No. 1961635

IN THE ALABAMA SUPREME COURT

EX PARTE VERNON MADISON	*	
	*	
STATE OF ALABAMA,	*	**EXECUTION SCHEDULED FOR**
	*	**JANUARY 25, 2016**
Petitioner,	*	**6:00 PM**
	*	
v.	*	
	*	
VERNON MADISON, SR.,	*	
	*	
Respondent.	*	

PETITION FOR RELIEF FROM UNCONSTITUTIONAL SENTENCE AND FOR STAY OF EXECUTION

Vernon Madison **is currently scheduled to be executed on Thursday, January 25, 2018 at 6:00 p.m.**

Vernon Madison was sentenced to death by Mobile County Circuit Court Judge Ferrill McRae despite the fact that the jury who heard his case decided that he should **not** be sentenced to death and instead returned a sentence of life imprisonment without parole. At the time of his trial and conviction, Alabama law permitted a judge to reject a jury's considered verdict.

In 2017, the State of Alabama repealed its judicial

override statute, thus joining the rest of the country in abolishing the practice of judicial override. Given Alabama's rejection of judicial override, the death sentence in this case constitutes cruel and unusual punishment and violates Mr. Madison's rights to a jury, fair and reliable sentencing and to due process and equal protection of the laws as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Alabama law.

Pursuant to Rules 2(b) and 8(d)(1) of the Alabama Rules of Appellate Procedure, and Alabama Code § 12-2-2, Mr. Madison respectfully requests that this Court stay his execution scheduled for January 25, 2018, determine that the judicial override in this case is unconstitutional, grant this petition, and order that he be sentenced to life without parole.

I. MR. MADISON'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Eighth Amendment requires that there be a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. 238, 313 (1972). Since reinstating the death penalty in Gregg v. Georgia, the U.S. Supreme Court has barred "sentencing procedures that create[]

a substantial risk that [a death sentence] would be inflicted in an arbitrary and capricious manner." 428 U.S. 153, 188 (1976) (plurality opinion); see also Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (recognizing the heightened "need for reliability in the determination that death is the appropriate punishment in a specific case").[1]

Allowing Vernon Madison to be executed, when a sentence of death is no longer permitted under Alabama law constitutes the kind of arbitrariness that violates the Eighth and Fourteenth Amendments and should not be permitted by this Court.

[1] See also Zant v. Stephens, 462 U.S. 862, 885 (1983); Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion)("[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.").

A. Mr. Madison's Sentence of Death, Imposed by a Judge Over a Jury's Life Verdict, Violates the Eighth Amendment Because There Is Unanimous State Agreement that a Jury's Verdict Should Be Final.

The Eighth Amendment's prohibition on cruel and unusual punishment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). The United States Supreme Court has found that this means that "resort to the [death] penalty must be reserved for the worst of crimes and limited in its instances of application." Kennedy v. Louisiana, 554 U.S. 407, 446-47 (2008). Because a national consensus has emerged against judicial override, Alabama's execution of individuals such as Vernon Madison who were sentenced to death by a judge despite a jury life verdict prior to the abolition of jury override in Alabama violates the Eighth Amendment's prohibition on cruel and unusual punishment.

The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures" as well as "state practice." Atkins v. Virginia, 536 U.S. 304, 312 (2002) (quoting Penry v. Lynaugh, 492 U.S. 302 (1989)); Roper v. Simmons, 543 U.S. 551 (2005) (finding "objective indicia of society's standards" are

"expressed in legislative enactments and state practice"). Although there are currently thirty-one (31) states that have active death penalty statutes, none of these states permits a judge to impose the death penalty after a jury verdict for life. Judicial override is thus inconsistent with current societal values.

The "consistency of the direction of change" is also significant. Atkins, 536 U.S. at 315. Before 2016, all but three states' death penalty schemes respected the jury's decision on whether to impose death or life imprisonment as final. See Equal Justice Initiative, The Death Penalty in Alabama: Judicial Override 11 (2011). Only Florida, Delaware, and Alabama permitted judicial override, though Alabama was the only state to allow override without guiding standards. Id. In 2016, however, the Florida legislature abolished judicial override and revised the state's death penalty scheme. See 2016 Fla. Sess. Law Serv. Ch. 2016-13 (H.B. 7101). Although not by legislative action, Delaware also ended judicial override in 2016 through a decision of the Delaware Supreme Court, Rauf v. State, 145 A.3d 430, 434 (2016) (per curiam), which then applied the decision retroactively to invalidate all death sentences, Powell v.

