note 16.

153. *Morrow v. State*, 928 So. 2d 315, 326 (Ala. Crim. App. 2004) (finding that the trial court indicated reliance upon the existence of nonstatutory mitigating circumstances but did not specify what they were). The court also relied upon *Roberts v. State*, which required the appellate court to independently re-weigh the trial court's assessment of the mitigating and aggravating factors. 735 So. 2d 1244, 1269 (Ala. Crim. App. 1997), *aff'd*, 735 So. 2d 1270 (Ala. 1999).

154. *Spencer*, 2008 WL 902766, at \*31; *see also* *Scott v. State*, 937 So. 2d 1065, 1087-88 (Ala. Crim. App. 2005) (holding that the trial court "must make a clear finding regarding the existence or nonexistence of nonstatutory mitigating evidence offered by a defendant").

a consistent method for employing judicial override, and many recent cases of judicial override vary widely in the rationale for imposition of the death sentence.<sup>155</sup>

### 3. The Alabama Death Penalty Broken Down: A Numerical Appeal to Logic and Reality

Judicial override is a prominent factor contributing to the high rate of death sentences in Alabama.<sup>156</sup> The cases that actually make it to appeal and whose opinions are published are the exception. Statistics provide a more accurate idea of just how skewed the Alabama capital sentencing system is in practice, demonstrating a reality that is lost by simply reviewing the stronger cases that made it to appellate review.

As of 2006, Alabama led the country in the rate of new death sentences for the fifth consecutive year.<sup>157</sup> While the rates of death sentencing in the rest of the country over the last three years demonstrate an average annual decrease of fourteen percent, Alabama's rate over the same period had an average annual *increase* of twenty-two percent.<sup>158</sup> In 2008, more people were sentenced to death in Alabama than in Georgia, Tennessee, Virginia, South Carolina, Kentucky, and Mississippi combined.<sup>159</sup> In addition, Alabama sentenced in excess of eight times more people to death per capita than Texas.<sup>160</sup>

Focusing on judicial override specifically, Alabama is one of only three states that permits judicial override,<sup>161</sup> and it is the only state in

155. See *supra* Part I.D.2.c.

156. *Death Sentences in Alabama*, EQUAL JUSTICE INITIATIVE (Feb. 2008), <http://eji.org/eji/files/02.08.08%20Death%20Sentences%20in%20Alabama.pdf> [hereinafter EJI, *Death Sentences*]. As of December 2009, there are 200 people on death row in Alabama. *The Death Penalty in Alabama*, EQUAL JUSTICE INITIATIVE (Dec. 2009), <http://eji.org/eji/files/06.07.10%20Death%20Penalty%20in%20Alabama%20Fact%20Sheet.pdf> [hereinafter EJI, *Death Penalty*].

157. EJI, *Death Sentences*, *supra* note 156.

158. *Id.*

159. *Id.*

160. EJI, *Death Penalty*, *supra* note 156; *Judicial Override in Alabama*, EQUAL JUSTICE INITIATIVE (Mar. 2008), [http://www.eji.org/eji/files/03.19.08%20Judicial%20Override%20Fact%20Sheet\\_0.pdf](http://www.eji.org/eji/files/03.19.08%20Judicial%20Override%20Fact%20Sheet_0.pdf) [hereinafter EJI, *Judicial Override*].

161. See generally EJI, *Death Penalty*, *supra* note 156; EJI, *Judicial Override*, *supra* note 160. The other two states with judicial override statutes are Florida and Delaware, but their override systems give a much more limited power to the judge to override the jury's decision.

the country that permits trial judges to impose a death sentence in cases where jurors strongly favor a lesser sentence.<sup>162</sup> Thirty percent of Alabama death sentences in 2008 were imposed by judicial override of a jury verdict for life without parole.<sup>163</sup> That rate is only slightly higher than the death row population of Alabama overall, with almost a quarter of death row inmates first receiving a life without parole sentence that was changed to a death sentence by the trial judge.<sup>164</sup> Since 1976, judicial override has accounted for eighty-

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*See* EJI, *Death Sentences*, *supra* note 156; EJI, *Judicial Override*, *supra* note 160. In Delaware, the only state with both an advisory verdict system and appointed judges, judges overrode seven jury recommendations, all from death to life, as of 2002. Adam Liptak, *Fewer Death Sentences Likely if Juries Make Ultimate Decision, Experts Say*, N.Y. TIMES, June 25, 2002, at A21; *see also supra* notes 42–48 and accompanying text.

*Tedder* mandates that the jury's sentencing decision be given "great weight" and requires that the facts suggesting a sentence of death be so clear and convincing that virtually no reasonable person could differ. *See* *Tedder v. State*, 322 So. 2d 908 (Fla. 1975). The Florida common law creates a judicial override provision that focuses on whether the jury's recommendation is reasonable; if so, it is improper to override the sentencing decision. *See id.* Therefore, Florida law requires there to be more than a mere difference of opinion regarding the balancing of aggravating and mitigating circumstances by the judge and the jury. *See id.*

Additionally, the Delaware statute provides:

If a jury has been impaneled and if the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of this section has been found beyond a reasonable doubt by the jury, the Court, after considering the findings and recommendation of the jury and *without hearing or reviewing any additional evidence*, shall impose a sentence of death if the Court finds by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist. The jury's recommendation concerning whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist shall be given such consideration as deemed appropriate by the Court in light of the particular circumstances or details of the commission of the offense and the character and propensities of the offender as found to exist by the Court. The jury's recommendation shall not be binding upon the Court.

