No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

VERNON MADISON, Petitioner,

v.

STATE OF ALABAMA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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January 24, 2018

CAPITAL CASE WITH AN EXECUTION SCHEDULED FOR JANUARY 25, 2018 at 6:00 pm

CAPITAL CASE

QUESTION PRESENTED

Vernon Madison was sentenced to death by a circuit judge despite a jury verdict for life. In 2017, Alabama abolished the practice of judicial override. This case thus gives rise to the following question:

> Now that the State of Alabama has abolished the practice of judicial override, does the execution of a prisoner who was sentenced to life by a jury render his execution arbitrary and capricious in violation of the Eighth and Fourteenth Amendments to the United States Constitution?

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MISCELLANEOUS

Vernon Madison is scheduled to be executed by the State of Alabama on January 25, 2018, at 6:00 pm. He respectfully petitions this Court for a writ of certiorari to review the judgment of the Alabama Supreme Court in this case.

OPINIONS BELOW

The Alabama Supreme Court denied Mr. Madison's Petition for Relief from Unconstitutional Sentence and for Stay of Execution in a one page order on Wednesday, January 24, 2018. That order is attached as Appendix A.

STATEMENT OF JURISDICTION

The Alabama Supreme Court denied relief on Mr. Madison's petition for relief from an unconstitutional sentence and for a stay of execution on January 24, 2018. Jurisdiction is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOKED

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

The Eighth Amendment to the United States Constitution provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor

cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Prior Proceedings

Vernon Madison was indicted on two counts of capital murder on May 20, 1985, in the Mobile County Circuit Court in Mobile, Alabama. Madison v. State, 620 So. 2d 62, 62 (Ala. Crim. App. 1992). The charges arose from the death of City of Mobile police officer Julius Schulte on April 18, 1985. Id. at 63-64. On September 12, 1985, a jury found Mr. Madison guilty of capital murder, and the trial court subsequently sentenced him to death. Id. at 63. The Alabama Court of Criminal Appeals reversed Mr. Madison's conviction and sentence after concluding that the Mobile County District Attorney's Office had engaged in racially discriminatory jury selection when it struck all seven qualified African American veniremembers, in violation of Batson v. Kentucky, 476 U.S. 79 (1986).

Madison v. State, 545 So. 2d 94, 95-99 (Ala. Crim. App. 1987).

At the second trial, Mr. Madison did not deny shooting the victim; rather, his primary defense was that he was not guilty by reason of mental disease or defect. Madison, 620 So. 2d at 65. On September 14, 1990, Mr. Madison was again convicted of capital murder, and the trial court imposed a sentence of death. Madison, 620 So. 2d at 63. The Alabama Court of Criminal Appeals reversed on the ground that the State had engaged in prosecutorial misconduct when it elicited expert testimony "based partly on facts not in evidence," in violation of Ex parte Wesley, 575 So. 2d 127 (Ala. 1990). Madison, 620 So. 2d at 73.

Mr. Madison's third trial was held from April 18, 1994, through April 21, 1994. At the guilt phase of trial, Mr. Madison again did not deny that he shot the victim, but claimed that he did so in self-defense. Madison v. State, 718 So. 2d 90, 97 (Ala. Crim. App. 1997). On April 21, 1994, the jury found Mr. Madison guilty of capital murder. After hearing significant evidence concerning Mr. Madison's profound history of mental illness, the same death-qualified jury voted to sentence Mr. Madison to life imprisonment without parole. On July 7, 1994, Judge Ferrill McRae[1] overrode the jury's verdict and sentenced Mr. Madison to

[1] In his time on the bench, Judge McRae overrode six life verdicts, more than any other judge in the state of Alabama. See Woodward v. Alabama, 134 S. Ct. 405, 409 (2013) (Sotomayor, J., dissenting) ("One Alabama judge, who has overridden jury verdicts to impose the death penalty on six occasions, campaigned by

death. Mr. Madison's case was affirmed on appeal, Madison v. State, 718 So. 2d 90 (Ala. Crim. App. 1997), aff'd, Ex parte Madison, 718 So. 2d 104 (Ala. 1998), and this Court denied certiorari review, Madison v. Alabama, 525 U.S. 1006 (1998).