State, 153 A.3d 69, 75-76 (2016) (per curiam). Finally, in early 2017, both houses of Alabama's legislature voted to end judicial override. See Act No. 2017-131, Ala. Acts 2017 ("S.B. 16"). On April 11, 2017, Governor Kay Ivey signed Senate Bill 16 into law, which prohibited any further practice of judicial override in Alabama capital cases. See Ala. Code § 13A-5-47 ("Where a sentence of death is not returned by the jury, the court shall sentence the defendant to life imprisonment without parole.").

As a result, no state currently allows a judge to override a jury's capital sentencing verdict. This constitutes not merely "national consensus," see Kennedy, 554 U.S. at 426, but **unanimous agreement** that a sentence of death imposed by a judge contrary to a jury's life verdict does not comport with our evolving standards of decency and the Eighth Amendment.

The abolition of judicial override further implicates a more basic expression of a society's evolving standards. As the United States Supreme Court has explained:

> "[O]ne of the most important functions any jury can perform in [deciding whether to impose death in a given case] is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment would hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'"

Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968) (quoting Trop); see also Atkins, 492 at 323-24 (Rehnquist, J., dissenting) ("[T]he actions of sentencing juries, though entitled to less weight than legislative judgments, is a significant and reliable objective index of contemporary values . . . ." (quotations and citations omitted)). By abolishing judicial override, Alabama and other states have sought to strengthen that link and prevent the interposition of a trial judge's actions between the Eighth Amendment's orientation to evolving standards and the fundamental expression of those standards by community members. Here, the life verdict rendered by the Mobile County Circuit Court was an expression of community values and, under the Eighth Amendment, it should be respected.[2]

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[2]As Alabama State Senator Dick Brewbaker, a proponent of the bill to abolish judicial override commented:

> One of the most important things about our democracy is our laws are derived from the common law, ...That's why a crime of violence is a crime against a community. That's why we have a trial in the community. That's why we pick a jury of the community and they decide guilt, innocence, and punishment. Judicial override flies in the face of that. You are entitled to a trial of a jury of your peers, and that ought to apply to sentencing too.

See *Bill Advances to Take Away AL judges' ability to override*

Because there is unanimous agreement among the states that a jury's decision as to whether to impose death or life imprisonment is final and because the jury voted to sentence Mr. Madison to life, Mr. Madison's sentence of death and impending execution violate the Eighth Amendment.

B. Mr. Madison's Sentence of Death, Imposed by a Judge Over a Jury's Life Verdict, Violates the Eighth Amendment Because it is Arbitrary and Capricious.

Although trial judges in Alabama previously had the authority to override either life or death verdicts, ninety-two percent of judicial overrides resulted in sentences of death. See Equal Justice Initiative, The Death Penalty in Alabama: Judge Override 14 (2011), http://eji.org/eji/files/Override_Report.pdf.

Override outcomes strongly suggest racial and geographic disparities in override cases which raise another set of concerns about the integrity and reliability of judge override.[3] Additionally, defendants who stand trial in certain

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juries,WSFA, Feb. 24, 2017,http://www.wsfa.com/story/34601206/bill-advances-to-take-away-al-judges-ability-to-override-juries.

[3]For example, Alabama circuit judges overrode "jury life verdicts in cases involving white victims much more frequently than in cases involving victims who are black." Equal Justice Initiative, The Death Penalty in Alabama: Judge Override 5 (2011), http://eji.org/eji/files/Override_Report.pdf.

counties are uniquely vulnerable to a judge overturning a jury verdict for life, in violation of the Equal Protection Clause of the Fourteenth Amendment. See Ross v. Moffitt, 417 U.S. 600, 609 (1974). This is because some Alabama counties have highly disproportionate rates of death sentences imposed by judicial override as compared to other counties. Significantly, just three of Alabama's 67 counties account for nearly 50% of the life-to-death overrides across the state. See Equal Justice Initiative, The Death Penalty in Alabama: Judge Override 17 (2011), http://eji.org/eji/files/Override_Report.pdf. Mobile County, where Mr. Madison was tried and sentenced, accounts for 10% of death sentences imposed statewide since 1977, but Mobile judges imposed 16% of Alabama's life-to-death overrides in that same period. Id. Moreover, the rate of judicial overrides per county does not rationally correspond with those same counties' rates of death sentences. For instance, in 2008, Houston County, with a population of approximately 95,660 and the highest per capita death sentencing rate in the state, sent sixteen times more people to death row than Lee County, which has a population of approximately 125,781. See Equal Justice Initiative, Study Reveals Geographic Disparities