DEL. CODE ANN. tit. 11, § 4209(d) (2007) (emphasis added).

162. EJI, *Death Penalty*, *supra* note 156; *see also* Eric Velasco, *Judge Overrides Jury, Imposes Death Penalty*, BIRMINGHAM NEWS, Apr. 22, 2008, at 1B.

163. EJI, *Death Penalty*, *supra* note 156. In 2006, one example of judicial override included "Oscar Roy Doster, who received a unanimous . . . jury verdict for [life without parole] that the trial judge replaced with a death sentence." EJI, *Death Sentences*, *supra* note 156.

164. EJI, *Death Sentences*, *supra* note 156.

four death sentences.<sup>165</sup> Though perhaps intended to allow judges to override sentences in the opposite direction (verdicts of death by a jury changed to life without parole by the judge), this has only occurred in a handful of cases.<sup>166</sup> Meanwhile, other factors contribute to the impact and direction of the judicial override statute.<sup>167</sup>

#### a. Elected Judges and Alabama Politics

Judicial override is prevalent partially due to the election of Alabama trial judges.<sup>168</sup> Judges campaign to appear “tough on crime,” demonstrating their support of the death penalty and ability to impose it effectively.<sup>169</sup> “Almost all of Alabama’s elected state appellate court judges campaign on their strong support for the death penalty and many promise to facilitate and expedite executions in

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165. EJI, *Judicial Override*, *supra* note 160.

166. *Id.*; Victoria L. Coman, *Death Penalty Needs Study, Law School Dean Says*, BIRMINGHAM NEWS, July 25, 2007, at 4B (“Ninety percent of overrides in Alabama are used to impose death sentences.”); Editorial, *Alabama and the Death Penalty*, ANNISTON STAR (Ala.), July 6, 2008 (“When judges override jury verdicts, it is nearly always to increase the sentence to death rather than to decrease it to life . . .”). As of 2002, Stephen B. Bright of the Southern Center for Human Rights had collected statistics from Alabama showing judges had overridden jury verdicts eighty-three times from life to death but only seven times from death to life. Liptak, *supra* note 161, at A21.

167. In 2005, the ACLU wrote a report entitled *Broken Justice: the Death Penalty in Alabama*, which detailed six problems the ACLU believes lead to unfair convictions and executions, in primarily areas in which Alabama is unique:

- No public defender system.
- Prosecutorial misconduct, especially involving illegal strikes of black people from juries.
- Judicial override of jury recommendations.
- Execution of the mentally retarded.
- Racial discrimination.
- Geographic disparities that load Death Row with people from a few counties.

The report call[ed] for a temporary halt on executions to fix the problems.

Carla Crowder, *ACLU Report Calls for Halt to Executions: Report Lists Problems That Could Lead to Unfair Convictions, Executions*, BIRMINGHAM NEWS, Oct. 20, 2005, at 1B.

168. EJI, *Judicial Override*, *supra* note 160. The general views of the voting public, however, do not necessarily reflect the specific positions of juries hearing individual cases. See *supra* note 165 and accompanying text.

169. EJI, *Judicial Override*, *supra* note 160.

order to win votes.”<sup>170</sup> Additionally, “Alabama is infamous for spending and fund-raising practices on judicial campaigns. A recent report documents that, since 1993, candidates vying for a seat on the Alabama Supreme Court have spent over \$54 million on campaigns—an amount that far exceeds judicial campaign spending in any other state.”<sup>171</sup>

Election of judges in a political climate pervaded by strong anti-defendant sentiments is already a problematic notion. This bias is only magnified by the fact that these judges are spending excessive funds on advertising their pro-death penalty stances and then, after winning these partisan elections, they are given an enormous amount of discretion to hand down the ultimate decision between life and death.<sup>172</sup> The confluence of all of these factors creates a nearly insurmountable burden against the capital defendant, one which may overcome otherwise important mitigating circumstances.

#### b. Alabama’s Problems with Counsel for Indigent Defendants

Alabama fails to provide adequate counsel throughout the capital process—from trial to post-conviction phases. Alabama lacks a statewide public defender system.<sup>173</sup> The poor are appointed unprepared and underpaid lawyers from the local bar.<sup>174</sup> “Without a

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170. EJI, *Death Penalty*, *supra* note 156.

171. *Id.* For a more in-depth discussion of the role politics play in judicial override decisions, see Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283 (2008). *See also* Republican Party of Minn. v. White, 536 U.S. 765, 788–92 (2002) (O’Connor, J., concurring).

172. EJI, *Death Penalty*, *supra* note 156.

173. *Id.* Olivia Turner, the executive director of the ACLU of Alabama noted, “The death penalty is not imposed on those who have committed the worst crimes. It’s imposed on those who have the weakest representation.” Crowder, *supra* note 167, at 1B (quoting Olivia Turner).

