No.

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

Petition for Writ of Certiorari

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CAPITAL CASE

QUESTION PRESENTED

At the penalty phase of Petitioner Calvin McMillan's capital trial in Alabama, the jury voted 8-4 for a sentence of life in prison without parole. Speculating that the jury voted for life only because the jurors were "tired" of the deliberative process, the trial judge overrode the jury and imposed a death sentence. This practice, known as judicial override, was permitted by Alabama law at the time of the trial. It has since been abandoned, in no small part due to growing concerns that it was an unreliable and inappropriate way to impose death sentences. The result is that no State in the country now permits a judge to sentence a defendant to death over a jury's vote for life. Nevertheless, McMillan is one of thirty-two people on Alabama's death row who faces execution based on judicial override.

The question presented is this:

> Does the execution of a person sentenced to death by judicial override violate the Eighth Amendment?

PARTIES TO THE PROCEEDING

Petitioner is Calvin McMillan. Respondent is the State of Alabama. Because no petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6

LIST OF RELATED PROCEEDINGS

Trial and Direct Appeal

State v. *McMillan*, Elmore Cty. No. CC-08-476 (Aug. 7, 2009)

McMillan v. *State*, Ala. Crim. App. No. CR-08-1954 (Nov. 5, 2010)

Ex parte McMillan, Ala. No. 1100441 (Aug. 23, 2011)

McMillan v. *Alabama*, S. Ct. No. 13-8054 (Mar. 31, 2014)

State Post-Conviction Proceedings

McMillan v. *State*, Elmore Cty. No. CC-08-476.60 (Mar. 17, 2015)

McMillan v. *State*, Ala. Crim. App. No. CR-14-0935 (Aug. 11, 2017)

Ex parte McMillan, Ala. No. 1170215 (Feb. 23, 2018)

McMillan v. *Alabama*, S. Ct. No. 18-5396 (Oct. 1, 2018)

Federal Habeas Review

McMillan v. *Dunn*, et al., M.D. Ala. No. 2:18-cv-00844-WKW (pending)

Second State Post-Conviction Proceedings (Instant Appeal)

McMillan v. *State*, Elmore Cty. No. CC-08-476.61 (Mar. 9, 2018)

McMillan v. *State*, Ala. Crim. App. No. CR-17-0718 (Nov. 9, 2018)

Ex parte McMillan, Ala. No. 1180438 (Mar. 20, 2020)

PETITION FOR WRIT OF CERTIORARI

Petitioner Calvin McMillan respectfully petitions this Court for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

OPINIONS BELOW

The order of the Alabama Supreme Court denying McMillan's petition for a writ of certiorari is attached as Appendix A. Pet. App. 1a. The per curiam decision of the Alabama Court of Criminal Appeals affirming the dismissal of McMillan's petition for post-conviction relief is attached as Appendix B. Pet. App. 3a. The order of the Circuit Court of Elmore County dismissing McMillan's petition is attached as Appendix C. Pet. App. 19a. The order of the same court sentencing McMillan to death by lethal injection over the jury's 8-4 vote for life is attached as Appendix D. Pet. App. 24a.

JURISDICTION

The Alabama Court of Criminal Appeals affirmed the dismissal of McMillan's post-conviction petition in a decision dated November 9, 2018. Pet. App. 3a. The Alabama Supreme Court denied certiorari as to all claims on March 20, 2020. Pet. App. 1a. On March 19, 2020, this Court ordered that the deadline to file any petition for a writ of certiorari due on or after the date of the order be extended to 150 days. This Court has jurisdiction pursuant to 28 U.S.C. 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

INTRODUCTION

Thirty-two people sit on death row in Alabama, condemned to die by a sentencing practice that every State in this Nation, including Alabama, has now abandoned. In each of these thirty-two defendants' cases, a jury voted for life. And in each of their cases, a judge overrode the jury's recommendation to impose death.

Time has made clear that which was obscured when this Court issued its decisions upholding the constitutionality of judicial override in *Spaziano* v. *Florida*, 468 U.S. 447, 464 (1984), *overruled on other grounds by Hurst* v. *Florida*, 136 S. Ct. 616 (2016), and *Harris* v. *Alabama*, 513 U.S. 504 (1995), more than two decades ago: judicial override violates the Eighth Amendment's prohibition on cruel and unusual punishment. Far from being the product of "properly guided discretion," *Harris*, 513 U.S. at 514, judicial override suffered from defects that rendered the final decision to impose death one of "arbitrary whim," *id*. The practice was highly susceptible to electoral pressure, plagued by racial bias, and disdainful of jurors who voted for life. The result was a death-sentencing scheme that was neither reliable nor consistent—one that defied the Eighth Amendment's demands that capital sentencing schemes ensure "measured, consistent application and fairness to the accused." *Eddings* v. *Oklahoma*, 455 U.S. 104, 111 (1982).

Recognizing this, the four States that adopted the practice of judicial override gradually abandoned it. Indiana abolished judicial override in 2002. Florida and Delaware eliminated the practice in 2016. Alabama followed suit in 2017. There is now a

unanimous, nationwide consensus against death sentences imposed by judicial override. This is a sure sign that execution by judicial override does not comport with the "evolving standards of decency that mark the progress of a maturing society," from which the Eighth Amendment draws its restrictions. *Atkins* v. *Virginia*, 536 U.S. 304, 311-12 (2002) (citation omitted).

Yet, despite these developments, thirty-five people sentenced to death through judicial override remain on death row in this country—thirty-two in Alabama alone—including Petitioner Calvin McMillan. Absent this Court's intervention, their executions will be irrevocable and will amount to the wholesale "inter[ring of] a constitutional right forever." *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1408 (2020) (plurality opinion).

This Court should grant review to decide whether McMillan's execution—which was authorized against the judgment of the jury through a practice that the entire Nation has rejected—violates the Eighth Amendment.

STATEMENT OF THE CASE

Petitioner Calvin McMillan, who is Black, was a teenager when he was arrested in 2007 for the robbery-murder of James Bryan Martin, a white man, in Elmore County, Alabama. According to the State, McMillan shot Martin in a Walmart parking lot and stole his truck.

The trial began on June 22, 2009 with jury selection. The parties questioned prospective jurors that afternoon and selected the jury the following morning. Over the course of questioning, the jurors who were ultimately selected each affirmed that they could

impose the death penalty if the facts and circumstances of the case warranted it. T.R. 434-35.[1]

The guilt phase of the trial commenced on June 23, 2009. At its conclusion, the jury found McMillan guilty of two counts of capital murder.[2] The penalty phase began on June 29, 2009. The State presented evidence establishing a single aggravating circumstance—that the murder occurred during the course of a robbery. T.R. 1504. McMillan presented substantial mitigating evidence concerning his youth, his lack of a significant prior criminal history, and his traumatic childhood. The evidence showed that McMillan was raised in a trailer with little food and no running water. T.R. 1534-36. He was exposed to regular drug use. He suffered severe physical and sexual violence. *Id.* When he was hungry, he drew pictures of sandwiches and ate the paper. He called his drawings "wish food" because he wished he had food. T.R. 1545. By the time he turned eighteen years old, he had been shuffled through more than twenty-five foster homes and transitional facilities. T.R. 1604.

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[1] "T.R. __" refers to the designated page of the reporter's transcript in the trial court, as compiled and certified for McMillan's direct appeal. "T.C. __" refers to the designated page of the clerk's record in the trial court, as compiled and certified for McMillan's direct appeal. "P.C. __" refers to the designated page of the clerk's record in the trial court, as compiled and certified for McMillan's post-conviction appeal. "C. __" refers to the designated page of the clerk's record in the trial court, as compiled and certified for the second post-conviction appeal, from which this petition arises.

[2] The two counts both pertained to the same crime. The first count alleged that McMillan caused Martin's death during the course of a theft. The second count alleged that McMillan caused Martin's death by shooting Martin while Martin was inside a vehicle. T.C. 31.

Following the presentation of evidence, the parties delivered closing arguments to the jury. When arguing for the death penalty, the prosecutor told the jury:

> [Y]ou are a jury of 12, a fair cross-section of this community, you are the conscious [sic] of this community. You are not an individual. You're 12 people who represent the residents of Elmore County, Alabama.

T.R. 1732. The jury then recommended, by an 8-4 vote, that McMillan be sentenced to life imprisonment without parole. T.R. 1799-1800.

In Alabama today, as in the rest of the country, the jury's life vote would have been decisive. That is so because in 2017, the Alabama Legislature passed a law ending the practice of judicial override, making it the last State in the country to abolish the practice.[3] Ala. Code 13A-5-47 (2017). In 2009, however, the trial judge was permitted to override the jury's life vote and impose a death sentence.

The judge in McMillan's case conducted a separate sentencing hearing on August 7, 2009. The judge expressed dismay as to "why the jury was unable to follow the law to make a recommendation of death in this case." Pet. App. 40a. The judge also hypothesized, "It is highly possible that fewer than eight jurors initially voted for life without parole and that the number of those jurors voting for life without parole

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[3] Indiana abolished judicial override in 2002. Ind. Code 35-50-2-9(e) (2002). Florida and Delaware each abandoned the practice in 2016. Fla. Stat. 921.141(3)(a)(1) (2016); *Rauf* v. *State*, 145 A.3d 430, 433-34 (Del. 2016).

only increased as they grew tired of the process . . . ." Pet. App. 40a. The judge then overrode the jury's vote and sentenced McMillan to death. Pet. App. 47a.

McMillan unsuccessfully sought relief on direct appeal[4] before pursuing post-conviction relief under Rule 32 of the Alabama Rules of Criminal Procedure. The same judge who rejected the jury's vote summarily dismissed McMillan's Rule 32 petition. P.C. 1477-1549. While McMillan's appeal was pending before the Alabama Court of Criminal Appeals,[5] the Alabama Legislature enacted a law prospectively repealing judicial override in capital cases. Ala. Code 13A-5-47 (2017); Ala. Code 13A-5-47.1 (2017).

Alabama's repeal of judicial override cemented a unanimous, nationwide consensus against the practice. Within six months of the law's passage, McMillan filed a petition for post-conviction relief under Rule 32 of the Alabama Rules of Criminal Procedure. McMillan argued that the consensus against the practice rendered his death-by-override sentence unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution. The state court below rejected McMillan's claims, holding that McMillan failed to show "how this 'national consensus' [against judicial override] overcomes the specific legislative

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[4] The Alabama Court of Criminal Appeals affirmed McMillan's conviction and sentence. *McMillan* v. *State*, 139 So. 3d 184 (Ala. Crim. App. 2010). The Alabama Supreme Court denied review, as did this Court. *McMillan* v. *Alabama*, 572 U.S. 1036 (2014).

[5] The Alabama Court of Criminal Appeals affirmed the circuit court's dismissal on August 11, 2017. *McMillan* v. *State*, 258 So. 3d 1154 (Ala. Crim. App. 2017). The Alabama Supreme Court denied review, as did this Court. *McMillan* v. *Alabama*, 139 S. Ct. 265 (2018).

determination that the law [banning override] is not retroactive." Pet. App. 14a. The state court then held that, because McMillan failed to demonstrate that his sentence was unconstitutional, he could not overcome state procedural bars that otherwise would not apply. Pet. App. 17a. The Alabama Supreme Court denied review in an unpublished order on March 20, 2020. Pet. App. 1a.

