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Cassandra Jahnke

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I. Introduction

The death penalty is very much alive in the state of Alabama. So alive that judges possess the power to override a jury's sentence of a defendant. The judicial override on death penalty cases is a controversial aspect of the punishment's ardent enforcement. This override has received attention for being discriminatory, biased, and unconstitutional based on United States Supreme Court precedent.¹ Alabama's allowance of a judicial override on death penalty sentences is criticized for being arbitrary and politically-motivated in a state where judges campaign as being tough on crime by enforcing the death penalty.

In Alabama, a "jury's decision as to whether a defendant should be executed is merely an 'advisory verdict' that the trial judge may override."² Since this Alabama statute was enacted, judges imposed 95 death sentences against jury verdicts; 43 of these individuals are still on death row as of 2013.³ These overrides add to Alabama's astonishingly high death sentence rate. In fact, the death sentence rate in Alabama is six times greater, per capita, than it is in Texas.⁴

Today, the U.S. Supreme Court acknowledges "that death is fundamentally different in kind from any other punishment."⁵ This view adheres to the Court's previous

¹ Adam Liptak, *Justices May Review Capital Cases in Which Judges Overrode Juries*, NEW YORK TIMES (March 9, 2015), http://www.nytimes.com/2015/03/10/us/justices-may-weigh-cases-of-alabama-judges-overriding-juries.html?_r=0.

² *Woodward v. Alabama*, 134 S. Ct. 405, 406 (2013) (Sotomayor, J., dissenting from denial of *certiorari*).

³ *Woodward*, 134 S. Ct. at 405 (Sotomayor, J., dissenting from denial of *certiorari*) citing EQUAL JUSTICE INITIATIVE, *THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE* (2011) at 8.

⁴ EQUAL JUSTICE INITIATIVE, *THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE* (2011) at 8.

⁵ *Woodward v. Alabama*, 134 S. Ct. 405, 406 (2013) (Sotomayor, J., dissenting from denial of *certiorari*) citing *Furman v. Georgia*, 408 U.S. 238 (U.S.1972) and *Gregg v. Georgia*, 428 U.S. 153 (U.S.1976).

opinions on the death penalty. In 1972, the Supreme Court declared the death penalty, as applied, was unconstitutional in *Furman v. Georgia*.⁶ In 1976, the Court upheld modern death penalty statutes with a commitment that the death penalty would no longer be arbitrary or discriminatory.⁷ Today, 32 states and the federal government currently have the death penalty.⁸ Three states (Illinois, New Mexico, and New Jersey) abolished the death penalty because of error and high cost, other states have abolished the death penalty for a variety of other reasons, and yet other states continue to use it.⁹

Although this issue mainly affects the state courts, the Eleventh Circuit has addressed it.¹⁰ In fact, since 1999, the Eleventh Circuit is the only circuit that continues to uphold the judicial override. Since this time, Alabama is the only state to judicially override a life imprisonment sentence for the death penalty. Prisoners asserting habeas arguments are at the heart of the issue; these defendants were originally sentenced in state court. Since Alabama is the only state that has judicially overridden a life imprisonment sentence to the death penalty since 1999, the Eleventh Circuit is the only circuit that continues to uphold this procedure due to Supreme Court precedent.¹¹ The Eleventh Circuit continues this practice of overriding a life prison sentence imposed by a jury to a death sentence.¹² Most circuits have not had to deal with the issue. The Eleventh Circuit has also dealt with cases about whether a similar capital sentencing statute in Florida

⁶ *Furman v. Georgia*, 408 U.S. 238 (U.S.1972)

⁷ EQUAL JUSTICE INITIATIVE, *THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE* (2011) at 6 citing *Furman v. Georgia*, 408 U.S. 238 (U.S.1972) and *Gregg v. Georgia*, 428 U.S. 153 (U.S.1976).

⁸ Death Penalty Information Center. <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>

⁹ EQUAL JUSTICE INITIATIVE, *THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE* (2011) at 6.

¹⁰ *Madison v. Comm'r*, 677 F.3d 1333, 1336 (11th Cir. Ala. 2012).

¹¹ *Madison*, 677 F.3d at 1336 citing *Harris v. Ala.*, 513 U.S. 504 (1995).

¹² *Id.*

violated the Sixth Amendment after the Supreme Court ruling in *Ring v. Arizona* in 2002.¹³ In *Evans*, the Eleventh Circuit denied habeas corpus relief to a death row inmate.¹⁴ The Court explained part of its reasoning that Florida’s “death sentencing procedures do provide jury input about the existence of aggravating circumstances that was lacking in the Arizona procedures the Court struck down in *Ring*.”¹⁵ Therefore, the Eleventh Circuit upheld this type of override system even after *Ring* and *Apprendi*.¹⁶

Recent cases have stressed the importance of the jury role in capital sentencing. Supreme Court Justice Antonin Scalia discussed the historical importance of the jury role by explaining that the founders of the country would not leave criminal justice to the government alone (which judges are a part of), “which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights.”¹⁷ When a law such as Alabama’s judicial override statute allows the judge to overturn the decisions of a jury, it must be carefully scrutinized.

Part IIIa addresses the implications of the Sixth and Fourteenth Amendments on a defendant’s right to a jury decision, specifically in the capital sentencing phase of trial. Part IIIb addresses the Eighth Amendment developments and the recent cultural shifts in the meaning of cruel and unusual punishment as it relates to Alabama’s judicial override system available to judges presiding over capital punishment cases. Part IIIc addresses the political pressures on elected judges in Alabama. Parts IIId and IIIe analyze other problems with Alabama’s judicial override including the lack of a required standard for

¹³ *Evans v. Sec’y, Fla. Dep’t of Corr.*, 699 F.3d 1249 (11th Cir. Fla. 2012).

