

IN THE CIRCUIT COURT OF MAYCOMB COUNTY, ALABAMA

STATE OF ALABAMA,

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v.

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Case No. CC-00-0000

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JOE CLIENT.

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**MOTION TO PROHIBIT IMPOSITION OF THE DEATH PENALTY
BECAUSE IT IS UNCONSTITUTIONALLY ARBITRARY**

Joe Client respectfully moves this Court to bar the death penalty in this case because Alabama’s capital statute is enforced and applied in an arbitrary manner, and because prosecutorial and judicial discretion lead to arbitrary imposition of the death penalty in violation of state and federal law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

1. A death penalty statute is unconstitutional if the death penalty is “imposed in an arbitrary or capricious manner.” Gregg v. Georgia, 428 U.S. 153, 195 (1976); see also Furman v. Georgia, 408 U.S. 238, 257 (1972); Ex parte Clark, 728 So. 2d 1126, 1138 (Ala. 1998) (“to survive Eighth Amendment scrutiny . . . a capital punishment statute must provide a ‘principled way to distinguish’ cases in which the death penalty is appropriate from cases in which it is not”) (quoting Godfrey v. Georgia, 446 U.S. 420, 433 (1980)).

I. Alabama’s Capital Statute Is Applied in a Geographically Arbitrary Manner.

2. When the application of a statute leads to arbitrary geographical differences, it violates the Equal Protection Clause of the Fourteenth Amendment. See Bush v. Gore, 531 U.S. 98, 107 (2000) (noting that disparities in application of laws violate Equal Protection Clause); Thorn v. Jefferson County, 375 So. 2d 780, 787 (Ala. 1979) (questioning validity of taxing some counties more than others without explanation from legislature); McCarthy v. Jones, 449 F. Supp. 480, 484 (S.D. Ala. 1978) (arbitrary distinctions in enforcement of law between counties renders tax law “repugnant to the Fourteenth Amendment of the United States Constitution”).

3. The disparities in the application of Alabama’s death penalty in different counties across the state are dramatic. As of September 26, 2016, only six of Alabama’s sixty-seven counties (Jefferson, Montgomery, Talladega, Houston, Mobile, and Etowah) accounted for nearly half (91) of all the inmates on death row (183) in Alabama. Alabama

Inmates on Death Row, Ala. Dep't of Corr., <http://www.doc.state.al.us/DeathRow.aspx>.

4. Differing homicide rates between counties do not explain these geographical disparities. In 2016, Etowah, Talladega, and Houston counties had twenty homicides between them, as compared to 104 homicides in Jefferson County. Despite the drastically lower number of homicides, Etowah, Talladega and Houston counties combined have sent thirty-four inmates to death row — five more than Jefferson County. Moreover, Butler County had five homicides, just like Talladega County, but while Butler has no inmates on death row, Talladega has nine. Ala. Law Enforcement Agency, Crime in Alabama Reports, 2016, available at <http://www.alea.gov/Documents/Documents/CrimeInAlabama-2016.pdf>.

5. The arbitrary and capricious geographical application of the death penalty in Alabama renders its capital statute unconstitutional. See Gregg, 428 U.S. at 195; Glossip v. Gross, 135 S. Ct. 2726, 2761 (2015) (Breyer, J., dissenting) (“Geography also plays an important role in determining who is sentenced to death . . . [W]ithin a death penalty State, the imposition of the death penalty heavily depends on the county in which a defendant is tried.”).

II. Alabama’s Capital Statute Is Applied in an Arbitrary and Racially Biased Manner.

6. Mr. Client is entitled to capital sentencing procedures that do not arbitrarily and unfairly discriminate on the basis of race. See Furman v. Georgia, 408 U.S. 238, 257 (1972) (Douglas, J., concurring) (“[Discretionary statutes] are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws implicit in the ban on ‘cruel and unusual’ punishments”); Ex parte Hays, 518 So. 2d 768, 776-77 (Ala. 1986) (noting that past juries exercised discretion in racially discriminatory ways); see also Glossip v. Gross, 135 S. Ct. 2726, 2762-63 (2015) (Breyer, J., dissenting) (“[R]acial and gender biases may, unfortunately, reflect deeply rooted community biases (conscious or unconscious), which, despite their legal irrelevance, may affect a jury’s evaluation of mitigating evidence.”).