This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Execution of a Person Sentenced to Death by Judicial Override Violates the Eighth Amendment.

The Eighth Amendment imposes two strict limits on the death penalty. The first limit reflects a "heightened need for reliability in the determination that death is the appropriate punishment in a specific case." *Caldwell* v. *Mississippi*, 472 U.S. 320, 340 (1985) (citation and internal quotation marks omitted). Thus, a sentencing practice that condemns "a capriciously selected random handful" to die cannot survive constitutional scrutiny because it imposes death arbitrarily and is "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Furman* v. *Georgia*, 408 U.S. 238, 309 & n.11 (1972) (Stewart, J., concurring). The second limit restricts the death penalty to only those individuals who are "the most deserving of execution." *Atkins* v. *Virginia*, 536 U.S. 304, 319 (2002). That determination is measured according to the Nation's "evolving standards of decency." *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958). Where a national consensus against a particular sentencing practice exists, that practice is unconstitutional. See, *e.g.*, *Atkins*, 536 U.S. at 312-17

(2002); *Roper* v. *Simmons*, 543 U.S. 551, 564-67 (2005); *Kennedy* v. *Louisiana*, 554 U.S. 407, 422-26 (2008); *Graham* v. *Florida*, 560 U.S. 48, 62-67 (2010).

Death sentences imposed via judicial override fail both of these constitutional tests. As Members of this Court have observed, "Alabama's sentencing scheme has led to curious and potentially arbitrary outcomes," where "Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures" by overriding jury recommendations for life more frequently during election years. *Woodward* v. *Alabama*, 134 S. Ct. 405, 408-09 (2013) (Sotomayor, J., dissenting from denial of certiorari). Alabama legislators made the same points when they voted to eliminate judicial override in 2017. State Senator Dick Brewbaker, who sponsored the legislation, explained that judges "were very frank that people use it to pressure them in election years." 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/. A system that determines who lives and who dies based on the timing of an election, or in this case, undue speculation about the jury's level of exhaustion, cannot satisfy the heightened standard of reliability that the Eighth Amendment requires.

At the same time, this case presents as clear a national consensus as this Court has ever seen. Legislative action and sentencing rates reflect a complete rejection of judicial override by every State in the country. Executing defendants who were sentenced to death through judicial override does not comport with this country's evolving standards of

decency and would not serve any legitimate penological purpose.

It is therefore appropriate for the Court to reconsider its decisions in *Spaziano* and *Harris* in light of these developments. It is now apparent that the penalties imposed by Alabama's judicial override statute were not "the product of properly guided discretion" but instead of "arbitrary whim." *Harris*, 513 U.S. at 514. Neither *Spaziano* nor *Harris* is consistent with related decisions by this Court addressing the reliability of death sentencing schemes or evolving standards of decency. See *Ramos*, 140 S. Ct. at 1405. Furthermore, legal developments have since called into question the constitutionality of judicial override. *Id.* The time has come for this Court to declare that the execution of a person sentenced to death by judicial override violates the Eighth Amendment's guarantee against cruel and unusual punishment.

A. Death Sentences Imposed by Judicial Override Are Arbitrary, Unreliable, and Capricious.

This Court has long recognized that "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976). "Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Id.*; see also *Saffle* v. *Parks*, 494 U.S. 484, 493 (1990) (acknowledging the Court's "longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary"). Accordingly, a death sentencing

scheme that imposes the death penalty "arbitrarily or irrationally," *Parker* v. *Dugger*, 498 U.S. 308, 321 (1991), or "capriciously or in a freakish manner," *Gregg* v. *Georgia*, 428 U.S. 153, 195 (1976) (opinion of Stewart, Powell, and Stevens, JJ), violates the Eighth Amendment's prohibition against cruel and unusual punishment.

Alabama's experience with judicial override proved that the practice was unreliable and problematic. When Alabama repealed the practice, Senator Brewbaker noted that judges freely admitted to feeling pressured by the threat of an upcoming election into using judicial override. Brian Lyman, *Judicial Override May be Dead After Alabama House Vote*, Montgomery Advertiser (updated Apr. 12, 2017), https://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2017/04/04/alabama-house-votes-end-judicial-override/100037694/. Other improper considerations infected judicial override as well. At least one judge explicitly invoked race as a reason to reject a jury's life vote. *Woodward*, 134 S. Ct. at 409 (Sotomayor, J., dissenting) (quoting a judge who sentenced a white defendant to death because if he had not done so, he "would have sentenced three black people to death and no white people"). Another judge justified his death vote by proclaiming that the 19-year-old Black defendant exhibited a "reptilian coldness" that belied his youth. C. 417. Another imposed a death sentence because the "sociological literature suggests Gypsies intentionally test low on standard IQ tests." *Woodward*, 134 S. Ct. at 409. More often, judges simply resorted to disparaging the jury as somehow not up to the task. Indeed, in McMillan's case, the judge speculated that it was "highly possible that fewer than eight jurors initially voted for life

without parole and that the number of those jurors voting for life without parole only increased as they grew tired of the process." Pet. App. 40a.[6]

Under Alabama's administration of judicial override, then, defendants could be—and, in many instances, were—sentenced to death over a jury recommendation of life based solely on the "vagaries," *Saffle*, 494 U.S. at 493, of the sentencing judge's idiosyncrasies, electoral prospects or biases. Experience has proven that judicial override cannot meet the Eighth Amendment's heightened reliability requirements.

B. Death Sentences Imposed by Judicial Override Deviate from Existing Standards of Decency.

This Court has long made clear that the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society," *Atkins*, 536 U.S. at 311-12 (citation omitted), the "clearest and most reliable objective evidence" of which "is the legislation enacted by the country's legislatures" as well as state practice. *Id.* at 312 (citation omitted). Applying this test, it is apparent that executing a death sentence obtained

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[6] Evidence also indicates that judicial override increased the risk of executing innocent people. Some jurors vote for life in capital cases based on residual doubt as to the defendant's guilt; as a result, override targets weak cases. Thus, even though death sentences imposed through judicial override accounted for 101, or approximately 24.5%, of all 413 death sentences imposed in Alabama from 1981 to 2015, they accounted for 50% of all exonerations from death row in Alabama during the same period. See *Innocence Database*, Death Penalty Info. Center, https://deathpenaltyinfo.org/policy-issues/innocence-database.

through judicial override does not comport at all with evolving standards of decency.

Only four States authorized the practice of judicial override after this Court reinstated the death penalty in 1976: Indiana, Florida, Delaware, and Alabama. Over the ensuing years, "the practice of judicial overrides [became] increasingly rare." *Woodward*, 134 S. Ct. at 407. In the 1980s, there were 125 life-to-death overrides. *Id.* Since 2000, however, there have been only 28 overrides, 27 of which were by Alabama judges. C. 431-33.[7] As the practice declined, Indiana became the first of the four States to formally repeal judicial override. Ind. Code 35-50-2-9(e) (2002). Florida and Delaware followed suit in 2016. Fla. Stat. 921.141(3)(a)(1) (2016); *Rauf* v. *State*, 145 A.3d 430, 433-34 (Del. 2016). Alabama voted to eliminate judicial override just one year later. Ala. Code 13A-5-47 (2017).

Alabama's rejection of judicial override cements a unanimous, nationwide consensus against such death sentences. At present, twenty-nine States have active death penalty statutes. No State permits a death sentence after a jury has voted for life. Only once before has this Court seen such a complete rejection of death sentences imposed on a certain group. See *Ford* v. *Wainwright*, 477 U.S. 399, 408 (1986) (holding that the Eighth Amendment bars the execution of the insane, in part because "no State in the Union permits the execution of the insane"). And in that case, this Court felt "compelled to conclude that the Eighth Amendment prohibits a State from carrying out a

[7] There was only one override between Justice Sotomayor's *Woodward* dissent in 2013 and Alabama's legislative repeal in 2017.

sentence of death upon a prisoner who is insane" because "the intuition that such an execution simply offends humanity [was] evidently shared across this Nation." *Id.* at 409-10. This Court does not require unanimous agreement among all States to hold that a practice violates the Eighth Amendment, see, *e.g.*, *Atkins*, 536 U.S. at 313-15 (twenty states authorized the death penalty for people with intellectually disability); *Roper*, 543 U.S. at 564 (twenty states authorized the death penalty for juveniles); *Kennedy*, 554 U.S. at 423 (six states authorized the death penalty for child rape), but the unanimous nature of the rejection here provides clear evidence that such sentences are inconsistent with the Eighth Amendment's prohibition of cruel and unusual punishment.

As this Court explained in *Graham* v. *Florida*, 560 U.S. 48 (2010), the Eighth Amendment's focus on evolving standards is intended to capture the fact that "the standard of extreme cruelty is not merely descriptive, but necessarily embodies a *moral* judgment." *Id.* at 58 (quoting *Kennedy*, 554 U.S. at 419) (alteration adopted, internal quotation marks omitted, and emphasis added). Alabama's decision to eliminate judicial override was exactly that: a moral decision—one that determined it was no longer proper to sentence an individual to death over a jury vote for life. See Lyman, *Senate Votes to End Judicial Override in Capital Cases* (statement of Sen. Brewbaker) (calling judicial override a "moral issue"). Because the states unanimously agree that sentencing a person to death through judicial override is improper, McMillan's death sentence violates the Eighth Amendment and should be vacated.

C. The Execution of a Person Who Was Sentenced to Death by Judicial Override Serves No Legitimate Penological Purpose.

This Court has recognized that the death penalty is unconstitutional when its imposition "does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes." *Kennedy*, 554 U.S. at 441. Death sentences imposed by override fail to serve either purpose.

It serves no deterrent purpose to carry out a sentence that the law no longer authorizes. Moreover, the legislature's considered determination that judicial override was unnecessary is significant evidence that whatever deterrent value the practice may have had, it was substantially outweighed by the arbitrariness with which the death penalty was imposed. *Roper*, 543 U.S. at 571 ("In general we leave to legislatures the assessment of the efficacy of various criminal penalty schemes.").

The execution of a sentence imposed by judicial override also does not serve any retributive purpose. In evaluating retribution, the Court has asked whether the death sentence "has the potential . . . to allow the community as a whole . . . to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed." *Panetti* v. *Quarterman*, 551 U.S. 930, 958 (2007). Far from respecting the judgment of the community, judicial override rejects it. This Court has observed that a jury choosing between "life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question

of life or death." *Witherspoon* v. *Illinois*, 391 U.S. 510, 519 (1968). The community members entrusted to convey the conscience of the community in this case concluded that life without parole was the appropriate punishment. It serves no retributive purpose to carry out a death sentence that they explicitly rejected.

D. This Court Should Revisit *Spaziano* and *Harris*.

On two separate occasions, this Court has upheld judicial override against constitutional challenges. See *Harris*, 513 U.S. at 515; *Spaziano*, 468 U.S. at 466. Both times, this Court emphasized that it saw "nothing that suggests that the application of the jury-override procedure has resulted in arbitrary or discriminatory application of the death penalty, either in general or in this particular case." *Spaziano*, 468 U.S. at 466; see *Harris*, 513 U.S. at 514 (similar). In the decades since, however, legislative action and studies of judicial override have introduced substantial evidence that the practice was, in fact, arbitrary and that executions by judicial override do not comport with contemporary standards of decency. Because both *Harris* and *Spaziano* were decided prior to these events, their conclusions regarding the constitutionality of judicial override should be revisited.

