No. 20-193

IN THE

Supreme Court of the United States

CALVIN MCMILLAN,

Petitioner,

v.

THE STATE OF ALABAMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

BRIEF OF THE INNOCENCE PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus, the Innocence Project, is a non-profit law office providing free legal representation to prisoners with provable claims of actual innocence. The Innocence Project represents prisoners across the country, primarily in cases where DNA testing can provide conclusive proof of innocence. Since it was founded in 1992, the Innocence Project's work has led to the exoneration of 375 people nationwide.

In addition to working to exonerate and free the innocent, *amicus* uses the lessons from these cases to advocate for changes in laws and policies that contribute to wrongful convictions. To date, numerous individuals who were sentenced to death via judicial override, or who were sentenced to life in death-eligible cases (precisely the kinds of cases in which life-to-death judicial override operates) have subsequently been proven innocent. *Amicus* has a direct interest in ending the executions of individuals sentenced to death through judicial override, which inherently carries a high risk of wrongful executions. *Amicus*'s experience suggests that jury life sentences provide an important safeguard against executing the innocent. In addition, due to the unbridled use of judicial override in Alabama, death sentences imposed there by

[1] Pursuant to the Court's Rule 37, *amicus* notes that no part of this brief was authored by counsel for any party, and no person or entity other than *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Timely notice of the filing of this brief was given to both parties. Petitioner and Respondent have consented to the filing of this brief.

override are particularly susceptible to racial bias. Therefore, in the interests of ending wrongful executions as a result of judicial override in this country, the Innocence Project respectfully files this *amicus curiae* brief in support of the Petitioner, Calvin McMillan.

SUMMARY OF THE ARGUMENT

For decades, a small number of states allowed judges to override jury verdicts in capital cases via the now-obsolete practice of judicial override. While judges in override states had discretion to convert death sentences to life sentences, it was the far more frequent use of judicial override to convert life sentences to death sentences—particularly in Alabama—that invited wrongful executions and is therefore the focus of this brief. There are currently over 30 individuals on death row in Alabama who were sentenced to life by a jury, only to have a judge override that sentence in favor of death. Calvin McMillan is one of them.

Life-to-death overrides are inherently unreliable because they impose death in cases where there is a greater likelihood of the defendant's innocence. This fact stems from the phenomena of "residual doubt." Frequently—as has been confirmed by studies and juror interviews, and recognized by members of this Court[2]—jurors in

[2] *See, e.g.*, *Spaziano v. Florida*, 468 U.S. 447, 488 n.34 (1984) (Stevens, J., dissenting) ("It may well be that the jury was sufficiently convinced of petitioner's guilt to convict him, but nevertheless also sufficiently troubled by the possibility that an irrevocable mistake might be made . . . that [it] concluded that a sentence of death could not be morally justified in this case.").

capital cases will choose to impose a life sentence, rather than death, when they have lingering doubts about the defendant's guilt. In certain cases, such doubts are harbingers of actual innocence. Because jurors are apt to impose life instead of death in cases where they have residual doubt, there is a greater likelihood that defendants in those cases are actually innocent. When that same jury determination is in turn overridden by a judge to impose death, a greater likelihood of wrongful execution results.

In addition to the inherent unreliability of life-to-death override, the practice as used in Alabama was particularly susceptible to discriminatory and politically motivated application because—unlike any other state that employed judicial override—Alabama lacked standards to guide judges' use of life-to-death override and because—also unlike any other state that employed judicial override—judges in Alabama were (and are) publicly elected. Studies show that despite their role as impartial decision makers, unsurprisingly, judges, like all individuals, are not immune from implicit racial and political bias. Such biases have the strongest influence where judges have unfettered discretion, as was the case with judicial override in Alabama. The disproportionate use of override by an overwhelmingly white judiciary to convert life sentences to death in cases involving Black defendants and white victims in Alabama supports the conclusion that implicit racial bias was at play. Notably, Alabama judges only overrode life sentences in two cases (out of 112 override cases) where the defendant was white and the victim was Black. Moreover, evidence suggests that publicly

elected judges may be inherently biased in favor of life-to-death judicial override in close cases, viewing it as consistent with a "tough on crime" political platform, further contributing to a skewed use of override in that state.

