No. 17-_____

IN THE SUPREME COURT OF THE UNITED STATES

CALVIN MCMILLAN,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for Writ of Certiorari
to the Alabama Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

An Alabama jury voted to sentence Petitioner Calvin McMillan to life in prison for capital murder. Circuit Judge John Bush overrode the jury's decision and imposed the death penalty. In his sentencing order, Judge Bush made an explicit finding that McMillan's trial attorneys "provided effective assistance throughout these entire proceedings." The judge issued that finding *sua sponte*, as McMillan could not raise a claim about his attorneys' performance at that time. Both of the attorneys were significant financial contributors to Judge Bush's most recent election campaign, and one of them was his most recent law clerk.

Following his direct appeal, McMillan secured new counsel and filed a post-conviction petition alleging that his trial attorneys were ineffective. The case was assigned to Judge Bush. McMillan moved for recusal, arguing that Judge Bush's prejudgment of the ineffectiveness issue and ties to the trial attorneys created an unconstitutional appearance of bias. Judge Bush denied the motion and summarily dismissed the post-conviction petition. The Alabama Court of Criminal Appeals affirmed those rulings, holding with respect to the recusal issue that Judge Bush was not "incapable of rendering a fair decision."

The question presented is this:

> Can a state court require a petitioner to establish actual, subjective bias to obtain judicial recusal even though this Court has held that the constitutional standard for judicial recusal is objective?[1]

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[1] *See Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881 (2009) ("The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'").

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PETITION FOR WRIT OF CERTIORARI

Petitioner Calvin McMillan respectfully petitions this Court for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

OPINIONS BELOW

The order of the Alabama Supreme Court denying McMillan's petition for a writ of certiorari is attached as Appendix A. Pet. App. 2a. The decisions of the Alabama Court of Criminal Appeals affirming the dismissal of McMillan's petition for post-conviction relief and denying rehearing are published on Westlaw, *see McMillan v. State*, No. CR-14-0935, 2017 WL 3446604 (Ala. Crim. App. Aug. 11, 2017), and are attached as Appendix B, Pet. App. 4a-44a. The order of the Alabama Court of Criminal Appeals denying McMillan's petition for mandamus is unpublished and is attached as Exhibit C. Pet. App. 46a-48a. The order of the Elmore County Circuit Court denying McMillan's motion to recuse Judge Bush from presiding over the Rule 32 proceedings is unpublished and is attached as Appendix D. Pet. App. 50a. McMillan's *Motion for Recusal of Judge Bush and Transfer of This Rule 32 Case* is attached as Appendix E. Pet. App. 52a-105a. The transcript of the January 5, 2015, hearing in the Elmore County Circuit Court regarding McMillan's motion to recuse Judge Bush is attached as Appendix F. Pet. App. 107a-158a. The order of the Elmore County Circuit Court granting McMillan's request for the appointment of counsel as to his Rule 32 proceedings—but denying it as to any litigation concerning judicial recusal—is attached as Appendix G. Pet. App. 160a. The sentencing order of the Elmore County Circuit Court overriding the

jury's life vote and sentencing McMillan to death is attached as Appendix H. Pet. App. 162a-179a.

JURISDICTION

The Alabama Court of Criminal Appeals affirmed the dismissal of McMillan's post-conviction petition in a decision dated August 11, 2017. *See McMillan v. State*, No. CR-14-0935, 2017 WL 3446604 (Ala. Crim. App. Aug. 11, 2017). The court denied McMillan's timely application for rehearing on all claims on December 8, 2017, and the Alabama Supreme Court denied certiorari as to all claims on February 23, 2018. On May 8, 2018, this Court granted McMillan an extension of time within which to file a petition for writ of certiorari, up to and including July 23, 2018. *See McMillan v. Alabama*, No. 17A1217 (Order, May 8, 2018). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a capital post-conviction case from Alabama in which the judge declined to recuse himself even though he had: (1) presided over the trial and imposed the death penalty despite a jury vote for life, (2) made a *sua sponte* finding at the end of trial that the defense attorneys were effective, even though their performance had not been raised, (3) accepted significant campaign contributions from both of the defense attorneys, and (4) personally mentored one of the defense attorneys, who had served as his most recent law clerk. The question before this Court is whether the average judge in his position was likely to be neutral in post-conviction proceedings involving a challenge to the effectiveness of McMillan's trial attorneys.