At the outset, "*stare decisis* has never been treated as an inexorable command," much less a vehicle for "methodically ignoring what everyone knows to be true." *Ramos*, 140 S. Ct. at 1405 (internal quotation marks omitted). This Court has therefore revisited the soundness of prior decisions when a number of factors counsel in favor of doing so. These factors include "the quality of the [prior] decision's reasoning; its

consistency with related decisions; legal developments since the decision; and reliance on the decision." *Id.* (quoting *Franchise Tax Bd. of Cal.* v. *Hyatt*, 139 S. Ct. 1485, 1499 (2019)). Much like in *Ramos*, each of these factors supports overruling *Harris* and *Spaziano*.

First, both *Harris* and *Spaziano* relied on two premises to uphold the constitutionality of judicial override: (1) there was no evidence that application of judicial override led to arbitrary death sentences; and (2) the fact that a majority of jurisdictions did not adopt judicial override did not "establish that contemporary standards of decency are offended by the jury override." *Spaziano*, 468 U.S. at 464, 466; *Harris*, 513 U.S. at 510, 514. Subsequent developments have gravely undermined these premises in ways that substantially diminish the quality of both opinions. As Justice Sotomayor observed in her dissent in *Woodward*, the empirical evidence suggests that "Alabama judges' distinctive proclivity for imposing death sentences" through judicial override flows from their desire to be seen as tough on crime for reelection purposes. *Woodward*, 134 S. Ct. at 408. Moreover, the Alabama Legislature cited their concerns that such arbitrary considerations had infected the judicial override process as a reason to repeal override.

Beyond that, it is no longer the case that only a majority of States have adopted a different practice. No State in this country now stands by judicial override—a remarkable display of unanimity seen only once before, with prohibitions on executing the insane. At the time this Court decided *Spaziano*, it faced a different landscape and a very different question: namely, whether the Eighth Amendment is violated "every time a State reaches a conclusion different from a majority of its sisters over how best to

administer its criminal laws." 468 U.S. at 464. This Court understandably did not want to intervene while States were still experimenting with their capital sentencing schemes. But every state has now rejected override. Thus, the question is whether the Eighth Amendment's prohibition on cruel and unusual punishment is violated when *every State in this country* has concluded that judicial override is improper.

Second, *Spaziano* and *Harris* "sit[] uneasily," *Ramos*, 140 S. Ct. at 1405, with over half a century of decisions examining the propriety of various death sentencing practices under the Eighth Amendment. Since this Court's adoption of the "evolving standards of decency" test in 1958, it has not hesitated to overrule prior decisions under the Eighth Amendment when a new consensus against a punishment has arisen. See, *e.g.*, *Atkins*, 536 U.S. at 314 (overruling *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), because "[m]uch ha[d] changed since" the Court decided *Penry*); *Roper*, 543 U.S. at 565 (overruling *Stanford* v. *Kentucky*, 492 U.S. 361 (1989), because "the change from *Stanford* to this case [was] significant"). And it has cited this same standard to strike down death sentences when they do not align with national consensus, even if the States are not in unanimous agreement. See, *e.g.*, *Kennedy*, 554 U.S. at 425-26; *Enmund* v. *Florida*, 458 U.S. 782, 789-94, 797 (1982). *Spaziano* and *Harris* thus stand alone in sanctioning the execution of death sentences obtained through a sentencing practice every State in this country has rejected.

Neither has this Court hesitated to invalidate sentencing schemes that produced unreliable and arbitrary death sentences. In *Furman*, this Court vacated three death sentences in part because they

were the product of a standard-less process that condemned people to live or die on the whims of the judge or jury. 408 U.S. at 239-40 (per curiam); 408 U.S. at 253 (Douglas, J., concurring); 408 U.S. at 305 (Brennan, J., concurring); 408 U.S. at 309-10 (Stewart, J., concurring). And in *Woodson*, this Court struck down North Carolina's mandatory death sentencing scheme because it did not "fulfill *Furman*'s basic requirement [to] replac[e] arbitrary and wanton" death sentencing practices. 428 U.S. at 303. *Spaziano* and *Harris* are no longer consistent with these decisions in light of the fact that Alabama itself has acknowledged that the practice of judicial override produced unreliable death sentences.

Third, Alabama has a markedly lower reliance interest in carrying out executions obtained through a practice it has since disavowed. Overturning *Spaziano* and *Harris* will not "provoke a crushing tsunami of follow-on litigation," *Ramos*, 140 S. Ct. at 1406 (internal quotation marks omitted), nor will it necessitate further action by the State in the same way retrials do. There are thirty-five people total in this country serving a death sentence despite a jury vote for life imprisonment—thirty-two of whom are in Alabama. Striking down judicial override would simply mean resentencing each of the defendants to life in prison without parole, and thereby vindicate the sentencing jury's judgment about the appropriate moral response to the defendant and his crime. The State's diminished reliance interests thus pale in comparison to the interests of the American people in preserving "our constitutionally promised liberties," and the interests of the thirty-two people on Alabama's death row to have their Eighth Amendment rights vindicated. *Id.* at 1408 (plurality opinion); see also

McGirt v. *Oklahoma*, 140 S. Ct. 2452, 2479-2480 (2020) (dismissing the cost of potentially re-prosecuting "[t]housands" of state-court convictions because "the magnitude of a legal wrong is no reason to perpetuate it").

"In the final accounting," *Ramos*, 140 S. Ct. at 1408, the factors strongly favor revisiting *Spaziano* and *Harris*. Both decisions couched their holdings in premises that have washed away with the tides of time. Justice is not done when the Court averts its gaze from that which is apparent to everyone. *Id.* Judicial override was not a reliable method of imposing death sentences, and it defies contemporary standards of decency. This Court should revisit the constitutionality of executing people sentenced to death by judicial override.

II. This Case Is an Ideal Vehicle for Addressing the Constitutionality of Judicial Override.

Substantively and procedurally, this is an excellent case for addressing the constitutionality of judicial override. Substantively, the case demonstrates the flaws of judicial override. Procedurally, the case presents the issue squarely because the state court's decision turns on the conclusion that judicial override is constitutional under the Eighth Amendment.

A. The Case Exemplifies the Problems with Judicial Override.

McMillan's case demonstrates the core problem with judicial override: its inability to reliably determine who is "the most deserving of execution." *Atkins*, 536 U.S. at 319. At sentencing, the State presented evidence proving only one aggravating circumstance—that the murder was committed during

the course of a robbery. On the other side of the ledger, McMillan presented evidence of his youth at the time of the crime (eighteen years old), his lack of a significant prior criminal history, and his traumatic upbringing. Pet. App. 34a-38a. As the trial judge explained in his sentencing order:

> McMillan submitted [evidence] . . . that he was raised in extreme poverty; that he was abandoned by his mother; that he was physically abused as a child; that he was raped as a child; that he was a witness to his mother's and sister's abuse; that he was raised in the home of an alcoholic/drug addict; that he did not get the treatment he needed; that he had no positive male role models; that he suffered from psychological and emotional difficulties; and that his intellectual functioning was in the borderline range.

Pet. App. 34a-35a. Based on this evidence, the jury correctly determined that the aggravating circumstance did not outweigh the mitigating circumstances. See generally *Wiggins* v. *Smith*, 539 U.S. 510 (2003). But the trial judge rejected that finding, castigating the jurors for being "unable to follow the law" and speculating about the legitimacy of their vote. Pet. App. 40a.

The jury in this case was correct. McMillan is not one of the rare defendants who is among "the most deserving of execution." *Atkins*, 536 U.S. at 319.

B. The Case Is Well Suited for Certiorari Review Because the State Court's Decision Turned on the Constitutional Question Presented.

This case presents the Court with an appropriate procedural vehicle for resolving the constitutional question presented. The state court held that McMillan failed to show "how this 'national consensus' [against judicial override] overcomes the specific legislative determination that the law [banning override] is not retroactive." Pet. App. 14a. That is the constitutional question presented in this case—whether the unanimous national consensus against judicial override and acknowledgement of the practice's unreliability justify a constitutional ruling that denies Alabama the authority to continue to execute people whose juries voted for life before the practice was repealed.

It is of no moment that the state appellate court purported to affirm the trial court's dismissal of McMillan's post-conviction petition on procedural grounds, because that decision was necessarily based on the court's substantive determination that McMillan's constitutional rights had not been violated. As this Court has made clear on numerous occasions, "when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded." *Ake* v. *Oklahoma*, 470 U.S. 68, 75 (1985) (citing *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945)); see also *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P.C.*, 467 U.S. 138, 152 (1984) ("[T]his Court retains a role when a state court's interpretation of state law has been influenced by an accompanying

interpretation of federal law."); *Foster* v. *Chatman*, 136 S. Ct. 1737, 1746 (2016) (same). Here, the state court relied on two separate procedural rules, but its application of both rules depended on an antecedent ruling on federal law.

First, the state court applied Rule 32.2(b), which authorizes successive petitions where "good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice." Ala. R. Crim. P. 32.2(b). The state court acknowledged that McMillan based his claim on new developments—Alabama's repeal of judicial override—thereby satisfying the first prong of the test. But the court then held that McMillan failed to demonstrate a "miscarriage of justice" because he did not show "how this 'national consensus' overcomes the specific legislative determination that the law is not retroactive." Pet. App. 14a.

The state court's "miscarriage of justice" ruling reflected its decision that the new national consensus did not create an Eighth Amendment violation. Stated another way, if the Court found that McMillan's death sentence violated the Eighth Amendment, the procedural bar would not apply. See *Click* v. *State*, 215 So. 3d 1189, 1194-95 (Ala. Crim. App. 2016). Thus, the application of Rule 32.2(b) was "influenced by an accompanying interpretation of federal law," *Three Affiliated Tribes*, 467 U.S. at 152, and "depend[ed] on [the] federal constitutional ruling," *Ake*, 470 U.S. at 75.

Second, the state court determined that McMillan's petition was time-barred under Rule 32.2(c), which requires a petitioner to bring a new claim within six

months of "the discovery of the newly discovered *material* facts." Ala. R. Crim. P. 32.2(c) (emphasis added). But the application of this bar similarly rested on an antecedent ruling of federal law. The state court recognized that McMillan filed his petition within six months of Alabama's law prohibiting judicial override. Had the court concluded that the unanimous national consensus against judicial override was a new fact rendering McMillan's sentence unconstitutional, McMillan would have been entitled to relief. However, the court reached the opposite conclusion, holding that McMillan failed to show "how this 'national consensus' overcomes the specific legislative determination that the law is not retroactive." Pet. App. 14a.