Mr. Madison subsequently filed a petition for post-conviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. The Alabama Court of Criminal Appeals affirmed the dismissal of that petition without a hearing, Madison v. State, 999 So. 2d 561 (Ala. Crim. App. 2006), and the Alabama Supreme Court denied certiorari review.

On January 8, 2009, Mr. Madison timely filed his petition for habeas corpus relief pursuant to 28 U.S.C. § 2254. The district court denied relief, but the United States Court of Appeals for the Eleventh Circuit reversed the district court's denial in part on April 27, 2012, and remanded the case with instructions for the district court to conduct a Batson hearing. Madison v. Comm'r, Ala. Dep't of Corr., 677 F.3d 1333 (11th Cir. 2012). In concurrence, Judge Barkett noted concern for Alabama's judicial override scheme: "because the sentencing decision

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running several advertisements voicing his support for capital punishment. One of these ads boasted that he had 'presided over more than 9,000 cases, including some of the most heinous murder trials in our history,' and expressly named some of the defendants whom he had sentenced to death, in at least one case over a jury's contrary judgment." (citing Equal Justice Initiative, The Death Penalty in Alabama: Judge Override 16 (2011), http://eji.org/eji/files/Override_Report.pdf)).

of the first decisionmaker—i.e., a presumed reasonable jury—can be ignored without any limiting principles in favor of a sentence of death by the second decisionmaker, I question whether it can be deemed constitutional." Id. at 1340. The State appealed that remand order to this Court, and the Court denied the State's Petition for Writ of Certiorari on November 13, 2012. Thomas v. Madison, 568 U.S. 1019 (2012). On April 25, 2013, the district court again denied Mr. Madison's petition for habeas corpus relief, and the United States Court of Appeals for the Eleventh Circuit affirmed that denial on August 4, 2014. Madison v. Comm'r, Ala. Dep't of Corr., 761 F.3d 1240 (11th Cir. 2014). This Court denied certiorari review on March 23, 2015. Madison v. Thomas, 135 S. Ct. 1562 (2015). This Court denied Mr. Madison's petition for rehearing on May 18, 2015. Madison v. Thomas, 135 S. Ct. 2346 (2015).

By motion of the State, Vernon Madison was scheduled to be executed on May 12, 2016. His motion to suspend the execution as a result of his incompetency was denied by the Mobile County Circuit Court on April 29, 2016. Pursuant to Alabama law, appellate review of that decision in the Alabama state courts was unavailable. See Weeks v. State, 663 So. 2d 1045, 1046 (Ala. Crim. App. 1995).

On May 4, 2016, Mr. Madison filed a petition for habeas corpus and a motion for a stay of execution in the United States District Court for the

Southern District of Alabama. Petition for Writ of Habeas Corpus, Madison v. Dunn, No. 1:16-cv-00191-KD-M (S.D. Ala. May 4, 2016). On May 10, 2016, the district court denied Mr. Madison's habeas petition and motion for a stay. Order, Madison v. Dunn, No. 16-00191-KD-M, 2016 WL 2732193 (S.D. Ala. May 10, 2016). On May 12, 2016, the Eleventh Circuit Court of Appeals granted Mr. Madison's motion for a certificate of appealability, stayed the execution, and ordered expedited briefing and oral argument in the case. Order, Madison v. Dunn, No. 16-12279 (11th Cir. May 12, 2016).

After full merits briefing and oral argument, the Eleventh Circuit Court granted habeas corpus relief, finding that by virtue of his vascular dementia and related medical impediments, Mr. Madison was not competent to be executed. Madison v. Comm'r, Ala. Dep't of Corr., 851 F.3d 1173, 1190 (11th Cir. 2017). After this Court issued its per curiam opinion reversing the Eleventh Circuit's grant of habeas corpus relief while expressing "no view on the merits of the underlying question," Dunn v. Madison, 138 S. Ct. 9, 12 (2017), as it was not "appropriately presented," id. (Ginsburg, J., concurring), the State of Alabama immediately sought and obtained an expedited execution date for Mr. Madison of **January 25, 2018**.