¹⁴ *Id.*

¹⁵ *Id.* at 1261.

¹⁶ *Id.*

¹⁷ *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (Scalia, J. concurring).

judges to use when overriding a jury sentence, the flawed defense system in Alabama, and the recent issue of not having an adequate supply of lethal injection drugs. This analysis explains why the Alabama judicial override from a life imprisonment sentence to a death sentence must be declared unconstitutional. However, Alabama may keep the judicial override in order to override death sentences to life in prison sentences.

II. Background

a. The Alabama Judicial Override Process and Statistics

The Alabama judicial override system shows a pattern unique compared to any other state in the country. Since 1976, Alabama judges have overridden 107 jury verdicts.¹⁸ In 92% of these overrides, elected judges have overruled jury verdicts of life, opting instead for the death penalty as opposed to overriding a death penalty sentence to a life without parole sentence.¹⁹ Of the almost one hundred people sentenced to death through judicial override in Alabama, 37% left death row after their convictions or sentences were overturned.²⁰ The reasons people were taken off death row ranged from prosecutorial misconduct in trials to incompetent defense counsel to new evidence becoming available.²¹

The Alabama judicial override sentencing statute was upheld in *Harris v. Alabama* in 1995.²² Pursuant to Alabama statutes, a defendant convicted of capital murder has the right to a sentencing hearing before a trial jury unless jury participation is

¹⁸ EQUAL JUSTICE INITIATIVE, THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE (2011) at 4.

¹⁹ *Id.*

²⁰ *Id.* at 22.

²¹ See *Innocence Cases*, DEATH PENALTY INFORMATION CENTER, Available at <http://www.deathpenaltyinfo.org/node/4900#131>.

²² 513 U.S. 504 (1995).

waived by both parties and approved by the court.²³ According to *Harris*, because the Constitution “permits the trial judge, acting alone, to impose a capital sentence,” a state may allow the sentencing judge to consider a jury’s recommendation but ultimately let the sentencing judge make his or her own decision.²⁴

b. Justice Sotomayor’s Dissent in *Woodward*

Supreme Court Justice Sotomayor’s dissent in *Woodward* shows a shift in cultural views and statistics since the last time the Supreme Court addressed the issue in 1995; other dissents in *Johnson v. Alabama* in 1988 and *Jones v. Alabama* in 1985 simply argued against the death penalty in general.²⁵ *Woodward*, who was convicted of killing a police officer, was sentenced to death by a trial judge after a jury had advised a sentence of life without parole.²⁶

The specific process in Alabama involves “bifurcated capital trial proceedings in which the jury, after finding the defendant guilty of capital murder in the first phase, participates in a second phase to decide the appropriate sentence.”²⁷ The bifurcated trial is popular in death penalty states as one post-*Gregg* and post-*Furman* method to ensure the death penalty’s use does not violate the Eighth Amendment.²⁸ The guilt and sentencing decisions are made separately to act as an additional safeguard to use the

²³ *Id.* at 506 citing Ala. Code § 13A-5-46; 13A-5-44.

²⁴ *Harris v. Alabama*, 513 U.S. 504, 515 (1995).

²⁵ See *Johnson v. Alabama*, 488 U.S. 876 (1988) and *Jones v. Alabama*, 470 U.S. 1062 (1985).

²⁶ *Woodward*, 134 S. Ct. at 405 (Sotomayor, J., dissenting from denial of *certiorari*).

²⁷ EQUAL JUSTICE INITIATIVE, THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE (2011) at 12.

²⁸ The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making , 63 WASH & LEE L. REV. 931, 932-933

death penalty constitutionally.²⁹ The defendant automatically receives a sentence of life imprisonment without parole unless the State proves beyond a reasonable doubt that at least one aggravating circumstance exists.³⁰ The jury then weighs the aggravating versus mitigating circumstances.³¹ If aggravating circumstances outweigh the mitigating circumstances, the jury returns a sentence of death, but if the mitigating outweigh the aggravating then the jury recommends life imprisonment without parole.³² In Alabama, a jury may recommend death only if ten jurors agree.³³ A life imprisonment sentence requires a simple majority jury vote.³⁴ Judges are allowed to hear extra aggravating circumstances when deciding whether to override.³⁵ This aspect is unique to Alabama since *Ring* has been decided and clearly affects whether the defendant will be sentenced to life or death.³⁶

As of 2013, 32 states permit capital punishment; 31 states require jury participation in the verdict (in Montana the jury has no role), and in 27 states plus federal courts, the jury decision is final.³⁷ In Nebraska, “the jury is responsible for finding aggravating circumstances, while a three-judge panel determines mitigating circumstances and weighs them against the aggravating circumstances to make the ultimate sentencing decision.”³⁸ Alabama, Delaware, and Florida allow a trial judge to

²⁹ *Id.*

³⁰ *Woodward*, 134 S. Ct. at 406 (Sotomayor, J., dissenting from denial of *certiorari*).

³¹ *Id.*

³² *Id.*

³³ *Harris v. Ala.*, 513 U.S. 504, 506 (U.S. 1995).

³⁴ *Id.*

³⁵ EQUAL JUSTICE INITIATIVE, *THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE* (2011) at 13.

³⁶ *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH & LEE L. REV. 931, 932-933

³⁷ *Woodward*, 134 S. Ct. at 407 (Sotomayor, J., dissenting from denial of *certiorari*).

³⁸ *Id.*

override jury's sentencing.³⁹ Therefore, two other states allow a similar type of override as Alabama.