in Death Sentencing Among Alabama Counties, May 1, 2008, https://eji.org/news/study-geographic-disparities-death-sentencing-alabama-counties. However, a Houston County judge has never overridden a jury's verdict from life to death, while Lee County judges have done so on four different occasions. See Equal Justice Initiative, The Death Penalty in Alabama: Judge Override at 17. Elected trial judges may have many different reasons for choosing to override a jury's life verdict. And in the absence of any procedural protections, jury verdicts of life imprisonment without parole play unpredictable and indeterminate roles in the sentencing process and have been rejected, as in this case, for reasons that remain wholly undisclosed. See Katheryn K. Russell, The Constitutionality of Jury Override in Alabama Death Penalty Cases, 46 Ala. L. Rev. 5, 32-35 (1994).

The judicial override in this case resulted in a death sentence that is arbitrary, disproportionate, and unconstitutional. See Woodson, 428 U.S. at 305 (requiring "reliability" in imposition of sentence of death). Allowing Mr. Madison's sentence to stand would violate the Eighth and Fourteenth Amendment guarantees of reliable capital sentencing.

II. EXECUTING MR. MADISON DESPITE THE ABOLITION OF JUDICIAL OVERRIDE VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT.

Given that Alabama no longer permits a prisoner to be sentenced to death where the jury has returned a verdict of life, the execution of Mr. Madison, where the trial court imposed death despite a jury verdict for life violates the Fourteenth Amendment's guarantee to equal protection of the laws and due process, as well as Mr. Madison's fundamental rights against the arbitrary and capricious imposition of death. In 2017, Alabama became the last state to end the practice of allowing a judge to impose death where a jury has voted for life, Act No. 2017-131, Ala. Acts 2017 ("S.B. 16"), and since that time Alabama has not sought to execute an individual whose sentence of death was the result of judicial override.[4]

Whether executing a man pursuant to a sentence imposed over a jury's life verdict after the practice has been abolished in all states violates the Equal Protection Clause of the Fourteenth Amendment is a unique question that no court has answered or had the opportunity to consider. Prior cases

[4]In 2017, since abolition of judicial override, Alabama has executed Tommy Arthur, Robert Melson, and Torrey McNabb, none of whom were sentenced to death over a jury's life verdict.

before the United States Supreme Court and this Court have not fully addressed equal protection and judicial override in any way. For example, in Harris v. Alabama, the United States Supreme Court approved the practice of judicial override, prior to its abolition, under the Eighth Amendment but stated "[Harris] does not bring an equal protection claim." 513 U.S. 504, 515 (1995); see also, e.g., Ex parte Taylor, 808 So. 2d 1215, 1217 n.2 (Ala. 2001) (dismissing equal protection argument concerning differentiation between those whose life verdict is overridden and those whose life verdict is followed where no authorities or evidence cited).

A. Executing Mr. Madison Although Everyone Sentenced After 2017 Cannot Be Similarly Sentenced Violates the Equal Protection Clause of the Fourteenth Amendment.

As a result of the 2017 legislative abolition of judicial override, no person tried today can be given the sentence Mr. Madison received, death where the jury has voted for life, and no person sentenced today can eventually be executed where the jury does not vote for death.

The Equal Protection Clause protects against "disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable," Ross v. Moffitt, 417 U.S. 600, 609 (1974), and requires that where such

disparity exists there must be a valid basis for it, Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 441-42 (1985). Regardless of whether Mr. Madison's status as a person sentenced to die over the will of a jury prior to abolition constitutes membership in a protected class, there is simply no legitimate basis for distinguishing between someone like Mr. Madison, who is scheduled to be executed despite a jury's life verdict, and a person sentenced to death now, who by law cannot be sentenced to death if a jury does not will it. For example, any argument as to the possibility of extensive litigation is inaccurate given the limited number of people affected and the clear line of demarcation for the class, the presence of a life verdict. Where as here there is no basis for distinction, the Equal Protection Clause of the Fourteenth Amendment requires relief. Cleburne, 473 U.S. at 450.