B. How the Federal Question was Raised Below

In April, 2017, both houses of Alabama's legislature voted to end judicial

override. See Act No. 2017-131, Ala. Acts 2017 ("S.B. 16"). On April 11, 2017, Governor Kay Ivey signed Senate Bill 16 into law, which prohibited any further practice of judicial override in Alabama capital cases. See Ala. Code § 13A-5-47 ("Where a sentence of death is not returned by the jury, the court shall sentence the defendant to life imprisonment without parole.").

Because a death sentence is no longer permissible in cases where the jury has returned a sentence of life, Mr. Madison filed a challenge to his death sentence and scheduled execution in the Alabama Supreme Court. He contended that this execution would be arbitrary and capricious and constitute a violation of the Sixth, Eighth and Fourteenth Amendment. The Alabama Supreme Court denied his petition on January 24, 2018.

REASONS FOR GRANTING THE WRIT

Vernon Madison was sentenced to death by Mobile County Circuit Court Judge Ferrill McRae despite the fact that the jury who heard his case decided that he should **not** be sentenced to death and instead returned a sentence of life imprisonment without parole. At the time of his trial and conviction, Alabama law permitted a judge to reject a jury's considered verdict.

In 2017, the State of Alabama repealed its judicial override statute, thus joining the rest of the country in abolishing the practice of judicial override. Given Alabama's rejection of judicial override, the death sentence in this case

constitutes cruel and unusual punishment and violates Mr. Madison's rights to a jury, fair and reliable sentencing and to due process and equal protection of the laws as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Alabama law.

I. MR. MADISON'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Eighth Amendment requires that there be a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. 238, 313 (1972). Since reinstating the death penalty in Gregg v. Georgia, the U.S. Supreme Court has barred "sentencing procedures that create[] a substantial risk that [a death sentence] would be inflicted in an arbitrary and capricious manner." 428 U.S. 153, 188 (1976) (plurality opinion); see also Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (recognizing the heightened "need for reliability in the determination that death is the appropriate punishment in a specific case").[2]

[2]See also Zant v. Stephens, 462 U.S. 862, 885 (1983); Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion)("[T]he risk that the death penalty will be

Allowing Vernon Madison to be executed, when a sentence of death is no longer permitted under Alabama law constitutes the kind of arbitrariness that violates the Eighth and Fourteenth Amendments and should not be permitted by this Court.

A. Mr. Madison's Sentence of Death, Imposed by a Judge Over a Jury's Life Verdict, Violates the Eighth Amendment Because There Is Unanimous State Agreement that a Jury's Verdict Should Be Final.

The Eighth Amendment's prohibition on cruel and unusual punishment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). This Court has found that this means that "resort to the [death] penalty must be reserved for the worst of crimes and limited in its instances of application." Kennedy v. Louisiana, 554 U.S. 407, 446–47 (2008). Because a national consensus has emerged against judicial override, Alabama's execution of individuals such as Vernon Madison who were sentenced to death by a judge despite a jury life verdict prior to the abolition of jury override in Alabama violates the Eighth Amendment's prohibition on cruel and unusual punishment.

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imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.").

The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures" as well as "state practice." Atkins v. Virginia, 536 U.S. 304, 312 (2002) (quoting Penry v. Lynaugh, 492 U.S. 302 (1989)); Roper v. Simmons, 543 U.S. 551, 563 (2005) (finding "objective indicia of society's standards" are "expressed in legislative enactments and state practice"). Although there are currently thirty-one (31) states that have active death penalty statutes, none of these states permits a judge to impose the death penalty after a jury verdict for life. Judicial override is thus inconsistent with current societal values.