The two latter states, though, use the judicial override differently than Alabama does. A Delaware trial judge has only condemned one defendant to death using the judicial override, and even then, the Delaware Supreme Court overturned his sentence stating, "the jury's recommendation must be respected if it is supported by the record and is not irrational."⁴⁰ The jury's recommendation is respected and given significant weight. Florida has not condemned a defendant to death using the judicial override since 1999.⁴¹ Thus, both Delaware and Florida use the judicial override to change the sentence from death to life more often.⁴² Florida judges are selected by uncontested retention elections after initial appointment.⁴³ Delaware judges are appointed by the governor with the senate's consent.⁴⁴ Delaware governors use judicial nominating commissions to find qualified candidates.⁴⁵ In order to be reappointed, Delaware judges must go through the whole process over again.⁴⁶

It follows then that Alabama stands alone as the only state to use the judicial override consistently to override life sentences for death sentences. Alabama judges continue to inflict these harsher sentences even though there is "no evidence that criminal

³⁹ *Id.*

⁴⁰ See *Garden v. State*, 815 A. 2d 327, 331-333 (2003); *Garden v. State*, 844 A. 2d 311, 318 (2004).

⁴¹ *Woodward*, 134 S. Ct. at 408 (Sotomayor, J., dissenting from denial of *certiorari*).

⁴² EQUAL JUSTICE INITIATIVE, THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE (2011). at 4.

⁴³ Fact Sheet on Judicial Selection Methods in the States, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf (last visited Feb. 18, 2015)

⁴⁴ Judicial Selection in the States: Delaware. National Center for State Courts. http://www.judicialselection.us/judicial_selection/index.cfm?state=DE.

⁴⁵ *Id.*

⁴⁶ *Id.*

activity is more heinous in Alabama than in other States, or that Alabama juries are particularly lenient in weighing aggravating and mitigating circumstances.”⁴⁷ Alabama is the only state still actively using the judicial override where judges are elected and may succumb to political pressure.

c. Developments Since *Harris* Upheld Alabama’s Judicial Override

In 1984, the United States Supreme Court stated in *Spaziano v. Florida* that “a capital sentence need not be imposed by a jury in order to satisfy the Fourteenth Amendment requirement that the death penalty not be imposed arbitrarily or discriminatorily.”⁴⁸ The Court added that capital sentencing is not actually considered a trial when analyzing the Sixth Amendment’s right to a jury trial.⁴⁹ However, recent cases such as *Apprendi v. New Jersey* in 2000 and *Ring v. Arizona* in 2002 seem to require this standard to change and that capital sentencing is in fact part of the jury trial. Furthermore, these cases suggest that a jury should impose the death sentence itself in order to comply with the Sixth and Fourteenth Amendments.⁵⁰ The Supreme Court of Alabama held in *Ex parte Waldrop* that Alabama’s capital sentencing scheme does not violate *Ring*.⁵¹ Alabama explained that since the jury found an aggravating factor by finding guilt, *Ring* is satisfied.⁵²

⁴⁷ *Woodward*, 134 S. Ct. at 408 (Sotomayor, J., dissenting from denial of *certiorari*).

⁴⁸ *Spaziano v. Florida*, 468 U.S. 447, 459 (1984).

⁴⁹ *Id.*

⁵⁰ *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002).

⁵¹ *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002).

⁵² *Id.* at 1186.

The U.S. Supreme Court has recently granted certiorari to decide the constitutionality of Florida's judicial override in *Hurst v. Florida*.⁵³ Hurst's lawyers are arguing that a jury, not a judge, should have determined if he was mentally ill and therefore ineligible for the death penalty.⁵⁴ The jury here voted 7-5 to impose capital punishment on the defendant.⁵⁵ The lawyers cite *Ring* as their support that the jury must make this factual determination.⁵⁶ The U.S. Supreme Court will rule on this case sometime during the nine-month term that begins in October 2015.⁵⁷ It is unclear whether the Court's ruling here has the ability to invalidate the complete judicial override system in all states, or if they will concentrate on the mental capacity as a factual finding. However, this case does have potential to invalidate the judicial override system, including Alabama's.

Supreme Court rulings on the death penalty require states to apply special procedural safeguards.⁵⁸ One safeguard is a requirement to have the jury decide whether to sentence the defendant to death. But in Alabama, judges invalidate this safeguard by frequently overriding juries' unanimous life-without-parole verdicts.⁵⁹

⁵³ Greg Stohr, *Florida's Death Penalty Rules Get Supreme Court Review*, BLOOMBERG (March 9, 2015), <http://www.bloomberg.com/politics/articles/2015-03-09/florida-s-death-penalty-rules-get-u-s-supreme-court-review>.

⁵⁴ *Id.*

⁵⁵ Tierney Sneed, *Supreme Court to Take on Florida's Death Penalty System*, U.S. NEWS AND WORLD REPORT (March 9, 2015), <http://www.usnews.com/news/articles/2015/03/09/supreme-court-to-take-on-floridas-death-penalty-sentencing-system>.

⁵⁶ *Id.*

⁵⁷ Greg Stohr, *Florida's Death Penalty Rules Get Supreme Court Review*, BLOOMBERG (March 9, 2015), <http://www.bloomberg.com/politics/articles/2015-03-09/florida-s-death-penalty-rules-get-u-s-supreme-court-review>.

⁵⁸ *Woodward*, 134 S. Ct. at 407 (Sotomayor, J., dissenting from denial of *certiorari*).

⁵⁹ *Id.* at 409. See *Lockhart v. State*, 2013 Ala. Crim. App. LEXIS 74 (Ala. Crim. App. Aug. 30, 2013) (overturned a 12-0 jury recommendation of life in prison for a soldier with PTSD convicted of murder. Circuit Court Judge Jacob A. Walker III overrode the jury and sentenced Lockhart to death).

