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CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
ANNE-MARIE ADAMS, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION

STATE OF ALABAMA	)		
	)		
V.	)	Case Nos.:	CC-2005-001755.00
	)		
BIILUPS KENNETH EUGENE			CC-2012-001194.00
Defendant.	)		CC-2012-001195.00
	)		CC-2014-003011.00
CHATMAN, STANLEY	)		CC-2014-003012.00
Defendant.	)		CC-2014-003015.00
	)		CC-2014-003016.00
MCMULLIN, TERRELL	)		
Defendant.	)		
	)		
ACTON, BENJAMIN			
Defendant			

ORDER

I.

The influence of partisan politics on the Alabama judiciary indeed has never ending, interlaced talons that reach into every aspect of its criminal justice system. Legal scholars, journalist and community advocates around the world have noted in numerous fashions the statistical realities in Alabama's death penalty statute. In most instances these views are articulated in a data driven, broad context – a bird's eye view. However, clearly comprehending the urgency of the circumstance in Alabama requires an immersion at the rudimentary level of this life-to-death override epidemic – a view from ground zero. There is a time and place for diplomacy and subtlety. That time and place has been expunged by the dire state of the justice system in Alabama. It is clear, from here on the front line, that Alabama's judiciary has unequivocally been hijacked by partisan interests and unlawful legislative neglect.

A. Independent Judiciary

The Alabama Canons of Judicial Ethics proclaims that "an independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved." Alabama Canons of Judicial Ethics Canon 1. Canon 3 advises that "[a] judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.' Alabama Canons of Judicial Ethics Canon 3.

The framers of our Constitution held high the importance of an independent judiciary. "The complete independence of the courts of justice is peculiarly essential in a limited constitution…Without this, all the reservations of particular rights or privileges would amount to nothing." See, Burnside, Fred, *Dying to Get Elected,* Wisconsin Law Review (1999). "The process of choosing judges in this country was historically that of an appointment system. In modern times, state courts in this country are globally solitary in selecting judges by way of election to such a degree. "[T]he switch from appointment to election has created tension between majoritarian ideas of democracy and constitutionalism." Today, twenty states use partisan elections to select their trial court judges. Of these twenty states, eight states select judges through partisan elections at all trial court levels, Alabama included.[1] Alabama is expressly unique as the only such state that allows judicial override.

In *Harris v. State*, 513 U.S. 504 (1995) Justice Stevens concludes:

[1] See, Burnside, Fred, *Dying to Get Elected,* Wisconsin Law Review (1999).

> The "higher authority" to whom present-day capital judges may be "too responsive" is a political climate in which judges who covet higher office – or merely wish to remain judges – must constantly profess their fealty to the death penalty. Alabama trial judges face partisan election every six years. Ala. Code § 17-2 – 7 (1987). The danger that they will bend to political pressures when pronouncing sentence in highly publicized cases is the same danger confronted by judges beholden to King George III.

Id. at 519. (Stevens, .J. dissenting).

1. Tough on Crime

There is evidence to support the conclusion that there is a "significant correlation between judicial override and election years in most of the counties where overrides take place…[I]t is one of the clearest examples of the precise dynamic of politics in the administration of the death penalty." Judges in Jefferson County have imposed a life-to-death override more than any other county in the state. Many of these overrides occurred during or near an election year.[2] An appeal to the higher courts in Alabama on behalf of a capital defendant sentenced to death by judicial override is ceremonial at best. "State supreme courts with judges elected [ ] in contested voter elections affirmed death penalty sentences in more than 62% of the cases. In contrast, state supreme courts comprised of judges appointed for life terms affirmed death sentences in only 26.3% of case."

[2] See, Burnside, Fred, *Dying to Get Elected,* Wisconsin Law Review (1999).

Much of the general electorate is greatly unacquainted with the judges who they select to represent them. Most voters "learn about judicial candidates and their decisions through the media."[3] This spurs some judges to obnoxiously announce a "tough on crime" election platform. Local television, radio, web and print ads are replete with such rhetoric. A decree of this nature is in fact a violation of the canons governing Alabama judges and judicial candidates. When an attempt was made to abandon partisan judicial races, it is reported that a republican legislator threatened members of his own party if they supported such a notion.[4]

In order to fulfill the constitutional obligations imposed upon the states, Alabama judges must be unbiased and impartial. A judge who announces a promise to impose the death penalty and a toughness for crime cannot sit as constitutionally required. More succinctly expressed by Justice Stevens, "[a] campaign promise to 'be tough on crime,' or to 'enforce the death penalty,' is evidence of bias that should disqualify a [judicial] candidate from sitting in criminal cases."

2. Appointment of Counsel and Campaign Contributions

It is intrinsic that every person charged with a crime in this country has a right to receive competent counsel. The Sixth Amendment of the Constitution states,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the

[3] Weiss, Joanna, *Tough on Crime: How Campaigns For State Judiciary Violate Criminal Defendants' Due Process Rights.* New York University Law Review. (June 2006.)