For these reasons, and as discussed in greater detail below, life-to-death judicial override, particularly as applied in Alabama, undermines fundamental pillars of the criminal justice and capital punishment systems. It permits judges to substitute jury determinations with their own subjective evaluations in capital cases, ones that may be subject to racial or political bias, to impose death in circumstances that are more likely to lead to wrongful executions. This is why sentences such as Mr. McMillan's must be vacated.

ARGUMENT

I. Historical Context Of Judicial Override

Judicial override is an unusual, now-defunct sentencing practice that enabled a judge to unilaterally override a jury's sentence in a capital murder case. Although early case law suggests judicial override developed out of an effort to make death sentences less arbitrary and discriminatory, in practice override has had the opposite effect, particularly in Alabama.

a. Judicial Override Stemmed From Efforts To Curb Arbitrary And Discriminatory Applications Of The Death Penalty

In 1972, this Court ruled that the death penalty as it was currently administered constituted "cruel and unusual punishment" and explained that in order for the death penalty to be constitutional, it must not be applied in an "arbitrary or discriminatory" manner. *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (per curiam) (Douglas, J., concurring). This Court focused in part on the dangers of jury discretion, with Justice Marshall, for example, remarking that "committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases" had been "an open invitation to discrimination." *Id.* at 365 (Marshall, J., concurring) (quoting *McGautha v. California*, 402 U.S. 183, 207 (1971)). States responded to *Furman* by adopting new capital sentencing schemes designed to curb the arbitrary imposition of the death penalty by juries. One of those schemes was judicial override, which was "envisioned by the legislatures as a way for judges to safeguard the capital sentencing process by reversing outraged, 'inflamed' juries set on imposing death." *See* John M. Richardson, *Reforming the Jury Override: Protecting Capital Defendants' Rights by Returning to the System's Original Purpose*, 94 J. Crim. L. & Criminology 455, 456, 461 (2004).

Five years after *Furman*, the Supreme Court upheld Florida's death penalty statute, which made a jury's death sentence advisory and gave the judge the authority to make the final sentencing

determination. *See Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (recognizing that while "jury sentencing in a capital case can perform an important societal function," the Court had "never suggested that jury sentencing is constitutionally required"). A year later, the Court spoke favorably of judicial override because it gave a defendant a second chance at a life sentence, noting that override in Florida provided "significantly more" protection to a defendant than prior death penalty mechanisms because "[d]eath [was] not automatic[] absent a jury recommendation of mercy." *Dobbert v. Florida*, 432 U.S. 282, 295–96 (1977). Aside from Florida, only Indiana, Delaware, and Alabama adopted judicial override.

b. While Most States Adopted Standards To Guide The Implementation Of Judicial Override, Alabama Did Not

Although this Court held in *Harris v. Alabama* that "the Eighth Amendment does not require the State to define the weight the sentencing judge must accord an advisory jury verdict," 513 U.S. 504, 512 (1995), most states that used judicial override established stringent standards for its implementation.

The Florida Supreme Court required that "to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975). This Court approved of these standards in *Dobbert*, commenting that, "most importantly," Florida's

death penalty scheme allowed "[a] jury recommendation of life [to] be overridden by the trial judge only under the exacting standards of Tedder." *Dobbert*, 432 U.S. at 295–96. It subsequently upheld Florida's judicial override practice, including the *Tedder* standard, in *Spaziano v. Florida*, 468 U.S. 447 (1984).

Indiana adopted a similar standard in 1989, *see Martinez Chavez v. State*, 534 N.E.2d 731, 735 (Ind. 1989) ("In order to sentence a defendant to death after the jury has recommended against death, the facts justifying a death sentence should be so clear and convincing that virtually no reasonable person could disagree that death was appropriate in light of the offender and his crime."), and Delaware adopted the *Tedder* standard in 2003, *see Garden v. State*, 815 A.2d 327, 343 (Del. 2003).