The "consistency of the direction of change" is also significant. Atkins, 536 U.S. at 315. Before 2016, all but three states' death penalty schemes respected the jury's decision on whether to impose death or life imprisonment as final. See Equal Justice Initiative, The Death Penalty in Alabama: Judicial Override 11 (2011). Only Florida, Delaware, and Alabama permitted judicial override, though Alabama was the only state to allow override without guiding standards. Id. In 2016, however, the Florida legislature abolished judicial override and revised the state's death penalty scheme. See 2016 Fla. Sess. Law Serv. Ch. 2016-13 (H.B. 7101). Although not by legislative action, Delaware also ended judicial override in 2016 through a decision of the Delaware Supreme Court, Rauf v. State, 145 A.3d 430, 434 (2016) (per curiam), which then applied the

decision retroactively to invalidate all death sentences, Powell v. State, 153 A.3d 69, 75-76 (2016) (per curiam). Finally, in early 2017, both houses of Alabama's legislature voted to end judicial override. See Act No. 2017-131, Ala. Acts 2017 ("S.B. 16"). On April 11, 2017, Governor Kay Ivey signed Senate Bill 16 into law, which prohibited any further practice of judicial override in Alabama capital cases. See Ala. Code § 13A-5-47 ("Where a sentence of death is not returned by the jury, the court shall sentence the defendant to life imprisonment without parole.").

As a result, no state currently allows a judge to override a jury's capital sentencing verdict. This constitutes not merely "national consensus," see Kennedy, 554 U.S. at 426, but **unanimous agreement** that a sentence of death imposed by a judge contrary to a jury's life verdict does not comport with our evolving standards of decency and the Eighth Amendment.

The abolition of judicial override further implicates a more basic expression of a society's evolving standards. As the United States Supreme Court has explained:

> "[O]ne of the most important functions any jury can perform in [deciding whether to impose death in a given case] is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment would hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'"

Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968) (quoting Trop); see also

Atkins, 492 at 323-24 (Rehnquist, J., dissenting) ("[T]he actions of sentencing juries, though entitled to less weight than legislative judgments, is a significant and reliable objective index of contemporary values . . . ." (quotations and citations omitted)). By abolishing judicial override, Alabama and other states have sought to strengthen that link and prevent the interposition of a trial judge's actions between the Eighth Amendment's orientation to evolving standards and the fundamental expression of those standards by community members. Here, the life verdict rendered by the Mobile County jury was an expression of community values and, under the Eighth Amendment, it should be respected.[3]

Because there is unanimous agreement among the states that a jury's decision as to whether to impose death or life imprisonment is final and because the jury voted to sentence Mr. Madison to life, Mr. Madison's sentence of death

[3]As Alabama State Senator Dick Brewbaker, a proponent of the bill to abolish judicial override commented:

> One of the most important things about our democracy is our laws are derived from the common law, ...That's why a crime of violence is a crime against a community. That's why we have a trial in the community. That's why we pick a jury of the community and they decide guilt, innocence, and punishment. Judicial override flies in the face of that. You are entitled to a trial of a jury of your peers, and that ought to apply to sentencing too.

See *Bill Advances to Take Away AL judges' ability to override juries*,WSFA, Feb. 24, 2017, http://www.wsfa.com/story/34601206/bill-advances-to-take-away-al-judges-ability- to-override-juries.

and impending execution violate the Eighth Amendment.

B. Mr. Madison's Sentence of Death, Imposed by a Judge Over a Jury's Life Verdict, Violates the Eighth Amendment Because it is Arbitrary and Capricious.

Although trial judges in Alabama previously had the authority to override either life or death verdicts, ninety-two percent of judicial overrides resulted in sentences of death. See Equal Justice Initiative, The Death Penalty in Alabama: Judge Override 14 (2011), http://eji.org/eji/files/Override_Report.pdf.