In August 2007, Calvin McMillan—an 18-year-old, intellectually limited, African-American teenager—was charged with the robbery-murder of James Bryan Martin. The murder occurred in a Walmart parking lot in Elmore County, Alabama, a predominately white county adjacent to Montgomery.[2] In June 2009, a jury convicted McMillan of two counts of capital murder.[3] At the penalty phase, the same jury found the existence of only one statutory aggravating circumstance—

[2] The U.S. Census Bureau estimates that the Elmore County population is approximately 73% white. *See* U.S. Census Bureau, *QuickFacts: Elmore County, Alabama*, *available at* https://www.census.gov/quickfacts/fact/table/elmorecountyalabama/PST045217 (last visited July 11, 2018).

[3] The jury found McMillan guilty of intentional murder during the course of a robbery, *see* Ala. Code § 13A-5-40(a)(2), and intentional murder while the victim was inside a vehicle, *see* Ala. Code § 13A-5-40(a)(17).

murder in the course of a robbery.[4] The jury then recommended, by an 8–4 vote, that McMillan receive a life sentence. Pet. App. 162a-179a.

Judge Bush conducted a judicial sentencing hearing approximately six weeks later. He overrode the jury's decision and sentenced McMillan to death. Pet. App. 162a-179a[5] Like the jury, Judge Bush found the existence of only one statutory aggravating circumstance. *See* Pet. App. 166a. He also found many mitigating circumstances—including that McMillan was "raised in extreme poverty," "raped as a child," and "physically abused as a child." Pet. App. 170a. But Judge Bush "assign[ed] very little weight" to the mitigating circumstances. Pet. App. 172a. Instead, Judge Bush expressed confusion as to "why the jury was unable to follow the law and make a recommendation of death in this case." Pet. App. 174a. He speculated that it was "highly possible that fewer than eight jurors initially voted for life without parole and that the number of those jurors voting for life without parole only increased as they grew tired of the process and dealt with the weight that a death recommendation would have on each of them." Pet. App. 174a. Judge Bush then discarded the jury's recommendation and sentenced McMillan to death. Pet. App. 179a.

[4] *See* Ala. Code § 13A-5-49(4).

[5] Judge Bush exercised his authority to override the jury's life in prison recommendation under then-existing Alabama law. Alabama eliminated judicial override in 2017, thereby establishing a nationwide consensus against the practice. *See* Ala. Code § 13A-5-47(a). After Alabama abolished override, McMillan filed a second state post-conviction petition challenging the judicial override in his case as a violation of the Sixth, Eighth, and Fourteenth Amendments. The circuit court denied the petition. An appeal is now pending before the Alabama Court of Criminal Appeals.

In the same sentencing order, Judge Bush made the following finding regarding the performance of defense counsel:

> Finally, this Court notes that Mr. Kenny James and Mr. Bill Lewis ably represented McMillan. McMillan's attorneys were well prepared, diligent, and performed admirably in their defense of McMillan. Based on the overwhelming evidence against McMillan in this case and the eventual outcome, this Court finds that McMillan's attorneys provided effective assistance throughout these entire proceedings.

Pet. App. 166a. Judge Bush issued this finding *sua sponte*, as McMillan—who was still represented by James and Lewis—had not had the opportunity to raise an ineffectiveness claim.