[4] Cobb, Sue Bell, *I Was Alabama's Top Judge. I'm Ashamed of What I had to do to Get There.* Politico Magazine. (March/April 2015).

> nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The old adage, "you get what you pay for" should not be of consequence when an indigent defendant is in need of effective legal representation. For those who stand accused of a capital crime, Alabama law provides that "if it appears to the trial court that an indigent defendant is entitled to counsel…the court shall appoint counsel to represent and assist the defendant." Ala. Crim. Code § Section 15-12-22. Competent representation is paramount in all criminal cases, especially those of a capital nature. It is a fact that most capital defendants are indigent, and cannot afford to retain counsel. As a result, the vast majority are appointed an attorney by the court. The practice in this county is for a trial judge to appoint an attorney theoretically with the requisite experience to represent a capital defendant. Unfortunately, like other facets of the capital law in Alabama, the appointment process in capital cases falls prey to the hazards of political partisanship and bias in the judiciary.

In an article for Politico Magazine, retired Alabama Supreme Court Justice Sue Bell Cobb explained with open promising candor the political pressure placed on judicial candidates when seeking election. She describes the process as "pitching yourself to the public just as if you were running for dogcatcher." Locally, it is an "open secret" that an attorney all too often receives case appointments in the criminal division based on his campaign contribution, and not squarely on his legal expertise. Much of this astounding reality has been curbed by the establishment of the Jefferson County Public Defender's Office. Nevertheless, the practice remains in effect. This is

especially disturbing when considering capital cases. Looking at this issue through a different lens, Chief Justice Cobb explains,

> When a judge asks a lawyer who appears in his or her court for a campaign check, it's about as close as you can get to legalized extortion. Lawyers who appear in your court, whose cases are in your hands, are the ones most interested in giving. It's human nature: Who would want to risk offending the judge presiding over your case by refusing to donate to her campaign."

3. Inadequate legal representation

There is plenty of incentive for local attorneys to contribute to judicial campaigns in Alabama. There is no limit on the amount of money that an attorney can charge the tax payers of this county when representing a capital defendant. The law provides, "[i]n cases where the original charge is a capital offense or a charge which carries a possible sentence of life without parole, there shall be no limit on the total fee." An attorney appointed without the necessary skill to adequately represent a capital defendant may charge absorbent amounts of money for subpar representation. This tradition not only exists in this county, but has been remarkably ratified. Additionally, "Alabama is the only state in the country without a state-funded program to provide legal assistance" for those convicted of a capital crime. [5] On appeal, convicted capital defendants have no right to counsel in this state.

The idea that an attorney is appointed to represent a capital defendant facing the death penalty based on the amount or frequency of a campaign contribution, and not on his or her legal prowess

[5] (2016), Retrieved from http://www.eji.org/deathpenalty/counsel

is repugnant to the Sixth Amendment, and should shock any sound conscious. The appointment of unqualified and/or unconcerned attorneys to represent capital defendants based on grossly unacceptable political motivation, coupled with an appellate review without the right to appellate counsel, before a politically compromised appellate court, wrongly leaves a capital defendant to climb an uphill battle for preservation of life, while lodged between a rock and hard place.

4. Manipulation of Case Assignment

A process as basic as capital case assignment is not immune to the cancer of politics in Alabama's judicial system. In practice, there is no uniform system for the assignment of capital cases in Alabama.[6] Such a practice on its face reeks of arbitrariness. There is evidence that certain high profile cases are assigned to certain judges during election seasons. When this practice is viewed in the light of judicial overrides, it highlights the constitutionally offensive nature of the Alabama capital sentencing scheme. For example, "[c]ertain Alabama judges have exercised override repeatedly. [A Mobile County judge] used the provision six times. [He] was one of nine local circuit judges but 'presided over thirty percent of the capital cases because he assigned a large number to himself…"[7]

The Fifth Amendment directs that no one shall be "deprived of life, liberty or property without due process of law." The Fourteenth Amendment, called the Due Process Clause, requires federal and state governments to provide fair procedures. Consequently, the imposition of the death penalty in Alabama by biased judges, improperly assigning criminal cases, and appointing counsel based

[6] . In one county the elected District Attorney assigned criminal cases to the judge of her choice until the local rule was changed in 2014.
[7] Williams, Paige, *Double Jeopardy: In Alabama, a judge can override a jury that spares a murderer from the death penalty.* The New Yorker (November 17, 2014).

on political motivation is in direct violation of the Fifth, Sixth and Fourteenth Amendments to our Constitution.