Override outcomes strongly suggest racial and geographic disparities in override cases which raise another set of concerns about the integrity and reliability of judge override. For example, Alabama circuit judges overrode "jury life verdicts in cases involving white victims much more frequently than in cases involving victims who are black." Equal Justice Initiative, The Death Penalty in Alabama: Judge Override 5 (2011), http://eji.org/eji/files/Override_Report.pdf. Indeed, "[s]eventy-five percent of all death sentences imposed by override involve[d] white victims, even though less than 35% of all homicide victims in Alabama are white." Id. Some courts revealed racial bias by referencing the race of the offender in their sentencing orders, and one judge explained his imposition of the death penalty despite a life verdict as he "had sentenced three black defendants to death so he decided to override the jury's life verdict for a white defendant to balance out his sentencing record." Id.; see also Woodward, 134 S.

Ct. at 409-10 (Sotomayor, J., dissenting) ("These results do not seem to square with our Eighth Amendment jurisprudence . . . ."). Judge McRae, the sentencing judge in this case, never overrode a jury death verdict, "even when an all-white jury condemned a retarded black man who couldn't read the confession that he signed."[4] Of Judge McRae's six overrides from life to death, five of the defendants were black men.[5]

Geographic disparities exist as well: defendants who stand trial in certain counties are uniquely vulnerable to a judge overturning a jury verdict for life, in violation of the Equal Protection Clause of the Fourteenth Amendment. See Ross v. Moffitt, 417 U.S. 600, 609 (1974). This is because some Alabama counties have highly disproportionate rates of death sentences imposed by judicial override as compared to other counties. Significantly, just three of Alabama's 67 counties

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[4]Id. In 2001, a journalist, investigating Alabama's death penalty practice, traveled to Mobile and talked with local members of the bar about Judge McRae. One attorney stated that "[w]hen an African American in his [Judge McRae's] courtroom wears a noticeable cologne, Judge McRae has been known to sniff the air and exclaim, 'Ahhhh, evening in Prichard'– the name of a poor, predominantly black city outside of Mobile." Another attorney "recalled needing the judge's signature on a client's bail-reduction application. McRae first wanted to know the client's 'color.' When informed that he was black, McRae supposedly told the attorney that he 'shouldn't try too hard because we need more n***ers in jail.'" Ken Silverstein, The Judge as Lynch Mob, The American Prospect, Dec. 19, 2001, http://prospect.org/article/judge-lynch-mob.

[5]Equal Justice Initiative, List of Override Cases, https://eji.org/sites/default/files/list-alabama-override-cases.pdf (last updated Jan. 12, 2016).

account for nearly 50% of the life-to-death overrides across the state. See Equal Justice Initiative, The Death Penalty in Alabama: Judge Override 17 (2011), http://eji.org/eji/files/Override_Report.pdf. Mobile County, where Mr. Madison was tried and sentenced, accounts for 10% of death sentences imposed statewide since 1977, but Mobile judges imposed 16% of Alabama's life-to-death overrides in that same period. Id. Moreover, the rate of judicial overrides per county does not rationally correspond with those same counties' rates of death sentences. For instance, in 2008, Houston County, with a population of approximately 95,660 and the highest per capita death sentencing rate in the state, sent sixteen times more people to death row than Lee County, which has a population of approximately 125,781. See Equal Justice Initiative, Study Reveals Geographic Disparities in Death Sentencing Among Alabama Counties, May 1, 2008, https://eji.org/news/study-geographic-disparities-death-sentencing-alabama-counties. However, a Houston County judge has never overridden a jury's verdict from life to death, while Lee County judges have done so on four different occasions. See Equal Justice Initiative, The Death Penalty in Alabama: Judge Override at 17.

Finally, the disproportionate use of judicial override can be attributed to the "tough on crime" politics of certain judges who are especially willing to overturn jury verdicts for life without parole. See Woodward, 134 S. Ct. at 408-

09 (Sotomayor, J., dissenting) ("What could explain Alabama judges' distinctive proclivity for imposing death sentences in cases where a jury has already rejected that penalty? . . . The only answer that is supported by empirical evidence is one that, in my opinion, casts a cloud of illegitimacy over the criminal justice system: Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures.") Not only has Mobile Circuit Judge Ferrill McRae overridden more jury life verdicts than any other single Alabama judge, he is one of only three judges in the state to override more than three jury life verdicts. Equal Justice Initiative, The Death Penalty in Alabama at 17.