Following affirmance of his conviction and death sentence on direct appeal,[6] McMillan secured new counsel and filed a petition for post-conviction relief under Rule 32 of the Alabama Rules of Criminal Procedure, alleging a claim of ineffective assistance of counsel, among several others. Pursuant to an Alabama law requiring that Rule 32 petitions "be assigned to the sentencing judge where possible," Ala. R. Crim. P. 32.6(d), Judge Bush was assigned to adjudicate McMillan's initial post-conviction proceedings.

McMillan filed a motion to recuse Judge Bush from presiding over the Rule 32 proceedings. *See* Pet. App. 52a-105a. In his recusal motion, McMillan argued that the ineffectiveness of trial counsel was a "key issue" in his Rule 32 petition, and that "Judge Bush has already prejudged the issue of ineffective assistance of counsel in this case." Pet. App. 52a. McMillan also argued that, when the

[6] *See McMillan v. State*, 139 So. 3d 184 (Ala. Crim. App. 2010). The Alabama Supreme Court denied review in 2013, and this Court declined review the following year. *See McMillan v. Alabama*, 134 S. Ct. 1760 (2014).

prejudgment was considered alongside (1) the trial attorneys' significant campaign contributions,[7] (2) Lewis's service as a prior law clerk to Judge Bush, and (3) the judicial override in this case, the totality of the circumstances created "an appearance of bias that is simply too great, particularly in a proceeding intended to ensure the fairness of the death sentence that was imposed on McMillan." Pet. App. 53a. McMillan rooted his argument in the Due Process Clause of the Fourteenth Amendment, which can require the recusal of judges even when they '"have no actual bias and would do their very best to weigh the scales of justice equally between contending parties."' Pet. App. 55a-56a (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). McMillan also simultaneously filed a motion for fair procedures regarding the recusal motion, asking for another judge within the same judicial circuit to determine whether Judge Bush should recuse himself from the Rule 32 proceedings.

Judge Bush held a hearing on the two motions on January 5, 2015. *See* Pet. App. 107a-158a. He quickly dismissed McMillan's effort to transfer the recusal hearing to another judge, stating that he would only do so "if you have some evidence that I cannot be fair, that I have – you know, not only that I cannot be, but I haven't been fair with regard to your client . . . ." Pet. App. 117a. Addressing the recusal motion, Judge Bush accused McMillan of arguing "that I am presumptively prejudiced and I can't do my job." Pet. App. 130a. *See also, e.g.*, Pet. App. 149a-

[7] James contributed $1,000 to Judge Bush's re-election campaign, placing him among the top six contributors. Lewis contributed $500, placing him in the top third of all contributors. Pet. App. E.

150a ("And it was really nice of you, you're telling me you're not talking about my ability to serve [as a judge generally], but, yes, you are. You're talking about my ability to perform my constitutional – my obligation to the people of this circuit."). Judge Bush acknowledged that his finding about the effectiveness of trial counsel was "an important paragraph" of his Sentencing Order, Pet. App. 152a, but he said that it did not render him actually biased against McMillan. *See* Pet. App. 155a ("I don't think that me including that language in there affects my ability to rule on the evidence and on the law in a Rule 32 Petition."). He similarly dismissed concerns about his campaign contributions, stating that the donations have "nothing to do with anything." Pet. App. 145.

On the same day as the hearing, Judge Bush entered a written order denying McMillan's recusal motion. Pet. App. 50a. He wrote that the "issues raised by the Petitioner in no way affect the undersigned's ability to be fair and impartial in evaluating the claims raised in the instant 'Rule 32' Petition nor do they show any prejudice by this Court against this Petitioner." Pet. App. 50a.

McMillan filed a petition for a writ of mandamus in the Alabama Court of Criminal Appeals, requesting an order directing Judge Bush to recuse himself from the Rule 32 proceedings. The Court of Criminal Appeals denied the petition. *See* Pet. App. 46a-48a. In a written order, the Court of Criminal Appeals stated:

> The mere fact that Judge Bush made a comment in his sentencing order on the performance of trial counsel does not mean that Judge Bush is incapable of rendering a fair decision on McMillan's claims of ineffective assistance of counsel in his post-conviction proceeding.

