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 IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

This Court has repeatedly held that judicial sentencing in death penalty cases is constitutional. And this Court has repeatedly held that requiring a judge to consider a jury's recommendation before imposing a sentence is constitutional. The questions presented are:

1. Does the Court have jurisdiction to consider a claim the state court rejected on multiple state law procedural grounds?
2. Does judicial sentencing violate the Eighth Amendment?

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STATEMENT OF THE CASE

A. McMillan Carjacks and Executes James Martin.

On August 29, 2007, James Bryan Martin entered an Alabama Wal-Mart to purchase diapers, an energy drink, and a candy bar. *McMillan v. State*, 139 So.3d 184, 191 (Ala. Crim. App. 2010). He returned to his truck and climbed into the driver's seat. *Id.* A moment later, Calvin McMillan, in front of several witnesses and a Wal-Mart surveillance camera, shot Martin and pulled him out of his truck. *Id.* Martin collapsed on the ground, and McMillan shot him twice more. *Id.* McMillan stole Martin's truck and began to flee but stopped the truck so that he could shoot Martin one last time. *Id.* McMillan then drove away. *Id.* He was apprehended by police the next day. *Id.* at 192. After his arrest, McMillan attempted to incriminate another man in the murder; however, that individual had been confined in the Lee County Detention Facility during the weeks before and after the murder.

B. A Unanimous Jury Finds McMillan Guilty of Capital Murder and a Judge Sentences Him to Death.

McMillan was convicted of capital murder for the intentional murder of James Martin after a unanimous jury found beyond a reasonable doubt that McMillan murdered Martin by shooting him in the course of a first-degree robbery and by shooting him inside a vehicle. *McMillan*, 139 So.3d at 190; *see also* Ala. Code § 13A-5-40(a)(2), (17). Alabama law in effect at the time "vest[ed] capital sentencing authority in the trial judge, but require[d] the judge to consider an advisory jury verdict." *Harris v. Alabama*, 513 U.S. 504, 505 (1995). The jury, by an 8-4 vote, recommended that McMillan be sentenced to life imprisonment without the

possibility of parole. Pet.App.4a. The trial judge considered this recommendation alongside "the evidence presented at trial, the evidence presented at the sentencing hearing, [and] the pre-sentence investigation report," and after weighing "the aggravating and mitigating circumstances," the judge "determined that McMillan should be sentenced to death." Pet.App.25a.

C. McMillan's First Petition for Post-Conviction Relief Is Denied on the Merits and his Second is Dismissed on State Procedural Grounds.

Following direct appeal, McMillan filed a petition for post-conviction review of his conviction and sentence, which was denied. In that case, state court review concluded with McMillan receiving no relief. McMillan then initiated habeas corpus proceedings in the United States District Court for the Middle District of Alabama.

Thereafter, McMillan filed a successive petition for post-conviction relief attempting to raise Sixth, Eighth, and Fourteenth Amendment challenges to the sentencing procedure used in his case. The circuit court dismissed the petition as untimely and as barred under Alabama's successive-petition rule. The trial court's order relied on Rules 32.2(c) (statute of limitations) and 32.2(b) (ban on successive petitions) of the Alabama Rules of Criminal Procedure to dismiss McMillan's petition without merits review of his federal claim. Pet.App.19.

On appeal, the Alabama Court of Criminal Appeals affirmed the circuit court. In an opinion devoted entirely to analysis of Alabama's post-conviction procedural rules, the court observed that "McMillan's [second] petition was time-barred on its face and was successive." Pet.App.10a. The court did not address the multiple constitutional challenges McMillan brought against Alabama's sentencing

procedures because "a successive or time-barred Rule 32 petition is not the proper vehicle to attack the constitutionality of § 13A-5-47.1, Ala. Code 1975." Pet.App.17a. The Alabama Supreme Court declined discretionary review of McMillan's claims.

REASONS FOR DENYING THE WRIT

The Court cannot and should not grant McMillan's petition. As an initial matter, federal jurisdiction does not exist to review the judgment of the Alabama Court of Criminal Appeals. The state court judgment was grounded in state procedural rules, and the lower court neither cited, analyzed, nor relied on federal law. Because the lower court's decision rested on state law precedent, applying only state procedural rules, federal jurisdiction does not exist.