In this case, Mr. Madison's death sentence was imposed without protections against the "whim, passion, prejudice, or mistake" of an elected trial judge. Elected trial judges may have many different reasons, including political ones, for choosing to override a jury's life verdict.[6] And in the absence of any procedural protections, jury verdicts of life imprisonment without parole play unpredictable and indeterminate roles in the sentencing process and have been rejected, as in this case, for reasons that remain wholly undisclosed. See Katheryn K. Russell, The Constitutionality of Jury Override in Alabama Death Penalty Cases, 46 Ala. L. Rev. 5, 32-35 (1994). Thus, there is no guarantee that

[6] Senator Brewbaker highlighted the need to eliminate judicial override in part because it "taints the process," and is used to "pressure [judges] in election years." See supra note 2.

the process by which Mr. Madison was sentenced was "neutral and principled so as to guard against bias or caprice in the sentencing decision." Tuilaepa v. California, 512 U.S. 967, 973 (1994).

The judicial override in this case resulted in a death sentence that is arbitrary, disproportionate, and unconstitutional. See Woodson, 428 U.S. at 305 (requiring "reliability" in imposition of sentence of death). Allowing Mr. Madison's sentence to stand would violate the Eighth and Fourteenth Amendment guarantees of reliable capital sentencing.

II. EXECUTING MR. MADISON DESPITE THE ABOLITION OF JUDICIAL OVERRIDE VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT.

Given that Alabama no longer permits a prisoner to be sentenced to death where the jury has returned a verdict of life, the execution of Mr. Madison, where the trial court imposed death despite a jury verdict for life violates the Fourteenth Amendment's guarantee to equal protection of the laws and due process, as well as Mr. Madison's fundamental rights against the arbitrary and capricious imposition of death. In 2017, Alabama became the last state to end the practice of allowing a judge to impose death where a jury has voted for life, Act No. 2017-131, Ala. Acts 2017 ("S.B. 16"), and since that time Alabama has not sought to execute an individual whose sentence of death was the result of

judicial override.[7]

Whether executing a man pursuant to a sentence imposed over a jury's life verdict after the practice has been abolished in all states violates the Equal Protection Clause of the Fourteenth Amendment is a unique question that no court has answered or had the opportunity to consider. Prior cases before this Court have not fully addressed equal protection and judicial override in any way. For example, in Harris v. Alabama, this Court approved the practice of judicial override, prior to its abolition, under the Eighth Amendment but stated "[Harris] does not bring an equal protection claim." 513 U.S. 504, 515 (1995); see also, e.g., Ex parte Taylor, 808 So. 2d 1215, 1217 n.2 (Ala. 2001) (dismissing equal protection argument concerning differentiation between those whose life verdict is overridden and those whose life verdict is followed where no authorities or evidence cited).

A. Executing Mr. Madison Although Everyone Sentenced After 2017 Cannot Be Similarly Sentenced Violates the Equal Protection Clause of the Fourteenth Amendment.

As a result of the 2017 legislative abolition of judicial override, no person tried today can be given the sentence Mr. Madison received, death where the jury has voted for life, and no person sentenced today can eventually be executed

[7]In 2017, since abolition of judicial override, Alabama has executed Tommy Arthur, Robert Melson, and Torrey McNabb, none of whom were sentenced to death over a jury's life verdict.

where the jury does not vote for death.

The Equal Protection Clause protects against "disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable," Ross v. Moffitt, 417 U.S. 600, 609 (1974), and requires that where such disparity exists there must be a valid basis for it, Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 441-42 (1985). Regardless of whether Mr. Madison's status as a person sentenced to die over the will of a jury prior to abolition constitutes membership in a protected class, there is simply no legitimate basis for distinguishing between someone like Mr. Madison, who is scheduled to be executed despite a jury's life verdict, and a person sentenced to death now, who by law cannot be sentenced to death if a jury does not will it. For example, any argument as to the possibility of extensive litigation is inaccurate given the limited number of people affected and the clear line of demarcation for the class, the presence of a life verdict. Where as here there is no basis for distinction, the Equal Protection Clause of the Fourteenth Amendment requires relief. Cleburne, 473 U.S. at 450.