Pet. App. 46a. The state court analyzed the campaign contributions separately, holding that it did "not consider the contributions at issue in this case to meet the threshold recognized in *Caperton* [*v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009)]—the contributions were not 'significant.'" Pet. App. 47a (alteration added).

Six weeks later, on March 10, 2015, Judge Bush appointed counsel to represent McMillan in his Rule 32 proceedings. However, the appointment order specifically excluded any efforts related to recusal. *See* Pet. App. 160a. One week later, on March 17, 2015, Judge Bush summarily dismissed McMillan's Rule 32 petition without a hearing, largely adopting the State's proposed order.[8] He also denied McMillan's requests for discovery and expert funding.

McMillan sought review in the Alabama Court of Criminal Appeals. The court rejected all of McMillan's claims, including his claim re-alleging that Judge Bush should have recused himself from the Rule 32 proceedings. *See* Pet. App. 31a-32a. The court quoted from its mandamus order before concluding that it "affirm[s] the grounds for denial set out in the above-quoted order." Pet. App. 32a (alteration added). The same court subsequently denied McMillan's application for rehearing, *see* Pet. App. 44a, and the Alabama Supreme Court declined review, *see* Pet. App. 2a. This petition follows.

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[8] McMillan subsequently filed a renewed motion for recusal and a motion to modify the appointment order to include representation for counsel's recusal efforts. Judge Bush denied both motions without explanation.

REASONS FOR GRANTING THE WRIT

This Court "has not shied away from summarily deciding . . . cases where, as here, lower courts have egregiously misapplied settled law." *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (citing cases). Summary reversal is appropriate in this case because the ruling of the Alabama Court of Criminal Appeals conflicts directly with this Court's precedents governing judicial recusal. Alternatively, this Court should grant plenary review. In either scenario, the case is well-suited for review, as the constitutional issue was squarely presented and preserved in the state courts.

I. The State Court Employed the Wrong Legal Standard in Evaluating Whether Judge Bush Should Have Recused Himself from Presiding Over McMillan's Rule 32 Proceedings.

This Court has long recognized that a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). In furtherance of that requirement, this Court has established a "workable framework" involving an "objective standard that, in the usual case, avoids having to determine whether actual bias is present." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016). Under this framework, "[t]he Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton*, 556 U.S. at 881. This inquiry requires consideration of the totality of the circumstances bearing on the potential for bias. *See Rippo v. Baker*, 137 S. Ct. 905, 907 (2017) (holding that the state court "did not ask the question our precedents require: whether, considering all the circumstances alleged, the risk of bias was too high to

be constitutionally tolerable"). This Court's "insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication." *Williams*, 136 S. Ct. at 1909.

In rejecting McMillan's claim of judicial bias, the Alabama Court of Criminal Appeals misapplied this Court's framework in two critical ways. First, although this Court has consistently stated that the inquiry is an objective one, the court below evaluated the issue under an incorrect, subjective standard. *See Rippo*, 137 S. Ct. at 907 (holding that the Nevada Supreme Court "did not ask the question our precedents require," and instead asked whether the judge harbored actual, subjective bias); *Lacaze v. Louisiana*, 138 S. Ct. 60 (2017) (granting the petition, vacating the Louisiana Supreme Court's judgment, and remanding for reconsideration in light of *Rippo*). In this case, the Alabama court recognized that it was supposed to ask "whether another person, knowing all of the circumstances, might reasonably question the judge's impartiality." Pet. App. 31a-32a (quoting *Ex parte Duncan*, 638 So. 2d 1332, 1334 (Ala. 1994)). Nevertheless, the court rejected McMillan's claim because he had not shown that the judge was actually, subjectively biased:

> The mere fact that Judge Bush made a comment in his sentencing order on the performance of trial counsel does not mean that Judge Bush is incapable of rendering a fair decision on McMillan's claims of ineffective assistance of counsel in his post-conviction proceeding.

