No. 20-193

IN THE

Supreme Court of the United States

CALVIN MCMILLIAN,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

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

BRIEF OF *AMICUS CURIAE*

NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER

SHERRILYN A. IFILL
Director-Counsel
JANAI S. NELSON
SAMUEL SPITAL
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector St., 5th Floor
New York, NY 10006
(212) 965-2200

DANIEL HARAWA*
Of Counsel
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
700 14TH ST, NW SUITE 600
WASHINGTON, DC 20005
dharawa@naacpldf.org

Counsel for Amicus Curiae NAACP Legal Defense & Educational Fund, Inc.

**Counsel of Record*

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INTERESTS OF AMICUS CURIAE

Founded in 1940 by Justice Thurgood Marshall, the NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights law organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights.

LDF has a long history of challenging the unconstitutional imposition of the death penalty. LDF has served as counsel of record or filed amicus briefs in numerous capital cases, including: *Furman v. Georgia*, 408 U.S. 238 (1972); *Coker v. Georgia*, 433 U.S. 584 (1977); *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Banks v. Dretke*, 540 U.S. 668 (2004); *Roper v. Simmons*, 543 U.S. 551 (2005); and *Buck v. Davis*, 137 S. Ct. 759 (2017).

Consistent with its opposition to the arbitrary or discriminatory imposition of the death penalty, LDF submits this amicus brief in support of Calvin McMillan's petition for writ of certiorari.[1]

[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of Amicus Curiae's deadline to file this brief. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Calvin McMillan was a Black teenager when he was arrested for the robbery-killing of James Bryan Martin, a white man. Pet. App. 33a. Mr. McMillan had no significant criminal history, *see* Pet. App. 32a, and in his short life leading up to his arrest, Mr. McMillan suffered extreme trauma, including severe physical and sexual abuse. *See, e.g.*, Pet. App. 35a. During the penalty phase of his trial, a death-qualified jury heard evidence about the crime, Mr. McMillan's tragic upbringing, and other aggravating and mitigating evidence. By a vote of 8-4, the jury recommended that Mr. McMillan be sentenced to life in prison without the possibility of parole as opposed to death. *See* Pet. App. 24a.

The trial judge overrode the jury's recommendation and sentenced Mr. McMillan to death. *See* Pet. App. 47A. In so doing, the trial judge baldly 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. 40a. In the judge's opinion, "a proper weighing of the aggravating circumstance and mitigating circumstances [did] not support a sentence of life without parole." Pet. App. 45a.

In *Harris v. Alabama*, 513 U.S. 504 (1995), this Court upheld Alabama's capital sentencing scheme that allowed a judge to impose a death sentence even if the jury voted for life in prison. This Court had previously upheld Florida's capital sentencing scheme that allowed for judicial override in *Spaziano v. Florida*, 468 U.S. 447 (1984).

Much has changed since *Harris and Spaziano*. Today, no State in the country allows a judge to override a jury's verdict. Since *Harris*, there is proof that the judicial override has been exercised arbitrarily, with evidence that judges in Alabama used the override for political reasons. And today, there is evidence that the override was exercised discriminatorily, with judges more likely to override the jury and condemn a defendant to death if he was Black or if the victim was white.

The abolition of the judicial override across the Nation proves that the practice violates our "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). It is also clear that the judicial override has been utilized "arbitrarily or irrationally" in violation of bedrock Eighth Amendment principles. *Parker v. Dugger*, 498 U.S. 308, 321 (1991). Finally, the judicial override invited the "risk of racial prejudice infecting a capital sentencing proceeding," which "is especially serious in light of the complete finality of the death sentence." *Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality opinion).

Given all that time has revealed, and the Court's special role in remedying the arbitrary and discriminatory application of the death penalty, this Court should grant Calvin McMillan's petition for certiorari, revisit *Harris* and *Spaziano*, and declare that the Constitution forbids the execution of a person sentenced to death by judicial override.

ARGUMENT

Decades ago, this Court unequivocally declared that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). The Court has since emphasized this point time and again. Said the Court: when race influences the criminal process, it is "a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017). "Relying on race to impose a criminal sanction 'poisons public confidence' in the judicial process." *Id.* (quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015)). Racial bias "injures not just the defendant, but 'the law as an institution the community at large, and the democratic ideal reflected in the processes of our courts.'" *Id.* (quoting *Rose*, 443 U.S. at 556) (ellipses omitted). The "familiar and recurring evil" of racial bias, "if left unaddressed, would risk systemic injury to the administration of justice." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017).

