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PROCEEDINGS BEFORE
**THE SUPREME COURT
OF THE
UNITED STATES**

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CASE NO: No. 93-7659
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IN THE SUPREME COURT OF THE UNITED STATES

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LOUISE HARRIS, :

Petitioner :

v. : No. 93-7659

ALABAMA :

- - - - -X

Washington, D.C.

Monday, December 5, 1994

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:02 a.m.

APPEARANCES:

RUTH FRIEDMAN, ESQ., Atlanta, Georgia; on behalf of the
Petitioner.

P. DAVID BJURBERG, ESQ., Assistant Attorney General of
Alabama, Montgomery, Alabama; on behalf of the
Respondent.

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1 P R O C E E D I N G S

2 (11:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 93-7659, Louise Harris v. Alabama.

5 Ms. Friedman, you may proceed.

6 ORAL ARGUMENT OF RUTH FRIEDMAN

7 ON BEHALF OF THE PETITIONER

8 MS. FRIEDMAN: Mr. Chief Justice Rehnquist, and
9 may it please the Court:

10 Alabama's capital sentencing scheme provides for
11 two decision-makers to determine sentence, a jury and a
12 judge. The legislature and the courts of Alabama have
13 always said that the jury has a sentencing role to play.
14 The Alabama code addresses both jury and judge with
15 provisions on how to determine sentence.

16 The legislature intended that "juries play a
17 major role in capital cases in Alabama" as the Alabama
18 supreme court noted in its landmark decision in Beck v.
19 State. The court confirmed in Ex Parte Williams that that
20 role cannot count for nothing in Alabama's system, where
21 the judge is the ultimate sentencing authority, following
22 the jury's completion of its significant part.

23 In Johnson v. State, the Court of Criminal
24 Appeals said that an Alabama capital jury must be death
25 qualified precisely because it plays a "key role in the

1 sentencing process," and despite the State's suggestion to
2 the contrary in its brief, a trial court's rejection of a
3 jury's advisory verdict is always understood and referred
4 to in the case law as an override of that verdict.

5 QUESTION: Well, that certainly isn't
6 technically correct, is it? I mean, because no one
7 claimed the jury has final authority in the event the
8 judge didn't act.

9 MS. FRIEDMAN: That's correct, the jury does not
10 have final authority --

11 QUESTION: So it's not like Florida.

12 MS. FRIEDMAN: It is like Florida. The Alabama
13 supreme court has said consistently, actually, that
14 Alabama is virtually identical to Florida in that it is a
15 dual sentencing State. It does not have -- the jury does
16 not have final sentencing authority, but it is a
17 constituent sentencer, as this Court has recognized in
18 Espinosa that in Florida the jury is a constituent
19 sentencer and Alabama has said that our system is
20 virtually identical to that.

21 And the Alabama courts have said repeatedly that
22 the jury verdict and the capital sentencing jury has a
23 very significant role to play, and that can be discerned
24 from both the statutory provisions and the case law in
25 Alabama.

1 The statutory provisions are addressed in 13A-
2 5-46, for example, to the capital sentencing jury, on how
3 it is to determine sentence, and that includes the
4 weighing and consideration of aggravation in mitigation,
5 the returning of a verdict only under certain
6 circumstances -- that is, when seven, at least 7 jurors
7 vote that death is -- life is the appropriate punishment,
8 or 10 that death is the appropriate punishment, and if
9 those numbers aren't reached, a new panel must be
10 empaneled because that verdict would not have been reached
11 by the first sentencer.

12 The State's attempt in this case to transform
13 the life without parole recommendation of this constituent
14 sentencer into a fact in mitigation is inconsistent, thus,
15 with the history and the logic of Alabama's capital
16 sentencing scheme.

17 QUESTION: On the facts of this case, can you
18 tell me, for the four defendants were there four different
19 juries?

20 MS. FRIEDMAN: That's correct. Well, actually,
21 one of the defendants, the codefendant in this case,
22 pleaded guilty in exchange for his testimony.

23 QUESTION: All right. In the jury -- was it
24 Sockwell --

25 MS. FRIEDMAN: Sockwell.

1 QUESTION: -- was the trigger man? That jury
2 also recommended life?

3 MS. FRIEDMAN: That's correct.

4 QUESTION: What was the division there, was it 7
5 to 5 as well?

6 MS. FRIEDMAN: Yes, it was.

7 QUESTION: But a different jury than Harris'
8 jury?

9 MS. FRIEDMAN: That's correct.

10 QUESTION: Thank you.

11 MS. FRIEDMAN: That's correct, and it's
12 impossible to tell, based on what this judge did, why this
13 jury was rejected, the jury's verdict was rejected in
14 Mrs. Harris' case. No explanation was given in
15 Mrs. Harris' case of why the jury's life without parole
16 verdict was not --

17 QUESTION: I take it that's consistent with
18 Alabama law. The Alabama courts have never required an
19 explanation from the judge as to why he rejected the
20 jury's verdict.