Pet. App. 32a. That incorrect analysis echoes the trial court's reason for denying the motion—that the issues McMillan raised "in no way affect the undersigned's

ability to be fair and impartial in evaluating the claims raised in the instant 'Rule 32' Petition nor do they show any prejudice by this Court against this Petitioner." Pet. App. 50a. Both analyses plainly reflect the state courts applying a subjective legal standard instead of asking "whether, as an objective matter, 'the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.''" *Williams*, 136 S. Ct. at 1905 (quoting *Caperton*, 556 U.S. at 881). As this Court has recognized, "[t]he failure to consider objective standards requiring recusal is not consistent with the imperatives of due process." *Caperton*, 556 U.S. at 886.

Second, the Alabama court analyzed the circumstances individually, rather than considering them in their totality, as this Court's precedents require. Isolating the justifications for recusal, the state court first considered Judge Bush's explicit "find[ing] that McMillan's attorneys provided effective assistance throughout these entire proceedings." Pet. App. 166a. As noted above, the state court rejected the prejudgment claims because McMillan could not prove that the finding rendered Judge Bush actually biased against him. Pet. App. 32a. The court then separately considered the campaign contributions, rejecting that circumstance as a basis for recusal because it did "not consider the contributions at issue in this case to meet the threshold recognized in *Caperton*—the contributions were not 'significant.'" Pet. App. 32a (quoting *Caperton*, 556 U.S. at 884). This Court has made clear, however, that the inquiry is not whether any particular factor creates an appearance of bias, but "whether, considering all the circumstances alleged, the risk of bias was too

high to be constitutionally tolerable." *Rippo*, 137 S. Ct. at 907. *See also Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865-68 (1988) (examining the totality of "the facts that might reasonably cause an objective observer to question [the judge's] impartiality"). In certain cases, campaign contributions alone may render the risk of bias too high. *See Caperton*, 556 U.S. at 884. In others, the risk may be high because the judge's "'own personal knowledge and impression' of the case . . . may carry far more weight with the judge than the prior parties' arguments to the court." *Williams*, 136 S. Ct. at 1906 (quoting *Murchison*, 349 U.S. at 138). But in all cases, the inquiry must measure the totality of the circumstances. The Alabama Court of Criminal Appeals, like Judge Bush before it, did not satisfy that requirement. This Court's intervention is required.

II. Based on the Totality of the Circumstances, Due Process Required Judge Bush's Recusal.

This Court "has recognized that not '[a]ll questions of judicial qualification . . . involve constitutional validity.'" *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820 (1986) (quoting *Tumey v. State of Ohio*, 273 U.S. 510, 523 (1927)). "But it is also true that extreme cases are more likely to cross constitutional limits, requiring this Court's intervention and formulation of objective standards. This is particularly true when due process is violated." *Caperton*, 556 U.S. at 887 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998)). This is such a case.

Several factors created a constitutionally intolerable risk of bias in McMillan's Rule 32 proceedings.[9] First, Judge Bush prejudged the central issues in McMillan's Rule 32 Petition long before McMillan had either the opportunity or the obligation to properly raise them. Judge Bush's judicial finding concerning the effectiveness of trial counsels' performance was not a mere passing comment; it was an explicit finding couched in the language of *Strickland v. Washington*, 466 U.S. 668 (1984), that resolved both prongs of the *Strickland* inquiry. Judge Bush himself characterized that portion of his order as "an important paragraph." Pet. App. 152a. And, after denying the recusal motion, he did little to dispel the notion that he had prejudged the ineffectiveness claim, denying McMillan's requests for discovery and expert funding before dismissing his petition without a hearing.[10]

Second, both of McMillan's trial attorneys were significant financial contributors to Judge Bush's most recent contested judicial campaign. Kendrick James was among the top individual contributors to Judge Bush's campaign, and Bill Lewis placed among the top third. Pet. App. 60a. To be sure, the contributions were not as exorbitant as those at issue in this Court's decision in *Caperton*. But the fact that Judge Bush found James and Lewis effective even though their performance was not yet at issue makes the appearance created by their campaign contributions particularly problematic. As this Court has recognized, "even if

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[9] This Court has recognized that post-conviction petitioners have a due process right to have their claims heard before a fair tribunal. *See Williams*, 136 S. Ct. at 1905-07.