174. According to the National Association of Criminal Defense Lawyers,

[t]he Alabama indigent defense system is currently divided according to the 41 judicial circuits in the state, and there are three representation service models used in these circuits. The majority of the judicial circuits use an appointed counsel system. Private attorneys place their names on an appointment list and are periodically asked to represent indigent defendants for an hourly rate. About ten circuits use the contract defender system; private attorneys are hired for a set dollar amount each month to handle all indigent cases. A small number of judicial circuits have a full-time public defender offices [sic] or a part-time public defender. There is no statewide oversight or supervisions of the delivery of indigent defense services in Alabama.

state public defender system or resources to obtain adequate legal representation, poor people in Alabama are being sentenced to death at record levels.”<sup>175</sup>

Alabama generally “appoints two lawyers to defend each capital case. Each must have at least five years experience in criminal law, but this can include cases like shoplifting and driving while intoxicated. . . . The lawyers must also apply to the judges for state money to hire experts and investigators.”<sup>176</sup> Even for capital cases, “[t]here is no state oversight of the quality or effectiveness of legal counsel for indigents. There are no uniform standards, guidelines or training requirements for those attorneys.”<sup>177</sup> Alabama additionally hinders defendants by capping compensation at \$1,000 for out-of-court preparation by state-appointed attorneys who are taken away from their more lucrative jobs.<sup>178</sup>

Moreover, Alabama is the only state in the country without a state-funded program to provide legal assistance to death row inmates for wrongful conviction and state post-conviction proceedings.<sup>179</sup> Professor Philip Alston of New York University wrote a report to the United Nations finding that death row inmates are inadequately represented on appeal, noting that “Alabama is the only state that

*Indigent Defense: About Alabama Indigent Defense*, NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, <http://www.nacdl.org/public.nsf/defenseupdates/alabama?OpenDocument> (last visited Sept. 18, 2010) [hereinafter *Indigent Defense*]; Val Walton, *75 Lawyers Set for Panel to Represent Indigent*, BIRMINGHAM NEWS, July 1, 2007, at 19A; see also Mike Odom, *Legal Aid for Indigent Gets Boost from New Rule*, BALDWIN COUNTY NOW.COM (Oct. 28, 2007), <http://www.nacdl.org/public.nsf/defenseupdates/alabama023?OpenDocument> (referencing the prior system for the Northern District of Alabama in appointing indigent counsel: from an “outdated list” of lawyers with “various degrees of experience”).

175. *Counsel for the Poor*, EQUAL JUSTICE INITIATIVE, <http://eji.org/eji/raceandpoverty/counsel> (last visited Sept. 18, 2010).

176. Sara Rimer, *Questions of Death Row Justice for Poor People in Alabama*, N.Y. TIMES, Mar. 1, 2000, at A1.

177. Editorial, *Poor Defendants Deserve Better Legal Assistance*, TUSCALOOSA NEWS, June 17, 2008, <http://www.tuscaloosanews.com/article/20080617/NEWS/807170301?p=1&tc=pg>.

178. See *Inadequate Counsel*, EQUAL JUSTICE INITIATIVE, <http://www.eji.org/eji/deathpenalty/inadequatecounsel> (last visited Sept. 18, 2010).

179. Stan Diel, *U.N. Report Blasts State’s Death Penalty*, BIRMINGHAM NEWS, July 2, 2008, at 1. “Increased hostility towards the plight of the economically disadvantaged threatens to undermine the equal administration of justice. Thousands of prisoners in Alabama have been sentenced to life in prison without parole and other excessive punishments for non-violent [sic] offenses.” *Counsel for the Poor*, *supra* note 175.

does not guarantee counsel after the first round of appeals.”<sup>180</sup> This leaves many defendants without an opportunity to review whether their trial lawyers were adequate.<sup>181</sup> Without any other option, many death row prisoners were represented by attorneys who have since been disbarred, suspended, or disciplined for misconduct.<sup>182</sup> Some lawyers have been found intoxicated or impaired during capital trials.<sup>183</sup> Still, even if a defendant is lucky enough to have an extremely competent attorney who knows how to navigate through trial and win over jurors with mitigating facts, a judge can single-handedly overturn a jury verdict of life imprisonment and impose a death sentence.

### c. Racial Prejudice

Another factor inextricably linked to the political climate of Alabama is racial prejudice.<sup>184</sup> Eighty percent of death sentences in Alabama are imposed in cases with white victims even though sixty-five percent of murder victims are African American.<sup>185</sup> Though Alabama’s population is twenty-seven percent black, nearly half of Alabama’s death row is black, and eighty-three percent of those

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180. See Diel, *supra* note 179, at 1.

181. See generally EJI, *Death Penalty*, *supra* note 156.

Lawyers appointed to represent death row inmates on appeal in Alabama are limited to only \$1000 for work in each appellate court—a cap that is woefully inadequate to compensate lawyers responsible for raising in the state appellate courts every error that happened at trial. In some cases, lawyers have actually abandoned their clients without notice in the middle of an appeal, causing death row prisoners to miss appeal deadlines and forfeit their constitutional rights.

*Id.*

182. EJI, *Death Penalty*, *supra* note 156.

183. *Id.*

184. Though the import of prejudice for the purposes of this Note is in regards to criminal defendants, it is also significant that none of Alabama’s nineteen appellate court judges were black and only one of the forty-two elected district attorneys was black as of December 2009. *Id.*

185. *Id.* Additionally, as of 2007, “courts have found that Alabama prosecutors illegally excluded African Americans from jury service through racially discriminatory” selection in two-dozen cases, suggesting both racial bias and prosecutorial misconduct. *Project Hope to Abolish the Death Penalty*, NAT’L COAL. TO ABOLISH DEATH PENALTY, <http://www.ncadp.org/affiliate.cfm?affID=6> (last visited Oct. 10, 2010).

executed since 1976 have been African American.<sup>186</sup> These statistics provide only a small window into the severe racial prejudice that still affects the justice system in Alabama. When a capital defendant is African American, his already diminished chances of an effective presentation of mitigating evidence and a life sentence without parole are even further reduced.

