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

Reply Brief for the Petitioner

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REPLY TO THE STATE'S BRIEF IN OPPOSITION TO CERTIORARI

Two years ago, the State of Alabama represented to this Court that death-sentenced inmates seeking to challenge the constitutionality of their sentences based on Alabama's decision to eliminate judicial override could do so through a second or successive Rule 32 petition. *See Madison* v. *Alabama*, No. 17-7535, Brief in Opposition at 7 (Jan. 25, 2018). That is precisely what Calvin McMillan did. The state court nonetheless dismissed his petition because it concluded that the new "national consensus" against judicial override did not render McMillan's sentence a "miscarriage of justice." As part of that conclusion, the state court necessarily determined that these new developments did not give rise to an Eighth Amendment violation—an antecedent ruling of federal constitutional law that gives this Court jurisdiction. *See Ake* v. *Oklahoma*, 470 U.S. 68, 75 (1985).

The State's efforts to portray the state court's ruling as resting on nothing more than state procedural law are unavailing. The question the state court answered is the same one presented in this petition: does the Eighth Amendment permit the execution of a person whose death sentence was the product of a practice that *every State in the Nation* has since abandoned? The answer is that it does not. Judicial override was an unreliable and inappropriate sentencing practice—one that fell into disfavor when its many defects were made apparent over time. Individuals like McMillan, who were sentenced to death by a judge over a recommendation for life by the jury, are not—and never have been—among the small number of people deserving of execution. This Court should grant review and decide whether the Eighth Amendment

prohibits the execution of a person sentenced to death by judicial override.

I. There Are No Impediments to This Court's Review.

The State previously explained to this Court how a death-sentenced individual could challenge the constitutionality of judicial override in light of Alabama's repeal of the practice:

> Alabama has a prescribed method for seeking postconviction relief from an allegedly unconstitutional sentence: a petition properly filed in the circuit court pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. Ala. R. Crim. P. 32.1(a), (c), 32.4. If Madison truly believed that the Act's prospective procedural change rendered his death sentence invalid, then he could have filed a Rule 32 petition within six months of the Act's effective date. *See* Ala. R. Crim. P. 32.2(c).

Madison v. *Alabama*, No. 17-7535, Brief in Opposition at 7 (Jan. 25, 2018).

Calvin McMillan followed precisely that course below. In response, the State has pulled a bait-and-switch, ignoring its previous representations and arguing instead that McMillan's claim was procedurally defective as a matter of state law and that this Court neither can nor should exercise jurisdiction. The State's new arguments have no merit. This Court has jurisdiction, and it should exercise it.

A. The State Court's Decision Depended on a Determination That Judicial Override Did Not Violate the Eighth Amendment.

The State's primary argument against review is that this Court has no jurisdiction because, in its view, "the [state court] opinion relied on Alabama law and procedure to affirm the trial court's dismissal of McMillan's successive post-conviction petition on procedural grounds." Opp. at 5. As the State acknowledges, however, the state court denied relief because "McMillan could not establish the required 'miscarriage of justice' necessary to allow consideration of a successive petition" under Rule 32.2(b) of the Alabama Rules of Criminal Procedure. Opp. at 6–7.

The state court's conclusion that McMillan could not establish a miscarriage of justice is, however, the federal constitutional holding that gives this Court jurisdiction. In his petition, McMillan alleged that the unanimous consensus against judicial override, which was established in 2017, constituted a new ground that rendered his potential execution unconstitutional under the Eighth Amendment and thus, a miscarriage of justice. The state court below agreed with McMillan that the law repealing judicial override constituted a new ground for relief. Pet. App. 13a. However, the court held that McMillan could not establish that "a failure to entertain the petition will result in a miscarriage of justice," *id.*, because McMillan "[did] not explain how this 'national consensus' overcomes the specific legislative determination that the law is not retroactive." Pet. App. 14a. In other words, the court rejected McMillan's argument that the national consensus rendered his execution unconstitutional under the Eighth Amendment.

Although the state court couched its decision in state law rules, there can be no doubt that "the state procedural law question depend[ed] on a federal constitutional ruling." *Ake*, 470 U.S. at 75. If the state court had found that the national consensus against judicial override rendered McMillan's sentence unconstitutional, its resolution of the state procedural law questions would certainly have come out differently. In that scenario, McMillan would have satisfied Rule 32.2(b) because his potential execution would result in a miscarriage of justice. Similarly, by filing his petition within six months of the Act's effective date, he would have satisfied the timeliness requirements of Rule 32.2(c).

Alabama precedent confirms this understanding of the state court's opinion. After this Court decided *Miller* v. *Alabama*, 567 U.S. 460 (2012), Jimmy Click filed a successive Rule 32 petition alleging that *Miller* was a new ground that rendered his life-without-parole sentence a miscarriage of justice. There, as here, the circuit court dismissed the petition under Rules 32.2(b) and 32.2(c).[1] However, the Alabama Court of Criminal Appeals reversed, holding that Click's sentence was a miscarriage of justice because it was unconstitutional in light of *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016). *Click* v. *State*, 215 So. 3d 1189, 1194–95 (Ala. Crim. App. 2016). As a result, "Click's petition conformed with the requirements of Rule 32," and the circuit court's summary dismissal was "reversible error." *Id.*

Click demonstrates that the state court's application of state procedural rules in McMillan's case "was not independent of the merits of

[1] *State* v. *Click*, Madison Cty. No. CC-92-1889.61, Order Granting Motion to Dismiss at 1 (Feb. 25, 2013).