The application of these standards in Delaware, Indiana, and Florida guarded against arbitrary judicial imposition of the death penalty: in Delaware, the only two instances of life-to-death judicial overrides (for the same defendant) were overturned on appeal due to the judge's failure to properly apply the *Tedder* standard. *See Garden*, 815 A.2d at 345; *Garden v. State*, 844 A.2d 311, 318 (Del. 2004). In Indiana, at least seven of the ten life-to-death overrides overturned on appeal were vacated under the *Martinez-Chavez* standard, *see, e.g.*, *Schiro v. State*, 669 N.E.2d 1357, 1359 (Ind. 1996). In Florida, the state supreme court's "strict[] adhere[nce] to the Tedder standard" has resulted in over 95 percent of the state's 166 life-to-death overrides being vacated on appeal. *See* Michael L. Radelet, *Overriding Jury Sentencing*

Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem, 2011 Mich. St. L. Rev. 793, 804, 816 (2011) [hereinafter Radelet, *Overriding Jury Sentencing*].

At the same time, judicial override in Florida, Delaware, and Indiana was frequently used to convert jury-imposed death sentences to life sentences and few, if any, individuals remain on death row as a result of judicial override. Florida judges used override to impose life 91 times; Delaware judges, 17 times; and Indiana judges, 9 times. *Id.* at 797, 799, 822. No one is on death row in Delaware or Indiana as a result of judicial override, *see id.* at 797, 801, and only three men—less than 1 percent of all Florida death row inmates—are on death row in Florida due to a life-to-death override. *Compare id.* at 809 & n.111, *with Death Row Roster*, Fla. Dep't of Corrections, http://www.dc.state.fl.us/OffenderSearch/deathrowroster.aspx (last visited Sept. 18, 2020).

Conversely, in Alabama, no standards existed to guide or review judges' use of judicial override. *See* Radelet, *Overriding Jury Sentencing*, *supra*, at 801; *see also Harris*, 513 U.S. at 515 (Stevens, J., dissenting) ("In Alabama, unlike any other State in the Union, the trial judge has unbridled discretion to sentence the defendant to death."). In Alabama, a sentencing judge was only required to "consider" the jury's advisory verdict, *see* Ala. Code § 13A-5-47(e) (1975), and was free to override a jury's life recommendation even where the court found that the jury had correctly evaluated the facts or where the jury had unanimously voted for life. *See* Shannon Heery, *If It's Constitutional, Then What's*

the Problem?: The Use of Judicial Override in Alabama Death Sentencing, 34 Wash. U. J. L. & Pol'y 347, 357, 374 (2010); *see also, e.g.*, Equal Justice Initiative, *The Death Penalty in Alabama: Judge Override* 8 (2011), http://eji.org/eji/files/Override_Report.pdf [hereinafter *EJI Report*] (discussing a case where the jury unanimously voted for life yet the court found the recommendation "not helpful," overriding the jury's decision in turn).

Although the Alabama Supreme Court eventually required trial judges to treat life recommendations as a mitigating circumstance, *see Ex Parte Carroll*, 852 So. 2d 833, 836 (Ala. 2002), appellate courts routinely failed to exercise meaningful or consistent oversight to enforce these guidelines: as of 2011, trial judges failed to consider the jury's life verdict as a mitigating circumstance in 57 of 98 life-to-death override cases. *See EJI Report*, *supra*, at 13.

Absent any meaningful guidelines, Alabama judges used judicial override to impose death at a far higher rate than life. One hundred and one out of 112—or 92 percent of—overrides in Alabama imposed death. Equal Justice Initiative, *Override Report* (updated Jan. 12, 2016), https://eji.org/wp-content/uploads/2019/11/list-alabama-override-cases.pdf [hereinafter *Override Report*]. Alabama judges even overrode juries to impose death where the juries *unanimously* voted for life. *See Woodward v. Alabama*, 134 S. Ct. 405, 409 (2013). In contrast, Alabama judges used judicial override to impose a life sentence only 11 times. *Override Report*, *supra*, at 3.