#### d. Wrongful Convictions

The possibility and unfortunate reality of wrongful convictions is a final important point.<sup>187</sup> Eight people have been exonerated in Alabama alone while one hundred thirty-nine people have been exonerated and released nationally.<sup>188</sup> As of 2009, “[f]or every eight people executed, one innocent person has been exonerated in Alabama.”<sup>189</sup>

#### 4. Public Outcry Heard and Ignored by Those with Power

Several public interest organizations have undertaken independent scrupulous review of the Alabama death penalty sentencing scheme in recent years,<sup>190</sup> and it appears that the public backs these efforts.<sup>191</sup>

186. EJI, *Death Penalty*, *supra* note 156.

187. In 2008, the United Nations looked into Alabama’s death penalty, leading some local newspapers to proclaim the report “highlight[ed] unsavory facts, and our state’s blithe acceptance of them.” Editorial, *Alabama On the World Stage*, BIRMINGHAM NEWS, July 3, 2008, at 4. Regarding the same report, another paper quoted its findings that “[g]overnment officials seem strikingly indifferent to the risk of executing innocent people and have a range of standard responses . . . characterized by a refusal to engage with the facts. The reality is that the system is simply not designed to turn up cases of innocence, however compelling they might be.” Editorial, *supra* note 166, at 1.

188. EJI, *Death Penalty*, *supra* note 156.

189. *Id.*

190. “The Alabama system is under review by the American Bar Association, the Equal Justice Initiative of Alabama and the state chapter of the American Civil Liberties Union, among others.” Editorial, *Embracing a Culture of Life*, BIRMINGHAM NEWS, Nov. 11, 2005, at 8A. Even more recently, a review by the American Bar Association’s death penalty assessment team for Alabama occurred from 2005 to 2006. Coman, *supra* note 166, at 4. The study “concluded Alabama fails to ‘ensure a fair and accurate system’ for those who are sentenced to die.” David Person, Editorial, *No Justice in the Death Penalty*, HUNTSVILLE TIMES, Nov. 2, 2007, at 8A. The Alabama system has even been criticized in the global community. The UN issued a report in 2008 regarding its findings of inadequacy in Alabama death penalty sentencing. Diel, *supra* note 179, at 1.

191. “A poll this past summer by the Capital Survey Research Center found that 57 percent



There is also a perennial bill seeking to amend the sentencing scheme.<sup>192</sup> Though it continually fails, one version of the bill would “prevent judges from overriding jury recommendations on death penalty cases, authorize DNA testing for death row inmates, ensure that mentally retarded inmates are not executed, and impose a 3-year moratorium on executions while a special committee examines Alabama’s capital punishment system.”<sup>193</sup> The year 2010 was no exception as the Alabama Senate again introduced a bill proposing prohibition of judicial override.<sup>194</sup>

A recent U.N. Human Rights Council investigator noted that the “[m]ost alarming [flaw] . . . [is] Alabama officials’ refusal to even discuss the possibility that the state’s capital punishment system is in need of improvement.”<sup>195</sup> After the report was published, Alabama’s Attorney General, Troy King stated “I’ve looked at all of [the report] that I intend to look at” and went on to accuse the U.N. of “pushing an ideological agenda.”<sup>196</sup> Faced with these and other similar responses,<sup>197</sup> many conclude that Alabama officials are not interested in change.<sup>198</sup> Even worse, some have suspected King of encouraging misuse of judicial override through political pressure.<sup>199</sup>

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of Alabamians would support a temporary halt to executions while policymakers evaluate the fairness of our system.” Jim Carnes, *Wrongful Deaths*, MOBILE REGISTER, Nov. 13, 2005, at D1.

192. “[T]he Alabama Legislature perennially fails to pass bills to end the practice [of judicial override]. Last week, the House of Representatives voted 37–48 against allowing this year’s bill to be brought up for debate and a vote. That’s far short of the 60 percent margin needed to bring the bill up for discussion before budgets have been considered.” Editorial, *Life-or-Death Legislation*, BIRMINGHAM NEWS, May 2, 2007, at 8A.

193. Samira Jafari, *Death Penalty Bills Spark Debate*, MOBILE REGISTER, Jan. 26, 2006, at B2.

194. In January 2010, the Alabama Senate introduced Bill Number 226, to prohibit a judicial override. The synopsis states that “[u]nder existing law, in a capital case, the jury may recommend to the court the sentence of a person convicted of a capital offense, but the court is not required to accept the jury’s recommendation. This bill would prohibit a court from overriding a verdict by a jury in a capital case.” S.B. 226, 2010 Leg., Reg. Sess. (Ala. 2010).

195. Diel, *supra* note 179, at 1.

196. *Id.*

197. “Assistant Attorney General Clay Crenshaw, chief of capital litigation in the AG’s office,” looked over a 2005 ACLU report “which includes anecdotes about five men who were released from Death Row after being found innocent in new trials or after appeals courts tossed out their convictions. Crenshaw said he’s convinced most of those men were guilty.” Crowder, *supra* note 167, at 1B.