[McMillan's] federal constitutional challenge," and "therefore poses no impediment" to this Court's review. *Foster* v. *Chatman*, 136 S. Ct. 1737, 1746–47 (2016).[2] Had the state court determined that the new national consensus against judicial override rendered McMillan's sentence unconstitutional, it could not have held that McMillan's petition was successive under Rule 32.2(b) or time-barred under Rule 32.2(c). Thus, the state court's decision to dismiss McMillan's petition on state procedural grounds necessarily turned on an antecedent conclusion of law that McMillan's sentence did not violate the Eighth Amendment. That holding gives this Court jurisdiction to decide this case.

II. The Nation Abandoned Judicial Override Because It Was a Uniquely Unreliable and Inappropriate Practice.

The State contends that McMillan's argument "challenges well-settled precedent" holding that "[j]udicial sentencing is constitutional." Opp. at 9. It further contends that there is no proof that there has been an "evolution in 'society's standards.'" Opp. at 12 (citation omitted).

As an initial matter, the question is not whether the Eighth Amendment prohibits judicial sentencing. Instead, the question is whether the Eighth Amendment prohibits judicial *override*—a particular

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[2] The Court should likewise reject the State's contention that there is no jurisdiction because "the lower court did not address the federal issue presented in McMillan's cert petition." Opp. at 6. This Court's jurisdiction does not depend on how explicit a state court's determination of a question of federal constitutional law is. To the contrary, this Court has long recognized that it has jurisdiction even when a court only "implicitly" determines "the merits of the constitutional question." *Ake*, 470 U.S. at 75.

form of judicial sentencing that has been rejected by every State in the Nation. This Court can address judicial override without disturbing any prior precedents affirming the constitutionality of judicial sentencing more broadly.

Four decades of experience have proven that judicial override was a uniquely unreliable practice. For one, it was plagued by racial disparities.[3] For another, it nullified jury votes rooted in residual doubt about a defendant's guilt and increased the risk of a wrongful execution.[4] Eventually, former trial judges came to oppose the practice altogether because "it placed judges in an impossible position and risked haphazard outcomes in whether to impose a sentence of death."[5] Moreover, Alabama judges admitted that they felt pressured to use judicial override during election years because they feared losing to a potential primary opponent. 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-end-judicial-override-capital-cases/98302650/. Finally, jurors whose votes were disregarded left the experience "feel[ing] shock, dismay, and betrayal."[6]

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[3] *McMillan* v. *Alabama,* No. 20-193, Brief of NAACP Legal Defense & Educational Fund, Inc. at 7-8 (Sept. 17, 2020).

[4] *McMillan* v. *Alabama,* No. 20-193, Brief of Innocence Project at 14-18 (Sept. 21, 2020).

[5] *McMillan* v. *Alabama,* No. 20-193, Brief of Former Alabama and Florida Circuit Court Judges at 9 (Sept. 21, 2020).

[6] *McMillan* v. *Alabama,* No. 20-193, Brief of Francis Miles and Janet Johnson, Former Alabama Jurors Whose Life Recommendations Judges Overrode at 13 (Sept. 21, 2020).

The State does not address any of these concerns in its response, and instead attributes the repeals to "Sixth Amendment jurisprudence," Opp. at 12, arising out of this Court's recent decisions. This overly simplistic take ignores the fact that these legislative repeals followed the steady decline of judicial override over four decades. After this Court last considered judicial override in 1995, States' reliance on the practice diminished considerably. In the 1980s, there were 125 life-to-death overrides nationwide. *See Woodward* v. *Alabama*, 134 S. Ct. 405, 407 (2013) (Sotomayor, J., dissenting). In the 1990s, the number of death sentences imposed through judicial override declined to 74. *Id.* And from 2000 to 2017, only 28 people were sentenced to death after a jury voted in favor of life, all but one of whom were sentenced in Alabama. *Id.* Thus, the legislative repeals marked the end of what had been a growing rejection of judicial override by the only four States that ever authorized it.

Additionally, nearly every override death sentence has been vacated—except in Alabama. In Delaware, the lone override death sentence was reversed on appeal before Delaware abolished the practice. *Garden* v. *State*, 844 A.2d 311, 318 (Del. 2004). After Indiana prospectively repealed judicial override in 2002, the Indiana Supreme Court held that it was "not appropriate to execute a person who was . . . sentenced through a procedure that has now been substantially revised so the same trial today would no longer render the defendant eligible for the death penalty." *Saylor* v. *Indiana*, 808 N.E.2d 646, 647 (Ind. 2004).[7] And in

[7] *See also Ben-Yisrayl* v. *Davis*, 114 F. App'x 760, 761 (7th Cir. 2004) (noting that a state court granted Ben-Yisrayl sentencing relief in light of Indiana's repeal of judicial override).