[10] *Cf. Liljeberg*, 486 U.S. at 856 (examining a judge's actions during the pendency of the case and after he became aware of the potential basis for his recusal).

judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributions is likely to undermine the public confidence in the judiciary." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1636, 1667 (2015) (citation omitted). In addition, two Members of this Court have specifically noted the acute relationship between judicial override in Alabama and the electoral pressure those judges face. *See Woodward v. Alabama*, 134 S. Ct. 405, 408-09 (2013) (Sotomayor, Breyer, JJ., dissenting from denial of certiorari) ("What could explain Alabama judges' distinctive proclivity for imposing death sentences in cases where a jury has already rejected that penalty? . . . Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures.").[11]

Third, Lewis served as a judicial law clerk to Judge Bush only a few years before McMillan's trial. This was not a situation in which a former law clerk simply appeared in court before the judge for whom he clerked. Instead, McMillan was asking Judge Bush to conclude that an attorney Judge Bush personally mentored had provided a level of advocacy that fell below constitutional standards. Given the other factors described above, it is reasonable to question Judge Bush's impartiality in this situation.

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[11] Upon his retirement, Judge Bush acknowledged a connection between his decision to override in McMillan's case and the electoral support he received for his decision. As he stated in an interview, "That case will always have an impact on me. There have been decisions, particularly sentencing decisions that I have made that I know sounded really strange. But the good news is, most of the people in our circuit, particularly those who have known me a long time, have backed me up." Jennifer Horton, *Judge John Bush to Retire After 30 Years on Bench*, WSFA, Oct. 14, 2016, *available at* http://www.wsfa.com/story/33395232/judge-john-bush-to-retire-after-30-years-on-the-bench (last visited July 11, 2018).

Finally, Judge Bush's actions throughout the Rule 32 proceedings provide further evidence undermining the appearance of neutrality. During the brief pendency of the proceedings, Judge Bush used his appointment power to try to control McMillan's litigation. *See* Pet. App. 160a. After counsel moved to be appointed to represent McMillan for his Rule 32 proceedings, Judge Bush granted the motion but specifically excluded litigation related to judicial recusal, including any appeals of that issue to higher courts. Pet. App. 160a. After counsel renewed his recusal motion and moved to modify the appointment to include such litigation, Judge Bush again refused to appoint counsel to litigate the judicial recusal issue. The only conceivable reason for exercising his appointment power in this manner is that Judge Bush was trying to limit McMillan's ability to litigate his right to a fair tribunal. The judge's actions provide further reason for objective observers to question his impartiality.

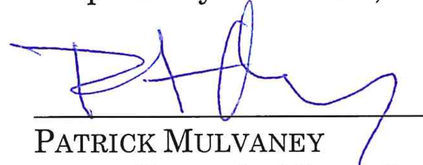
Under "a realistic appraisal of psychological tendencies and human weakness," the constellation of circumstances in this case "poses such a risk of actual bias or prejudgment" that recusal was required. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). That is particularly true given that the trial case involved a judicial override in which Judge Bush did not merely reject the jury's sentencing recommendation—he accused the jury of failing to follow the law. *See* Pet. App. 174a ("In the end, this Court is unable to specifically say why the jury was unable to follow the law to make a recommendation of death in this case."). This Court should

intervene in this case by granting the petition and vacating or reversing the decision below.

CONCLUSION

Petitioner McMillan respectfully requests that this Court (1) grant certiorari, (2) vacate or reverse the ruling of the Alabama Court of Criminal Appeals, and (3) remand this case to the Alabama Court of Criminal Appeals for further proceedings.

Respectfully submitted,



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