The decisions of the same state court in other cases make clear that the procedural bars of Rule 32 would not apply here if judicial override violates the Eighth Amendment. In *Click*, for instance, the petitioner was mandatorily sentenced to life without parole for a murder he committed when he was seventeen years old. 215 So.3d at 1191. He appealed unsuccessfully and was denied post-conviction relief. *Id.* After this Court decided *Miller* v. *Alabama*, 567 U.S. 460 (2012), the petitioner filed a successive Rule 32 petition alleging that his sentence was unconstitutional. *Click*, 215 So. 3d at 1192. The circuit court dismissed the petition, but the Court of Criminal Appeals reversed. *Id.*[8] Recognizing that Alabama's collateral review procedures are open to Eighth Amendment claims, the court held that "Click's petition conformed with the

[8] The Court of Criminal Appeals had initially affirmed the circuit court's dismissal, but this Court granted Click's petition, vacated the judgment, and remanded for reconsideration in light of *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016). *Click* v. *Alabama*, 136 S. Ct. 1363 (2016).

requirements of Rule 32." *Id.* at 1194-95. Thus, the procedural bars that were enforced here apply *only* when the state court fails to recognize the constitutional violation. The procedural rules are therefore directly interwoven with the federal issue.

Significantly, the State of Alabama has argued to this Court that if a death-sentenced individual wishes to challenge his sentence in light of the repeal of judicial override, then this is the appropriate procedural mechanism to do so. In a separate case in which the petitioner sought to challenge his override sentence through a petition filed directly in the Alabama Supreme Court, the State represented the following to this Court:

> 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 [the petitioner] 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).

State's Brief in Opposition to Certiorari, at 7, *Madison* v. *Alabama*, No. 17-7535 (U.S. Jan. 25, 2018). That is precisely the course McMillan followed. Within six months of the new law, he filed a Rule 32 petition alleging that his sentence violates the Eighth Amendment. This case thus presents one of the last and best opportunities for this Court to decide whether

judicial override violates the Eighth Amendment's prohibition against cruel and unusual punishment. The Court's answer to that question will determine the fates of thirty-five people on death row, each of whom the community voted should live but whom a judge nonetheless condemned to die.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to decide whether the execution of a person sentenced to death by judicial override violates the Eighth Amendment.

Respectfully submitted,

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August 17, 2020

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF ALABAMA

[SEAL]

March 20, 2020

1180438

Ex parte Calvin McMillan. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Calvin McMillan v. State of Alabama) (Elmore Circuit Court: CC08-476.61; Criminal Appeals: CR-17-0718).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on March 20, 2020:

Writ Denied. No Opinion. Mitchell, J. - Parker, C.J., and Bolin, Shaw, Bryan, Sellers, Mendheim, and Stewart, JJ., concur. Wise, J., recuses herself.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 20th day of March, 2020.

[/s/ Julia Jordan Weller]

Clerk, Supreme Court of Alabama

APPENDIX B

REL: November 9, 2018

This unpublished memorandum should not be cited as precedent. *See* Rule 54, Ala. R. App. P. Rule 54(d), states, in part, that this memorandum "shall have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state, except for the purpose of establishing the application of the doctrine of law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar."

ALABAMA COURT OF CRIMINAL APPEALS

CR-17-0718

Calvin McMillan

v.

State of Alabama

Appeal from Elmore Circuit Court
(CC-08-476.61)

Before MARY B. WINDOM Presiding Judge, SAMUEL HENRY WELCH, J. ELIZABETH KELLUM, J. MICHAEL JOINER, Judges

MEMORANDUM

PER CURIAM.

Calvin McMillan was convicted of murder made capital because it was committed during the course of a first-degree robbery and because the victim was shot while inside a vehicle. *See* § 13A-5-40 (a)(2) and (a)(17), Ala. Code 1975. They jury, by a vote of 8-4, recommended that McMillan be sentenced to life imprisonment without the possibility of parole. However, the trial court overrode the jury's recommendation and sentenced McMillan to death.[1] This Court affirmed McMillan's convictions and sentence in *McMillan v. State*, 139 So. 3d 184 (Ala. Crim. App. 2010), cert. denied, 572 U.S. 1036 (2014). In August of 2014, McMillan filed a timely petition for postconviction relief pursuant to Rule 32, Ala. R. Crim. P. This Court affirmed the circuit court's summary dismissal of that petition in *McMillan v. State*, [Ms. CR-14-0935, August 11, 2017] __ So. 3d __ (Ala. Crim. App. 2017). The Alabama Supreme Court denied certiorari on February 23, 2018, *see Ex parte McMillan*, [Ms. 1170215, February 23, 2018] __ So. 3d __ (Ala. 2018). McMillan's petition for a writ of certiorari in the United States Supreme Court is currently pending.

On October 10, 2017, McMillan filed this, his second petition for postconviction relief pursuant to Rule 32, Ala. R. Crim. P. In his petition, McMillan contended that his death sentence was unconstitutional because, he said, it violated the Fifth, Sixth, Eight, and Fourteenth Amendments to the United States Constitution. In support of his argument, McMillan points to § 13A-5-47, Ala. Code 1975, which effectively ended the practice of judicial override in death-

[1] The facts underlying McMillan's conviction and sentence are not relevant to this appeal.

penalty cases. The Act was signed into law on April 11, 2017, nearly eight years after McMillan was convicted and sentenced to death. *See* Act 2017-131. Section 13A-5-47(a), Ala. Code 1975, provides, in pertinent part:

> "After the sentence hearing has been conducted, and after the jury has returned a verdict, or after such a verdict has been waived as provided in Section 13A-5-46(a) or Section 13A-5-46(g), the trial court shall impose sentence. Where the jury has returned a verdict of death, the court shall sentence the defendant to death. Where a sentence of death is not returned by the jury, the court shall sentence the defendant to life imprisonment without parole."

McMillan asserted that he was entitled to relief under Rule 32.1(a), Ala. R. Crim. P., because, he said, his death sentence violated both the Alabama and United States Constitutions in light of the passage of § 13A-5-47, Ala. Code 1975. He also contended that his sentence exceeded the maximum authorized by law, *see* Rule 32.1(c), Ala. R. Crim. P., and that the above-mentioned statute constituted newly-discovered evidence pursuant to Rule 32.1(e), Ala. R. Crim. P.

In its response and motion to dismiss, the State noted that § 13A-5-47.1, Ala. Code 1975, which was signed into law at the same time as§ 13A-5-47, provides: "Sections 13A-5-45, 13A-5-46, and 13A-5-47 shall apply to any 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." As noted, McMillan was convicted and sentenced in 2009. According to the State, McMillan's petition was precluded by Rule 32.2(b), Ala. R. Crim. P., because it was a successive petition, and that it was precluded by Rule 32.2(c), Ala. R. Crim. P., because it was filed outside of the one year statute of limitations. The State also asserted that McMillan's claim did not constitute newly-discovered evidence under Rule 32.1(e), Ala. R. Crim. P.

Initially, "[w]hen reviewing a circuit court's denial of a Rule 32 petition, this Court applies an abuse-of-discretion standard." *Shouldis v. State*, 38 So. 3d 753, 761 (Ala. Crim. App. 2008) (quoting *Whitman v. State*, 903 So. 2d 152, 154 (Ala. Crim. App. 2004), citing in turn *McGahee v. State*, 885 So. 2d 191 (Ala. Crim. App. 2003)). However, "when the facts are undisputed and an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo." *Ex parte White*, 792 So. 2d 1097, 1098 (Ala. 2001)(citing *State v. Hill*, 690 So. 2d 1201, 1203 (Ala. 1996)). Further, "[t]he plain error rule does not apply to Rule 32 proceedings, even if the case involves the death sentence." *Burgess v. State*, 962 So. 2d 272, 277 (Ala. Crim. App. 2005) (internal citations and quotations omitted). Finally, "[t]he procedural bars of Rule 32[.2, Ala. R.Crim. P.,] apply with equal force to all cases, including those in which the death penalty has been imposed." *Id.* (internal citations and quotations omitted). The facts underlying the issue raised in McMillan's petition are not in dispute. Accordingly, this Court will apply a de novo standard of review.

I.

On appeal, McMillan first argues that the circuit court erred by summarily dismissing his petition. The record reveals that the court initially set the matter for an evidentiary hearing but, after receiving the State's response, cancelled the hearing and summarily dismissed the petition. McMillan points to the fact that the trial court entered its summary dismissal two days after the State filed its response thus depriving him of an opportunity to reply and disprove the State's asserted grounds of preclusion. He also asserts that the circuit court's order was not the result of its independent judgment because, he said, the court's order was a "wholesale adoption of the State's proposed order . . . ." (McMillan's brief, at 13).

As to McMillan's argument regarding his opportunity to respond the State's answer, this Court has held:

> "Rule 32.6(a), Ala. R. Crim. P., provides that "[a] proceeding under this rule is commenced by filing a petition, verified by the petitioner or the petitioner's attorney, with the clerk of the court.' Rule 32.6(b), Ala. R. Crim. P., requires a petitioner to disclose the full factual basis establishing entitlement to relief, including any facts necessary to overcome the procedural bars contained in Rule 32.2, Ala. R. Crim. P. *See Ex parte Ward*, 46 So. 3d 888, 897 (Ala. 2007) ('[W]hen a Rule 32 petition is time-barred on its face, the petition must establish entitlement to the remedy afforded by the doctrine of equitable tolling. A petition

that does not assert equitable tolling, or that asserts it but fails to state any principle of law or any fact that would entitle the petitioner to the equitable tolling of the applicable limitations provision, may be summarily dismissed. . . .'). Rule 32.7(a), Ala. R. Crim. P., allows the State 30 days to file a response to the Rule 32 petition. There is, however, no provision in Rule 32 for the petitioner – who, pursuant to Rule 32.6(b), Ala. R. Crim. P., should have included the full factual basis for his request for relief and each of his legal assertions in his Rule 32 petition – to file a reply to the State's response.

"Furthermore, there is no provision in Rule 32 that requires the circuit court to await a response from the State before dismissing a Rule 32 petition. Instead, as Alabama courts have repeatedly held, 'Rule 32.7(d), Ala. R. Crim. P., allows the trial court to summarily dismiss a Rule 32 petition that, on its face, is precluded or fails to state a claim, and [the Alabama Supreme Court has] held that the trial court may properly summarily dismiss such a petition without waiting for a response to the petition from the State.' *Ex parte Ward*, 46 So. 3d at 897 (citing *Bishop v. State*, 608 So. 2d 345, 347-48 (Ala.1992) ('Where a simple reading of a petition for post-conviction relief shows that, assuming every allegation of the petition to be true, it is obviously without

merit or is precluded, the circuit court [may] summarily dismiss that petition without requiring a response from the district attorney.')).

"Recognizing these principles, this Court, in *Beckworth v. State*, [Ms. CR-07-0051, May 1, 2009] __ So. 3d __, __ (Ala. Crim. App. 2009), rejected Jenkins's argument. Three days after the State filed its response to Beckworth's Rule 32 petition and without allowing Beckworth to file a reply, the circuit court summarily dismissed Beckworth's petition. *Id.* On appeal, Beckworth argued, among other things, 'that the trial court abused its discretion when it dismissed the petition only three days after the State filed its answer....' *Id.* This Court disagreed and held that because 'the trial court may properly summarily dismiss a Rule 32 petition even before it receives from the State a response to the petition ...[,] [n]o error occurred as a result of the trial court's entry of the judgment within days of its receipt of the State's response.' *Id.* *See Bishop v. State*, 608 So.2d at 347-48 (holding that where a simple reading of a petition for postconviction relief shows that, assuming every allegation of the petition to be true, it is obviously without merit or is precluded, the circuit court may summarily dismiss that petition without requiring a response from the district attorney). Similarly, this Court holds that the circuit court did not err in

> dismissing Jenkins's petition prior to receiving a reply to the State's answer and motion to dismiss."

