No. 20-193

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

Brief of *Amici Curiae* Former Alabama and Florida Circuit Court Judges In Support of Petitioner Calvin McMillan's Petition for Writ of Certiorari

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici are former Alabama and Florida circuit court judges who presided over capital trials and had firsthand experience weighing juries' advisory sentencing verdicts. *Amici* contend that by giving trial judges, rather than juries, the independent power to issue a death sentence, judicial override improperly substituted the judge as the arbiter of a community's values—a role traditionally reserved for the jury. Moreover, *Amici* experienced that under the judicial override system, judges had no meaningful guidance on how to weigh a jury's advisory life-or-death verdict. *Amici* contend that judicial override undermined the reliability of death sentences and therefore support Petitioner's position that persons sentenced to death by judicial override ought not to be executed.

The individual *Amici* are:

Judge Thomas H. Bateman, III, served on the Circuit Court for Florida's Second Judicial Circuit Court from 2001 through 2009, and as Leon County Court Judge from 1990 through 2001. While a jurist, he served as Associate Dean of the Florida College of Advanced Judicial Studies and a contributing faculty member to the AJS course entitled Handling Capital Cases, under the Chairmanship of Amicus Judge O.H. Eaton, Jr. Judge Bateman has served as a member of the Supreme Court of Florida's Criminal Court Steering Committee and twice served as Chair of The

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[1] In accordance with Rule 37.6, *Amici 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. No person other than *Amicus Curiae* or its counsel made a monetary contribution to its preparation or submission. Both Petitioner and Respondent consented to the filing of this brief and received timely notice.

Florida Bar's Criminal Procedure Rules Committee. Before becoming a Judge, he served as an Assistant Attorney General for the State of Florida, an Assistant Public Defender for Orange County, Florida, and a Deputy Sheriff for the Broward County Sheriff's Office.

Judge O.H. Eaton, Jr., served on the Circuit Court for Florida's Eighteenth Judicial Circuit Court from 1986 through 2010, including as Chief Judge. He was a member of the Florida Sentencing Commission from 1991 until 1998, and served as Chair of the Criminal Justice Section of the Florida Conference of Circuit Judges from 1994 through 1996. He was selected to be a member of the American Bar Association's Florida Capital Punishment Assessment Committee (2004-2005), and was the Chair of the Supreme Court of Florida's Criminal Court Steering Committee from its inception in 2002 until 2010. He teaches the Handling Capital Cases course at the Florida College of Advanced Judicial Studies and at the National Judicial College, University of Nevada, Reno. A concurring opinion by a Florida Supreme Court Justice discussing the problems attendant to Florida's then-applicable capital sentencing procedures quoted at length a capital sentencing order by Judge Eaton addressing these very issues. *Aguirre-Jarquin v. State*, 9 So. 3d 593, 611-12 (Fla. 2009) (Pariente, J., specially concurring), *receded from on other grounds by Hooks v. State*, 286 So. 3d 163 (Fla. 2019).

Judge Glenn E. Thompson served on the Circuit Court for Alabama's Eighth Judicial Circuit Court from 1995 through 2019. He overrode a jury's life recommendation and imposed a death sentence in one case, but later reversed the conviction because of

prosecutorial misconduct. *See State v. Moore*, 969 So. 2d 169, 170 (Ala. Crim. App. 2006).

INTRODUCTION

This Court has held time and again that to withstand Eighth Amendment scrutiny, capital sentencing requires heightened reliability, which in turn requires heightened procedural safeguards. *See, e.g., Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Gregg v. Georgia*, 428 U.S. 153, 188–89 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). And this Court has emphasized the importance of juries in safeguarding citizens against arbitrary government action that leads to the unjust deprivation of liberty. *See Duncan v. Louisiana*, 391 U.S. 145, 155–56 (1968).

As trial judges, *Amici* conveyed to jurors the importance of their service. *Amici* regularly observed jurors taking this admonition to heart and performing their duties cautiously and devotedly. This was particularly true of those jurors who were called to serve in capital cases.

Amici believe that judicial override diminished the role of the jury in a misguided effort to follow this Court's precedent. As a result, *Amici* contend that the fruits of this flawed procedure are tainted, calling into question the legitimacy of any capital sentence imposed by judicial override, for at least three reasons.

First, judicial override reduced the jury's role as the proper reflection of community values, because a single, elected judge cannot reliably supplant the deliberative moral judgment of twelve lay jurors.

Second, judicial override tasked judges to decide whether to accept a jury's advisory life-or-death

verdict without any meaningful guidance on how to weigh that verdict.

Third, the now-abandoned practice of judicial override reflects a misguided attempt to comply with this Court's *Furman* decision.