21 MS. FRIEDMAN: And that's -- that's exactly
22 right, and that's why Mrs. Harris is here today, because
23 what Alabama law has done is, in essence, created a dual
24 sentencing system, but done nothing to regulate the
25 relationship between the sentencers.

1 QUESTION: Well, you call it a dual sentencing
2 system, but the statute says, while the jury's
3 recommendation concerning sentence shall be given
4 consideration, it is not binding upon the court. Here,
5 the trial judge recited that he had considered the jury's
6 recommendation. Surely the statute doesn't require any
7 more.

8 MS. FRIEDMAN: The statute does not require any
9 more, Chief Justice Rehnquist.

10 QUESTION: What's your authority for thinking
11 the Constitution requires any more?

12 MS. FRIEDMAN: Because this Court's
13 jurisprudence under the Eighth Amendment has always said
14 that procedures by which a death penalty is imposed must
15 be reliable.

16 In Godfrey v. Georgia, for example, this Court
17 said that a State must tailor and apply its law in a
18 manner that avoids arbitrariness.

19 QUESTION: If a jury were out of this picture
20 entirely and you just had a judge with the standards that
21 the judge has given, there would be no constitutional
22 infirmity.

23 MS. FRIEDMAN: That's correct, Justice Ginsburg.
24 In Alabama, it is pretty consistent with Federal law to
25 withdraw the jury from this process. It's also pretty

1 consistent with Federal law to withdraw the judge from
2 this process. What it cannot do is have two sentencers,
3 both of whom are governed by the Eighth Amendment, and
4 have no connection whatsoever between them.

5 QUESTION: Well, isn't --

6 QUESTION: What is the constitutional
7 requirement? You have said that the particular standard
8 that Florida uses that's been called the Tedder standard,
9 that that's not constitutionally required, but I don't
10 think you identified what is the constitutional minimum.

11 MS. FRIEDMAN: That's right. The Tedder
12 standard is not itself constitutionally required, but this
13 Court has recognized it is constitutionally acceptable.

14 There are a number of valid standards that
15 Alabama could apply.

16 QUESTION: What's the least?

17 MS. FRIEDMAN: The least standard might be that
18 the jury's verdict is rejected if there's some reasonable
19 basis for rejecting that, or if no reasonable person could
20 differ that life was not the appropriate punishment, or
21 another minimal basis could be that the jury's verdict was
22 itself considered a mitigating factor, as some of the
23 courts have done in Alabama, because they literally do not
24 know how to factor this jury verdict into the sentencing
25 consideration.

1 QUESTION: Why -- what about just disagreeing
2 with the jury? I mean, I could understand the need for a
3 reasoned rejection of the jury verdict if the jury verdict
4 itself were a reasoned verdict. Was it? Did the jury
5 give reasons why it thought that the death sentence should
6 not be imposed?

7 MS. FRIEDMAN: The jury is not required under
8 Alabama law to specify aggravation in mitigation, though
9 there is no reason in this case --

10 QUESTION: So it just comes in and says, we
11 recommend life? What could the judge possibly say to
12 explain his disagreement except to say, I disagree? Not
13 knowing the reasons the jury said that, how can you
14 explain the reason for your rejecting? His reason is, I
15 see it differently.

16 MS. FRIEDMAN: Justice Scalia, I disagree would
17 be, I weigh the aggravation differently against the
18 mitigation to come up with a different -- a different
19 response. Alabama law requires something else.

20 QUESTION: Doesn't he say that implicitly simply
21 by saying, in my view the death penalty is the right one?

22 MS. FRIEDMAN: But Alabama law requires the
23 judge to do something else. It's not just enough to say,
24 aggravation outweighs mitigation, because the statute
25 requires something else. The statute requires that

1 somehow that jury verdict be factored into the calculus,
2 be factored into the process.

3 QUESTION: No, it doesn't require -- it requires
4 that he consider it.

5 MS. FRIEDMAN: And our contention is --

6 QUESTION: And he did. Did he consider it?

7 MS. FRIEDMAN: He -- this trial judge did say
8 that he considered the verdict.

9 QUESTION: And he disagreed with it, evidently.

10 MS. FRIEDMAN: He clearly must have disagreed
11 with it.

12 QUESTION: What more could be possibly have
13 said --

14 MS. FRIEDMAN: Because --

15 QUESTION: -- to show why he disagreed with it,
16 since he didn't know the basis on which it was -- itself
17 was made?