Jenkins v. State, 105 So. 3d 1234, 1244-45 (Ala. Crim. App. 2011). Because McMillan was not entitled to file a reply to the State's response, he was not deprived of his due-process rights. Additionally, as will be discussed below, McMillan's petition was time-barred on its face and was successive. Thus, the trial court was not even required to await the State's response before summarily dismissing the petition.

Additionally, McMillan is not entitled to relief based on his assertion that the circuit court adopted the State's proposed order. The appellant in Jenkins, *supra*, made the same argument. In denying relief, this Court held:

> "In *Ex parte Ingram*, 51 So. 3d 1119, 1122 (Ala. 2010), the Alabama Supreme Court reaffirmed 'the general rule ... that, where a trial court does in fact adopt the [prevailing party's] proposed order as its own, deference is owed to that order in the same measure as any other order of the trial court.' The Court went on to state that "[i]n this unusual case, [it could not] conclude that the above-stated "general rule" was applicable' because the adopted order contained indisputably false statements. *Id.* at 1123-24. Specifically, the judge who signed the State's proposed order stated that he had presided over Ingram's trial and had personal knowledge of the trial proceedings when, in fact, another judge

had presided over the trial. *Id*. The Supreme Court then held that 'the patently erroneous nature of the statements regarding the trial judge's "personal knowledge" and observations of Ingram's capital-murder trial undermines any confidence that the trial court's findings of fact and conclusions of law are the product of the trial judge's independent judgment and that the ... order reflects the findings and conclusions of that judge.' *Id*. at 1125 (emphasis in the original). Because the order established that the conclusions were not those of the judge, the Supreme Court reversed the dismissal of Ingram's Rule 32 petition. *Id*.

"Later, in *Ex parte Scott*, [Ms. 1091275, March 18, 2011] ___ So. 3d ___, ___ (Ala. 2011), the Alabama Supreme Court held that the circuit court erred in adopting verbatim as its order the State's answer to a Rule 32 petition. After reaffirming its earlier decision in *Ex parte Ingram*, the Court held that it constitutes error for a circuit court to adopt the prevailing party's answer because an answer 'is infected with ... adversarial zeal [and] because an answer is a pleading that never is prepared with the pretense of impartiality.' *Id.* Because a party's answer 'is infected with ... adversarial zeal,' the "verbatim adoption of the State's answer to [a] Rule 32 petition as its order, by its nature, violates [the

> Court's] holding in *Ex parte Ingram* [that the circuit court's order must] reflect the independent and impartial findings and conclusions of the trial court. *Id*."

105 So. 3d at 1241.

In his brief on appeal, McMillan does not identify any specific examples of how the circuit court's order was improper. Rather, he makes the general assertion that the court's adoption of the State's proposed order "undermines the integrity of the proceedings." (McMillan's brief, at 13). Additionally, this Court has reviewed the circuit court's order and does not find any of the types of errors described in *Ingram* and *Scott*. Accordingly, McMillan is not entitled to any relief on this issue.

II.

Next, McMillan argues that the circuit court erroneously determined that his claim was precluded. According to McMillan, his claim was properly raised under Rules 32.1(a), (c), and (e), Ala. R. Crim. P., and his petition was not precluded by Rule 32.2(b), Ala. R. Crim. P., or Rule 32.2(c), Ala. R. Crim. P. McMillan contends that his claim is based on new evidence.

> Rule 32.2(b), Ala. R. Crim. P., provides:
>
> "If a petitioner has previously that challenges any judgment, petitions by that petitioner judgment arising out of that filed a petition all subsequent challenging any same trial or guilty-plea proceeding shall be treated as successive petitions under this rule. The court shall not grant relief on a successive petition on the same or similar grounds on behalf

> of the same petitioner. A successive petition on different grounds shall be denied unless (1) the petitioner is entitled to relief on the ground that the court was without jurisdiction to render a judgment or to impose sentence or (2) the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice."

McMillan concedes that the present petition is successive but maintains "... both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice." (McMillan's brief, at 17) quoting Rule 32.2(b), Ala. R. Crim. P.

As noted above, the statute that McMillan relies on was not signed into law until 2017. McMillan filed his first Rule 32 petition in 2014, thus, he could not have known about the law or ascertained that it would be passed through the exercise of reasonable diligence. However, to 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. (McMillan's brief, at 19).

Accordingly, the circuit court's failure to address McMillan's petition at an evidentiary hearing did not constitute a miscarriage of justice. McMillan's petition was successive and, therefore, summary dismissal was appropriate. *See* Rule 32.7(d), Ala. R. Crim. P. (A circuit court may summarily dismiss a Rule 32 petition "[i]f the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings. . . .").

McMillan also claims that his petition was not time-barred under Rule 32.2(c), Ala. R. Crim. P., because, he says, the petition was filed within six months of the passage of § 13A-5-47, and was the appropriate way to argue for retroactive application of the override repeal. (McMillan's brief, at 21.) However, 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."

For the same reasons, McMillan's claim does not constitute newly-discovered evidence pursuant to Rule 32.1(e), Ala. R. Crim. P. "Before the allegations in [a] Rule 32 petition can be considered to be based on newly discovered evidence, they must meet all five requirements of Rule 32.1(e)." *Musgrove v. State*, 144 So. 3d 410, 419 (Ala. Crim. App. 2012), quoting *McCartha v. State*, 78 So. 3d 1014, 1017 (Ala. Crim. App. 2011). Rule 32.1(e), provides five elements that must be met in order for a fact to constitute newly-discovered evidence:

> "(1) The facts relied upon were not known by the petitioner or the petitioner's counsel at the time of trial or sentencing or in time to file a post-trial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence;
>
> "(2) The facts are not merely cumulative to other facts that were known;
>
> "(3) The facts do not merely amount to impeachment evidence;
>
> "(4) If the facts had been known at the time of trial or of sentencing, the result probably would have been different; and
>
> "(5) The facts establish that the petitioner is innocent of the crime for which the petitioner was convicted or

> should not have received the sentence that the petitioner received."

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 sentencing 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.

III.

The remainder of McMillan's brief on appeal explains in detail the reasons that he believes the judicial-override repeal should be retroactive. He also puts forth constitutional arguments as to why the law's non-retroactivity violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. McMillan concedes that these arguments are constitutional in nature and that they arise under Rule 32.1(a), Ala. R. Crim. P. (McMillan's brief, at 15). Rule 32.2(c), Ala. R. Crim. P., specifically provides that a circuit court "shall not entertain any petition for relief from a conviction or sentence on the grounds specified in Rule 32.1(a)[, Ala. R. Crim. P.]" Similarly, in addition to what was discussed in Section II above, Rule 32.2(b), Ala. R. Crim. P., provides that a circuit court shall not grant relief on a successive petition unless "the petitioner is entitled to relief on the ground that the court was without jurisdiction to render a judgment or to impose sentence." McMillan does not contend that the trial court lacked jurisdiction to sentence him to death. Accordingly, both the specific

language of the law in question and Rule 32.2, Ala. R. Crim. P., establish that McMillan is not entitled to postconviction relief.

Conclusion

Alabama's capital-sentencing laws authorized the trial court to override the jury's recommendation and sentence McMillan to death in 2009. Although the judicial-override provision of the State's capital-sentencing scheme was repealed in 2017 by § 13A-5-47, Ala. Code 1975, the legislature specifically excluded defendants like McMillan from the law with its simultaneous passage of § 13A-5-47.1. The purpose of Rule 32 is to allow a petitioner to attack the validity of a conviction or sentence on the grounds that they are unconstitutional, unlawful, or imposed by a court that lacked jurisdiction. *See* Rule 32.1, Ala. R. Crim. P. As noted, McMillan does not allege that the court was without jurisdiction to impose the death sentence nor does he claim that the sentence was unlawful at the time it was imposed. The crux of McMillan's argument is that § 13A-5-47.1, Ala. Code 1975, is unconstitutional and, therefore, renders his death sentence unconstitutional as well. However, attacks on the constitutionality of a conviction or sentence under Rule 32.1(a), Ala. R. Crim. P., are subject to the preclusive bars of Rule 32.2, Ala. R. Crim. P. Therefore, 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.

For the foregoing reasons, the judgment of the circuit court is affirmed.

AFFIRMED.

Welch, Kellum, and Joiner, JJ., concur. Windom, P.J., recuses.

APPENDIX C

IN THE CIRCUIT COURT OF
ELMORE COUNTY, ALABAMA

Case No.: CC-2008-000476.61

State of Alabama,

v.

McMillan Calvin

Defendant.

Order Dismissing Successive Petition

This matter comes before the Court on Petitioner Calvin McMillan's successive petition for postconviction relief, the State of Alabama's answer to that petition, and the State of Alabama's motion to dismiss. Having considered McMillan's petition, the State's answer, and the State's motion to dismiss, it is HEREBY ORDERED that the petition be DISMISSED pursuant to Rules 32.2(c) and 32.2(b) of the Alabama Rules of Criminal Procedure.

In paragraph 30 of the successive petition, McMillan states that he brings three constitutional challenges predicated on the passage of Act Number 2017-131, during the legislature's 2017 session. That ground for relief arises under Rule 32.1(a). In addition, McMillan alleges that his grounds for relief also arise under Rule 32.1(c) (that his sentence exceeds the maximum authorized by law), and Rule 32.1(e) (newly discovered material facts). Because he does not specify

which claims are presented pursuant to which Rule 32.1 ground for relief, the Court has presumed that McMillan intended for each of his claims to be presented as a form of each ground for relief.

Act Number 2017-131 amended several parts of Alabama's capital sentencing law, but included a provision that it "shall not apply retroactively to any defendant whohas previously been convicted of capital murder and sentenced to death prior to April 11, 2017." Ala. Code § 13A-5-47.1 (1975). There has been no change in Alabama's law that directly applies to McMillan.

Inasmuch as McMillan's petition proffers Rule 32.1(a) as a ground for relief, his entire petition is barred by the statute of limitation contained in Rule 32.2(c). Under Rule 32.2(c), a "court shall not entertain any petition for relief from conviction or sentence on the grounds specified in Rule 32.1(a)" unless brought within one year of the issuance of the certificate of judgment by the Court of Criminal Appeals at the conclusion of the direct appeal. The Court of Criminal Appeals issued the certificate of judgment in McMillan's direct appeal on April 23, 2013. McMillan's successive petition was filed well beyond this one-year limitation period.

Accordingly, all three claims in the successive petition are DISMISSED pursuant to Rule 32.2(c), inasmuch as they present constitutional challenges. In addition to McMillan's admission in paragraph 30, all three claims in the successive petition clearly allege that McMillan's sentence is the product of constitutional violations. As set forth more fully below, Rule 32.1(a) is the only legitimate ground for relief alleged by McMillan.