A nationwide consensus has now formed that judicial override constitutes an unreliable and improper way to sentence capital defendants. All states have abandoned this sentencing practice. *Amici* contend that executing defendants who were sentenced to death by judicial override does not comport with this country's evolving standards of decency and would allow the consequences of an unreliable system to continue despite its unanimous rejection by every state.

ARGUMENT AND CITATION OF AUTHORITIES

I. A Single, Elected Judge Cannot Reliably Supplant the Deliberative Moral Judgment of Twelve Jurors.

"The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned . . . response of a judge." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (citing *Duncan*, 391 U.S. at 155). "Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system." *Id.* at 530.

In recognition of those principles, the four states that previously employed judicial override have all abandoned that practice, recognizing that judicial override was less reliable than simply treating the jury's recommendation as final. Because depriving a person of his or her life constitutes a decision of unique judgment and severity, *Amici* agree that sentencing in capital trials is best done by twelve representatives of the "community as a whole," *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007), as they "are more likely to express the 'conscience of the community'" than are judges, *Ring v. Arizona*, 536 U.S. 584, 615–16 (2002) (Breyer, J., concurring in judgment) (citation omitted). As Justice Breyer explained in *Ring*, jurors "possess an important comparative advantage over judges. . . . [because] they are more likely to 'express the conscience of the community' on the ultimate question of life or death.'" 536 U.S. at 615–16 (Breyer, J., concurring in judgment) (citation omitted).

Each elected judge brings to the bench his or her own experience and perspective. While jurors also have their own experiences and perspectives, *Amici* believe a sentence of death emanating from the considered judgment of twelve lay jurors engaging in the deliberative process more reliably represents the community's moral values and conscience than one imposed by a single judge. Indeed, the decision whether to impose a sentence of death, which critically depends on weighing fact-based aggravating factors against "compassionate or mitigating factors stemming from the diverse frailties of humankind," *Woodson*, 428 U.S. at 304–05, is so distinctly dependent upon contemporary community moral values that it should be made by the community's

representatives—jurors—in order to ensure the reliability that the Eighth Amendment demands.

Death sentences imposed by judicial override also risked being less reliable than those imposed by juries. Even where jurors determined the prosecution has shown the defendant's guilt beyond a reasonable doubt, they still may have harbored "residual doubt," meaning "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). Data compiled by the Capital Jury Project, including surveys of thousands of capital jurors, indicates residual doubt constituted the most significant reason jurors voted for life sentences.[2] Judicial override eliminated the ability of jurors to spare the life of a defendant as to whom they harbored residual doubt regarding guilt. *See also Lockhart v. McCree*, 476 U.S. 162, 181 (1986) (quoting from dissenting opinion below that observed "residual doubt has been recognized as an extremely effective argument for defendants in capital cases" (citation omitted)).[3]

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[2] *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1562 (1998); *see also* 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").

[3] The death sentences in both cases where the Court upheld judicial override (*Spaziano v. Harris*, 468 U.S. 447 (1984), and *Harris v. Alabama*, 513 U.S. 504 (1995)) ultimately were reversed because of unreliable proceedings. In *Spaziano*, the main trial witness recanted, which prompted *Amicus* Judge Eaton to vacate Spaziano's conviction. *State v. Spaziano*, 692 So. 2d 174 (Fla. 1997). In *Harris*, Alabama courts later found the defendant's

Because the decision whether to impose a death sentence goes far beyond a strict legal inquiry, a single elected trial judge cannot reliably supplant the deliberative moral judgment of twelve jurors representing the "conscience of the community." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). As noted by Justice Sotomayor in her dissent from the denial of certiorari in an Alabama judicial override case, empirical evidence suggests some judges "appear to have succumbed to electoral pressures" when judicially overriding the jury's recommended life sentence. *Woodward v. Alabama*, 571 U.S. 1045, 134 S. Ct. 405, 408-09 (2013) (Sotomayor, J., dissenting from denial of certiorari).[4] Indeed, some judges told

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lawyer to have been ineffective for failing to present mitigation evidence. The Court of Criminal Appeals found that had counsel presented mitigating evidence, "it is probable that additional jurors would have voted for life imprisonment without parole and that [the sentencing judge] would not have overridden the jury's recommendation of life imprisonment without the possibility of parole." *Harris v. State*, 947 So. 2d 1079, 1131 (Ala. Crim. App. 2004).