198. Diel, *supra* note 179, at 1. Alabama’s Attorney General King “might well have a shot at being one of the nation’s most pro-death penalty attorneys general.” Person, *supra* note 190,

## II. ANALYSIS AND PROPOSAL

The Alabama courts assume that the constitutionality of their capital sentencing scheme is settled.<sup>200</sup> The question, however, remains unanswered by the Supreme Court after *Ring*, and merits a second, closer examination given the persisting inequities in the trial courts' use of judicial override.<sup>201</sup> Though the Supreme Court decision in *Furman*<sup>202</sup> required a manner of imposing the death sentence that was not arbitrary, capricious, or discriminatory, adherence to this basic tenet has been lost in Alabama's statutory scheme and muddled judicial opinions.<sup>203</sup> The clear language<sup>204</sup> and requirements of *Gregg v. Georgia* are overlooked during Alabama death penalty sentencing.<sup>205</sup> *Gregg* and subsequent Supreme Court precedent definitively require adequate guidelines in sentencing, including a consistent method for assessing aggravating and mitigating factors.<sup>206</sup> However, Alabama's sentencing scheme fails to achieve this consistency.<sup>207</sup>

Having already upheld judicial override in general,<sup>208</sup> the *Harris* Court appeared to make the ultimate decision regarding the constitutionality of judicial override in Alabama, turning unresolved

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at 8A.

199. "Groups pushing for a three-year moratorium on executions in Alabama said . . . that Attorney General Troy King put political pressure on judges in two high-profile murder cases to get them to override jury recommendations and impose death sentences." Bob Johnson, *King Accused of Pressuring*, MOBILE REGISTER, Oct. 20, 2005, at B1; see *supra* Part I.D.3.

200. See *supra* Part I.D.2.b.

201. See discussion *supra* Part I.D.2-3.

202. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam); see *supra* notes 10-13.

203. See discussion *supra* Parts I.B, I.C, I.D.2.

204. The Supreme Court determined:

[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

*Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

205. See discussion *supra* Part I.D.2; see also *supra* notes 14-18.

206. *Gregg*, 428 U.S. at 206; see *supra* notes 14-18; discussion *supra* Part I.A.

207. See discussion *supra* Part I.D.1-3.

208. See, e.g., *Spaziano v. Florida*, 468 U.S. 447, 460 (1984).

issues regarding sentencing over to the Alabama legislature.<sup>209</sup> The Court used vague language to virtually dismiss the issues presented concerning judicial override in Alabama, giving veiled approval of the scheme and making judicial or legislative changes seem unnecessary.<sup>210</sup>

The *Harris* court relied in large part on the idea that judges alone were capable of imposing a capital sentence,<sup>211</sup> but *Apprendi* and *Ring* made it clear that this is now incorrect; the jury must play a heightened role in capital sentencing.<sup>212</sup> What seemed like a decision that would alter the state of capital sentencing nationwide failed to have significant impact in Alabama.<sup>213</sup> Alabama courts initially struggled to interpret their statute in light of *Ring*, resulting in confusion and contradictory opinions.<sup>214</sup> However, once the courts settled on a substantially limited role for *Ring*,<sup>215</sup> there has been little if any consideration of the constitutionality of the sentencing scheme by the courts.<sup>216</sup>

Based on the Alabama courts' determination that judicial overrides are constitutional, opponents to the sentencing scheme are left with two options. Fairness in Alabama's capital sentencing cannot be achieved until either: (i) the Supreme Court recognizes the issues and gets involved; or (ii) the Alabama legislature takes action and changes its own policy.

First, the Supreme Court should reconsider Alabama's use of judicial override and find it unconstitutional. The Court should completely disallow the use of judicial override because it violates the due process clause, and it cannot effectively provide a method of imposing the death penalty that is not arbitrary under *Furman v. Georgia*. In the alternative, the Court could articulate a clear standard

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209. *Harris v. Alabama*, 513 U.S. 504, 513–14 (1995); see *supra* note 57.

210. *Harris*, 513 U.S. at 514–15; see discussion *supra* Part I.D.2.

211. "The Constitution permits the trial judge, acting alone, to impose a capital sentence." *Harris*, 513 U.S. at 515.

212. See discussion *supra* Part I.C.

213. See discussion *supra* Part I.D.2.

214. See discussion *supra* Part I.D.2.a.

215. See discussion *supra* Part I.D.2.a.

216. See *supra* Part I.D.2.b.

and procedure that judges must follow when overriding a jury verdict of life without parole.

Central to the Constitution and to the policy of the Court, the state legislature may enact its own provisions for its people so long as they are constitutional. When a statute violates the Constitution, the Court has a duty to enforce the Constitution and overturn the state statute.<sup>217</sup> It seems unfathomable that a statute leading to such gross inequities in imposition of the death penalty could possibly comport with the Constitution. The Alabama sentencing scheme violates the Eighth Amendment under *Furman* and *Gregg* as well as due process and equal protection rights of defendants under the Fourteenth Amendment.<sup>218</sup>

*A. The Supreme Court Must Find that the Alabama Sentencing Scheme is Unconstitutional*

1. Override Violates the Eighth Amendment under *Furman* and *Gregg*

Despite reviewing *Harris*, the Supreme Court must again review the statutory sentencing scheme of Alabama, and this time it must find the statute unconstitutional by upholding the basic ideas of *Furman* and *Gregg*. The bottom line of death penalty jurisprudence is that the death penalty cannot be arbitrarily, capriciously or discriminatorily imposed.<sup>219</sup> Even though *Harris* recognized the judicial override statutes, it failed to acknowledge many of the underlying issues of the Alabama sentencing scheme that directly violated the central ideas of *Furman* and *Gregg*.<sup>220</sup> Arbitrary sentencing at the trial level and failure of the appellate courts to express a single, clear standard for override make Alabama's imposition of the death penalty more akin to playing Russian roulette than to a constitutionally appropriate determination.