But even if this Court could exercise jurisdiction, there are no compelling reasons for granting McMillan's petition and several reasons to deny it. First, in the last 36 years, this Court has twice rejected the claim that a State violates the Eighth Amendment by allowing a jury to make a non-binding recommendation to a sentencing judge on whether to impose the death penalty. Most recently, the Court, by an 8-1 margin, rejected an Eighth Amendment challenge to the same sentencing procedure that McMillan challenges here. *See Harris v. Alabama*, 513 U.S. 504 (1995).

Second, the "fundamental premise" of McMillan's attack on advisory juries "is that the capital sentencing decision is one that, in all cases, should be made by a jury." *Spaziano v. Florida*, 468 U.S. 447, 458 (1984). But as the Court recognized earlier this year, "States that leave the ultimate life-or-death decision to the judge

may continue to do so." *McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020). And because "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence," it is "not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight." *Harris*, 513 U.S. at 515.

Third, even if there were some meaningful difference between judicial sentencing schemes that use an advisory jury and those that don't, "standards of decency" have not "evolved" to retroactively render McMillan's 2009 sentence unconstitutional. The fact that Alabama made *future* juries' judgments binding does not show a societal will to undo long final sentences, for the democratically elected legislature specifically chose *not* to retroactively apply the new sentencing regime to prisoners already on death row. Nor was this unusual: when Indiana eliminated the possibility for judicial override in 2002, it also chose not to apply the law retroactively. Ind. Code 35-50-2-9(e) (2002). This legislation is the "clearest and most reliable objective evidence of contemporary values," *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), including the value judgment that final sentences like McMillan's are legitimate and should be enforced.

Finally, McMillan's case is a particularly poor vehicle for raising this oft-rejected claim because he raised it in state post-conviction proceedings. Thus, even if the Court were to overturn *Harris* and *Spaziano*, it is doubtful that McMillan would receive any relief from the new procedural right the Court would craft. That is likely

one additional reason why the Court has rejected several similar challenges in recent years, and the Court should deny this one as well.

I. The Decision Below Rested on State Procedural Grounds That Preclude Consideration of the Federal Question.

The Alabama Court of Criminal Appeals decision that affirmed the dismissal of McMillan's successive state habeas petition did not address McMillan's Eighth Amendment claim. *See* Pet.App.4a-17a. Instead, the opinion relied on Alabama law and procedure to affirm the trial court's dismissal of McMillan's successive post-conviction petition on procedural grounds. The Court of Criminal Appeals affirmed the dismissal of McMillan's petition because it "was time-barred on its face and was successive." Pet.App.10a. Additionally, the Court held that Alabama's newly-discovered-evidence rule did not authorize McMillan's filing of a successive petition. Pet.App.15a. In the conclusion to its opinion, the lower court held that "a successive or time-barred Rule 32 petition is not the proper vehicle to attack the constitutionality of §13A-5-47.1, Ala. Code 1975." Pet.App.17a. In short, the lower court's opinion met the requirement that an adequate and independent state law ground be "clear from the face of an opinion." *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

McMillan points to a snippet of the lower court's opinion as evidence that the court necessarily determined that McMillan's constitutional rights had not been violated. *See* Pet.25-26. Read in context, however, it is clear the lower court was addressing McMillan's attempt to circumvent Alabama's procedural rules through reliance on the Alabama Legislature's 2017 amendment to section 13A-5-47. In

finding that McMillan's petition was properly dismissed under Alabama's successive-petition rule, the Alabama Court of Criminal Appeals observed:

> [T]o be entitled to relief in a successive petition, McMillan must also show that a failure to entertain the petition will result in a miscarriage of justice. When the legislature passed § 13A-5-47, Ala. Code 1975, it simultaneously passed § 13A-5-47.1, which expressly provided that the law was not retroactive and would not apply to people convicted and sentenced prior to April 11, 2017. Because the legislature specifically chose to make the law prospective only, it intentionally excluded McMillan and other similarly situated convicts from its purview. McMillan contends that these new developments in Alabama law as well as the laws of other states entitle him to relief. However, he does not explain how this "national consensus" overcomes the specific legislative determination that the law is not retroactive.

Pet.App.13a-14a. As this passage reflects, the lower court did not address the federal issue presented in McMillan's cert petition; rather, that court noted that the federal question (as presented by McMillan) did not satisfy the requirements for consideration of a successive petition.