III. Analysis

a. The Eight Amendment Cruel and Unusual Punishment

When interpreting the Eighth Amendment, the “amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁶⁰ Certain safeguards are in place to make the death penalty comply with the Eighth Amendment. For example, the State cannot execute rapists, people who are insane at the time of execution, people who are mentally disabled, or juveniles.⁶¹ Furthermore, precedent suggests the only crime available for the death penalty punishment is murder.⁶² “The State must not arbitrarily inflict a severe punishment.”⁶³ There has been a clear shift in the use of the judicial override proven by the statistics, which is indicative of a shift in the evolving standards of society.

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 Alabama judges.⁶⁴

Justice Sotomayor elaborated on the shift by saying a “dramatic shift has taken place over the past decade: Judges now override jury verdicts of life in just a single State, and they do so roughly twice a year.”⁶⁵

⁶⁰ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

⁶¹ John B. Wefing, *Cruel and Unusual Punishment*, 20 SETON HALL L. REV. 478, 483 (1990). Citing *Coker v. Georgia*, 433 U.S. 584 (1977); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989).

⁶² *Coker v. Georgia*, 433 U.S. 584 (1977).

⁶³ *Furman v. Georgia*, 408 U.S. 238, 274 (U.S.1972).

⁶⁴ See Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011 MICH. STATE L. REV. 793, 818 (2011); *Id.* at 828; *Id.* at 825-827.

⁶⁵ *Woodward*, 134 S. Ct. at 408 (Sotomayor, J., dissenting from denial of *certiorari*).

One Alabama judge interviewed about overriding jury verdicts from life sentences to death stated, “You can’t put everybody in the penitentiary. You just can’t.... Sometimes you just have to put ’em down.”⁶⁶ When you have judges talking about people’s lives as if they are considering putting a pet to sleep, you know there could be a problem with the practice being cruel and unusual.

Alabama’s capital sentencing scheme could be considered arbitrary in violation of the Eighth Amendment. In a 1985 U.S. Supreme Court dissent, Justices Marshall and Brennan stated “It approaches the most literal sense of the word ‘arbitrary’ to put one to death in the face of a contrary jury determination where it is accepted that the jury had indeed responsibly carried out its task.”⁶⁷ The death penalty must not be arbitrary in order for it to be constitutional, but this judicial override practice seems arbitrary as it is applied.

For example, in the *Tomlin* case, no new evidence was given to the trial court judge when he overrode the jury’s sentence to death.⁶⁸ Tomlin spent twenty-six years on death row until 2004 when the Court of Criminal Appeals overturned Tomlin’s sentence back to a life in prison sentence.⁶⁹ The Court of Criminal Appeals found that the jury’s unanimous recommendation against the death penalty should have been given more weight.⁷⁰ The man spent twenty-six years on death row because a judge decided the jury’s sentence was incorrect.⁷¹

⁶⁶ Adam Liptak, *Justices May Review Capital Cases in Which Judges Overrode Juries*, NEW YORK TIMES (March 9, 2015), http://www.nytimes.com/2015/03/10/us/justices-may-weigh-cases-of-alabama-judges-overriding-juries.html?_r=0.

⁶⁷ *Jones v. Alabama*, 470 U.S. 1062, 1065 (Marshall and Brennan, JJ., dissenting 1985).

⁶⁸ *Ex parte Tomlin*, 909 So. 2d 283 (Ala. 2003).

⁶⁹ *Id.*

⁷⁰ *Id.* at 285.

⁷¹ *Id.*

In *Johnson*, Anthony Johnson was not the one who killed the victim (a co-defendant shot the victim).⁷² The murder occurred in 1984, and he was executed in 2002.⁷³ A jury decided that the punishment for Johnson should be life imprisonment without parole but a trial judge overrode that decision to impose the death penalty.⁷⁴ The Court of Criminal Appeals of Alabama only considered the jury's recommendation as a mitigating factor in its decision and upheld the trial court's override.⁷⁵ These two cases (and two men's lives) ultimately came down to how much weight should be given to the jury recommendation at sentencing.⁷⁶ In one case, the jury recommendation was enough to spare the man's life; in another case, it was considered not important enough to halt the man's death. This system of letting the judge override a jury sentencing is arbitrary.

b. The Sixth and Fourteenth Amendments Right to a Jury Trial – *Apprendi* and *Ring*

The Sixth Amendment jury trial guarantee is applicable to the states through the Incorporation Doctrine, which makes certain features of the Constitution's first ten amendments binding on the states through the Fourteenth Amendment's due process clause.⁷⁷ The Sixth Amendment provides certain protections to a defendant. The "Sixth Amendment does not permit a defendant to be "expose[d] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict

⁷² *Johnson v. State*, 521 So. 2d 1006, 1017 (Ala. Crim. App. 1986).

⁷³ EQUAL JUSTICE INITIATIVE, *THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE* (2011) at 23.

⁷⁴ *Johnson v. State*, 521 So. 2d 1006, 1017 (Ala. Crim. App. 1986).

⁷⁵ *Id.*

⁷⁶ *Ex parte Tomlin*, 909 So. 2d 283 (Ala. 2003); *Johnson v. State*, 521 So. 2d 1006, 1017 (Ala. Crim. App. 1986).