5. Inadequate funding of the Judicial Branch

The Alabama Constitution of 1901 Article VI mandates adequate funding for the judicial branch of government. It states in part, "Adequate and reasonable financing for the entire unified judicial system shall be provided. Adequate and reasonable appropriations shall be made by the Legislature for the entire unified judicial system. Amendment 328, Alabama Constitution 1901. Each year, the judicial branch of government in Alabama suffers from inadequate funding. The increasing deficits judicial budget in Alabama has surpassed critical status. Judges across the state are required to administer justice on less than a skeleton budget. This detrimentally affects the ability of any judge to adequately comport with the theoretical or practical application of the law. Because of inadequate funding the very underpinnings of judicial administration are severely undermined. Basic judicial functions are compromised on a daily basis. Specifically, due to inadequate funding of the judicial branch, the constitutional rights of citizens in Alabama are being violated routinely and/or the proper administration of the law is affected daily in the Alabama. The following is a non-exhaustive summary of the crippling effect of judicial underfunding:

- Critical departments have been gutted and left with loyal and dedicated staff who are over worked, over whelmed and humanely unable to keep pace with the demands of the judicial system;
- Citizens are unlawfully arrested and detained because orders are not processed properly and/or in a timely manner;

- Evidence in capital cases has been lost due to inadequate evidence storage and inefficient retention policies;
- Subpoenas are not executed properly if an attempt to execute was made at all;
- Inmates are not awarded accurate jail credit; and
- Detained defendants are all too often held for long periods of time without hearings because notice of detention is not communicated to the judge;

6. Lack of Security

The disposition of capital cases is exceptional to say the least. The emotions of the victim's family, the defendant's family and all other interested parties runs high. At present, the Jefferson County Criminal Justice building is not properly equipped to ensure the security of any courtroom in the building when hearing highly charged cases like, death eligible offenses.

The Alabama Rules of Judicial Administration Rule 11, stipulates that each courtroom is authorized to employ a bailiff when funds allow. Several years ago, the budget for bailiff employment was dramatically reduced. Jefferson County, saw a reduction from two courtroom bailiffs to one in the county's criminal courthouse. In other divisions in the county the position of bailiff was eradicated all together. The provisions of ARJA Rule 11 specifically state "[e]ach bailiff and court attendant shall perform such duties as may be required…; provided, however, that any duties relating to courtroom security shall remain the responsibility of the sheriff." ARJA Rule 11. This county does not adhere to this provision in the law. This directly affects the imposition of justice, especially in capital cases.

In capital case, multiple co-defendants were originally charged. A preliminary hearing was scheduled for all co-defendants. On the day of the hearing more than forty relatives and friends of

the defendants and victims sought entrance to the courtroom to observe the case. This was in addition to the people present for other non-related docketed cases. The courtroom has a capacity in the gallery for approximately 60 people. Emotions were visibly high. For security purposes, the court denied access to all of the capital case observers, asking each party to choose representatives from this large group to remain. Those not chosen by the parties were asked to exit the floor. A crowd made up of these observers in support of the defendants' and victims' families gathered in front of the courthouse, and a brawl ensued.

In Jefferson County, there is no active protocol for securing the safety of the jury, attorneys, or any other observers present in the courtroom in the event of a courtroom security breach. Courtroom bailiffs have been instructed to secure the safety of the judge only. This effectually leaves unsuspecting jurors, members of the community and others at risk when court is in session.

During another capital case, a juror inquired into the safety of the courtroom. She was concerned with the fact that there was only one bailiff, and the defendant who was facing the death penalty was not restrained in any manner. While this point may be regarding as inconsequential, it is of grave concern when considering a jurors ability to fairly and impartially adjudicate a capital case while in a state of unease about the adequacy of courtroom security.

7. Inadequate Administrative Support

Judges of varying legal pedigree are expected to interpret the law and make judicial findings relating to cases affecting life itself, without invaluable assistance with legal research and other key components of administering the law. To make this point clear, expecting a judge charged with administering justice in capital cases without sufficient staffing equates to requiring a surgeon to perform open heart surgery without the aid of a nurse.

To summarize the inadequacies in the Alabama capital sentencing scheme on points locally germane, the state allocates funds to extinguish a life, but fails to provide the constitutionally mandated funding necessary to ensure that the very process by which a person's life is condemned to eternity is legally sound, with all requisite safeguards and procedures. Alabama's unlawful defunding of the judicial branch is in itself a violation of the Alabama Constitution of 1901. More importantly, the effects of this underfunding cause violations of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution in one form or another.

II. Judicial Override

Logically, it is the innate structure of our justice system which permits lawyers to argue perspective points of the law. Consequently, lawyers may argue into eternity the similar or dissimilar nature of any question of law. In light of the Supreme Court's decision in Hurst, there is agreement on both sides that there are similarities in the Florida and Alabama capital sentencing schemes. The argument, nevertheless, is framed squarely on the method by which judges are allowed to override a jury's advisory verdict. Again, to adequately address this question, it must be considered in the proper framework.