This Court has also recently reiterated that "*[t]he jury* is to be a criminal defendant's protection of life and liberty against race or color prejudice." *Id.* (emphasis added; quotation marks omitted). As Justice Felix Frankfurter explained, "the broad representative character of the jury" promotes a "diffused impartiality . . . ." *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting). One of the "greatest benefits" of the jury, this Court emphasized close to a century ago, is "the security it gives the people that they, as jurors, actual or possible, being part of the judicial system of the country, can prevent its arbitrary use or abuse." *Balzac v.*

Porto Rico, 258 U.S. 298, 310 (1922). Put another way, the jury "minimize[s] the risk of wholly arbitrary and capricious action," which takes on particular importance in the imposition of the death penalty. *See Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)

The judicial override nullifies the jury's vote. In so doing, it eviscerates the vital check that the jury provides against arbitrary or prejudiced decision-making. Indeed, there are examples of Alabama judges overriding the jury even when the jury *unanimously* voted against the death penalty. *See Woodward v. Alabama*, 571 U.S. 1045, 1051 (2013) (Sotomayor, J., dissenting from denial of certiorari) (citing an example from 2011). Thus, if the jury is meant to guard against "arbitrary and capricious action," *Gregg*, 428 U.S. at 189, the judicial override wholly undermines that protection. As Justice Stevens explained in his dissent in *Harris*: "Death sentences imposed by judges over contrary jury verdicts do more than countermand the community's judgment: They express contempt for that judgment. Judicial overrides undermine the jury system's central tenet that 'sharing in the administration of justice is a phase of civic responsibility.'" *Harris*, 513 U.S. at 522 (Stevens, J., dissenting) (quoting *Thiel*, 328 U.S. at 227).[2]

Members of the Alabama Legislature understood that the judicial override was an affront to the jury's critical role under our constitutional system when they moved to abolish the practice in 2017. *See* Ala. Code § 13A-5-47(a) (2017) (requiring the trial

[2]Ironically, Alabama established the override post-*Furman* as a remedy to ameliorate "the racial bias of juries" in capital sentencing. *Ex parte Hays*, 518 So. 2d 768, 776 (Ala. 1986). As this brief shows, the judicial override has introduced more arbitrariness and discrimination in capital sentencing, not less.

court to impose the sentence returned by the jury). The proponent of the bill in the Alabama Senate remarked that it "flies in the face" of democracy to allow a judge to impose a death sentence after the jury voted for life in prison: "we pick a jury of the community and they decide guilt, innocence, and punishment. . . . You are entitled to a trial of a jury of your peers, and that ought to apply to sentencing too."[3] The proponent in the Alabama House of Representatives similarly explained that the judicial override "actually undermines our [jury] system, as the Constitution guarantees your right to a jury and a trial by your peers"[4]; abolishing the override "places the death penalty . . . where in my opinion the Constitution intends it to be: in the hands of juries."[5]

Before the judicial override was abolished in Alabama, the practice effectively allowed for judges to impose a death sentence based on an "arbitrary whim." *Harris*, 513 U.S. at 514. For example, there is statistically significant evidence tending to show that judges overrode jury verdicts for political purposes, as judicial overrides were more frequent during election years when judges would openly campaign on pro-death penalty platforms. *See Woodward*, 571 U.S. at 1050. In fact, one scholar conducted "a mini-multiple regression analysis of how the death penalty is applied

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[3] *See* Jennifer Horton, *Bill Advances to Take Away AL Judge's Ability to Override Juries*, WSFA, Feb. 24, 2017, https://www.wsfa.com/story/34601206/bill-advances-to-take-away-al-judges-ability-to-override-juries/ (quoting Senator Dick Brewbaker, R-Montgomery).

[4] *See* Chip Brownlee, *The End to Judicial Override in Alabama is Imminent*, ALA. POLITICAL REPORTER, Apr. 5, 2017, https://www.alreporter.com/2017/04/05/end-judicial-override-alabama-imminent/ (quoting Representative Chris England, D-Tuscaloosa).

[5] *See Alabama Legislature Votes to End Judicial Override*, Apr. 5, 2017, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/news/alabama-legislature-votes-to-end-judicial-override (quoting Representative England). The bill passed with broad bipartisan support. *See id.* (noting that the bill passed the House on a vote of 78-19); Horton, *supra* note 3 (noting that only one senator voted against the bill).

and how the override is applied" and found that the judicial override "is one of the clearest examples of the precise dynamic of politics in the administration of the death penalty." [6] Justice Sotomayor gave a real life example of how the judicial override had been influenced by politics: "One Alabama judge, who has overridden jury verdicts to impose the death penalty on six occasions, campaigned by running several advertisements voicing his support for capital punishment." *Id.* at 1050-51. In fact, Alabama legislators cited improper political motives influencing the override as a reason to abolish the practice, with one state senator recalling judges telling him that they felt "pressure" to override the jury "during election years."[7] Thus, the judicial override allowed for the very arbitrary and capricious decision-making that the Eighth Amendment forbids. *See Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) ("Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.").

Even worse, the override allowed judges to sentence defendants to death out of racial prejudice. Evidence shows that the judicial override was riddled with racism. Studies estimate that Black people comprise 55 percent of all defendants sentenced to death by judicial override.[8] That same study found that the victims were white in

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[6] *See also* Ronald J. Tabak, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 FORDHAM URB. L.J. 239, 255–56 (1994).
[7] *See* Horton, *supra* note 3.
[8] David V. Baker, *Purposeful Discrimination in Capital Sentencing*, 5 J. L. & SOC. CHALLENGES, 189, 216 (2003).