⁷⁷ See *Powell v. Alabama*, 287 U.S. 45 (1931); *Brown v. Mississippi*, 297 U.S. 278, (1936); *Palko v. Connecticut*, 302 U.S. 319 (1937).

alone.”⁷⁸ *Ring* and *Apprendi* support the fact that the Supreme Court should take a fresh look at the judicial override.⁷⁹ “When ‘a State makes an increase in a defendant’s authorized punishment contingent on the finding of fact,’ we explained, ‘that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.’”⁸⁰ *Ring v. Arizona* applied *Apprendi* to invalidate Arizona’s capital sentencing scheme, which permitted the trial judge to determine the presence of aggravating factors required for imposition of the death penalty.⁸¹ A “defendant has a constitutional right to present mitigating evidence in capital cases.”⁸² In Alabama, a defendant is only eligible for the death penalty if the aggravating factors outweigh the mitigating factors.⁸³

The issue is what role the jury must have in imposing a capital sentence under the Sixth Amendment. United States Supreme Court Justice Sotomayor emphasized this function’s importance stating, “*Apprendi* and its progeny have made clear the sanctity of the jury’s role in our system of criminal justice.”⁸⁴ In Justice Stevens’ dissent in *Harris*, he stated the “government-sanctioned executions unsupported by judgments of a fair cross section of the citizenry may undermine respect for the value of human life itself.”⁸⁵

⁷⁸ *Woodward*, 134 S. Ct. at 410 (Sotomayor, J., dissenting from denial of *certiorari*) citing *Apprendi*, 530 U.S. 466.

⁷⁹ *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002).

⁸⁰ *Woodward*, 134 S. Ct. at 410 (Sotomayor, J., dissenting from denial of *certiorari*) citing *Ring*, 536 U.S. at 602 and *Apprendi*, 530 U.S. at 466.

⁸¹ *Ring*, 536 U.S. at 609, 614.

⁸² *Woodward*, 134 S. Ct. at 410 (Sotomayor, J., dissenting from denial of *certiorari*) citing *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (holding that the State may not preclude the sentence from hearing mitigating circumstances and the person sentencing may not refuse to consider any relevant mitigating evidence).

⁸³ *Woodward*, 134 S. Ct. at 410 (Sotomayor, J., dissenting from denial of *certiorari*) citing Ala. Code §§13A-5-46(e), 13A-5-47(e).

⁸⁴ *Woodward*, 134 S. Ct. at 411 (Sotomayor, J., dissenting from denial of *certiorari*).

⁸⁵ *Harris v. Alabama*, 513 U.S. 504, 515 (1995) (Stevens, J., dissenting).

In *Apprendi*, a New Jersey statute allowed an extended sentence if a trial judge found an offense was a hate crime.⁸⁶ *Apprendi* addressed “whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt.”⁸⁷ The Court found that a court needs to analyze whether a fact is a sentencing factor versus an element of an underlying offense; the latter elements must be presented to juries. In *Apprendi*, the substantive part of the statute was not at issue; the issue was the procedure of who should make factual determinations regarding sentences.⁸⁸

Fourteenth Amendment “rights indisputably entitle a criminal defendant to ‘a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.’”⁸⁹ The question regarding the Alabama statute is whether the aggravating and mitigating factors are elements of the crime. Recent cases argue defendants should be punished based only on the facts presented to a jury.⁹⁰ The U.S. Supreme Court remarked on the “novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.”⁹¹ Furthermore, the Court explains, a “state scheme

⁸⁶ *Apprendi*, 530 U.S. at 468.

⁸⁷ *Id.* at 469.

⁸⁸ *Id.* at 475.

⁸⁹ *Apprendi*, 530 U.S. at 477 citing *United States v. Gaudin*, 515 U.S. 506, 510 (1995).

⁹⁰ *Ring*, 536 U.S. at 589.

⁹¹ *Apprendi*, 530 U.S. at 482-83.

that keeps from the jury facts that ‘expose [defendants] to greater or additional punishment,’ may raise serious constitutional concern.”⁹²

A judge should not be presented with additional facts when deciding to override the jury’s advisory sentence of life imprisonment. Justice Scalia explains, “What the right to trial by jury *does* guarantee if, as they assert, it does not guarantee -- what it has been assumed to guarantee throughout our history -- the right to have a jury determine those facts that determine the maximum sentence the law allows.”⁹³ The Constitutional “guarantee that ‘in all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury’ has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury.”⁹⁴ If additional aggravating factors are presented only to a judge in the sentencing phase of a capital trial, then the jury is not privy to all the facts.

Alabama uses aggravating versus mitigating circumstances in deciding whether to impose the death penalty. An “aggravating fact -- of whatever sort, including the fact of a prior conviction -- the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.”⁹⁵ There is clear historical precedent treating aggravating factors as elements of the crime.⁹⁶ Justice Thomas refused to say whether *Apprendi* analysis applies to capital punishment calling it a “question for another day”⁹⁷ but Ring later does apply the *Apprendi* analysis to capital sentencing.

⁹² *Apprendi*, 530 U.S. at 486 citing *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986).

⁹³ *Apprendi*, 530 U.S. at 499 (Scalia, J. concurring).

⁹⁴ *Id.*

⁹⁵ *Id.* at 501 (Thomas and Scalia, JJ. concurring).

⁹⁶ *Id.* at 506 (Thomas and Scalia, JJ. concurring).

⁹⁷ *Apprendi*, 530 U.S. at 506 (Thomas and Scalia, JJ. concurring).

The *Ring* court “held that juries, not judges, must make the factual findings legally required before a death sentence can be imposed.”⁹⁸ Since a trial judge can consider aggravating factors not known to the jury when overriding, the judge is making factual findings. The *Ring* court states that “[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment,” and accordingly, the Sixth Amendment does not permit “a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty.”⁹⁹ If the defendant chooses to waive his or her right to a jury trial, the judge becomes the trier of fact and may rightfully find the aggravating circumstances then.

In Arizona, the trial judge alone would determine the presence of aggravating factors Arizona law required for the death penalty after the jury finds the defendant guilty of murder.¹⁰⁰ The Supreme Court previously held the sentencing scheme was allowable under the Sixth Amendment since the aggravating factors were sentencing factors.¹⁰¹ However, *Apprendi* changed that view by holding that aggravating factors are actual elements of a crime if they will be used to impose a harsher punishment.¹⁰² There is no reason death penalty defendants should be treated differently under the *Apprendi* analysis. Accordingly, “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.”¹⁰³ Since aggravating factors clearly increase the

⁹⁸ EQUAL JUSTICE INITIATIVE, THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE (2011) at 9.