The Court further finds that McMillan's second ground for relief does not challenge his conviction or sentence. That is, McMillan does not allege that the sentencing judge violated his right to due process of law or to equal protection under the law by imposing a sentence of death. Instead, McMillan's successive petition alleges that the legislature's amendment of Alabama's capital sentencing statutes, with the non-retroactivity provision, deprives him of equal protection and due process. A petition for postconviction relief attacks a criminal judgment; that is not what McMillan purports to do in his successive petition. To the extent McMillan believes the legislature committed a constitutional wrong by refusing to make its amendments to Alabama's capital sentencing statute retroactive, his claim is against Act Number 2017-131 or the legislature, not the trial judge who imposed the sentence in this matter. Accordingly, the second ground for relief alleged in McMillan's petition is DISMISSED for failing to state a valid claim for postconviction relief.

In the alternative, all three claims in McMillan's successive petition are DISMISSED pursuant to Rule 32.2(b), which prohibits relief on a successive petition unless certain criteria are met. Here, the facts alleged in the successive petition would not permit McMillan to establish that the failure to entertain his petition would result in a miscarriage of justice. The majority of the "facts" McMillan pleads in support of his Eighth Amendment "evolving standards of decency" claim were available when he filed his initial petition and when he filed an amendment to that petition in December 2014. Thus, this claim could "have been ascertained through reasonable diligence when the first petition was heard." Ala. R. Crim. P. 32.2(b).

Additionally, the legislature's passage of Act Number 2017-131, with its non-retroactivity provision, did not create the basis for a new Eighth Amendment challenge where none had existed previously.

To the extent McMillan claims that his grounds for relief arise under Rule 32.1(c), he is incorrect. A petitioner's characterization of his grounds for relief is not controlling on a court. *See, e.g.*, *Wallace v. State*, 959 So. 2d 1161, 1164 (Ala. Crim. App. 2006); *Carr v. State*, 950 So. 2d 1228, 1229 (Ala. Crim. App. 2006); *Goetzman v. State*, 844 So. 2d 1289, 1291 (Ala. Crim. App. 2002); *Catchings v. State*, 684 So. 2d 168, 169 (Ala. Crim. App. 1995). So, though McMillan alleges that his sentence now violates the "evolving standards of decency," it is without question that the trial judge possessed the legal authority to sentence McMillan to death. Additionally, Act Number 2017-131 does not change this reality, as evidenced by its non-retroactivity provision. McMillan's first ground for relief, then, does not arise under Rule 32.1(c). The same is true of McMillan's second ground for relief. His equal protection and due process arguments attack the constitutionality of the legislature's subsequent amendments to Alabama's sentencing statutes, but it does not implicate the circuit court's legal authority to impose a sentence of death in 2009. Finally, McMillan's third ground for relief does not arise under Rule 32.1(c). The argument that a non-retroactive amendment to a sentencing statute somehow deprives a circuit court of legal authority over a prior judicial act is a non-sequitur. Not one of the three claims asserted in McMillan's successive Rule 32 petition arises under Rule 32.1(c).

Nor do any of McMillan's claims arise under Rule 32.1(e). McMillan contends that his successive

petition is timely, because it was brought within six months of the date on which Act 2017-131 was signed into law. (Pet. at 21.) Thus, McMillan's successive petition is predicated on a theory that Act Number 2017-131, alone, is a newly discovered material fact entitling him to relief. The fact that the legislature provided that its amendments were not retroactive is a significant factor weighing against finding that the enactment of Act Number 2017-131 is a fact which requires McMillan's conviction and sentence be vacated by the Court. Additionally, the legislature's amendment, with its non-retroactivity, is not a factual or legal development that would establish that he should not have received the sentence imposed. In fact, because a statute's enactment in 2017 could never have been "known at the time of trial," there are no circumstances under which McMillan could satisfy Rule 32.1(e)(4). Thus, McMillan is not entitled to proceed before the Court under a Rule 32.1(e) theory for seeking relief.

DONE this 9th day of March, 2018.

/s/ SIBLEY G. REYNOLDS

CIRCUIT JUDGE

APPENDIX D

IN THE CIRCUIT COURT OF
ELMORE COUNTY, ALABAMA

Case No.: CC-08-476

State of Alabama,

Plaintiff,

v.

Calvin McMillan

Defendant.

SENTENCING ORDER

Calvin McMillan was indicted by the Elmore County Grand Jury on July 25, 2008 for two counts of capital murder; an intentional murder during the course of a robbery 1st degree and an intentional murder while the victim was inside a vehicle. On June 26, 2009, after approximately an hour and twenty minutes of deliberation, the jury returned verdicts finding McMillan guilty of both counts of capital murder.

The penalty phase was presented to the same jury, beginning on June 29, 2009. On June 30, 2009, after approximately three hours of further deliberation, the jury recommended a sentence of life without parole by a vote of eight to four.

A pre-sentence investigation report was ordered and has been received and considered by this Court The Court has also considered the additional

testimony and evidence offered at the sentencing hearing on August 7, 2009.

After considering the evidence presented at trial, the evidence presented at the sentencing hearing, the pre-sentence investigation report and after having independently weighed the aggravating and mitigating circumstances this Court has determined that McMillan should be sentenced to death.

General Findings Concerning the Crime

After a Montgomery Biscuit's baseball game on August 29, 2007, James Bryan Martin started home to be with his wife and two children; a son two years old and a daughter three months old. After speaking with his wife on his cell phone, he stopped at the new Millbrook Wal-Mart in Elmore County, Alabama just off of I-65 and Alabama Highway 14. After purchasing some diapers, a soft drink and some Reese's candy he returned to his pick-up truck, a four door 2004 Ford F-150 with custom wheels and rims, to be confronted by Calvin McMillan. Martin got in his truck and attempted to leave. McMillan shot Martin with a 9 mm High Point pistol while Martin was seated in his truck. McMillan then pulled Martin out of the truck, threw him to the ground in the parking lot and shot him again. After he had shot James Bryan Martin four times, McMillan got in the truck and left the scene.

Earlier in the day McMillan had asked Rondarrell Williams to take him from Montgomery to the Millbrook Wal-Mart so that he could "peel a ride". Williams and McMillan took Williams' girlfriend to her home in Coosada, dropped her off and later, in her car, arrived at the Millbrook Wal-Mart. While Williams knew that McMillan intended to steal a car

and knew that McMillan had a pistol, he did not know that McMillan intended to kill someone that night.

While Williams was inside the store, McMillan was scoping out the parking lot searching for his prey. He walked through the parking lot several times in a black t-shirt with a fluorescent green skull figure on front and skeleton likeness on back. He even propped himself at the front door and watched vehicles come and go. After having done this for several minutes and after having observed James Bryan Martin pull into the parking lot and go into the store, McMillan put on a red striped pullover shirt and waited for James Bryan Martin to come back out into the parking lot. After Martin returned to his truck he was shot four times and left in the parking lot to die in a pool of blood while McMillan fled from Millbrook in Martin's truck.

During the course of the night several BOLO's were issued by the Millbrook Police Department after having talked to witnesses and viewed the security video from the store.

The next morning, at approximately 9:30 a.m., Corporal Manora of Montgomery Police Department spotted and pulled in behind James Bryan Martin's truck. The driver of the truck pulled into a parking lot at Bridgecroft Apartments in Montgomery, jumped out of the truck and took off running.

Millbrook police were contacted and the truck was transported to the Alabama Bureau of Investigation where it was processed for fingerprints. Later, the truck was turned over to Millbrook Police Department and it was driven to Millbrook where it was inventoried.

The truck was filled with Calvin McMillan's belongings. It contained bags with his clothes, shoes and hats; a karaoke machlne and iron; and the black shorts that he had on at the time of the murder that contained an empty 9 mm shell casing in one pocket and a Reese's candy wrapper in another pocket. The black shirt with the fluorescent green skull on front and skeleton on back was located in the back floorboard of the truck. A 'Wild Hogs" DVD that James Bryan Martin had rented and not yet returned to Movie Gallery was found in Calvin McMillan's bag with his other belongings as well as Martin's ownership and loan documents for the truck, one now containing Calvin McMillan's signature.

A High Point 9 mm pistol was located in the pocket behind the driver's seat under some of McMillan's clothes. The pistol contained four unfired rounds which, when tested, matched the shell casings located at the scene of the murder and the shell casing which was found in the pants. Also recovered were disposable cameras which contained pictures of Calvin McMillan with the gun and money lying on a bed as well as pictures of McMillan glaring into the camera, pointing the gun directly at it and making some kind of sign with his hand. Additionally, the photographs, among other things, showed the red striped shirt in a closet behind McMillan.

The same day that the truck was located on August 30, 2009, Calvin McMillan was arrested. After being confronted with the presence of his fingerprints in and around the truck during interrogation by Investigators Evans and Pelham at the Millbrook Police Department, McMillan stated that an individual named Melvin Browning had let him ride in the truck and was going to take him to Hardaway with all of his

worldly possessions. He further stated that Browning had run off with all of his possessions and that he had intended to report that theft to the authorities. Melvin Eugene Browning was later located by investigators and testified and proved that he was in the Lee County Jail from August 28, 2007 through August 31, 2007.

Procedural History

As stated earlier, McMillan was indicted by an Elmore County Grand Jury in July 2008 for two counts of capital murder. The first count was the intentional murder of James Bryan Martin during the course of a robbery 1st degree in violation of Section 13A-5-40(a)(2). The second count was the intentional murder of James Bryan Martin while James Bryan Martin was inside a vehicle in violation of Section 13A-5-40(a)(17).

The guilt phase of this case began on June 23, 2009 after jury selection on June 22 and continued through June 26 when, after deliberating for approximately an hour and twenty minutes, the jury returned verdicts finding McMillan guilty on both counts of capital murder.

The State's case consisted of the evidence as outlined above as well as other evidence. The Defense called only one witness, Private Investigator Shannon Fontaine, who testified that there is a good supply of High Point 9 mm pistols in the Montgomery area available for purchase and similar to the one that was used to commit the murder in this case.

The penalty phase portion of this case was presented to the same jury on June 29 and 30.

The State presented evidence of the defendant's assault 3rd degree conviction out of Dallas County

from December 20, 2006 and further presented testimony from James Bryan Martin's father and wife.

Thereafter, McMillan presented his penalty phase evidence consisting of testimony from his sister, his aunt, a social worker and his natural father. Additionally, the Defense called two expert type witnesses who testified regarding McMillan's background from a review of the Department of Human Resources' records, the forensic evaluation performed by Dr. Karl Kirkland pursuant to this Court's order for a mental evaluation, and interviews with McMillan's family. These witnesses testified regarding McMillan's poor and abusive upbringing and his history. After approximately three hours of deliberation on June 30, 2009, the jury recommended a sentence of life imprisonment without the possibility of parole by an eight to four vote.

A final sentencing hearing was held on August 7, 2009 wherein additional witnesses testified on behalf of the State and Defense.

Finally, this Court notes that Mr. Kenny James and Mr. Bill Lewis ably represented McMillan. McMillan's attorneys were well prepared, diligent, and performed admirably in their defense of McMillan. Based on the overwhelming evidence against McMillan in this case and the eventual outcome, this Court finds that McMillan's attorneys provided effective assistance throughout these entire proceedings.