7. A pattern of discrimination in the application of Alabama’s death penalty based on the race of the victim, the race of the defendant, or both, is plainly evident.¹ In 2016, only 11.2 percent of all Alabama homicides where the offender’s race is known involved white victims and black offenders and only 16.7 percent of homicides committed by black offenders

¹ As of September 21, 2017, all of Alabama’s nineteen appellate court judges are white.

were against white victims. Ala. Law Enforcement Agency, Crime in Alabama Reports, 2016, available at <http://www.alea.gov/Documents/Documents/CrimeInAlabama-2016.pdf>. However, 50 percent of the black inmates currently on death row were convicted of a crime involving a white victim. In 2016, approximately 26 percent of all homicides in the state where the victim's race is known involved victims who were white. Id. Currently, however, 69 percent of the people on death row were sentenced for crimes with white victims. These disparities demonstrate that racial bias results in arbitrary imposition of Alabama's death penalty.

8. Black inmates represent an arbitrarily disproportionate share of the inmates that have been executed by the State of Alabama. Since the death penalty was reinstated in 1976, 68 percent of the black inmates executed in Alabama were convicted of crimes with white victims. See NAACP Legal Defense and Education Fund, Death Row U.S.A., Spring 2017 (statistics as of April 1, 2017).

9. Since 1986, when the Supreme Court decided Batson v. Kentucky, 476 U.S. 79 (1986), over twenty death sentences have been overturned because the prosecutor illegally excluded African Americans from the jury in a racially discriminatory manner.²

10. Because the death penalty is applied in an arbitrary and racially biased manner in Alabama, the capital statute is unconstitutional. See McCleskey v. Kemp, 481 U.S. 279, 312 (1987).

² See, e.g., Adkins v. Warden, Holman CF, 710 F.3d 1241 (11th Cir. 2013); McGahee v. Ala. Dep't of Corr., 560 F.3d 1252 (11th Cir. 2009); Bui v. Haley, 321 F.3d 1304 (11th Cir. 2003); Cochran v. Herring, 43 F.3d 1404 (11th Cir. 1995); Ex parte Bankhead, 625 So. 2d 1146 (Ala. 1993); Ex parte Floyd, 571 So. 2d 1234 (Ala. 1990); Ex parte Jackson, 516 So. 2d 768 (Ala. 1986); Yancey v. State, 813 So. 2d 1 (Ala. Crim. App. 2001); Lucy v. State, 785 So. 2d 1174 (Ala. Crim. App. 2000); Giles v. State, 815 So. 2d 585 (Ala. Crim. App. 2000); Moore v. State, 661 So. 2d 770 (Ala. Crim. App. 1994); Freeman v. State, 651 So. 2d 576 (Ala. Crim. App. 1994); Kynard v. State, 631 So. 2d 257 (Ala. Crim. App. 1993); Williams v. State, 620 So. 2d 82 (Ala. Crim. App. 1992); Neal v. State, 612 So. 2d 1347 (Ala. Crim. App. 1992); Duncan v. State, 612 So. 2d 1304 (Ala. Crim. App. 1992); Smith v. State, 620 So. 2d 732 (Ala. Crim. App. 1992); Acres v. State, 548 So. 2d 459 (Ala. Crim. App. 1987); Powell v. State, 548 So. 2d 590 (Ala. Crim. App. 1988); Turner v. State, 521 So. 2d 93 (Ala. Crim. App. 1987); Owens v. State, 531 So. 2d 22 (Ala. Crim. App. 1987).

III. Unfettered Prosecutorial Discretion Makes the Application of the Death Penalty in Alabama Arbitrary.

11. Prosecutors’ decisions about who to charge with a capital crime and against whom to seek the death penalty introduce an arbitrary factor in the application of Alabama’s death penalty. See Leigh B. Bienen et al., The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion, 41 Rutgers L. Rev. 27, 327 (1988) (statistical analysis shows that prosecutorial decisionmaking “varied greatly across counties”). Because each elected prosecutor has her own views on capital punishment and her own implicit and explicit biases, each prosecutor enforces the death penalty using different criteria, resulting in impermissibly arbitrary application of the death penalty.

12. Because the death penalty cannot be applied in an “arbitrary or capricious manner,” Gregg v. Georgia, 428 U.S. 153, 195 (1976), prosecutorial discretion that leads to arbitrary enforcement of Alabama’s capital statute is unconstitutional.

For these reasons, Mr. Client respectfully moves this Court to enter an order granting this motion.

Respectfully submitted,

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[CERTIFICATE OF SERVICE]

[MOTION UPDATED ON 10/05/17]