Florida, all but 3 of 166 override death sentences have been vacated or otherwise terminated.[8] Thus, Alabama stands virtually alone in continuing to enforce death sentences imposed against the judgment of the jury.

The State correctly observes that this Court has twice upheld the practice—"[m]ost recently" in 1995. Opp. at 3. However, "[m]uch has changed since then." *Atkins* v. *Virginia*, 536 U.S. 304, 314 (2002). Proof of the unreliability of the practice was not available to the Court when it considered judicial override in *Spaziano* v. *Florida*, 468 U.S. 447 (1984), and *Harris* v. *Alabama*, 513 U.S. 504 (1995). And none of the four States had renounced the practice.

Subsequent developments in the law have eroded the foundations underlying this Court's decisions in *Spaziano* and *Harris*. As such, the time has come for this Court to revisit the constitutionality of judicial override and decide whether persons like McMillan, who were sentenced to death over a jury's recommendation for life, can be executed in accordance with the Eighth Amendment.

III. If This Court Holds That Judicial Override Is Unconstitutional, Alabama Courts Will Apply That Holding Retroactively.

The State urges this Court to decline review because, in its view, "any opinion from this Court would almost certainly not benefit McMillan because a new procedural ruling would not apply retroactively." Opp. at 14. The State thus argues that

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[8] Michael L. Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011 Mich. St. L. Rev. 793, 808–09 (2011).

McMillan's case "presents a particularly poor vehicle" for resolving the constitutionality of judicial override. *Id.*[9] The State is incorrect on both fronts.

This case is about a substantive restriction on who can be executed. If this Court rules in McMillan's favor, then the Alabama courts will apply that holding retroactively through Rule 32 proceedings. The Alabama courts have explicitly held that Rule 32 proceedings "'are open to claims that a decision of [the United States Supreme Court] has rendered certain sentences illegal, as a substantive matter, under the Eighth Amendment.'" *Click*, 215 So. 3d at 1194 (quoting *Montgomery*, 136 S. Ct. at 732) (alteration in original). Indeed, every time this Court has announced a substantive restriction on certain punishments under the Eighth Amendment, the Alabama courts have given effect to those decisions. *See Click*, 215 So. 3d at 1194; *Duncan* v. *State*, 925 So. 2d 245, 250–52 (Ala. Crim. App. 2005) (applying *Roper* v. *Simmons*, 543 U.S. 551 (2005)); *Clemons* v. *State*, 55 So. 3d 314, 318–20 (Ala. Crim. App. 2003) (applying *Atkins* v. *Virginia*, 536 U.S. 304 (2002)).[10]

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[9] The State also hypothesizes that this is the reason the Court recently declined review in another case challenging judicial override. Opp. at 15 (citing *Woodward* v. *Alabama*, 140 S. Ct. 46 (2019)). However, as the State noted in its response to that petition, Woodward did not preserve the claim in state court. *Woodward* v. *Alabama*, No. 18-1298, Brief in Opposition at 7–8 (June 14, 2019). By contrast, McMillan followed every procedural requirement under Rule 32. This case thus presents a procedurally appropriate vehicle for addressing the constitutionality of judicial override.

[10] Even before Alabama enacted Rule 32, its courts consistently gave retroactive effect to this Court's Eighth Amendment decisions. *See, e.g.*, *Thigpen* v. *Thigpen*, 541 So. 2d 465, 466–67 (Ala. 1989) (applying *Sumner* v. *Shuman*, 483 U.S. 66 (1987));

A decision holding judicial override unconstitutional would be no different. When a jury votes in favor of a life sentence, it has made a determination that the defendant does not fall within the narrow category of people who are "the most deserving of execution." *Atkins*, 536 U.S. at 319. That, in turn, produces a substantive restriction on who can receive the death penalty. *See Montgomery*, 136 S. Ct. at 735 ("[W]hen the Constitution prohibits a particular form of punishment for a class of persons, an affected prisoner receives a procedure through which he can show that he belongs to the protected class."). If this Court determines that the execution of a person sentenced to death by judicial override is unconstitutional under the Eighth Amendment, the Alabama courts would enforce that restriction in Rule 32 proceedings.

In fact, and as McMillan made clear in his petition, this case is likely one of the last and best opportunities for this Court to address whether the execution of a person sentenced to death by judicial override violates the Eighth Amendment. The last life-to-death override occurred in 2013, and by the end of 2017, the Alabama Court of Criminal Appeals had already decided every direct appeal from an override case. This leaves Rule 32 proceedings as the only available mechanism under state law through which McMillan can vindicate his rights under the Eighth Amendment. The State's contrary assertion notwithstanding, McMillan's case presents an ideal vehicle for this Court to resolve the constitutionality of judicial override.

Hubbard v. *State*, 274 So. 2d 298, 300-01 (Ala. 1973) (applying *Furman* v. *Georgia*, 408 U.S. 238 (1972)).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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