⁹⁹ *Id.* at 13.

¹⁰⁰ *Ring*, 536 U.S. at 588.

¹⁰¹ *McMillan v. Pennsylvania*, 477 U.S. 79 (U.S. 1986).

¹⁰² *Apprendi*, 530 U.S. at 506 (Thomas and Scalia, JJ. concurring).

¹⁰³ *Ring*, 536 U.S. at 589.

maximum punishment, there is no doubt that they need to be determined by a jury. Since a judge overriding a death sentence to a life sentence would not be increasing a maximum punishment, the judge may consider mitigating factors and override a death sentence to a life imprisonment sentence.

Justice Scalia's concurrence in *Ring* suggests that the Sixth Amendment applies only to aggravating facts that have to be found by a jury.¹⁰⁴ He states, "all facts essential to imposition of the level of punishment that the defendant receives -- whether the statute calls them elements of the offense, sentencing factors, or *Mary Jane* -- must be found by the jury beyond a reasonable doubt."¹⁰⁵ However, Justice Scalia's concurrence notes that the Sixth Amendment does not apply to judgments about the weight or sufficiency of the evidence needed to impose a death sentence; he believes those decisions may still be made by the judge alone.¹⁰⁶ Justice Thomas joined Justice Scalia's concurrence, Justice Kennedy filed a concurrence, and Justice Breyer concurred in the judgment.¹⁰⁷ Justices O'Connor and Rehnquist dissented.¹⁰⁸

In *Ring*, the jury seemed uncomfortable deciding whether the defendant was simply present at the armed robbery or whether he committed the murder. "Under Arizona law, Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made."¹⁰⁹ Under the Arizona statute, the judge is supposed to make all factual determinations to sentence and determine the aggravating and mitigating circumstances (and can only sentence to death when there are

¹⁰⁴ *Ring*, 536 U.S. at 610 (Scalia and Thomas, JJ. concurring).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 612.

¹⁰⁷ *Ring*, 536 U.S. at 588.

¹⁰⁸ *Id.*

¹⁰⁹ *Ring*, 536 U.S. at 592.

aggravating circumstances and no mitigating circumstances that require leniency). The jury does not find these facts. Another participant in the murder testified against Ring to get a deal after previously telling counsel that Ring had little to do with planning and executing the armed robbery and murder.¹¹⁰ The Supreme Court held that Arizona's capital sentencing scheme violated the Sixth and Fourteenth Amendments because it "entrusts to a judge the finding of a fact raising the defendant's maximum penalty."¹¹¹ Similarly, Alabama's capital sentencing scheme violates the Sixth and Fourteenth Amendments because it allows the judge to determine aggravating factors needed to impose the death penalty without the jury finding those facts.

c. Elected Judges

Sandra Day O'Connor wrote the majority opinion in *Harris* upholding Alabama judicial override; now she is fighting judicial elections. The retired U.S. Supreme Court Justice has led an initiative to use bipartisan nominating committees to replace judicial elections.¹¹² Justice O'Connor stated, "I think there are many who think of judges as politicians in robes. In many states, that's what they are."¹¹³ She called the judicial election process "embarrassing" and explained further, "You just can't have a fair and

¹¹⁰ *Id.* at 594.

¹¹¹ *Id.* at 595.

¹¹² "The O'Connor Judicial Selection Plan." Quality Judges Initiative.

<http://iaals.du.edu/initiatives/quality-judges-initiative/oconnor-judicial-selection-project/the-oconnor-judicial-selection-plan-how-it-works-why-it-matters>

¹¹³ Severino, Carrie. "Justice O'Connor's Hypocritical Crusade Against Judicial Elections"

<http://www.nationalreview.com/bench-memos/350694/justice-oconnors-hypocritical-crusade-against-judicial-elections-carrie-severino>

impartial system if you have cash in the court.”¹¹⁴ The worry is that the campaign money given by businesses and citizens will influence judges. Justice O’Connor asks, “How can the judge be expected to be absolutely fair and impartial if the donor is before him in the court?”¹¹⁵ Instead, she advocates for a system where nonlawyers and lawyers can make their recommendations to the state governor. Justice O’Connor stated, “In recent years, I have been distressed to see persistent efforts in some states to politicize the bench and the role of our judges.”¹¹⁶ She presented her plan to use nominating committees in June 2014 in the *Journal of the Institute for the Advancement of the American Legal System*.¹¹⁷ At this time, only 13 states used nominating commissions to appoint all their judges.¹¹⁸

The problems with elected judges were addressed in *Caperton*.¹¹⁹ In this case, a Supreme Court of Appeals of West Virginia judge refused to recuse himself even though one of the parties had contributed \$3 million to his campaign.¹²⁰ The U.S. Supreme Court heard the case and noted there are circumstances where “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.”¹²¹ The Court found that the extraordinary campaign contributions made by the chairman and principal officer of the corporation were enough to require recusal under the Due Process Clause of the Fourteenth Amendment.¹²² It is clearly problematic

¹¹⁴ Larson, Leslie. “Sandra Day O’Connor decries letting ‘cash in the court’ with judicial elections.” *Daily News*. July 11, 2014. <http://www.nydailynews.com/news/politics/sandra-day-o-connor-decries-letting-cash-court-judicial-elections-article-1.1863510>

¹¹⁵ “Sandra Day O’Connor on Judicial Elections, Supreme Court’s New Players” http://www.pbs.org/newshour/bb/law-july-dec10-oconnor_10-13/

¹¹⁶ ¹¹⁶ Larson, Leslie. “Sandra Day O’Connor decries letting ‘cash in the court’ with judicial elections.”