18 MS. FRIEDMAN: He said nothing about what may
19 have been improper about this verdict, and when there are
20 two sentencers, which Alabama has created, I consider it
21 simply not constitutionally sufficient.

22 If this Court -- if a trial judge had said with
23 regard to aggravation and mitigation, I did what I was
24 supposed to do, but didn't say what that was, that
25 wouldn't be sufficient, and this Court has recognized in

1 other contexts that simply saying, I did something, such
2 as, I found this case to be heinous, atrocious, and cruel,
3 is not enough when that doesn't provide sufficient
4 guidance to the sentencer to make a sentencing decision,
5 and that's what we have here.

6 QUESTION: Ms. Friedman --

7 QUESTION: But the role that the jury has here
8 seems to be a familiar one, and this is not unknown. It
9 is like the advisory jury in equity. If you look at
10 Federal Rule 39(c), you'll see an advisory jury, that it's
11 not binding on the judge, that he will consider or she
12 will consider for the value he or she thinks it has, so
13 why isn't -- and that's certainly compatible with the
14 Constitution. Why should this be regarded differently?

15 MS. FRIEDMAN: Because the Eighth Amendment
16 requires some guided discretion of the sentencer, and here
17 we have -- a second sentencer has to evaluate the judgment
18 of the first sentencer and has absolutely no idea how to
19 take that into consideration, which allows for
20 arbitrariness, and that's evidenced by --

21 QUESTION: No more arbitrary than if the judge
22 were alone during the sentence.

23 MS. FRIEDMAN: And if the judge were alone
24 during the sentence, Justice Ginsburg, we wouldn't have an
25 issue here. There would not be a problem of a

1 disconnection when there is a disagreement between the
2 sentencers, and Alabama is free to set up that system if
3 it wishes.

4 This Court said in Johnson v. Mississippi that
5 there is no perfect procedure by which a State can set up
6 its capital sentencing scheme, but it cannot set up a
7 scheme that's premised in any way on caprice, and that's
8 what we have here, because two sentencers are required.

9 The jury verdict -- the jury in this case is
10 very much like a penalty phase jury in other States where
11 there is no additional sentencer, where the judge is not
12 involved. It is death-qualified, it's got to be properly
13 instructed, it has to hear only admissible evidence and
14 then return a verdict only under certain circumstances,
15 and as I said, the code provision is addressed to the
16 jury.

17 QUESTION: Is your client somehow worse off
18 because a jury made a recommendation of life?

19 MS. FRIEDMAN: She's worse off under the scheme
20 that -- yes, that Alabama has created.

21 QUESTION: I.e., worse off than if there had
22 been no jury at all?

23 MS. FRIEDMAN: But we cannot look, Justice
24 Kennedy, at the scheme as if there is no jury.

25 QUESTION: Well, if we look at just that,

1 because Justice Ginsburg was asking you what if there were
2 just a judge sitting, and so my question is, is your
3 client really worse off than if there were no jury at all?
4 Here's a jury who tells a judge, 7 to 5, we think it
5 should be life. How is she worse off than if there'd been
6 no jury at all?

7 MS. FRIEDMAN: I think she would not be worse
8 off if we just had a jury involved in sentencing in
9 Alabama or if we just had --

10 QUESTION: No, that's not my question.

11 MS. FRIEDMAN: I'm sorry.

12 QUESTION: My question is, why is she worse off
13 under the present system?

14 MS. FRIEDMAN: Because she was sentenced to
15 death under a process that was unreliable. Alabama law
16 requires that that jury be involved in the sentencing
17 process.

18 QUESTION: Why is it less reliable if a judge
19 has an opinion to take into account?

20 MS. FRIEDMAN: Because -- precisely because the
21 advisory verdict of an Alabama jury is not simply an
22 opinion. An Alabama law has never treated it as simply an
23 opinion, but it has treated it as --

24 QUESTION: I assume that that's what you're
25 complaining about. Let's say it was just an opinion. Is

1 your client any worse off?

2 MS. FRIEDMAN: If it was just an opinion, no.
3 If it was just a --

4 QUESTION: Well then, how is she any worse off
5 under this procedure, where it's even more than an
6 opinion? It seems to me that that's even more protection
7 for her.

8 MS. FRIEDMAN: Because it's more of an opinion,
9 Justice Kennedy -- because it's more than an opinion. It
10 is the advisory verdict of a sentencer, and you asked in
11 this case, is she worse off?