The concept of judicial override was first adopted by the Florida State Legislature. The argued purpose of this statutory provision was "specifically to provide the constitutional procedural protections required by *Furman v. State*, thus providing capital defendants with more, rather than less, judicial protections."[8] In *Harris v. State*, Justice O'Connor, quoting *Dobbert v. Flordia*, 432 U.S. 282 (1977), further expounds on the legitimate function of the judicial override stating, "[w]e have observed in the Florida context that permitting a trial judge to reject the jury's verdict may

[8] Burnside, Fred, *Dying to Get Elected: A Challenge to the Jury Override".* Wisconsin Law Review. 1999. Print.

afford capital defendants 'a second chance for life with the trial judge.'" *Harris v. State* at 513. This paradigm is based in part if not wholly on the premise that "[…] a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases." *Proffitt v. Florida*, 428 U.S. 242 (1976). In spite of this practical intention, the practice of overriding a jury's advisory verdict of life without the possibility of parole for the imposition of capital punishment in Alabama has become questionably prevalent and suspiciously routine.

Thirty-one states in the United States authorize the imposition of capital punishment for those convicted in accordance with capital offenses.[9] Judicial override of a jury's advisory verdict is allowed by law in three states: Alabama, Florida and Delaware. [10] According to the Equal Justice Initiative (EIJ) Executive Summary and Major Findings in "*The Death Penalty in Alabama: Judge Override"* "[o]f the [31] states with the death penalty Alabama is the only jurisdiction where judges routinely override jury verdicts of life to impose capital punishment.[11] Since 1976, Alabama judges have overridden jury verdicts 107 times."[12] In 2011, it is reported that in this county alone thirteen judges were known to have exercised judicial override of a jury advisory verdict of a life sentence for the imposition of the death penalty.[13]

[9] Death Penalty Information Center. 2016. Online.
[10] *The Death Penalty in Alabama: Judge Override*, Equal Justice Initiative, July 2011. Print.
[11] In 27 of these 31 states and the federal system, the jury's decision to impose life imprisonment is final and may not be disturbed by the trial judge under any circumstances. "Alabama's capital sentencing statute is unique. In Alabama , unlike any other State in the Union, the trial judge has unbridled discretion to sentence the defendant to death – even though a jury has determined that death is an inappropriate penalty, and even though no basis exists for believing that any other reasonable, properly instructed jury would impose a death sentence.
[12] AL.com reports 95 judicial overrides of a jury sentence of life for the imposition of death. Stephens, Challen, *U.S. Supreme Court: Alabama judges can continue to override juries and impose death sentences*. November 19, 2013. Online.
[13] Project Hope to Abolish the Death Penalty.

At present Alabama is solitary in its unbridled system of allowing judges to deviate from jury advisory verdicts in order to effect life-to-death sentence overrides.[14] Jefferson County leads the state in total death sentences resulting from judicial overrides, with 17, according to the study, which looked at sentencing since the U.S. Supreme Court allowed capital punishment to resume in 1976 after a four-year nationwide ban.[15]

Florida and Delaware statutorily allow for judicial override. However, among the eighteen death row inmates in Delaware, none were sentenced to death by fashion of judicial override. Correspondingly, Florida judges have not utilized this feature of its law to override advisory verdicts of life for that of death in over fifteen years.[16] Dissenting from denial of certiorari in Woodward v. Alabama, 134 S.Ct. 405 (2013), Justice Sotomayor notes

> […] where juries have voted to impose the death penalty, Alabama judges have overridden that verdict in favor of a life sentence only nine times." In the nearly two decades since we decided *Harris,* the practice of judicial overrides has become increasingly rare. In the 1980's, there were 125 life-to-death overrides: 89 in Florida, 30 in Alabama, and 6 in Indiana. In the 1990's, there were 74: 26 in Florida, 44 in Alabama, and 4 in Indiana. Since 2000, by contrast, there have been only 27 life-to-death overrides, 26 of which were by

[14] Justice Stevens dissenting in *Harris v. State* "Alabama's capital sentencing statute is unique. In Alabama, unlike any other State in the Union, the trial judge has unbridled discretion to sentence the defendant to death – even though a jury has determined that death is an inappropriate penalty, and even though no basis exists for believing that any other reasonable, properly instructed jury would impose a death sentence.

[15] Velaso, Eric, *More Jefferson County Judges Issue Death Sentences Despite Jury*, Birmingham News (July 17, 2011).

[16] Buckwalter-Poza, Rebecca, *With Judges Overriding Death Penalty Cases, Alabama Is An Outlier*, National Public Radio.org. July 27, 2014. Online.

> Alabama judges. As these statistics demonstrate, Alabama has become a clear outlier. Among the four States that permitted judicial overrides at the time of *Harris,* Alabama now stands as the only one in which judges continue to override jury verdicts of life without parole.