75 percent of judicial override cases.[9] The racial disparities in the use of the judicial override demonstrate that both the race of the defendant *and* the race of the victim influenced who judges chose to condemn to death after a jury had already voted to spare their life.

These same racial disparities hold true in Alabama.[10] A 2015 report found Black defendants comprised 50 percent of all cases where an Alabama judge overrode the jury and condemned the defendant to death.[11] And the victim was white in 75 percent of Alabama override cases even though the Black victim murder rate in Alabama is significantly higher than the white victim murder rate.[12] More to the point, a 2011 report by the Equal Justice Initiative estimated that only six percent of murders in Alabama involve Black defendants and white victims, yet 31 percent of judicial override cases involve a defendant of color convicted of killing a white person.[13] Finally, of the 32 people presently on death row in Alabama who were sentenced to death by judicial override, 21 are Black and only 11 are white.[14] Thus, in Alabama, the race of the defendant and the race of the victim were salient to judges deciding to override the jury. The statistics provide powerful reason to believe that

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[9] *Id.*

[10] Alabama was the last State that clung to the judicial override. Since 2000, 26 out of 27 life-to-death overrides were by Alabama judges. *Woodward*, 571 U.S. at 1049.

[11] *See* Adam Lindekugel, *Alabama Judicial Override: Is One Greater than Twelve*? *A Post-Furman Look at Potential Disparities in Capital Sentencing in Alabama*, at 27-28 tbl.4, Spr. 2015, https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/34836/Lindekugel%20-%20Captone.pdf?sequence=1.

[12] Less than 35 percent of murder victims in Alabama are white. *Id.*

[13] Equal Justice Initiative, *The Death Penalty in Alabama: Judicial Override*, at 18, July 2011, https://eji.org/wp-content/uploads/2019/10/death-penalty-in-alabama-judge-override.pdf.

[14] *Compare* Equal Justice Initiative, *Alabama Overrides from Life to Death* (Jan. 12, 2016), https://eji.org/wp-content/uploads/2019/11/list-alabama-override-cases.pdf; *with* Alabama Department of Corrections, *Alabama Inmates Currently on Death Row*, Sept. 11, 2020, http://www.doc.state.al.us/deathrow.

the override allowed for judges to discriminatorily impose the ultimate punishment on the basis of race.

It should perhaps be expected that gross racial disparities plague the judicial override given the fact that "numerous studies document specific instances of trial judges exhibiting racial bias in capital cases."[15] Studies also show that judges harbor negative biases against Black defendants, including, for example, intuitively associating Black people with violence.[16] The judicial override allowed such biases to influence judges' decision to condemn a defendant to death over a jury's vote for life.

This is not hypothetical. There are examples of judges in Alabama openly expressing racial bias when overriding the jury and imposing a death sentence. Justice Sotomayor, joined by Justice Breyer, highlighted two such instances. One Alabama judge dismissed a defendant's far-below-average IQ score when overriding the jury and sentencing him to death because the "sociological literature suggests Gypsies intentionally test low on standard IQ tests." *Woodward*, 571 U.S. at 1051 (quotation marks omitted).[17] A different Alabama judge overrode the jury and sentenced a white defendant to death to make it seem as if he was not racist, explaining that if "I had not imposed the death sentence, I would have sentenced three black people to death and no white people." *Id.* at 1052 (quotation marks

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[15] Sherrilyn A. Ifill, J*udging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 143-44 (1997).

[16] *See* Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 156-58 (2010).

[17] *See* Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1752-53 (1993) (citing the term "gypsy" as an example of a "racial image[] related to criminality").

omitted). And Mr. McMillan identified a third Alabama judge using animalistic imagery in referring to a young Black defendant's "reptilian coolness" when overriding the jury's recommendation and sentencing him to death. Pet. at 13. The evidence and examples leave no question that the judicial override allowed "racial prejudice [to] infect[ ] capital sentencing . . . ." *Turner*, 476 U.S. at 35.

Over the years, this Court has "struck down capital sentences when [it] found that the circumstances under which they were imposed created an unacceptable risk that the death penalty [may have been] meted out arbitrarily or capriciously or through whim or . . . mistake." *Id.* at 35-36 (second alteration in original). The judicial override created precisely such an unacceptable risk of the arbitrary, capricious, and racist imposition of the ultimate punishment. This violates the Eighth Amendment. Accordingly, the Court should grant Calvin McMillan's petition for certiorari and declare it unconstitutional to execute someone sentenced to death by judicial override.

CONCLUSION

For these reasons, amicus curiae the NAACP Legal Defense and Educational Fund, Inc. respectfully asks this Court to grant certiorari.

Respectfully submitted,

SHERRILYN A. IFILL
Director-Counsel
JANAI S. NELSON
SAMUEL SPITAL
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector St., 5th Floor
New York, NY 10006

DANIEL S. HARAWA*
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
700 14th St., NW Suite 600
Washington, DC 20005
dharawa@naacpldf.org

**Counsel of Record*

Counsel for Amicus Curiae NAACP Legal Defense & Educational Fund, Inc.

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