Over the more than 40 years in which judicial override was practiced, 101 Alabama defendants were sentenced to death through judicial override, *see* Michael Radelet & G. Ben Cohen, *The Decline of the Judicial Override*, 15 Ann. Rev. L. & Soc. Sci. 539, 545 (2019), and over 30 override defendants remain on death row today, *see* Radelet, *Overriding Jury Sentencing*, *supra*, at 825; *Alabama Inmates Currently on Death Row*, Ala. Dep't of Corrections, http://www.doc.state.al.us/DeathRow (last visited Sept. 16, 2020).

c. Over Time, The Use Of Life-To-Death Judicial Override Declined And Was Eventually Eliminated

In Florida, Indiana, and Delaware, life-to-death overrides fell out of favor long before judicial override was formally abolished. In Florida, judicial override was not used to impose a death sentence after 1999, and in Indiana, life-to-death overrides ceased after 1994. *See* Radelet, *Overriding Jury Sentencing*, *supra*, at 809, 818 (tbl.1). As indicated above, life-to-death overrides were never in favor in Delaware, where only one judge used judicial override to override the same life sentence twice in the early 2000s. *Id.* at 798.

Perhaps due to the unique, unrestricted nature of judicial override in Alabama, its use declined more slowly there. Alabama judges used override to impose the death penalty for far longer than judges in any other state, albeit at a slower pace than they had previously. *See Woodward*, 134 S. Ct. at 408. As a result, the percentage of nationwide life-to-death overrides attributable to

Alabama increased nearly fourfold between the 1980s and mid-2000s, from approximately 20–25 percent to almost 100 percent. *See, e.g.*, *id.* at 407 (noting that 30 of the 125 life-to-death judicial overrides in the 1980s, 44 of the 74 life-to-death overrides in the 1990s, and 26 of the 27 life-to-death overrides between 2000 and 2013 occurred in Alabama); Radelet, *Overriding Jury Sentencing*, *supra*, at 825–27 (listing life-to-death judicial overrides in Alabama between 1981 and 2011).

Beginning in the early 2000s, this Court gave renewed credence to the importance of the jury in the administration of the death penalty, and moved away from its prior decisions in *Proffit*, *Spaziano*, and *Harris*. *See Ring v. Arizona*, 536 U.S. 584, 589 (2002). At the same time, a nationwide consensus rejecting judicial override was solidified as every state that had used override abandoned it. Indiana's legislature abolished override in 2002. Ind. Code § 35-50-2-9(e) (2002). In 2016, in *Hurst v. Florida*, this Court overruled *Spaziano*, and struck down Florida's death penalty statute because it improperly "required the judge to [independently] . . . determine whether sufficient aggravating circumstances existed to justify imposing the death penalty," 136 S. Ct. 616, 619, 621–22 (2016); Florida's legislature formally abolished override when revising its death penalty statute that same year. Fla. Stat. § 921.141(3)(a)(1) (2016). The Delaware Supreme Court also struck down the practice in 2016, *see Rauf v. State*, 145 A.3d 430, 456 (Del. 2016), and the Alabama legislature eliminated judicial override from its death penalty statute in 2017, *see* Ala. Code § 13A-5-47 (2017). In voting to eliminate judicial override, Alabama legislators

focused on override's lack of reliability and susceptibility to political pressures. *See* Brian Lyman, *Senate Votes to End Judicial Override in Capital Cases*, Montgomery Advertiser (updated Feb. 24, 2017), https://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2017/02/23/senate-votes-endjudicial-override-capital-cases/98302650/.

II. Life-To-Death Judicial Override Increases The Risk Of Wrongful Convictions

a. Jurors Often Impose Life Sentences In Capital Cases Due To Residual Doubt

"Residual doubt" refers to "a state of mind that exists somewhere between 'beyond a reasonable doubt' and 'absolute certainty.'" *Franklin v. Lynaugh*, 487 U.S. 164, 188 (1988) (O'Connor, J., concurring). Because the judicial standard of "beyond a *reasonable* doubt" does not require the elimination of *all* doubt, *id.*, it is often the case that in a capital sentencing proceeding, a lingering uncertainty of facts establishing the defendant's guilt exists in jurors' minds, directly impacting their willingness to sentence a defendant to death, even though they were willing to convict the defendant of a capital offense. Residual doubt encompasses not only doubt as to guilt of a crime, but also doubt that a defendant is guilty of a capital offense versus a lesser offense, and concern that new evidence of innocence could emerge in the future. Christina S. Pignatelli, *Residual Doubt: It's a Life Saver*, 13 Cap. Def. J. 307, 308 (2001) (demonstrating "the public

response to questions about innocence is to restrict imposition of the death penalty until conflicts are resolved").