Woodward v. State, 134 S.Ct. 405 (2013).

III. The Constitution

The consequence of the judicial override has raised flags among legal circles for several decades. Detractors of Alabama's capital sentencing scheme allowing for judicial override point to Constitutional violations inherent in the administration of such a structure. The Supreme Court's held in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), "[t]he Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 466.

Challenges have been lodged to undo the Alabama scheme of sentencing in capital cases allowing judicial override. One such challenge raised violation of the Fifth Amendment. The Fifth Amendment reads in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury…nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any

> criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...

Some of the arguments presented revolved around the "Double Jeopardy" clause contained in the Fifth Amendment. It has been contended that the practice of the judicial override in Alabama places a capital defendant in the circumstance of fending off death twice – first with a jury, then with a judge. Dissenting in *Harris v. State*, *513* U.S. 504 (1995) Justice Stevens writes:

> If Alabama's statute expressly provided for a death sentence upon a verdict of either the jury or the judge, [there is] no doubt it would violate the Constitution's command that no defendant 'be twice put in jeopardy of life or limb…[The] Alabama scheme has the same practical effect…Alabama trial judges almost always adopt jury verdicts recommending death; a prosecutor wins before the jury can be confident that the defendant will receive a death sentence. A prosecutor who loses before the jury gets a second, fresh opportunity to secure a death sentence. She may present the judge with exactly the same evidence and the repeat performance before a different, and likely less sympathetic, decision maker. A scheme that we assumed would 'provide capital defendant with more, rather than less, judicial protection,' has perversely devolved into a procedure that requires the defendant to stave off a death sentence at each of two de novo sentencing hearings.

Id. at 521. (Stevens, J. dissenting).

In fact, a prosecutor who fails to convince ten jurors to return a verdict of death may present to the judge the same information along with additional information that was not presented to the jury. In overruling its holding in *Walton v. Arizona*, 497 U.S. 639 (1990), the Supreme Court held "[c]apital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. This holding also implicates the fundamental underpinnings of the Fourteenth Amendment right to due process. Additionally, a capital defendant is entitled to a jury trial guarantee accorded in the Sixth Amendment, which reads. *Ring v. Arizona*, 536 U.S. 584 (2002).

"Excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Founding fathers of this country set out to prohibit against tortuous and cruel punishments.

IV. Death Penalty and Judicial Override in Alabama Statistics

The controversy surrounding the discharge of capital punishment is ubiquitously linked to the Alabama capital sentencing scheme. Despite one's intimate opinion of capital punishment, it is in fact a tenet of our law, and its effectuation was originally intended to reflect society's moral prudence. More exactly put, "[a] capital sentence expresses the community's judgment that no lesser sanction will provide an adequate response to the defendant's outrageous affront to humanity. *Gregg v. Georgia*, 428 U.S. 153 (1976). For this reason, the number of capital sentences in Alabama has been the topic of impassioned discussion worldwide.

There are a total of 185 inmates on death row in Alabama. Approximately twenty-one percent of the 199 people[17] on death row were sentenced to death through judicial override. It is documented

[17] Currently there are 185 people on death row in Alabama according to the Alabama Department of Corrections.

that "Alabama has the highest per capita death sentencing and execution rate in the U.S."[18] In 2011, Alabama executed more death row inmates than Texas. Texas has a population of 29.96 million, while Alabama's population stands at 4.894 million. Simply put, Alabama is the only state currently carrying out judicial override life-to-death sentences and executes more people than states five time its size. This phenomena is a curious one, as there is no "evidence that criminal activity in Alabama is more heinous than in other states or that Alabama juries are particularly lenient in weighing aggravating and mitigating circumstances." (Sotomayor, J., dissenting *Woodard v. Alabama*, 571 U. S. ____ (2013).

A. Alabama

The Alabama capital sentencing scheme was enacted and has remained in its current form since the nine-teen seventies. In accordance with the Alabama capital offense statute, after a defendant is unanimously convicted of a capital offense by a jury of her peers, the court conducts a sentencing hearing before a jury that decides whether a defendant should be sentenced to life imprisonment without the possibility of parole or death. The jury then presents an advisory verdict to the court. A sentence of life imprisonment without the possibility of parole requires a majority vote by the jury. A sentence of death requires no less than ten votes. Once the jury has rendered its advisory verdict, the statute requires the judge to conduct a separate sentencing hearing without a jury. At this hearing, the State is allowed by law to present additional evidence not presented to the jury. The judge is also obligated to review a pre-sentence report prepared by the State Board of Pardons and Paroles. This report is not made available to the jury. The judge then is given statutory authority to override a jury verdict of life or death. Essentially, the Alabama capital sentencing

[18] EIJ cite

law allows a judge to overturn a jury recommendation without statutory guidelines to steer the final decision.[19]