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 868 (U.S. 2009).

¹²⁰ *Id.* at 872.

¹²¹ *Id.* citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

¹²² *Id.*

to expect judges to be impartial when they are depending on money from parties to a case. \$3 million did not make this judge believe that his impartiality may reasonably be questioned.¹²³ The U.S. Supreme Court at least set out that this kind of situation is unconstitutional.¹²⁴ Since the Alabama Bar Association does not consider it unethical for judges and lawyers to contribute to judges' campaigns, Alabama must deal with this issue as well.¹²⁵ People who contribute money to a campaign may expect favorable treatment, and this calls into question a judge's ability to decide cases fairly.¹²⁶

Alabama judges face partisan elections every six years.¹²⁷ Judicial campaigns often promise to be "tough on crime" and feature pro-death penalty advertisements.¹²⁸ Overrides suspiciously spike in election years.¹²⁹ It has even attracted the attention of United Nations in 2008. A United Nations Human Rights Council Report found that elected Alabama judges were overturning sentences in capital murder cases for political reasons.¹³⁰ A presiding judge in Birmingham's criminal court commented on the effect of elections on fair trials saying, "It has to have some impact. ... Let's face it, we're human beings."¹³¹

A study by the Center for American Progress shows that "in states where judicial campaign spending increased, courts ruled more often against criminal defendants."¹³²

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Adam Liptak, *Justices May Review Capital Cases in Which Judges Overrode Juries*, NEW YORK TIMES (March 9, 2015), http://www.nytimes.com/2015/03/10/us/justices-may-weigh-cases-of-alabama-judges-overriding-juries.html?_r=0.

¹²⁶ *Id.*

¹²⁷ EQUAL JUSTICE INITIATIVE, *THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE* (2011) at 14.

¹²⁸ *Id.* at 15.

¹²⁹ *Id.* at 5.

¹³⁰ "Death Sentence." *Times Daily*. July 5, 2008. <http://www.eji.org/node/147>.

¹³¹ Brandenburg, Burt. "Life and death of electing judges." *USA Today*. January 5, 2014.

¹³² *Id.*

There are numerous examples of political pressure on judges using the override. For example, one judge stated that “[i]f I had not imposed the death sentence, I would have sentenced three black people to death and no white people.”¹³³ Judges seem more concerned about their records than about the actual cases and getting the sentence right. When the Alabama judicial override statute was upheld in 1995 in *Harris*, Justice Stevens dissent stated judges “ben[t] to political pressures when pronouncing sentence in highly publicized capital cases.”¹³⁴

Alabama’s geography also shows some curious patterns. “Three of Alabama’s 67 counties account for nearly half of the life-to-death overrides statewide.”¹³⁵ The criticism of Alabama’s elected judges being entrusted with a constitutionally suspect override to determine life and death is clear. Some view Alabama’s judges as “insufficiently independent to provide a fair and impartial hearing on controversial issues or enforce the rights of politically unpopular minorities.”¹³⁶ The judges are looking forward to the next election instead of at the cases in front of them. The immense power granted to these elected judges is unacceptable.

d. No standard for judges

The Alabama Supreme Court ruled that judges need to seriously consider jury verdicts and provide a written explanation when using the judicial override in capital

¹³³ *Woodward*, 134 S. Ct. at 409 (Sotomayor, J., dissenting from denial of *certiorari*).

¹³⁴ *Harris v. Alabama*, 513 U.S. 504 (1995) (Stevens, J., dissenting).

¹³⁵ EQUAL JUSTICE INITIATIVE, *THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE* (2011) at 17.

¹³⁶ *Id.* Page 16.

sentencing.¹³⁷ However, this standard has not been enforced well.¹³⁸ For example, in the case of Taurus Carroll, the defendant robbed a dry cleaner when he was 17-years-old and the gun he carried went off accidentally. The victim's own family asked to spare his life but the judge overrode the jury's unanimous recommendation for life imprisonment.¹³⁹ A jury's unanimous life recommendation and mitigating circumstances are supposed to be afforded great weight but it does not seem that they were in the *Carroll* case.¹⁴⁰ In *Harris*, the "petitioner argued that Alabama's scheme is unconstitutional because it does not specify the weight the judge must give to the jury's advisory verdict and thus permits arbitrary imposition of the death penalty."¹⁴¹ However, the petitioner lost this argument in *Harris*.¹⁴² Only Justice Stevens dissented from the opinion in *Harris*.¹⁴³

The United States Supreme Court ruled that Florida's judicial override is not arbitrary because Florida has a standard that is enforced. Alabama does not. "Florida had forbidden its trial judges to reject such jury decisions unless the evidence favoring death was "so clear and convincing that virtually no reasonable person could differ."¹⁴⁴ Per *Jones v. Alabama*, in Alabama, the trial judge must simply 'consider' the jury's 'advisory' sentence.¹⁴⁵ Florida's standard is much more clear and is actually enforced.

¹³⁷ *Ex parte Carroll*, 852 So. 2d 821 (Ala. 2001).

¹³⁸ EQUAL JUSTICE INITIATIVE, THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE (2011) at 8.

¹³⁹ Ken Silverstein, *The Judge as Lynch Mob*, AMERICAN PROSPECT (December 19, 2001), <http://prospect.org/article/judge-lynch-mob>.

¹⁴⁰ See *Ex parte Carroll*, 852 So. 2d 833 (Ala. 2002); see also *Ex parte Tomlin*, 909 So. 2d 283 (Ala. 2003).

¹⁴¹ EQUAL JUSTICE INITIATIVE, THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE (2011) at 12.

¹⁴² *Harris v. Alabama*, 513 U.S. 504, 515 (1995).