The issues before the lower court were whether McMillan's petition was untimely and whether he could meet the requirements for consideration of a successive petition. McMillan's position was that his claim did not arise until section 13A-5-47 was amended, and that the failure to consider his claim would result in a miscarriage of justice. Thus, if the 2017 change to Alabama's sentencing scheme had no impact on McMillan's prior ability to assert an Eighth Amendment claim, and if failure to consider his claim would not result in a miscarriage of justice, state procedural rules required that the dismissal entered by the trial court be affirmed.

The trial court determined that because the 2017 amendment did not apply to McMillan's sentence, McMillan could not establish the required "miscarriage of

justice" necessary to allow consideration of a successive petition. As evidenced by the foregoing passage, the Court of Criminal Appeals agreed. McMillan's averment of a "national consensus" did not control the dispositive issue: whether the 2017 amendment's non-retroactive application excluded McMillan's sentence from its scope and, thus, prevented his reliance on that amendment to meet the required "miscarriage of justice" finding.

Similarly, the Alabama Court of Criminal Appeals' finding that McMillan's successive petition was time-barred did not wade into the merits of the federal question presented in his petition. In rejecting such a theory, the court noted:

> McMillan again appears to ignore the fact that § 13A-5-47.1 specifically states that the judicial override repeal is not retroactive. Even if the law had been passed before McMillan was convicted and sentenced he would still fall outside of its reach if it contained the same language indicating that it applied only to a "defendant who is charged with capital murder after April 11, 2017, and shall not apply retroactively to any defendant who has previously been convicted of capital murder and sentenced to death prior to April 11, 2017."

Pet.App.14a-15a.

Finally, the lower court's rejection of McMillan's newly-discovered-evidence theory further highlights its reliance on wholly adequate and independent state law grounds to affirm. The court reasoned that:

> Because the legislature chose to exempt from the law defendants who were convicted before April 11, 2017, the law, as written, would not have changed the result of McMillan's resentencing nor would it have established that he should not have received the sentence he received. Accordingly, McMillan's claim does not meet the requirements of Rule 32.1(e)(4) or (5), Ala. R. Crim. P. Thus, the circuit court did not err when it summarily dismissed McMillan's petition. *See* Rule 32.7(d), Ala. R. Crim. P.

Pet.App.16a. In other words, the court's holding was that because the *state* statute at issue exempted inmates such as McMillan from the change to Alabama's sentencing procedure, that *state* statute was not a legitimate foundation for a newly-discovered evidence claim pursuant to *state* procedural rules governing the limitations period for post-conviction petitions.

Moreover, the passage of the 2017 law does not establish that McMillan "should not have received the sentence that the petitioner received." Pet.App.15a-16a (quoting Rule 32.1(e)). McMillan's challenge is to the procedure Alabama used to determine that his crime merited the death penalty, and Alabama courts do not retroactively apply a new procedural ruling from the Supreme Court or an Alabama court unless the rule is a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Acra v. State*, 105 So. 3d 460, 466 (Ala. Crim. App. 2012) (cleaned up).

Here, of course, there isn't even a ruling to apply—just an anticipated overruling of this Court's precedents. But even if the Court of Criminal Appeals had been so presumptuous as to declare that *Spaziano* and *Harris* were no longer good law, that holding would not have applied retroactively to McMillan. Such a ruling would not (1) be "necessary to prevent an 'impermissibly large risk' of an inaccurate conviction," nor would it (2) "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Williams v. State*, 183 So. 3d 198, 214 (Ala. Crim. App. 2014) (quoting *Schiro v. Summerlin*, 542 U.S. 348, 356 (2004)). After all, one means of curing the purported problem of a judge not following the

jury's recommendation would be to remove jury recommendations altogether and simply have judicial sentencing. Removing the jury from the picture would not reduce the risk of an inaccurate conviction nor signal a massive shift in how we understand a fair criminal proceeding. Moreover, there is no reason to think that the trial judge who handed down McMillan's death sentence did so *because* the jury recommended otherwise. Thus, because the ruling that McMillan sought would not "appl[y] retroactively to cases on collateral review, [he] is … excluded from relief by the grounds of preclusion set out in Rule 32.2, Ala. R. Crim. P." *Acra v. State*, 105 So. 3d 460, 465 (Ala. Crim. App. 2012).[1]

And because the lower court's opinion and judgment rest on adequate and independent state law grounds requiring the dismissal of McMillan's successive and untimely post-conviction petition, certiorari jurisdiction does not exist.