Studies have proven that residual doubt is one of the most significant reasons that jurors vote for life sentences. *See, e.g.*, Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 Ariz. St. L.J. 769, 775 (2006) (describing residual doubt as "the most potent mitigator in capital cases"). In one study, more than 77 percent of survey respondents—all of whom were jurors in capital cases—indicated they would be less likely to impose death if they held lingering doubt over the defendant's guilt at the sentencing phase, far more than any other mitigating factor. *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1559 (tbl.4), 1563 (1998).

Jurors in Alabama judicial override cases have confirmed the role that residual doubt played in sentencing determinations. Jurors from the trials of two of the three Alabama judicial override exonerees—Larry Randal Padgett and Daniel Wade Moore—confirmed that they felt lingering uncertainty and indecision regarding the defendant's guilt, even though they found the defendants guilty of capital murder. Patrick Mulvaney & Katherine Chamblee, *Innocence and Override*, 126 Yale L.J. Forum 118, 119–21 (2016). One juror from Padgett's trial explained she voted for a life sentence "'because of the doubt [she] had left' about whether Padgett had committed the crime." *Id.* at 120. A juror from Moore's trial

similarly stated he voted for a life sentence because of residual doubt. Nevertheless, the judges in both Padgett's and Moore's trials overturned the jurors' 9–3 and 8–4 votes for life, respectively, and imposed the death penalty. Larry Randal Padgett was exonerated in 1997, and Daniel Wade Moore was exonerated in 2009. *Id.* at 120–21.

Feelings of residual doubt also plagued the jurors of Shonelle Jackson's 1998 capital murder trial in Alabama. Jurors expressed "concerns about whether [Jackson] was responsible" for the offense at issue—an element required for a capital murder conviction in Alabama. *Id.* at 121 (citing Paige Williams, *Double Jeopardy*, New Yorker, Nov. 17, 2014, at 56). This widely shared lingering concern led to a unanimous jury vote for life. However, the judge overrode the jury and imposed a death sentence. Shonelle Jackson is just one of the individuals currently on death row in Alabama as a result of judicial override. *Id.*

b. Imposing Death Via Judicial Override Imposes Death In Cases Where Residual Doubt Exists And Actual Innocence Is More Likely

Residual doubt is an influential factor in juries' selection of life in capital cases for good reason: at least 21 individuals nationwide who were charged with, but not ultimately sentenced to, death have been exonerated based on DNA evidence. *DNA Exonerations in the United States*, Innocence Project, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Sept. 16, 2020). Because jury recommendations for life often reflect

an effort to safeguard against the execution of an innocent person, life-to-death judicial override cases are more likely to involve wrongful convictions than non-override death penalty cases.

In Florida, where judicial override accounts for less than 1 percent of current death sentences, *see* Radelet, *Overriding Jury Sentencing*, *supra*, at 809 n.111; *Death Row Roster*, *supra*, 4 of the 25 death row inmates who have been exonerated since 1976 were sentenced to death through judicial override. *See DPIC Analysis: Exoneration Data Suggests Non-Unanimous Death-Sentencing Statutes Heighten Risk of Wrongful Convictions*, Death Penalty Info. Ctr. (Mar. 13, 2020), https://deathpenaltyinfo.org/news/dpic-analysis-exoneration-data-suggests-non-unanimous-death-sentencing-statutes-heighten-risk-of-wrongful-convictions [hereinafter *2020 DPIC Analysis*]. In Alabama specifically, where judicial override has been used to impose the death penalty more than in any other state, although judicial override cases account for only a quarter of all death sentences, they represent half of all death row exonerations: three of the six individuals exonerated from death row were sentenced to death through judicial override. *See* Radelet, *Overriding Jury Sentencing*, *supra*, at 825; *Innocence Database*, Death Penalty Info. Ctr. , https://deathpenaltyinfo.org/policy-issues/innocence-database?filters%5Bstate%5D=Alabama (last visited Sept. 16, 2020). As discussed above, several jurors in those cases have since said publicly that they voted to impose a life sentence *because of* their residual doubt as to the defendant's guilt.