B. Hurst Application

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), Timothy Lee Hurst (Hurst) was convicted by a jury of first-degree murder, a capital offense, in Escambia County Florida. The jury recommended a sentence of death. The trial court sentenced Hurst to death. Hurst appealed the trial court's sentence to the Florida Supreme Court, and was granted a new sentencing hearing. At the conclusion of the resentencing hearing the jury again recommended death, and the trial court again at the close of the separate sentencing hearing articulated facts as required by Florida law to sentence Hurst to death. The Florida Supreme Court affirmed the trial court's sentence, rejecting Hurst's argument pursuant to the holding in *Ring v. Arizona*, 536 U.S. 584 (2002), in which the United States Supreme Court (The Supreme Court) found "unconstitutional an Arizona capital sentencing scheme that permitted a judge rather than a jury to find the facts necessary to sentence a defendant to death. Hurst appealed, and was granted certiorari.[20] In the opinion delivered by Justice Sotomayor, the Supreme Court cited its ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) "[] [a]ny fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's verdict is an 'element' that must be submitted to a jury." *Id.* at 494. Specifically, the Supreme Court held

> The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death

[19] Heery, Shannon, *If It's Constitutional, Then What's the Problem?: The Use of Judicial Override in Alabama Death Sentencing*. Washington University Journal of Law and Policy. 2010. Print.
[20] Arguments were heard before the Supreme Court on October 13, 2015. The Supreme Court rendered an opinion on January 12, 2016.

> sentence on a jury's verdict, not a judge's factfinding [sp]. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.

Hurst v. Florida, 136 S.Ct. 616 (2016).

In light of the ruling in *Hurst*, this Defendant, by and through his attorney of record, comes before the court today on a motion requesting the Court to declare the Alabama Capital Murder Statute Unconstitutional and to bar the death penalty.[21] The Jefferson County District Attorney's Office representing the State of Alabama (the State) filed a response requesting that the court to deny the defendant's motion.[22]

The quotation "[w]hat's past is prologue"[23] is precisely applicable when examining the evolution of the law relating to capital punishment in the United States. The changing mores of this country's citizenry has led to distinct trends in the attitudes toward capital punishment and its application throughout the years. Considering such a concept as the imposition of capital punishment requires the application of context. The first recorded imposition of capital punishment occurred in colonial Virginia in 1608.[24] The purpose of punishment can be divided into four groupings: retribution, incapacitation, rehabilitation and deterrence. As it relates to capital punishment, retribution is the only relevant purpose for which this form of punishment would be affected. Precisely, retribution

[21] Defendant's motion was filed with the Jefferson County Circuit Clerk on January 1, 2016.
[22] The State's response was filed on February 1, 2016.
[23] Shakespeare, William, *The Tempest*, Act 2, Scene I
[24] Bridges, F.D., Eaton, O.H., Elwyn, T., Emas, K., Jones, C.D., Kent-Stevens, C., Maag-Kline, M., Piasecki, M., Sage, M., Sinclair, V.L., & White, P., *Presiding Over A Capital Case. A Benchbook for Judges*. The National Judicial College, 2009. Print.

has been historically correlated with the "eye for an eye" theory of justice, or lex talionis the "law of retaliation."[25]

Death as a retributive punishment during the 17th century was not uncommon, nor were other punishments such as whipping, hanging or ear cropping.[26] It is in this context that capital punishment must be firstly considered. For three centuries since the first recorded state ratified execution, capital punishment statutes varied tremendously. The chronicles of history undoubtedly reflect the grossly indiscriminate application of capital punishment upon black Americans, the poor, and the mentally impaired. In response to this unseemly chasm between the theoretical and actual application of the law, the Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972) pronounced the modern era "Death is Different Jurisprudence." As a result of the ruling in *Furman*, several state death penalty statutes were held unconstitutional.

In *Furman*, the Supreme Court granted certiorari limited to the question "whether the imposition and carrying out of the death penalty in (these cases) constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?" In response to this question, The Supreme Court held that

> [I]mposition and carrying out of death penalty in cases before court would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments…It has been assumed in our decisions that punishment by death is not cruel, unless the manner of execution can be said to be inhuman and barbarous. [However],

[25] Fieser, James, *Moral Issues that Divide Us* and *Applied Ethics: A Sourcebook*, 2008. Print
[26] Cox, J., *Bilboes, Brands, and Branks Colonial Crimes and Punishments*, CW Journal. Winter 2002-2003.

> [a]ny law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment."

Id. at 238, 241 and 257.

As a result of this holding, several state death penalty statutes were deemed unconstitutional. Justice Stewart, concurring in *Furman*, opined:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Id. at 306.