Aggravating and Mitigating Circumstances

I. Aggravating Circumstances

The State raised and this Court has considered only one statutory aggravating circumstance during the penalty phase of this case; that being that the capital

offense was committed while the defendant was engaged in the commission of a robbery under Section 13A-5-49(4). Since this aggravator is identical to the capital murder conviction returned by the jury under count I, this Court treated it as "self-proved", meaning that the jury did not have to find that the State proved its existence beyond a reasonable doubt for a second time during the penalty phase.

Of all the aggravating and mitigating circumstances in this case, this Court places the most weight on the fact that McMillan intentionally killed James Bryan Martin while in the course of robbing him of his truck. Not only is the intentional murder of a human being in order to take their property from them morally and legally reprehensible, but also the commission of such an offense is so reprehensible that it is "double counted" under our law as a reason to make a murder capital and weigh as an aggravating circumstance in favor of the death penalty.

The facts in this case clearly establish that McMillan set out not only to take another person's vehicle but also to take their life as well. He calmly and coldly observed unsuspecting citizens while deciding which vehicle he wanted to take. James Bryan Martin just happened to be in the wrong place at the wrong time while running an errand for his family and having a nice truck.

Not only did McMillan intentionally murder James Bryan Martin in the parking lot of the Millbrook Wal-Mart and drive away in his truck, but he also later signed his name to ownership documents attempting to convert the ownership of the truck to himself. McMillan even ate James Bryan Martin's Reese's

candy and put James Bryan Martin's rented DVD with his own belongings.

Facts such as or very similar to these have supported the application of the death penalty many, many times. As a result, this Court weighs the fact that McMillan killed James Bryan Martin while robbing him of his truck and McMillan's actions leading up to and following the murder as weighing most heavily in favor of imposing the death penalty.

II. The Remaining Statutory Aggravators

As required by Section 13A-5-47(d), this Court must state the absence of the remaining statutory aggravating circumstances. This Court finds that the following aggravating circumstances do not exist and were not alleged by the State: 1) the capital offense was not committed by a person under sentence of imprisonment; 2) McMillan had not been previously convicted of another capital offense or a felony involving the use or threat of violence to the person; 3) McMillan did not knowingly create a great risk of death to many persons; 4) the capital offense was not committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody; 5) the capital offense was not committed for pecuniary gain; 6) the capital offense was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the law; 7) the capital offense was not especially heinous, atrocious, or cruel compared to other capital offenses; 8) the defendant did not intentionally cause the death of two or more persons by one act or pursuant to one scheme or one course of conduct; and 9) the capital offense was not one of a series of intentional killings committed by the defendant Since these aggravating

circumstances were neither alleged nor proven, this Court assigns no weight to these factors.

The Mitigating Circumstances

As required by Section 13A-5-47(d), the Court must also consider and discuss each of the statutory mitigating circumstances, as well as the non-statutory mitigating circumstances alleged by McMillan. Because this case also involves a jury recommendation of life without parole, the Court must also discuss in detail its reason for overriding this mitigating factor.

I. Statutory Mitigating Circumstances

This Court finds the existence of two statutory mitigators. Those are that the defendant had no significant history of prior criminal activity and the age of the defendant at the time of the crime.

During the trial of this case the jury was informed that the defendant had been convicted of assault 3rd degree in December of 2006. The law of this state generally requires that misdemeanor convictions may not be considered for the purposes of negating this mitigator. However, the misdemeanor offense of assault 3rd degree can be used to negate the mitigating circumstance of "no significant history of prior criminal activity" because it is a crime of violence. *Stallworth v State*, 868 So.2d 1128 (Ala. Crim. App. 2001).

Accordingly, even though McMillan has no prior felony convictions, the Court finds that this statutory mitigator is significantly diminished by his assault 3rd degree conviction.

Additionally, the Court may use a defendant's juvenile record to diminish the weight to be accorded

the mitigating circumstance of that defendant's lack of significant history of prior criminal activity as well as the mitigating circumstance of that defendant's age at the time he committed the capital offense. *Ex parte Carroll*, 852 So.2d 833 (Ala. 2002). As stated elsewhere in this order, McMillan has a significant juvenile record consisting of adjudications of guilt in two cases of domestic violence 3rd degree, one case of assault 3rd degree, one case of menacing, one case of reckless endangerment, one case of theft 3rd degree and one case of burglary 3rd degree.

With regard to the statutory mitigator dealing with the age of the defendant at the time of the crime, the evidence has established that McMillan was 18 years of age at the time that he murdered James Bryan Martin. Therefore, this Court finds that this statutory mitigator does exist. However, based upon his juvenile record and other factors this Court assigns little weight to this factor.

Not only did McMillan have a juvenile record of violence, but he also possessed the pistol that the used to kill James Bryan Martin as well as ammunition for other weapons. McMillan also had been emancipated prior to committing this crime, had an adult conviction for assault 3rd degree and had obtained a job.

II. Remaining Statutory Mitigating Circumstances

In accordance with Section 13A-5-47(d), this Court must state that it finds that the remaining statutory mitigators do not exist in this case. Accordingly, based upon the evidence presented in this case, the Court finds that there is no evidence that the defendant was under the influence of extreme mental or emotional disturbance at the time that this capital offense was

committed. To the contrary, it is clear that the defendant did have the ability to distinguish between right and wrong and was able to control his actions. The victim in this case, James Bryan Martin, was not a participant in the defendant's conduct nor did he consent to it in any way. McMillan was not an accomplice in this capital offense as he committed it His participation was not relatively minor as he planned and carried out this murder robbery. There is no evidence that McMillan acted under extreme duress or under the substantial domination of another person. Further, McMillan clearly had the capacity to appreciate the criminality of his conduct and his ability to conform his conduct to the requirements of the law was not substantially impaired. Testimony provided from previous written reports of Dr. Karl Kirkland and Dr. Majure establish that McMillan does in fact know the difference between right and wrong and that he was aware of and in control of his behavior.

Non-Statutory Mitigating Circumstances

Under Section 13A-5-47(d), this Court must also consider each of the non-statutory mitigating circumstances argued by McMillan. In accordance with Section 13A-5-52, this Court recognizes that a non-statutory mitigating circumstance can include evidence concerning the defendant's character, life, or record; the facts of the crime; mercy for the defendant and any other relevant information for sentencing purposes.

This Court has considered al] of the non-statutory mitigating evidence presented by McMillan. *As* outlined below, McMillan submitted testimony and argument to the jury on the following non-statutory mitigating circumstances: that he was raised in

extreme poverty; that he was abandoned by his mother; that he was physically abused as a child; that he was raped as a child; that he was a witness to his mother's and sister's abuse; that he was raised in the home of an alcoholic/drug addict; that he did not get the treatment he needed; that he had no positive male role models; that he suffered from psychological and emotional difficulties; and that his intellectual functioning was in the borderline range.

As stated earlier, the Defense called a number of witnesses who testified during the penalty phase of this trial. McMillan's sister, Ella Torrance, testified that she, her sister and McMillan were basically left to fend for themselves by their alcoholic and drug addicted mother. Although Ms. Torrance and her sister were born while their mother lived in New York and abandoned them there, McMillan was not born until after they arrived in the Montgomery and Macon County area. They lived with her mother's abusive boyfriend and it was claimed that he physically bused the children as well as their mother by beating them and threatening to shoot them with a pistol. The mobile home that they resided in often did not have electricity nor did it have running water. Further, there was very little food available for the children to eat while they were growing up.

Ms. Torrance also reported that McMillan had been sexually abused by the son of their mother's boyfriend. It is noted however, that this report of sexual abuse is not documented in any record until McMillan reported it to Dr. Karl Kirkland during Dr. Kirkland's mental evaluation for the purposes of determining whether this case should proceed to trial.

McMillan's aunt, Carol Weaver Christian, testified to facts similar to those as testified by McMillan's sister, Ella Torrance. Ms. Christian took temporary custody of these three children and attempted to raise them with her four children. However, the children had to go back into the custody of the Department of Human Resources, as Ms. Christian was unable to care for all of them. Since the trial, this Court has learned, based upon its review of McMillan's juvenile records, that his aunt also requested to be relieved of her temporary custody agreement because she could not govern McMillan's negative behavior

Mr. Teal Dick, a licensed professional counselor and director of the Alabama Family Resource Center, testified as well based upon his review of the records of the Department of Human Resources and his interviews with McMillan and some of McMillan's family members. Mr. Dick's testimony revealed that McMillan and his family's contact with the Department of Human Resources began in 1995. These records confirmed many of the same reports as testified to by McMillan's sister with regard to the living conditions and threats and abuse suffered by McMillan, his sisters and his mother.

By the time that McMillan was committed to foster care by the Department of Human Resources he was already aggressive and angry. Within a six-year period. McMillan was in and out of twenty-five different homes and placements. At one point, one of his foster parents even tried to get him involved in YMCA basketball but he refused to do so.

Emma Cosby, also known as Emma Peoples, a social worker who had contact with McMillan through her work with SAFY, a therapeutic foster care

organization, testified on McMillan's behalf as well. She stated that it was her opinion that "the system" had failed McMillan while he was growing up. However, in 2001 she tried to take steps to control his rebellious and aggressive behavior but was unsuccessful. She reported that McMillan had threatened she and a foster parent with what she later found out was an electric toothbrush. After seeking the intervention of law enforcement, in April 2001, McMillan further threatened Ms. Cosby by telling her that she would find her new born baby's head lying in a pool of blood when she got home. As a result of this behavior, McMillan was placed in the HIT program, which is a detention type setting. McMillan was enrolled in special education classes while in school due to his tendency to threaten others and he was in fact removed from the Safety Net Residential Program after he assaulted another student.

Eddie Tucker, McMillan's biological father testified during the penalty phase as well. He established that he had very little contact with McMillan but would have been willing to take him in and raise him in his home if he had had the opportunity.

Dr. Kimberly Ackerson also testified on behalf of the Defense. Dr. Ackerson is a forensic psychologist with a private practice in Birmingham, Alabama. Dr. Ackerson reviewed the DHR records, met with the defendant and spoke with his aunt and sister. Dr. Ackerson did not do any testing of McMillan although she did review the report that was generated by Dr. Karl Kirkland who did. Dr. Kirkland, in his evaluation prepared for this Court, conducted a number of tests in arriving at his diagnostic impressions and an IQ score of 76 for McMillan.

Dr. Ackerson's testimony was basically a recap of the testimony of the other witnesses. She did, however, testify from the records that it had been determined by other professionals that McMillan knew the difference between right and wrong and that in 2001 Dr. Majure had reported that there was no evidence that McMillan was suffering from psychosis and that McMillan was aware of and in control of his behavior. She further acknowledged that her review of the records revealed that McMillan's alleged sexual abuse was first reported to Dr. Kirkland by McMillan at the time of his interview.

With regard to the Defense's claim of borderline intellectual functioning the Court notes that Dr. Kirkland's report established that McMillan has an IQ of 76. McMillan is not mildly retarded, but functions in the classification range immediately above the mild mental retardation as well as in the range of low average intellectual functioning. Dr. Kirkland, in his report, further stated that while McMillan functions on a fourth grade reading level, his intellectual functioning and social adaptive functioning were on a high borderline to low average intellectual level.

In reviewing and considering the non-statutory mitigating circumstances, as a whole, this Court assigns very little weight to them.