The statistics are even more staggering when you consider death sentences imposed by non-unanimous juries. Non-unanimous jury death sentences present similar concerns to judicial override with respect to residual doubt because in both cases, individuals may be sentenced to death where at least one member of their jury was not convinced that death was the appropriate sentence. *See, e.g.*, *State v. Poole*, No. SC18-245, 2020 WL 3116597, at *20 (Fla. Jan. 23, 2020) (Labarga, J., dissenting) (describing the "requirement that a jury unanimously recommend a sentence of death" as "an important safeguard for ensuring that the death penalty is only applied to the most aggravated and least mitigated of murders"); *Wrongful Capital Convictions May Be More Likely in Cases of Judicial Override, Non-Unanimous Death Verdicts*, Death Penalty Info. Ctr. (Sept. 9, 2016), https://deathpenaltyinfo.org/news/ wrongful-capital-convictions-may-be-more-likely-in-cases-of-judicial-override-non-unanimous-death-verdicts (explaining that "[n]on-unanimous jury recommendations for death [] appear to pose similar problems" to judicial override). In addition, like judicial override, the practice of non-unanimous jury death sentences has only been permitted in Alabama, Florida, and Delaware.[3] *See 2020 DPIC Analysis*, *supra*. In *five* out of the *six* Alabama death row exonerations, at

[3] Today, only Alabama allows a non-unanimous jury to sentence a defendant to death, and it executed one such defendant in March of this year. Rick Rojas, *2 Jurors Voted to Spare Nathaniel Woods's Life. Alabama Executed Him*, N.Y. Times (Mar. 5, 2020), https://www.nytimes.com/2020/03/05/us/nathaniel-woods-alabama.html.

least one juror voted for a life sentence.[4] *Id.* The same is true with respect to 22 out of the 25 Florida death row exonerations since *Furman*.[5] *Id.* The only death row exoneration in Delaware also involved a non-unanimous jury death sentence. *Id.*

Exoneration statistics alone do not capture the full extent of judicial override's unreliability, as individuals sentenced to death by judicial override have also been released from prison through other mechanisms, such as Alford pleas, which are frequently used to incentivize "factually innocent defendants to plead [guilty], as they [allow the defendant to] receive the benefits of a guilty plea without having to falsely admit guilt." John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 Cornell L. Rev. 157, 172, 175–79 (2014) (collecting examples of innocent defendants who accepted Alford pleas). For example, Montez Spradley, a former Alabama death row inmate whose death sentence was the result of judicial override, was released from prison pursuant to an Alford plea in 2015. *See Former Alabama Death Row Inmate Freed on Evidence of Innocence "Glad to Be Alive,"* Death Penalty Info. Ctr. (Sept. 14, 2015), https://deathpenaltyinfo.org/news/former-alabama-death-row-inmate-freed-on-evidence-of-innocence-glad-to-be-alive. Spradley was granted a new trial and, after it came to light that the State's key witness against him had lied at Spradley's original

[4] The sixth death row exoneree in Alabama waived his right to a jury trial. *See DPIC Analysis*, *supra*.

[5] For one of the additional three exonerations in Florida, the jury vote is unknown. *See id.*

trial *and* that the State had threatened her with jail time or the loss of custody of her children if she recanted, Spradley was ultimately released from prison after serving only seven years. *See id.*; Kent Faulk, *Alabama Man Who Once Spent Time On Death Row: 'I'm So Glad to Be Alive*,*'* Alabama.com (updated Mar. 7, 2019), https://www.al.com/news/birmingham/2015/09/once_on_death_row_in_slaying_o.html.

c. Individual Override Cases—Including *Spaziano*—Showcase The Practice's Lack Of Reliability