II. This Court Has Repeatedly Reaffirmed the Constitutionality of Judicial Sentencing, Even When a Judge Considers a Jury's Recommendation.

McMillan's petition should also be denied because he challenges well-settled precedent that has been repeatedly affirmed by the Court—as recently as this year. Judicial sentencing is constitutional. And it remains constitutional, even if a judge is required to consider the jury's recommended sentence.

[1] While the Court in *Montgomery v. Louisiana* held that *Teague*'s exception for substantive rules is of constitutional status and thus "requires state collateral review courts to give retroactive effect to" substantive rules, the Court left open the question whether "*Teague*'s exception for watershed rules of procedure" enjoys a similar "constitutional status." 136 S. Ct 718, 729 (2016). And, in any event, abolishing advisory juries would not be a watershed rule.

McMillan's appeal to a supposed "national consensus" against advisory juries ignores that society's current view is that shifts away from advisory juries should not apply retroactively to upset society's interest in the finality of judgments. Moreover, two of the four states no longer have advisory juries because courts invalidated their schemes based on this Court's Sixth Amendment jurisprudence, making those changes poor evidence of society's values.

1. Earlier this year, this Court observed that "*Ring* and *Hurst* did not require jury weighing of aggravating and mitigating circumstances," and that the "States that leave the ultimate life-or-death decision to the judge may continue to do so."[2] *McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020). The Court was clear that "a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate decision within the relevant sentencing range." *Id*. at 707. McMillan was sentenced within the boundaries of this recent guidance, rendering certiorari review unwarranted.

Moreover, *Spaziano* and *Harris* are well-reasoned decisions that Alabama relied on for decades, and they should not be disturbed. In those cases, the Court considered and rejected the arguments that McMillan now raises. McMillan first asserts that under Alabama's prior sentencing regime "defendants could be—and, in many instances, were—sentenced to death over a jury recommendation of life based solely on the 'vagaries,' of the sentencing judge's idiosyncrasies, electoral prospects or biases." Pet.14 (quoting *Saffle v. Parks*, 494 U.S. 484, 493 (1990)). But those are

[2] *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Ring v. Arizona*, 536 U.S. 584 (2002).

arguments against judicial sentencing, not arguments against anything unique to a system with advisory juries. Thus, McMillan's "fundamental premise is that the capital sentencing decision is one that, in all cases, should be made by a jury." *Spaziano*, 468 U.S. at 458. But state and federal judges across the country make sentencing decisions every day, and "there certainly is nothing in the safeguards necessitated by the Court's recognition of the qualitative difference of the death penalty that requires that the [death] sentence be imposed by a jury." *Id.* at 460.

McMillan next contends that the death penalty cannot fulfill the purpose of retribution if it is imposed over the recommendation of a jury, but it's hard to see why that is so. Pet.17. McMillan suggests that retribution is not served because the jury has already voiced "the judgment of the community." *Id.* But "[t]he community's voice is heard at least as clearly in the legislature when the death penalty is authorized and the particular circumstances in which death is appropriate are defined." *Spaziano*, 468 U.S. at 462. Thus, the community's voice was heard when McMillan was sentenced in 2009 according to the laws enacted by the community's representatives. And the community's voice was heard again in 2017 when the Alabama Legislature decided not to vacate the sentences that McMillan and others received for their violent crimes.

2. McMillan contends that newly discovered standards of decency warrant overturning *Spaziano* and *Harris*, and he grounds this argument on the fact that none of the four States that had used advisory juries in capital sentencing since 1976 still maintain the practice. *See* Pet.14-16. But when this Court last considered

"Alabama's capital sentencing statute," that statute was "unique." *Harris*, 513 U.S. at 516 (Stevens, J., dissenting). Even so, the Court recognized "that the 'Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.'" *Id.* at 510 (quoting *Spaziano*, 468 U.S. at 464). For while "'the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for [the Court] ultimately to judge whether the Eighth Amendment' is violated by a challenged practice." *Spaziano*, 468 U.S. at 464 (quoting *Enmund v. Florida*, 458 U.S. 782, 797 (1982)). And "[i]n light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional," even if the practice is rare. *Id.*