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217. *Cooper v. Aaron*, 358 U.S. 1, 19 (1958).

218. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

219. *See supra* Part I.D.2.d.

220. ALA. CODE § 13A-5-47 (2009).

Reading the Alabama statute on its face demonstrates a clear lack of an articulable standard for judicial override.<sup>221</sup> The judge is able to override any jury verdict for life without parole, regardless of whether the verdict is unanimous in favor of life. Even if the jury avoided mistakes and reached a fair outcome, the judge is able to override because he disagrees with their decision.<sup>222</sup> Likewise, the judge does not have to proffer a clear explanation as to how he considered the jury verdict and the weight he gave to it.<sup>223</sup>

The low trial standards are not remedied by the appellate requirement that death sentencing avoid being arbitrary, capricious, or discriminatory.<sup>224</sup> Trial courts that act in an arbitrary, capricious, and discriminatory manner have already imposed the death penalty by the time of the appeal. *Furman* and its progeny held that the Constitution guarantees this right at *imposition* of the death sentence.<sup>225</sup> The right is certainly not fulfilled by first imposing the death sentence in a manner that unquestionably violates the Constitution, and then providing a remedy to a few lucky defendants on appeal. The Constitution and the holding in *Furman* require more. The Supreme Court must find that Alabama's statutory sentencing scheme is arbitrary, capricious, and discriminatory in violation of the Eighth Amendment under *Furman* and *Gregg*.

## 2. Override Violates the Defendants' Fourteenth Amendment Due Process Rights

Alabama courts have never actually dealt with constitutional challenges to their sentencing scheme raised by defendants. They relied heavily upon the *Harris* decision, which upheld the statute under *Furman*.<sup>226</sup> The Alabama courts decided that because the override was constitutional under *Harris* and the Eighth Amendment at the time it was decided, it would forever withstand any

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221. See discussion *supra* Part I.D.2.c.

222. See discussion *supra* Part I.D.2.c.

223. See *supra* Part I.D.2.d.

224. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

225. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

226. See *supra* Part I.D.2.b.

constitutional challenge.<sup>227</sup> The mantra of the Alabama Criminal Court of Appeals became “we have repeatedly upheld Alabama’s capital-murder sentencing scheme against constitutional attacks.”<sup>228</sup>

As Justice Stevens recognized in *Gardner v. Florida*, there is an inherent due process issue when death is a possible sentence.<sup>229</sup> “[F]ive Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed;” therefore capital-sentencing procedures now require closer due process scrutiny.<sup>230</sup>

The fact that a judge is able to consider facts outside the view of the jury and use them to unilaterally impose a sentence of death under Alabama’s sentencing scheme is just one factor that violates defendants’ due process rights. Often the information given to the judge is excluded from the jury because it is deemed inadmissible by reasoned evidentiary rules that seek to ensure the jury is making their decision based upon the appropriate evidence. As Justice Murphy stated in his dissent in *Williams v. New York*, “[d]ue process of law includes at least the idea that a person accused of crime shall be accorded a fair hearing through all the stages of the proceedings against him.”<sup>231</sup>

A judge exercises unfettered discretion in his decision to impose the death penalty, viewing any available evidence that would generally be inadmissible.<sup>232</sup> The judge is inherently biased given the political climate, yet he sits with unbridled power ready to overturn a decision made by the jury of the defendant’s peers guaranteed under the Sixth Amendment.<sup>233</sup> In *Crawford v. Washington*, the Court articulated why relying on one judge, who lacks a standard in his politically charged decision, is so very dangerous:

[The Framers] knew that judges, like other government officers, could not always be trusted to safeguard the rights of

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227. See *supra* Part I.D.2.b.

228. *Hooks v. State*, 21 So. 3d 772, 792 (Ala. Crim. App. 2008); see *supra* note 126.

229. 430 U.S. 349 (1977).

230. *Id.* at 357.

231. 337 U.S. 241, 253 (1949) (Murphy, J., dissenting).

232. See *supra* note 142.

233. See *supra* Part I.D.3.a.

the people . . . .*They were loath to leave too much discretion in judicial hands.* By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable, and . . . the Framers had an eye toward politically charged cases . . . where the impartiality of even those at the highest levels of the judiciary might not be so clear.<sup>234</sup>

Due process cannot possibly be met under a standard where the defendant is not aware of what might tip the balance from life to death in the eyes of one judge making the fatal decision.

### 3. Override Violates *Ring* and the Sixth Amendment

At the heart of *Ring* is the importance of the Sixth Amendment and a defendant's right to trial by jury. As noted by Justice Murphy, "[i]n our criminal courts the jury sits as the representative of the community . . . . A judge, even though vested with statutory authority to do so, should hesitate indeed to increase the severity of such a community expression."<sup>235</sup> The Sixth Amendment right of the defendant to be evaluated by his peers is what *Ring v. Arizona* relied upon to find that capital sentencing requires heightened jury involvement.<sup>236</sup>

Alabama courts' narrow interpretation of *Ring*—that it only requires the jury to find the existence of one statutory aggravating factor beyond a reasonable doubt—appears feasible without further exploration, but comparing *Ring*'s requirements with Alabama's statutory scheme reveals inequities. Alabama Code section 13A-5-47 allows the trial judge to order and receive a pre-sentence investigation report outside the presence of the jury.<sup>237</sup> The *Brownlee* court described the judge's ability (after the jury verdict was

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234. *Crawford v. Washington*, 541 U.S. 36, 67–68 (2004) (emphasis added) (citations omitted).