One of the original life-to-death override cases, Joseph Spaziano's, demonstrates that lack of reliability has plagued the practice since its inception. Following his conviction for first-degree murder in 1976, Spaziano was twice sentenced to death by judicial override in the face of two jury life recommendations in 1976 and 1981, respectively. *See* Radelet, *Overriding Jury Sentencing*, *supra*, at 805. Five death warrants later, Spaziano won a stay of execution from the Florida Supreme Court after the State's key trial witness recanted his testimony; ultimately, his conviction was set aside and a new trial was ordered as a result. *See State v. Spaziano*, 692 So. 2d 174, 175 (Fla. 1997); Radelet, *Overriding Jury Sentencing*, *supra*, at 806 n.89. Shortly thereafter, Spaziano entered a no contest plea to second degree murder and was sentenced to time served plus two years. *See id.*

Such errors are still coming to light today. As recently as August 27, 2020, another man was released from prison after serving 37 years for a

crime that he did not commit, having initially been sentenced to die via judicial override. *See Innocence Project Client Robert DuBoise Released After Nearly 37 Years in Prison for 1983 Tampa Murder*, Innocence Project (Aug. 27, 2020), https://www.innocenceproject.org/innocence-project-robert-duboise-is-released-37-years-1983-tampa-murder/. In March 1985, Robert DuBoise was sentenced to life by a jury. The only "evidence" presented against Mr. DuBoise was unreliable bite-mark evidence and the testimony of a jailhouse informant. Nevertheless, the judge overrode the jury's recommendation of life and instead sentenced Mr. DuBoise to death. He served three years on death row before the Florida Supreme Court vacated his death sentence, after which he was resentenced to life and 15 years, to run consecutively. Incontrovertible DNA evidence has now proven that Mr. DuBoise did not commit the crime for which he spent 37 years in prison, but for which he mercifully was not killed, despite the trial judge's unilateral, and now demonstrably erroneous, decision that he should die. *See id.*

III. Alabama's Lack Of Guiding Standards Made Life-To-Death Judicial Override Particularly Unreliable

a. Unfettered Discretionary Judicial Override Decisions Are Susceptible To Subjective Bias

In Alabama, the purely discretionary nature of life-to-death override opened the door to discriminatory—and thus unconstitutional—implementation of the death penalty due to judges'

vulnerability to implicit (and in some cases explicit) racial and political bias.

Implicit bias describes "the process whereby the human mind automatically and unintentionally reacts to different groups in divergent ways." Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 Fla. L. Rev. 63, 70 n.19 (2017) (citation omitted) [hereinafter Levinson et al., *Judging Implicit Bias*]. In the context of the law, implicit racial bias can become "systemic" when "automatic racial bias . . . become[s] unwittingly infused with, and even cognitively inseparable from, supposedly race-neutral legal theories (such as retribution or rehabilitation) and jurisprudential approaches to well-considered constitutional doctrines (such as Eighth Amendment excessiveness analysis)." Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 Yale L.J. Forum 406, 408 (2017).

Although the universe of empirical studies measuring judicial implicit bias is limited, those that have addressed the issue have uniformly found that judges are as susceptible to implicit racial bias as the rest of the population. *See* Levinson et al., *Judging Implicit Bias*, *supra*, at 73–74; Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1197 (2009). Such studies make clear that judges—and therefore their discretionary decisions—are not immune from implicit bias.

Research also indicates that judges "commonly favor compelling intuitive reactions over

careful deliberative assessments," even when those reactions are "clearly wrong." Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 Tex. L. Rev. 855, 864 (2015). Judges, like most individuals, find narratives that fit into their preexisting beliefs to be emotionally compelling. *Id.* at 865. This is particularly troublesome when an emotional response, such as sympathy or disgust toward a person, occurs rapidly and can entirely shape an individual's judgments. *Id.* at 866; *see also* William Wundt, *Outlines of Psychology* 216 (Charles Hubbard Judd trans., 1897) (noting that "the clear apperception of ideas in acts of cognition and recognition is always preceded by special feelings").