B. Executing Mr. Madison Following Abolition of Judicial Override Violates His Fundamental Right to Be Free of Arbitrary and Capricious Punishment.

Additionally, and in any case, Mr. Madison's right to be free of the arbitrary and capricious imposition of death is a fundamental right infringement of which requires satisfaction of strict scrutiny. The right to be free of the arbitrary and capricious imposition of death is a fundamental right. See

U.S. Const. amend. VIII; Gregg v. Georgia, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (noting "penalty of death is different in kind from any other punishment" and explaining "Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."); see also Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015) ("The identification and protection of fundamental rights . . . requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect."). Thus, carrying out the death penalty in a case like Mr. Madison's where the jury voted for life despite the abolition of judicial override must overcome strict scrutiny. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) ("equal protection analysis requires strict scrutiny" where fundamental rights infringed). Here, the lack of retroactive applicability of judicial override abolition in S.B. 16 and the State of Alabama's plan to execute him violates Mr. Madison's fundamental right by treating him and others like him in a way that no person can be now, by carrying out execution where a jury voted for life,

cannot withstand any constitutional scrutiny.

III. JUDICIAL OVERRIDE VIOLATES HURST V. FLORIDA AND THE SIXTH AND FOURTEENTH AMENDMENTS.

In Hurst v. Florida, 136 S. Ct. 616 (2016), the United States Supreme Court held that the Sixth Amendment requires that every fact necessary to impose a sentence of death must be proven to a jury beyond a reasonable doubt. 136 S. Ct. at 621-22. In so holding, Hurst invalidated death penalty sentencing schemes, such as Alabama's superseded law, that allowed for judicial override of a jury's sentencing verdict specifying life without parole. After Hurst, the Constitution is understood to "require[] [states] to base [the imposition of a] death sentence on a jury's verdict, not a judge's factfinding." 136 S. Ct. at 624. In this case, Mr. Madison's death sentence was imposed by the trial court despite the fact that 1) the jury never made a unanimous finding in the penalty phase as to the existence of any aggravating circumstance beyond a reasonable doubt, and 2) the jury affirmatively found that the aggravating circumstances did not outweigh the mitigating circumstances, resulting in the return of a verdict of life without parole. (R. 800.) Because the findings necessary for the imposition of a sentence of death in this case were never made by the jury, but were instead made by the

judge, Mr. Madison's sentence of death is unconstitutional.

Hurst also overruled the core precedent that was relied upon to uphold Alabama's judicial override system. Twenty-three years ago, in Harris v. Alabama, 513 U.S. 504 (1995), the U.S. Supreme Court upheld Alabama's judicial override provisions against an Eighth Amendment challenge by relying on Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam), and Spaziano v. Florida, 468 U.S. 447 (1984). See 513 U.S. at 509-10. At the time, Hurst's ruling was particularly relevant to Alabama because this state's death penalty statute was nearly identical to the Florida statute that was struck down. See Harris v. Alabama, 513 U.S. 504, 508 (1995) ("Alabama's death penalty statute is based on Florida's sentencing scheme . . . ."). Against the State's arguments, the Hurst Court explicitly overruled Spaziano and Hildwin, explaining that "'stare decisis does not compel adherence to a decision whose underpinnings have been eroded by subsequent developments of constitutional law.'" 136 S. Ct. at 623-24 (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989)). Without the core precedent on which it relied, Harris is no longer valid. See Brooks v. Alabama, 136 S. Ct. 708 (2016) (mem.) (Sotomayor, J., concurring in denial

of cert.) ("This Court's opinion upholding Alabama's capital sentencing scheme was based on and Hildwin[] and Spaziano[], two decisions we recently overruled in Hurst[]."). Consequently, the very basis for Mr. Madison's death sentence is now unconstitutional.

For these reasons, Mr. Madison **moves this Court to stay his execution scheduled for January 25, 2018**, determine that the judicial override in this case is unconstitutional, grant this petition, and order that he be sentenced to life without parole.

Respectfully submitted,

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January 24, 2018

CERTIFICATE OF SERVICE

I certify that on January 24, 2018, a copy of the attached pleading was sent by email to:

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/s/Angela L. Setzer
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