[4] At the time of *Woodward*, Alabama judges had imposed the death penalty in 95 cases after a jury verdict of life imprisonment, while only overriding a jury vote to impose the death penalty nine times. 134 S. Ct. at 405 n.1. By the time Alabama abolished judicial override, Alabama judges made nearly ten times as many life-to-death overrides as death-to-life overrides. *See* C. 431–33. These statistics undermine the claimed value of judicial override in reducing arbitrariness, as does the frequency with which Alabama judges had overridden unanimous jury votes for life sentences. *See Woodward*, 134 S. Ct. at 409 & n.7; *Bush v. State*, 695 So. 2d 70, 81 (Ala. Crim. App. 1995); *Jackson v. State*, 836 So. 2d 915, 964 (Ala. Crim. App. 1999); *Doster v. State*, 72 So. 3d 50, 62 (Ala. Crim. App. 2010); *Lockhart v. State*, 163 So. 3d 1088, 1097 (Ala. Crim. App. 2013); *Shanklin v. State*, 187 So. 3d 734, 745 (Ala. Crim. App. 2014).

Alabama legislators weighing the abolition of judicial override that electoral concerns fueled their decision to override life votes.[5]

Although *Amici* endeavored to perform their responsibilities to the best of their ability, their considered view is that no single judge can reliably override and replace the collective conscience of the community with the heightened degree of reliability that the Eighth Amendment requires.

II. Judicial Override Presented Judges with the Impossible Task of Weighing a Jury's Advisory Sentencing Verdict.

Capital sentencing requires weighing aggravating and mitigating circumstances. The former constitute largely fact-bound circumstances designed to narrow the class of death-eligible defendants, *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988), while the latter must take into account a vast array of evidence designed to ensure that the "sentence imposed . . . reflect[s] a reasoned moral response to the defendant's background, character, and crime." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). After the Court's decision in 1976 in *Gregg*, all American capital-sentencing procedures incorporated

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[5] *See* Brian Lyman, *Senate Votes to End Judicial Override in Capital Cases*, Montgomery Advertiser, (Feb. 23, 2017), https://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2017/02/23/senate-votes-end-judicial-override-capital-cases/98302650/ (Republican State Senator Dick Brewbaker: "I did not have a single judge, not one who talked to me formally or informally, tell me they need to keep judicial override. . . . They were very frank that people use it to pressure them in election years.").

the weighing of aggravating and mitigating circumstances. 428 U.S. 153. The consideration of mitigating circumstances must be wide-ranging and account for circumstances not reducible to sharp-edged facts, but rather involving complex, value-laden judgments. *See, e.g.*, *Tennard v. Dretke*, 542 U.S. 274, 284 (2004) (holding no factual nexus to crime needed for mitigating evidence to be relevant); *Payne v. Tennessee*, 501 U.S. 808, 822 (1991) (noting there are "virtually no limits" placed on relevant mitigating evidence).

Amici have experience weighing advisory jury verdicts in capital cases. Collectively, they have accepted the jury's life-or-death verdicts in some cases and overridden death verdicts in other cases. In their experience, the advisory jury verdict did not increase the reliability of the death sentence. Rather, because judicial override gave judges no meaningful guidance on how to weigh a jury's advisory verdict, it placed judges in an impossible position and risked haphazard outcomes in whether to impose a sentence of death.

In one case where *Amicus* Judge Thompson overrode a jury's life verdict and imposed a death sentence, the jury recommended a life sentence by a vote of 8–4. Although Alabama did not provide any standards for weighing the jury's advisory verdict, *Harris*, 513 U.S. at 504, Judge Thompson gave "significant weight" to the jury's verdict. *State v. Moore*, No. CC-00-1260, 02-646, Sentencing Order at 16 (Ala. Morgan Cty. Jan. 1, 2003). Ultimately, despite having misgivings about the strength of the prosecution's case, Judge Thompson rejected the jury's recommendation, stating: "[T]he Court cannot reconcile the jury's verdict of guilt with their recommendation of life without parole." *Id.* Soon after

the trial, it was discovered that the State had suppressed exculpatory evidence. As a result of the State's misconduct, Judge Thompson granted Moore a new trial and dismissed the indictment. *Moore*, 969 So. 2d at 170. Moore eventually stood trial again and was acquitted. Following *Moore*, Judge Thompson supported revising Alabama's law in a way that eliminated judicial override.

As *Amicus* Judge Eaton explained while an active judge, the guidance provided to judges on how to weigh advisory verdicts was essentially meaningless in practice. *Aguirre-Jarquin*, 9 So. 3d at 611–12 (Pariente, J., specially concurring) (quoting Judge Eaton's sentencing order imposing death sentence). The trial judge was to give the jury recommendation "great weight," yet that subjective term was not defined by either the statute or case law. *Id.* (citation omitted).

Amicus Judge Eaton pointed out another complicating factor: the jury in Florida made no findings of fact as to the existence of aggravating or mitigating circumstances,[6] nor what weight should be given to them, when rendering its sentencing recommendation. *Id.* Accordingly, the jury verdict did not set forth which aggravating factors were found, or by what vote, nor how the jury weighed the various aggravating and mitigating circumstances. *Id.* Thus, judges charged with the discomforting duty to substitute their own moral judgment for the conscience of the community also had to wrestle with

[6] In Alabama, juries had to find any aggravating circumstances beyond a reasonable doubt and would then weigh the aggravating evidence against any mitigating evidence presented by the defendant to render its advisory verdict. *See Woodward*, 134 S. Ct. at 406.

the impossible task of applying an undefined term to an undefined verdict.