235. *Williams*, 337 U.S. at 253 (Murphy, J., dissenting).

236. 536 U.S. 584, 609 (2002).

237. *See Brownlee v. Haley*, 306 F.3d 1043, 1050 (11th Cir. 2002).

rendered) to “hear further arguments, and may receive additional evidence concerning the aggravating and mitigating factors.”<sup>238</sup>

In *Ring*, the Court unambiguously found that the Sixth Amendment applied to capital cases since “[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant’s sentence by two years, but not the factfinding necessary to put him to death.”<sup>239</sup> *Ring*, therefore, requires factfinding on the part of the jury when evaluating anything contributing to the death sentence. It is difficult to understand how the Alabama courts can provide the judge with a pre-sentencing report after the jury verdict that, pursuant to statute, contains additional information regarding the defendant’s mitigating and aggravating circumstances and still feel that *Ring* is satisfied. Facts found outside of the jury’s knowledge should be a clear violation of *Ring*.

Alabama courts have navigated around this argument by finding that *Ring* merely requires the jury to find beyond a reasonable doubt the existence of one statutory aggravating circumstance.<sup>240</sup> They reason that this then makes the defendant eligible for the death penalty, and judicial override can be imposed while still adhering to the *Ring* requirement.<sup>241</sup> A closer examination of *Ring* reveals this is not an appropriate interpretation of its requirements. “Capital defendants, no less than noncapital defendants . . . are entitled to a jury determination of *any fact* on which the legislature conditions an increase in their maximum punishment.”<sup>242</sup> Alabama interprets this to mean, as stated above, that so long as the defendant is eligible for the death penalty by a jury finding of at least one statutory aggravating circumstance, the court gives appropriate deference to the jury’s fact-finding obligations.

Alabama courts fail to recall the basic requirements of *Furman* and *Gregg*. To impose the death sentence, the sentencer must find that the aggravating factors outweigh the mitigating factors in

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238. *Id.*

239. 536 U.S. at 609.

240. See discussion *supra* Part I.D.2.b.

241. See discussion *supra* Part I.D.2; see also *Ex parte Waldrop*, 859 So. 2d 1181, 1187–88, 1190 (Ala. 2003).

242. *Ring*, 536 U.S. at 589 (emphasis added).



sentencing. Therefore, a defendant is not truly eligible for the death penalty until this finding has been made. Simply because a jury finds one statutory aggravating circumstance does not actually make the defendant eligible for death. Constitutionally, it makes him eligible for a fair, nonarbitrary, and balanced evaluation of the specific mitigating and aggravating circumstances in his case to see if death is an appropriate remedy over life in prison without parole.

The Alabama courts' death-favoring interpretation of *Ring* takes power from the jury. It undermines the Sixth Amendment guarantee of a jury trial that was affirmed by *Ring*.<sup>243</sup> The Alabama courts only provide part of the jury trial guaranteed to the defendant instead of the whole guarantee. Alabama courts allow the jury to participate in the most minimal way possible and assert it is perfectly constitutionally acceptable. It is not.

*B. If the Supreme Court Cannot Provide a Remedy, the Legislature Must Do So*

If the decision of the Alabama courts to disregard *Ring* is not granted review by the Supreme Court, or worse, is reviewed and again given a cursory glance and held to pass the bare minimum standards of constitutionality, defendants facing death must look for alternative avenues of change. Luckily, public interest organizations in Alabama are attempting to find an appropriate solution by critically examining the inequities of the system.<sup>244</sup> Based on their evaluations of statistics and data, many scholars have formulated suggestions for mitigating the problem.

Regarding judicial override in and of itself, the general atmosphere is disapproval. Organizations that have evaluated the procedure find that it is an unfair method of imposing the death penalty, contrary to standards of decency deserved by defendants facing capital crimes.<sup>245</sup> Many commentators have found that Alabama uniformly lacks a standard for imposing judicial override, which is exceedingly dangerous in a state with a host of other related

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243. *Id.*

244. See discussion *supra* Part I.D.4.

245. See, e.g., Diel, *supra* note 179, at 1; EJI, *Death Sentences*, *supra* note 156.

issues, such as lack of indigent counsel, racial disparities, a politically charged climate with judges elected to their posts, and a history of uncovered wrongful convictions.<sup>246</sup> The confluence of these factors leads to gross inequities in Alabama's death sentencing.<sup>247</sup>

This is undoubtedly a very complicated issue, one that cannot be solved in a clear, step-by-step process. There are a multitude of factors that would need to be addressed before judicial override could become an appropriate manner of imposing death sentences. Thus, the most logical and simple solution is to erase judicial override from the Alabama statute. Sadly, this is unlikely given the political stance of many Alabama legislators and their past decisions to maintain the override procedure.<sup>248</sup> It is encouraging that there is a drive within the state to find ways to remedy the problem, but the reality is (without the Supreme Court's involvement) it cannot be altered until either the legislature completely changes its mind or the Alabama courts recognize the issues and get involved.