McMillan's sister, Ella Torrance, was raised in the same home and under the same conditions as he was. She graduated from school, owns her own car, has a good job, supports herself and has not been involved in any criminal conduct.

Jury's Recommendation

Finally, under *Ex parte Carroll*, 852 So.2d 833 (Ala. 2002), this Court addresses the mitigating factor of the jury's recommendation of a life sentence without the possibility of parole. In *Carroll,* the Supreme Court outlined the factors for judging the propriety of a jury's recommendation of life imprisonment without the possibility of parole:

> "the weight to be given that mitigating circumstance should depend upon the number of jurors recommending a sentence of life imprisonment without parole, and also upon the strength of the factual basis for such a recommendation in the form of information known to the jury, such as conflicting evidence concerning the identity of a "trigger man" or a recommendation of leniency by the victim's family; the jury's recommendation may be overridden based upon information known only to the trial court and not to the jury, when such information can properly be used to undermine a mitigating circumstance."

Additionally, the Supreme Court in *Carroll* took notice of "the circumstances of the crime (particularly that the defendant made no attempt to kill the witnesses to the crime). Using these factors, this Court distinguishes this case and *Carroll* and will explain its decision for overriding the jury's recommendation.

Distinguishing *Ex Parte Carroll*

Carroll and *Martin* and the cases decided after them, mandate this Court to address its reasons for

overriding the jury's advisory sentencing recommendation. Using the factors outlined in *Carroll,* the following distinctions are made:

A) Number of Jurors Recommending Life:

In *Carroll,* ten jurors recommended life without parole. Here, eight jurors made such a recommendation, one number greater than the statutory minimum to allow a life without parole recommendation.

Just as this Court is unable to read the minds of any witnesses or parties, likewise it is unable to read the minds of the jury. However, the Court had an opportunity to work with and observe these jurors for almost a week and a half.

Based on the overwhelming evidence in this case and the unanimous verdicts on both counts of capital murder, it is not easy to determine why eight members of the jury voted against the death penalty in this case. It is highly possible that fewer than eight jurors initially voted for life without parole and that the number of those jurors voting for life without parole only increased as they grew tired of the process and dealt with the weight that a death recommendation would have on each of them.

In the end, this Court is unable to specifically say why the jury was unable to follow the law to make a recommendation of death in this case. The only fact that is known, is that two more jurors ultimately voted for the death penalty in this case than in *Carroll*. The Court finds that that weighs in favor of an override of the jury's recommendation in this case; at least in comparison to *Carroll*.

B) Conflicting Evidence of the "Trigger Man":

While the facts in *Carroll* may have left some doubt as to the identity of the of the "trigger mann, all of the evidence in this case points to McMillan as the perpetrator. As outlined in great detail earlier in this order, the State's evidence established beyond all reasonable doubt that McMillan intentionally murdered fames Bryan Martin while robbing him of his truck The jury unanimously returned a verdict in approximately an hour and twenty minutes finding that McMillan killed James Bryan Martin. If there was any residual doubt as to any other person's involvement in these murders, as there apparently was in *Carroll,* it is not founded upon the evidence presented at trial or in the jury's guilt phase verdicts. Accordingly, in comparison to *Carroll,* judicial override is proper in this case.

C) Recommendation of Victim's Family:

In *Carroll,* the victim's family recommended Carroll not receive the death penalty. No person from the Martin family has made any such recommendation in this case. In fact, members of James Bryan Martin's family were properly precluded from giving any testimony with regard to their recommendation of McMillan's sentence in one way or another. Accordingly, in comparison to *Carroll*, judicial override is proper in this case.

D) Facts of the Crime/Not Killing the Witnesses:

Although in *Carroll*, the defendant did not kill all the witnesses and the Supreme Court found that that factor weighed in favor of a life without parole sentence that is not the case here. The main witness to McMillan's robbery was James Bryan Martin and McMillan killed him so he could escape in Martin's

truck. The surrounding circumstances of this crime did not afford McMillan with an opportunity to kill or not kill other potential witnesses. Accordingly, in comparison to *Carroll*, judicial override is proper in this case.

E) Additional Facts Unknown to the Jury:

Finally, *Carroll* also allows this Court to consider information known only to the trial court and not to the jury, when such information can properly be used to undermine a mitigating circumstance. This Court places substantial weight on this factor in this case.

This Court has had the benefit of working on this case since shortly after the Grand Jury returned the indictment. It has held numerous evidentiary hearings in preparation for the trial of this case. This Court has had an opportunity to observe McMillan's demeanor and conduct throughout these proceedings. He has shown no emotion nor has he indicated any remorse whatsoever.

In the course of preparing the mental evaluation Dr. Karl Kirkland interviewed McMillan. McMillan concocted a story about a "drug deal gone bad" when relating the facts of this case to Dr. Kirkland. Obviously, the evidence presented in this case including the video evidence in no way support such a story.

During the penalty phase of this case the jury was informed that McMillan had been convicted of assault 3rd degree on December 20, 2006 in Dallas County. The jury was not told that the facts supporting this crime to which McMillan pled guilty, established that McMillan was chasing another student at the Safety Net Program, caught up with him and pushed him to

the ground injuring his knee because the other student had told on McMillan for choking him.

Additionally, McMillan has a substantial juvenile record dating back to the age of 12. During the almost six years between December 8, 2000 and November 1, 2006 McMillan was adjudicated guilty in two cases of domestic violence 3rd degree, one case of assault 3rd degree, one case of menacing, one case of reckless endangerment, one case of theft 3rd degree and one case of burglary 3rd degree. Of these seven offenses, only two of them are non-violent offenses.

McMillan's domestic violence adjudications both involved altercations that he had with one of his foster parents, Wilhemenia Boykin. On two occasions he hit her in the head and shoulder and in another he threatened to kill her. Twenty-nine months later he was adjudicated guilty of reckless endangerment, menacing and assault 3rd degree arising out of him shooting a "BB" gun at students at Loachapoka High School, shooting at one young man specifically and shooting a young lady in the thigh.

McMillan has been incarcerated in the Elmore County Jail since his arrest in this case. During this time he has assaulted at least two different inmates. One of those has been assaulted with a bar of soap inside a sock and a second one was cut on his right eye, shoulder and hand using a jail made "shank." During the trial of this case and on July 8, 2009, jail made handcuff keys were found in McMillan's constructive possession. Additionally, a few weeks before trial the lock on McMillan's cell door was found bent so that the door would not close and lock correctly.

In addition to these facts, shortly after McMillan and his co-defendant Rondarrell Williams were

arrested, McMillan sent a letter to Williams telling him to lie about what happened. In September 2008 McMillan threatened Williams' life and the life of his family if Williams testified against him in this case.

Since none of the factors listed by the Alabama Supreme Court in Carroll "tips the scales in favor of following the jury's recommendation" this Court finds no legal prohibition for overriding the jury's recommendation.

These facts significantly diminish the statutory and non-statutory mitigating circumstances that have been presented in this case.

Justification For Override

Under Alabama Law the trial judges are required to make the ultimate determination with regard to sentencing. In *Harris v. Alabama*, 513 US 504 (1995), the Supreme Court of the United States held:

> "the Constitution permits a trial judge, acting alone, to impose a capital sentence. It is thus notoffended when a state further requires a sentencing judge to consider a jury's recommendation and trust a judge to give it the proper weight."

This responsibility of making this decision has been placed upon the trial judge's of this state in general and this Court in particular by the legislature through the Alabama Criminal Code.

This Court has had the opportunity to try and impose the sentence in a number of capital murder cases over the last twenty-two years and eight months. In some of these cases, this Court has imposed death.

In others, it has imposed a sentence of life without parole. In each of these cases this Court has followed the recommendation of the jury. In this case however, the Court finds that a proper weighing of the aggravating circumstance and mitigating circumstances does not support a sentence of life without parole.

The Court is aware of many cases in Alabama over the years where the death penalty has been upheld as the appropriate punishment for the capital offense of an intentional murder during the course of committing a robbery 1st degree. In fact, this Court has been affirmed most recently on direct appeal of Charlie *Washington v. State of Alabama*, 922 So.2d 145(Ala. Crim. App. 2005) cert denied June 16, 2005 Ala. S. Ct, cert denied, *Washington v. Alabama*, 546 US 1142 (2006) in it's imposition of a death sentence after Washington was convicted of an intentional murder during a robbery 1st degree. Additionally, the Court of Criminal Appeals in *Bush v. State*, 2009 WL 1496826 (Ala. Crim. App. 2009) again affirmed the trial court in ruling on a Rule 32 appeal when the trial court sentenced the defendant to death after having received a life without parole recommendation from the jury with a twelve to nothing vote. Further, in *Ferguson v. State*, 2008 WL 902901 (Ala. Crim. App. 2008) the trial court was again affirmed on a review of a Rule 32 appeal on a robbery murder when the trial judge sentenced the defendant to death after receiving a jury recommendation oflife without parole by a vote of eleven to one.

No juror is in a position to compare this case with other capital cases as they do not have the resources and benefit of the decisions from the appellate courts nor the personal experience received by trying and

deciding these types of cases. When this Court compares the facts of this case to similar cases there is little question that "when compared to other cases with similar facts, a sentence of death is not in any way a disproportionate sentence".

Conclusion

This Court has sworn an oath to uphold the law of this state, and this is a duty that it does not take lightly. This Court will continue, to best of its ability, follow the law of this state and of this country.

The law as it applies to this case requires the Court to weigh the aggravating circumstance against the mitigating circumstances, which includes the jury's recommended sentence of life without parole.

This Court has fulfilled that duty and has considered each of McMillan's mitigating factors as set forth above and all the evidence presented by McMillan at trial, during the penalty phase of this case and at the final sentencing hearing. This Court has also given great consideration to the jury's recommendation and considers it to be the heaviest mitigator in this case. After taking all of these factors into consideration this Court cannot find that the mitigating circumstances outweigh the aggravating circumstance of the intentional killing of an innocent victim while in the course of robbing him for his truck. Facts similar to these have led to a sentence of death in many cases. Accordingly, this Court finds that the sentence in this case should be death.

It is therefore ORDERED, ADJUDGED and DECREED that the defendant, Calvin McMillan, is adjudged guilty of one count of capital murder pursuant to Section 13A-5-40(a)(2) of the intentional

murder of James Bryan Martin during the course of a robbery 1st degree and the defendant, Calvin McMillan is further adjudged guilty of one count of capital murder under Section 13A-5-40(a)(17) capital offense of the intentional murder of James Bryan Martin while James Bryan Martin was inside a vehicle.

It is further ORDERED, ADJUDGED and DECREED that pursuant to Section 15-18-68 Code of Alabama, 1975, as amended in Act #2009-632, the Defendant shall pay restitution in the amount of $100,000.00.

It is further ORDERED, ADJUDGED and DECREED that for the capital offenses for which e has been adjudicated guilty, the defendant, Calvin McMillan, is hereby sentenced to death by lethal injection. Pursuant to Alabama Rules of Appellate Procedure 8(b)(1), the date of execution is to be set by the Alabama Supreme Court. at the appropriate time. The Defendant is to be remanded to the custody of the Alabama Department of Corrections to await execution of his sentence.

DONE and ORDERED this 7th day of August 2009.

s/ John B. Bush
JOHN B. BUSH
Circuit Judge