Even if judges had meaningful guidance on how to weigh the jury's advisory verdict, *Amici* maintain that judicial override still would be problematic because it fundamentally disregards the primacy of the jury. Courts instruct jurors on the importance of their role, and "[a]s Mr. Justice Stewart stated in *Witherspoon*, a jury in a capital felony trial 'can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.'" *Ex parte Bracewell*, 407 So. 2d 845, 846–47 (Ala. 1979) (quoting *Witherspoon*, 391 U.S. at 519), *vacated on other grounds sub nom. Alabama v. Bracewell*, 457 U.S. 1114 (1982). As judges, *Amici* observed jurors in trial and regularly watched them perform their duties with great care. In light of the diligence with which jurors perform their duty, the notion of second-guessing—much less overriding—the jury's reasoned judgment undermined the honor and privilege of jury duty, which for most citizens is one of "their most significant opportunit[ies] to participate in the democratic process." *Powers v. Ohio*, 499 U.S. 400, 407 (1991).

III. Judicial Override Constitutes a Misguided Attempt to Comply with *Furman*.

In Florida and Alabama, judicial override emerged in response to this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972). This Court struck down Alabama's initial post-*Furman* statute as incompatible with *Furman*. *Beck v. Alabama*, 447 U.S. 625, 639–40 (1980). In response, the Alabama Supreme Court created a new scheme, which included

the possibility of override. *Beck v. State*, 396 So. 2d 645, 660–63 (Ala. 1980). The Alabama Legislature then passed a law authorizing override two years later. Ala. Code § 13A-5-46 (1982). The Alabama Supreme Court later held that death sentences imposed by override were consistent with *Furman*. *Ex parte Hays*, 518 So. 2d 768, 775 (Ala. 1986).

Similarly, in the century leading up to *Furman*, Florida had required juries to make the final sentencing decision in capital cases. After *Furman*, however, the Legislature transferred ultimate sentencing authority to trial judges, mandating independent judicial decision-making while retaining jury participation in the form of an advisory role. *Proffitt v. Florida*, 428 U.S. 242, 247–48 (1976) (plurality opinion) (describing legislative response); *see also Spaziano*, 468 U.S. at 474–76 (Stevens., J., dissenting) (same).

Neither Alabama's nor Florida's enactment of statutory provisions authorizing judicial override of a jury's life sentence recommendation reflected any judgment, either legislative or judicial, that the override served an important state interest. Rather, the override schemes were a product of the states' misapprehension that judicial override must be authorized to meet the requirements of *Furman*.

In *Furman*, a divided Court held that the Eighth Amendment prohibits imposition of the death penalty under statutes that allow juries uncontrolled discretion to impose death. 408 U.S. at 239–40 (per curiam). The statutes at issue in *Furman* failed this constitutional test because they lacked standards to distinguish who should live from who should die, which the Court rejected as facilitating arbitrary

capital sentencing. *Id.* at 293–95 (Brennan, J., concurring in judgment).

Each member of the Court wrote a separate opinion either concurring in or dissenting from the judgment in *Furman*. "Predictably, the variety of opinions supporting the judgment in *Furman* engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment." *Lockett v. Ohio*, 438 U.S. 586, 599 (1978). The Florida and Alabama Legislatures misconstrued *Furman* as condemning all discretionary capital sentencing by juries. To address this perceived constitutional problem, these legislatures enacted judicial override.

Legal developments in the ensuing decades have shown Alabama and Florida's reading of *Furman*—that the constitution requires judicial capital sentencing—was incorrect. This Court has stated directly that "[s]entencing by the trial judge certainly is not required by [*Furman*]." *Spaziano*, 468 U.S. at 463 n.8.

In practice, judicial override has proven impossible to employ reliably. Among other reasons, and as discussed above, a single judge cannot reliably replace the deliberative moral judgment of jurors; the jury's advisory verdict did not provide the sentencing judge with sufficient findings regarding which aggravating and mitigating circumstances were found or how they were applied; and sentencing judges lacked any practical guidance as to how to weigh a jury's advisory sentencing verdict.

In light of this universal experience, every state has now eliminated the imposition of death sentences by judicial override. *Amici* therefore contend that

executing persons sentenced to death under a system that has been rejected by all states in this country would be inconsistent with the "evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (citation omitted).

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court grant Petitioner's Petition for Writ of Certiorari to review the judgment of the Alabama Court of Criminal Appeals.

Respectfully submitted, September 21, 2020.

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