Moreover, the legal changes in Indiana, Florida, Delaware, and Alabama hardly evince societal "standards of decency" or a national consensus that would benefit McMillan. Rather, these changes were largely driven not by evolution in "society's standards," *Graham v. Florida*, 560 U.S. 48, 61 (2010), but by this Court's Sixth Amendment decisions over the past two decades. *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and then *Ring v. Arizona*, 536 U.S. 584 (2002), marked major shifts in the Court's Sixth Amendment jurisprudence. During that time, the United States and several States were forced to examine and, in some instances, amend their sentencing regimes in an effort to read the Sixth Amendment tea leaves. Thus, in

2002, as this Court was considering *Ring*, the Indiana Legislature amended its capital sentencing so that defendants sentenced after June 30, 2002, would be sentenced according to the jury's recommendation of life or death. *See* 2002 Ind. Legis. Serv. P.L. 117-2002 (S.E.A. 426), codified at Ind. Code § 35-50-2-9(e).

Florida's move away from advisory juries in 2016 was no more driven by natural "evolution" of societal values. Rather, Florida's sentencing procedure changed because this Court commanded that result when it overruled *Spaziano*. *See Hurst*, 136 S. Ct. at 623-24. This change was judicial, not societal.

The same goes for Delaware, where that State's supreme court acknowledged that it invalidated Delaware's capital sentencing statute because of "the majority's collective view that Delaware's current death penalty statute violates the Sixth Amendment role of the jury as set forth in *Hurst*." *Rauf v. State*, 145 A.3d 430, 433 (Del. 2016). This language leaves no doubt that the changes in Delaware, on which McMillan relies, were a direct result of this Court's decision in *Hurst*.

And it is no accident that Alabama's sentencing amendments occurred the year following *Hurst.* The law did not limit or restrict the death penalty, but merely protected the State's criminal justice system from being upended in the event this Court decided to extend *Hurst* to Alabama's sentencing regime.

Further undercutting the notion that these legal changes show a new consensus against advisory juries is the fact that three of the four States have refused to apply the changes to their sentencing regimes retroactively. If the Alabama Legislature's 2017 amendments reflected a societal shift against advisory juries,

presumably the legislation would not have exempted McMillan and others from its scope. And, as mentioned above, Indiana did away with advisory juries for capital sentencing only on a prospective basis. *See* Ind. Code § 35-50-2-9(e). Similarly, the Florida Supreme Court has determined that *Hurst* applies only to cases that were not final when *Ring* was announced. *See Reynolds v. Florida*, 139 S. Ct. 27 (2018) (Breyer, J., statement respecting denial of certiorari).

Thus, even if recent procedural changes in Alabama, Florida, and Indiana were indicative of society's views, they reflect a society that values finality over the retroactive application of those changes. Thus, McMillan's claim fails even on its own terms and is not worthy of review.

III. This Case Is a Poor Vehicle for Addressing an Issue That is Now Resolved by Legislation.

McMillan's case presents a particularly poor vehicle for considering whether to overturn this Court's past holdings on judicial sentencing in capital cases. As discussed in Part I, McMillan's case comes before the Court following the denial of his successive state habeas petition. Thus, before reaching the merits, the Court would need to resolve whether the state procedural rulings relied on below were independent of federal law. And any opinion from this Court would almost certainly not benefit McMillan because a new procedural ruling would not apply retroactively.

Indeed, the same is true for most, if not all, defendants in McMillan's situation. *See* Pet.15 n.7 (noting there has been only one judicial override since 2013). And because Alabama in 2017 made the jury's capital sentencing recommendation binding on the trial judge, the issue McMillan raises is far less important. At the same time,

Alabama has relied on *Harris* for decades to sentence McMillan and others to death for capital murder, and "the States' settled expectations deserve [the Court's] respect." *Ring*, 536 U.S.at 613 (Kennedy, J., concurring).

Finally, even when a defendant raised this claim on direct appeal in 2013, the Court denied his petition. *Woodward v. Alabama*, 571 U.S. 1045 (2013). And though two Justices dissented from the denial of Mr. Woodward's first petition, when he raised the issue again following his state habeas proceedings, this Court again denied the petition, this time with no dissent. *See Woodward v. Alabama*, 140 S. Ct. 46 (2019). Of course, that petition was denied after Alabama had amended its sentencing regime to create the purported "national consensus" relied on by McMillan. McMillan's petition is no more cert-worthy than Woodward's, and it too should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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