B. Executing Mr. Madison Following Abolition of Judicial Override Violates His Fundamental Right to Be Free of Arbitrary and Capricious Punishment.

Additionally, and in any case, Mr. Madison's right to be free of the arbitrary and capricious imposition of death is a fundamental right infringement

of which requires satisfaction of strict scrutiny. The right to be free of the arbitrary and capricious imposition of death is a fundamental right. See U.S. Const. amend. VIII; Gregg v. Georgia, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (noting "penalty of death is different in kind from any other punishment" and explaining "Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."); see also Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015) ("The identification and protection of fundamental rights . . . requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect."). Thus, carrying out the death penalty in a case like Mr. Madison's where the jury voted for life despite the abolition of judicial override must overcome strict scrutiny. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) ("equal protection analysis requires strict scrutiny" where fundamental rights infringed). Here, the lack of retroactive applicability of judicial override abolition in S.B. 16 and the State of Alabama's plan to execute him violates Mr. Madison's fundamental right by treating him and others like him in a way that no person can be now, by carrying out execution where a jury voted for life, cannot withstand any constitutional scrutiny.

III. JUDICIAL OVERRIDE VIOLATES HURST V. FLORIDA AND THE SIXTH AND FOURTEENTH AMENDMENTS.

In Hurst v. Florida, 136 S. Ct. 616 (2016), this Court held that the Sixth Amendment requires that every fact necessary to impose a sentence of death must be proven to a jury beyond a reasonable doubt. 136 S. Ct. at 621-22. In so holding, Hurst invalidated death penalty sentencing schemes, such as Alabama's superseded law, that allowed for judicial override of a jury's sentencing verdict specifying life without parole. After Hurst, the Constitution is understood to "require[] [states] to base [the imposition of a] death sentence on a jury's verdict, not a judge's factfinding." 136 S. Ct. at 624. In this case, Mr. Madison's death sentence was imposed by the trial court despite the fact that 1) the jury never made a unanimous finding in the penalty phase as to the existence of any aggravating circumstance beyond a reasonable doubt, and 2) the jury affirmatively found that the aggravating circumstances did not outweigh the mitigating circumstances, resulting in the return of a verdict of life without parole. (R. 800.) Because the findings necessary for the imposition of a sentence of death in this case were never made by the jury, but were instead made by the judge, Mr. Madison's sentence of death is unconstitutional.

Hurst also overruled the core precedent that was relied upon to uphold Alabama's judicial override system. Twenty-three years ago, in Harris v. Alabama, 513 U.S. 504 (1995), this Court upheld Alabama's judicial override

provisions against an Eighth Amendment challenge by relying on Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam), and Spaziano v. Florida, 468 U.S. 447 (1984). See Harris, 513 U.S. at 509-10. At the time, Hurst's ruling was particularly relevant to Alabama because this state's death penalty statute was nearly identical to the Florida statute that was struck down. See Harris, 513 U.S. at 508 ("Alabama's death penalty statute is based on Florida's sentencing scheme . . . ."). Against the State's arguments, the Hurst Court explicitly overruled Spaziano and Hildwin, explaining that "'stare decisis does not compel adherence to a decision whose underpinnings have been eroded by subsequent developments of constitutional law.'" 136 S. Ct. at 623-24 (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989)). Without the core precedent on which it relied, Harris is no longer valid. See Brooks v. Alabama, 136 S. Ct. 708 (2016) (mem.) (Sotomayor, J., concurring in denial of cert.) ("This Court's opinion upholding Alabama's capital sentencing scheme was based on and Hildwin[] and Spaziano[], two decisions we recently overruled in Hurst[]."). Consequently, the very basis for Mr. Madison's death sentence is now unconstitutional.

CONCLUSION

For these reasons, Mr. Madison moves this Court to grant this certiorari petition, stay his execution scheduled for January 25, 2018, and determine that the judicial override in this case is unconstitutional.

Respectfully submitted,

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