From this proposition the "Death is Different Jurisprudence" was settled. This application of the law links the exceptionality of the death penalty to the exceptionality of the process requisite to keep death sentences from being imposed in a cruel and unusual manner.[27]

There are been several cases relating to the constitutionality of capital punishment in this country since the ruling in *Furman*. This multitude of opinions address varying aspects of the law relating to capital punishments. These opinions were considered at varying instances in history and were

[27] Abramson, J., *Death-is-Different Jurisprudence and the Role of the Capital Jury*, Ohio State Journal of Criminal Law [Vol 2:117], 2004. Print.

considered in the framework of varying fact patterns. Even so, all of these opinions by the Supreme Court offer critical peripheral context to the question at bar. As Justice Marshall so aptly surmised, "[s]everal principles emerge from these prior cases and serve as a beacon to an enlightened decision in the instant case[]." *Id.* at 328.

The Supreme Court in *Hurst v. Florida*, 136 S.Ct. 616 (2016), reviewed the application of capital punishment pursuant to the Florida capital sentencing scheme. Under Florida law, felonies are grouped into five categories.[28] Relevant for discussion in this determination is the category of Capital felony. Pursuant to Florida law, "the maximum sentence a capital felon may receive on the basis of a conviction alone is life imprisonment." *Id.* at 617. The statute further provides that if a person is convicted of a capital felony, he or she may be sentenced to death, but only if an additional sentencing proceeding "results in findings by the court that such a person shall be punished by death."[29] This proceeding requires the judge to conduct an evidentiary hearing before a jury. The jury then, by a majority vote "renders an 'advisory sentence." *Id.* at 617. The court is then required to "independently find and weigh the aggravating and mitigating circumstances before entering a sentence of life or death." *Id.* at 617.[30] The aggravating and mitigating circumstances available for judicial consideration are itemized in Florida Statute 921.141. In citing its holding in *Apprendi v. New Jersey*, 530 US 466 (2000) and *Ring v. Arizona*, 122 S.Ct. 2428, the Supreme Court held that the Florida capital sentencing scheme "violates the Sixth Amendment." *Hurst v. Florida* at 618.[31]

[28] Fla. Stat. § 775.081.
[29] Fla. Stat. § 775.082(1).
[30] Fla. Stat. § 921.141 (2) and (3).
[31] In *Ring v. Arizona*, the Supreme Court held "[a]n Arizona judge's independent factfinding exposed Ring to a punishment greater than the jury's guilty verdict authorized. *Id.* at 2428.

C. Harris Argument

In delivering the opinion of the Supreme Court in *Harris v. State*, 513 U.S. 504 (1995), Justice O'Conner provides an adequate explanation of the similarities and differences in the Florida and Alabama statutory capital sentencing schemes. In her opinion Justice O'Conner opined,

> Alabama's capital sentencing scheme is much like that of Florida. Both require jury participation in the sentencing process but give ultimate sentencing authority to the trial judge. A sentence of death in both States is subject to automatic appellate review. In Florida, as in Alabama, the reviewing courts must independently weigh aggravating and mitigating circumstances to determine the propriety of the death sentence, and must decide whether the penalty is excessive or disproportionate to similar cases. The two States differ in one important respect. The Florida Supreme Court has opined that the trial judge must give "great weight" to the jury's recommendation and may not override the advisory verdict of lifeunless [sic] "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." The Alabama capital sentencing statute, by contrast, requires only that the judge "consider" the jury's recommendation, and Alabama courts have refused to read the *Tedder* standard[32] into

[32] In *Tedder V. State*, 322 So.2d 908 (1975), the defendant was convicted of first degree murder and the jury, after a second trial for sentencing, returned a recommended sentence of life imprisonment. Based upon a finding of three aggravating circumstances, and none in mitigation, the trial judge overrode the jury's recommendation of life imprisonment and imposed a sentence of death. Upon immediate appeal, the Florida Supreme Court reversed the trial court's decision and announced the *Tedder* standard, wherein, the trial judge must afford "great weight" to a jury's

> the statute. This distinction between the Alabama and Florida schemes forms the controversy in this case – whether the Eighth Amendment to the Constitution requires the sentencing judge to ascribe any particular weight to the verdict of an advisory jury.

Harris v. State at 508.

Alabama Attorney General Office argued in a recent brief to the Supreme Court, "[t]his Court upheld the constitutionality of Alabama's current capital sentencing statute in *Harris v. Alabama*, 513 U.S. 504 (1995), and that decision remains good law."[33] This statement is in fact legally correct. However, the Attorney General fell short of wholly explicating the Supreme Court's holding in its unadulterated context. Specifically, Justice O'Connor distinctly identifies the question submitted by the Petitioner in *Harris*. Justice O'Connor stated,

> Consistent with established constitutional law, Alabama has chosen to guide the sentencing decision by requiring the jury and judge to weigh aggravating and mitigating circumstances. Harris does not challenge this legislative choice. And she objects to neither the vesting of sentencing authority in the judge nor the requirement that the advisory verdict be considered in the process. What she seeks instead is a constitutional mandate as to how that verdict should be

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recommendation and cannot override a jury's recommendation of life unless "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ."