¹⁴³ *Id.*

¹⁴⁴ *Jones v. Alabama*, 470 U.S. 1062 (U.S.1985) (Brennan and Marshall, JJ. dissenting from denial of *certiorari*).

¹⁴⁵ *Jones*, 470 U.S. at 1064 citing Ala. Code § 13A-5-47(e).

Under “Florida's Tedder rule, a judge must at least engage in the awesome task of determining whether he can say, in spite of a jury's rejection of death, that death was so clearly appropriate that the jury determination was virtually beyond reason.”¹⁴⁶ Without a clear standard for judges to use in the judicial override, it is unconstitutional under the Eight Amendment because it is arbitrary. Even if there was a standard for Alabama judges to use, overriding a life sentence to death would still be unconstitutional. The jury needs to make the determination on the aggravating and mitigating factors.

e. Flawed defense system

Added to the problems with Alabama’s capital sentencing scheme is its flawed defense system. One example of the trend of incompetent defenses is the case of William Knotts, whose jury life sentence was overridden by a judge to a death sentence.¹⁴⁷ Knotts was a white teenager who murdered a black woman.¹⁴⁸ The judge who overrode his sentence to death rejected Knotts's appeal, including the assertion that his defense had been incompetent.¹⁴⁹ Knotts’s two lawyers did not call a single witness during the guilt phase and one defense attorney even slept through part of the trial.¹⁵⁰ During the defense’s closing argument, this defense attorney said, “I’ll have to compliment the prosecution... They certainly have an abundance of evidence.”¹⁵¹ Knotts’s death sentence

¹⁴⁶ *Jones*, 470 U.S. at 1064.

¹⁴⁷ Ken Silverstein, *The Judge as Lynch Mob*, AMERICAN PROSPECT (December 19, 2001), <http://prospect.org/article/judge-lynch-mob>.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

was overturned, but only because he was a juvenile at the time of the crime.¹⁵² This man's life was spared because he fit another exception but defendants do not stand a chance in a system that will not recognize such incompetence and will override a life sentence to death in the face of it.

Another factor in Alabama's flawed defense system is race. Seventy-five percent of all death sentences imposed by override involve white victims, even though less than 35% of all homicide victims in Alabama are white.¹⁵³ Only 6% of all murders in Alabama involve black defendants and white victims.¹⁵⁴ However, in 31% of Alabama override cases, the trial judge condemned a black defendant in a case with a white victim.¹⁵⁵ For example, McMillian was an innocent black man convicted of killing a white woman and jury recommended life in prison; a judge overrode to death.¹⁵⁶ Thankfully, post conviction counsel proved the State's witnesses lied and he was released in 1993 after six years on death row.¹⁵⁷ In such cases, it is clear that the jury's recommendation should have been followed and there was most likely no sound reason for a judge to override the punishment to death.

¹⁵² Samira Jafari, *Supreme Court Sets Aside Death Penalty for Juveniles*, THE GADSEN TIMES (March 2, 2005), <https://news.google.com/newspapers?nid=1891&dat=20050302&id=FW4vAAAAIIBAJ&sjid=xNwFAAAIIBAJ&pg=2081,67778&hl=en>. See also *Roper v. Simmons*, 543 U.S. 551 (U.S. 2005) (holding the Eighth Amendment forbids imposing the death penalty on juveniles under the age of 18).

¹⁵³ EQUAL JUSTICE INITIATIVE, *THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE* (2011) at 5.

¹⁵⁴ *Id.* at 18.

¹⁵⁵ *Id.* Page 18.

¹⁵⁶ *McMillian v. Monroe County*, 520 U.S. 781 (U.S. 1997).

¹⁵⁷ EQUAL JUSTICE INITIATIVE, *THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE* (2011) at 22.

IV. Conclusion

Alabama's judicial override statute cannot stand. Keeping this system in place is an embarrassment in the international community and it should be repealed.

Death row executions were on hiatus until 2015 in Alabama due to a dearth of chemicals needed for lethal injections.¹⁵⁸ Now, Alabama has decided to halt all executions until the Supreme Court rules on the legality of a new drug that has caused some problematic executions.¹⁵⁹ "No capital sentencing procedure in the United States has come under more criticism as unreliable, unpredictable, and arbitrary than the unique Alabama practice that permits an elected trial judge to override unilaterally a jury verdict of life and sentence a defendant to death."¹⁶⁰ Alabama may allow the judicial override to stand in the cases of overriding from death to life because this would not be imposing a harsher sentence under the *Apprendi* and *Ring* analysis. However, the override from life to death needs to be repealed or declared unconstitutional.

Justice Sotomayor explained, "Under our *Apprendi* jurisprudence, as it has evolved since *Harris* was decided, a sentencing scheme that permits such a result is constitutionally suspect."¹⁶¹ As a result of its recent rulings, the Supreme Court needs to look at the issue again. The Court should abolish the judicial override in Alabama replacing life with a death sentence rather than just impose a clear standard (such as

¹⁵⁸ *Life without parole: Let jury verdicts prevail*, MONTGOMERY ADVERTISER (August 4, 2014 3:55 PM), <http://www.montgomeryadvertiser.com/opinion/>.

¹⁵⁹ Mark Berman, *Alabama judge says state will halt executions until after Supreme Court rules*, WASHINGTON POST (March 20, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/03/20/alabama-judge-says-state-will-halt-executions-until-after-supreme-court-rules/>.

¹⁶⁰ EQUAL JUSTICE INITIATIVE, *THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE* (2011) at 6.

¹⁶¹ *Woodward*, 134 S. Ct. at 411 (Sotomayor, J., dissenting from denial of *certiorari*).

Florida's standard). Even with a clear standard, the override should only be allowed from death to life. Any other system allows Alabama to be imposing a rogue, unconstitutional system and the consequences are dire.