If the legislature does choose to alter the current statutory death sentencing scheme, it should narrow the judicial override provision by providing a clear standard the judge must satisfy before overriding a jury verdict. In addition, judicial override could be dramatically altered (and fairness in sentencing increased) if the legislature addresses other factors contributing to the unfairness and inequities of Alabama's death sentencing, such as the political election of judges and the lack of a statewide public defender system.

Judicial override can be narrowed by only allowing a judge to override a jury recommendation in cases where at least a majority of jurors recommend death. This would still give the defendant a life without parole sentence under the Alabama statute because a ten-to-two juror vote in favor of death is needed to impose the sentence. The judge's sentence would then more accurately reflect the jury opinion and give greater value to the role of the jury.

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246. See, e.g., EJI, *Death Penalty*, *supra* note 156; EJI, *Death Sentences*, *supra* note 156; EJI, *Judicial Override*, *supra* note 160.

247. See discussion *supra* Part I.D.3; see also *supra* note 145. See generally Person, *supra* note 190, at 8A.

248. See *supra* notes 194–97.

Also, there could be more provisions allowing judges to overturn a jury recommendation only when the jurors failed to consider all aggravating circumstances or misunderstood a fact of the case. For these measures to be possible, juries would need to state their specific fact-findings, an easy task for the jury to perform.

Further, the legislature could provide an exacting standard for the judge's evaluation of the aggravating and mitigating factors, such as only when there are three aggravating factors present and no mitigating factors, or a similar formula. The legislature has attempted to provide such a formula to jurors for balancing mitigating and aggravating factors.<sup>249</sup> Therefore, it should not prove too difficult to articulate an appropriate method for evaluation by the judge.

In addition, the legislature should elucidate the appropriate weight to accord the jury recommendation. The "great weight" standard of *Ex parte Tomlin* requires further definition for judges to employ it in a fair and uniform way.<sup>250</sup> As it stands now, "great weight" could mean anything and certainly has no clear and attainable definition.

Finally, the legislature could require judges to specifically state all of the reasons why they feel a particular case merits judicial override, and also require that those reasons comport with an articulated standard. As discussed above, perhaps the jury made a mistake, or there are a defined number of aggravating circumstances present. Alternative standards could include what rubric courts have used in the past, such as the murder is heinous, atrocious, or cruel as compared to other capital murders. If a reasonable basis for override is appropriately defined, it might provide an additional standard.<sup>251</sup>

Judicial override in practice has the potential to improve if even the smallest changes are made to death penalty statutes in other regards. Short of requiring appointment of judges (though this step would positively influence the judicial-political climate), the legislature could start by limiting judicial funding for statewide campaigns or limiting the issues on which candidates market themselves. Judicial candidates might be prohibited from marketing their views on the death penalty. Perhaps the legislature might

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249. ALA. CODE § 13A-5-46(d) to -(e).

250. See *supra* note 132 and accompanying text.

251. See discussion *supra* Part I.D.2.c.ii.

consider limiting judicial campaign reelection funds to less than five times the amount the state allots the untrained attorneys representing indigent defendants who face capital murder charges.<sup>252</sup>

Another remedy would be to create a statewide public defender system.<sup>253</sup> Unfortunately, this would be expensive. Still, the necessity of its existence should overcome its price. Having untrained lawyers who are unfamiliar with the process of representing capital clients is tantamount to providing ineffective counsel at appointment unless the attorney is motivated to learn or has authorized outside methods of paying for all the expenses a capital case entails.

Other important legislative measures that could be taken require a greater emphasis on the presumption of innocence, something the Alabama legislature seems to largely ignore. The discovery procedures of the state should allow for more “open-file” discovery. Also, a statute could be enacted requiring DNA testing if available or, at the least, preservation of DNA evidence obtained and a manner for asserting innocence during post-conviction on its basis.

These are but a few suggestions for the legislature to remedy the frequency of death sentencing in Alabama due to judicial override and other inequitable factors. Because the problems plaguing death penalty imposition are so inexorably intertwined, even creating one measure of those listed above would surely have positive ramifications for the overall process.

The legislative measures may appear more feasible step-by-step, but the Supreme Court should reexamine the effects of judicial override on the arbitrary nature of the death sentence in Alabama to begin to remedy the gross inequities that current capital defendants face. Even if the legislature makes changes now it could only have an effect much further in the future; if the Supreme Court gets involved and strikes down the law as unconstitutional, many defendants’ rights will be immediately restored.

When a statute does not effectively channel its objectives, judicial intervention is required. Though there is much evidence to the contrary, I hope the Alabama legislature intends to follow the Supreme Court’s mandate that the death penalty should not be

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252. See discussion *supra* Part I.D.3.b–c.

253. See discussion *supra* Part I.D.3.b.

arbitrarily imposed.<sup>254</sup> If so, it must reassess its statute and tailor it to ensure that the death penalty is given in a way that does not allow for discretion of trial court judges and an inconsistent imposition of death. The Supreme Court must otherwise step in to ensure Alabama no longer arbitrarily sentences defendants to death.

#### CONCLUSION

Judicial override is a serious problem for the defendants and citizens of Alabama. It has harsh and lasting consequences. Without either a review by the Supreme Court or legislative action, judicial override will continue to be the sole reason for the execution of a large number of death row inmates, inmates that no one will ever be sure were given justice before they were sentenced to die. Twelve people may have decided a defendant deserves to live, but he or she could die because the hand of one judge placed the defendant on death row.

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254. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).