[33]State of Alabama, *BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI AND TO THE MOTION FOR STAY OF EXECUTION* Woodard v. State, 571 U.S.____(2013).

> considered, she suggests that the judge must give "great weigh" to the jury's advice

Id. at 511.

In accordance with Federal Law, the Supreme Court grants certiorari:

> By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; (2) [b]y certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C.A. § 1254.

Inherently the Supreme Court delivers opinions relating to certified questions exclusively. Consequently, the question relating to judicial override of a jury's sentence recommendation in capital cases was not presented to the Supreme Court in *Harris v. State.* The State argues in the present case that Alabama's statute "varies significantly from Florida's." The Alabama Court of Criminal Appeals in its affirmation of Harris' conviction noted "Alabama's death penalty statute is based on Florida's sentencing scheme, which we have held to be constitutional." *Id.* at 508.

Alabama Code 1975 §13A-1-2 defines a felony offense as "[a]n offense for which a sentence to a term of imprisonment in excess of one year is authorized by this title." Ala.Code 1975 § 13A-1-2.

This definition mirrors that enumerated in the Florida Criminal Code. [34] Alabama Code 1975 §13A-5-40 further provides a register of capital offenses. Here, the Alabama Code deviates slightly from the Florida Code, wherein the Alabama Criminal Code intertwines the capital offense and the aggravating circumstances. In essence, as argued by the State in its response to the motion before this court, "Florida, unlike Alabama, did not require that a jury find the existence of a death eligible aggravating factor beyond a reasonable doubt in order to make a guilty verdict death eligible."[35] However, as argued by the defendant, the court is permitted to consider information that was not privy to the jury.

A jury's recommendation of a life sentence based on a finding that the requisite aggravating factors have been proven beyond a reasonable doubt, and that the mitigating circumstances outweigh these factors, should remain undisturbed. Allowing a judge to consider information not known to the jury and override the jury's determination in effect voids the jury's finding of guilt beyond a reasonable doubt. Alabama law intertwines the finding of aggravating factors with the offense itself. In order to find a defendant guilty of a capital offense, the jury must find that the state has proven the aggravating factor as an element of the charge beyond a reasonable doubt. If the law does not consider the jury's finding sufficient for a sentencing verdict, then it cannot rationally find it sufficient for a finding of guilt.

More importantly, capital defendants in Alabama are subject to having the "maximum authorized punishment…increased by a judge's own factfinding." *Hurst v. Florida*, 136 S.Ct. 616 (2016). In light of the ruling in *Hurst*, Alabama's capital sentencing scheme, "under which an advisory jury

[34] "(1) The term 'felony' shall mean any criminal offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by death or imprisonment in a state penitentiary….A person shall be imprisoned in the state penitentiary for each sentence which…exceeds 1 year. Fla. Stat. §775.08.

[35] Fla. Stat. §921.141.

makes a recommendation to a judge, and the judge makes critical findings needed for the imposition of a death sentence, violates the Sixth Amendment right to trial by jury." *Id.* at 616.

V. CONCLUSION

In this nation's infancy, it was forecasted that [if]f the power of making [periodic judicial appointments] was committed either to…the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the constitution and the laws. Furthermore, "creating an elected judiciary was akin to an assault on the 'the democratic republic itself,' and that 'sooner or later these innovations will have dire results. Alabama judges have become "too responsive to a higher power" and have "succumbed to electoral pressures." (Sotomayor, J. Dissenting, *Woodward v. State* 571 U.S. _____ (2013) at 7).

As it relates to capital punishment, it is settled law that death is different. Therefore, our Constitution requires states to apply "special procedural safeguards to 'minimize the risk of wholly arbitrary and capricious action' in imposing the death penalty. (Sotomayor, J. Dissenting, *Woodward v. State* 571 U.S. _____ (2013) at 3). The Alabama capital sentencing scheme fails to provide special procedural safeguards to minimize the obvious influence of partisan politics or the potential for unlawful bias in the judiciary. As a result, the death penalty in Alabama is being imposed in a "wholly arbitrary and capricious" manner.

The call for justice has been resounding. The answer to this call has been unjustifiably belated. In the words of Dr. Martin Luther King, Jr. "[w]e are now faced with the fact that tomorrow is today. We are confronted with the fierce urgency of now. In this unfolding conundrum of life and history, there 'is' such a thing as being too late. This is no time for apathy or complacency. This is a time

for vigorous and positive action."[36] It is hereby, **ORDERED, ADJUDGED AND DECREED** that the capital sentencing scheme as provided by the Alabama Criminal Code is unconstitutional and is this day barred from enactment.

[36] Cite speech