Judicial override in Alabama is a discretionary determination, and thus, it is just as vulnerable to judges' implicit biases. Indeed, statistics on race and the use of override in Alabama support the conclusion that implicit racial bias illegally influenced override decisions. For example, Alabama judges used their judicial override power in cases involving white victims more frequently than in cases involving Black victims. *See Override Report*, *supra*. Seventy-five percent of all death sentences imposed by override involved white victims, despite the fact that less than 35 percent of all homicide victims in Alabama are white. *EJI Report*, *supra*, at 18. Although only 6 percent of all murders in Alabama involve Black defendants and white victims, trial judges condemned a person of color to death for killing someone white in 31 percent of override cases. *Id*. These statistics arise from a judiciary where, as of 2011 (when judicial override

was still legal in Alabama), none of the 19 appellate court judges and only one of the 42 elected District Attorneys were Black. *Id.*

Further, there is no means by which to gain comfort that Alabama life-to-death override decisions were not motivated by implicit (or explicit) bias. Alabama judges consistently failed to provide specific reasons for override decisions, and when they did, the reasons varied and were inconsistent. *See* Heery, *supra*, at 374–75. In at least one Alabama case, the judge, in fact, admitted to illegal bias by explaining that a decision to override the jury's life verdict for a white defendant balanced out his sentencing record, which included three prior life-to-death overrides against three African American defendants. *See* Sentencing Hearing Transcript, *State v. Waldrop*, No. 98-162 (Randolph Co. Cir. Ct. July 25, 2000).

b. Alabama Override Decisions Were Also Influenced By Politics

Alabama was the only state where the trial judges imposing sentences via judicial override were elected through partisan elections. *See* Bryan Stevenson, *Just Mercy: A Story of Justice and Redemption* 70 (2015). Judicial candidates frequently campaigned on support for capital punishment, and seated judges often relied on override decisions to gain political support. *Id.* Data suggests that there is a "statistically significant correlation" between judicial override and election years in many of the counties where the overrides took place. Colloquium, *Politics and the Death Penalty: Can Rational Discourse and Due Process*

Survive the Perceived Political Pressure?, 21 Fordham Urb. L. J. 239, 256 (1994) (comments of Bryan Stevenson).

The override rates in Alabama tended to fluctuate from year to year and were often elevated in election years. For example, in 2008, an election year, 30 percent of new death sentences were imposed by judicial override, compared to 7 percent in 1997, a non-election year. *EJI Report*, *supra*, at 8, 16. These statistics suggest that the pressure of elections led Alabama judges to more heavily impose the death penalty in an effort to appear "tough on crime." *See id.* at 14–16. Indeed, in his *Harris v. Alabama* dissent, Justice Stevens acknowledged that "[n]ot surprisingly, given the political pressures they face, judges are far more likely than juries to impose the death penalty." *See Harris*, 513 U.S. at 521 (Stevens, J., dissenting); *see also Woodward*, 134 S. Ct. at 406–10 (Sotomayor, J., dissenting).

In 2013, Justice Sotomayor highlighted this aspect of Alabama's override practices in her dissent from the denial of certiorari of *Woodward v. Alabama*, noting that there was "no evidence that criminal activity [was] more heinous in Alabama than in other States, or that Alabama juries [were] particularly lenient in weighing aggravating and mitigating circumstances" such that "could explain Alabama judges' distinctive proclivity for imposing death sentences." *Id.* at 408. "By permitting a single trial judge's view to displace that of a jury representing a cross-section of the community, Alabama's sentencing scheme has led to curious and potentially arbitrary outcomes." *Id.* at 409.

Indicative of the role that both personal bias and political influence played, use of judicial override in Alabama also varied significantly from county-to-county and from judge-to-judge. Just three of Alabama's 67 counties accounted for nearly half of the life-to-death overrides across the state. *EJI Report*, *supra*, at 17. Further, certain judges were known for routinely converting life sentences to death. *Id.* Judge McRae, who was initially appointed while promoting "segregation for-ever!" in 1965, used override discretion in six jury life verdicts. *Id*. at 16. Of the six men that Judge McRae sentenced to death via judicial override, five were Black. *Id.*

Taken together, these data points illustrate the problematic nature of not just judicial override, but of Alabama's judicial override practices in particular, and why Mr. McMillan's sentence in this case should be vacated.

CONCLUSION

For the foregoing reasons, as well as those expressed in the Petition, this Court should grant the Petition.

Respectfully submitted,

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