12 We have no idea why the judge rejected the
13 advisory verdict of life without parole in this case, on
14 which there was considerable basis for returning that
15 verdict.

16 This jury heard evidence that Mrs. Harris was a
17 mother of seven, that she worked three jobs while she was
18 raising her family, that she had no prior criminal history
19 whatsoever, and that this -- the killing in this case
20 occurred after a history of domestic strife between
21 husband and wife, including incidents in which her husband
22 had hit Mrs. Harris in the head, threatened her with a
23 gun, and where there had been a separation and an
24 application for divorce.

25 Under those circumstances, the jury was required

1 under Alabama law to return a considered verdict, an
2 advisory verdict of what the appropriate punishment was,
3 and Alabama law requires, the statute requires that the
4 judge do more here than simply consider aggravation and
5 mitigation, and this Court has recognized in cases such as
6 Espinosa v. Florida, or Gardner v. Florida, that when the
7 Alabama -- excuse me, when a trial judge must do more than
8 simply consider aggravation and mitigation, there is
9 another issue that this Court must take into account which
10 can lead to an arbitrary sentence of death, which is what
11 happened in this case, which is why she is worse off.

12 When one looks at the sentencing orders returned
13 in the cases in Alabama, it is impossible to have any kind
14 of consistent formulation as to how the jury was made part
15 of the process.

16 QUESTION: Well, is that a different argument?
17 I mean, you've been arguing about the unreliability of
18 what happened in this case and can happen in other cases,
19 but are you also making the argument that in fact
20 different trial judges are applying different standards in
21 evaluating what the jury's verdict actually is? Not
22 merely that some happen to give great weight in a given
23 case and others happen to give little weight, but that
24 there are different legal standards that they are bringing
25 to bear in deciding what to do with a jury verdict? Is

1 that also your argument?

2 MS. FRIEDMAN: Certainly, Justice Souter.

3 QUESTION: Well, I went back, and here's where I
4 want you to help me out. I went back through, admittedly
5 somewhat quickly this morning, but I went back through the
6 examples that you gave in your brief, and I found examples
7 in which some trial judges are saying that they consider
8 the jury's recommendation as a mitigating circumstance.

9 I found some in which they simply don't say
10 that -- they don't say that they don't consider it a
11 mitigating circumstance. They just don't describe it --
12 and I found a third category in which judges, whether they
13 call it a mitigating circumstance or not, in fact have
14 said that they gave great weight to the jury verdict.

15 Do those three examples ground an inference that
16 there are different legal standards being used in the
17 importance given to the verdict as distinct from simply
18 different treatments, depending on what in individual
19 cases judges happen to think the value of the jury
20 recommendation is?

21 Is there a -- as they say today, is there a
22 systemic difference based on legal standards, or are there
23 just varieties of applications which vary according to the
24 evidence?

25 MS. FRIEDMAN: I think there are differing legal

1 standards. I think there are some judges who say --

2 QUESTION: Well, can you infer that from the
3 examples that I gave, or am I missing something? Is there
4 something more in here?

5 MS. FRIEDMAN: I think there are other cases
6 which are also useful to look at. For example, there are
7 some judges who say, I reject the jury's life-without-
8 parole verdict, because there's a reasonable basis for
9 doing that, and there are other judges who say, I reject
10 the jury's verdict even though there is a reasonable basis
11 for the jury's verdict.

12 They're approaching it in a completely different
13 way, and they also take it into account in a different
14 way. Some do treat it as a mitigating factor, as Your
15 Honor suggested. Some treat it in a way that we just
16 don't even know.

17 QUESTION: Yes, but it doesn't follow from the
18 latter instance that they're not giving it the same weight
19 they would give it if they called it a mitigating
20 circumstance. I don't think we can infer much from that.

21 But you say there are examples in which some
22 judges say, I follow it because it is reasonable,
23 implying -- because there's a reasonable basis for it,
24 implying that there would be a sort of heightened standard
25 of persuasion to reject it, whereas others say, although

1 it is reasonable I reject it without indicating that there
2 is any heightened standard for rejection, is that correct?

3 MS. FRIEDMAN: That's exactly right.

4 QUESTION: Can you give me -- and you don't
5 necessarily have to do it this moment, but you could do it
6 after argument. Could you give me two cases illustrating
7 those two approaches?

8 MS. FRIEDMAN: Yes. The first -- except for the
9 first question that you mentioned was, I follow it. In
10 the cases we have here, where they haven't followed it,
11 but I can give you examples of where those -- there's a
12 different heightened standard, that's exactly right, and
13 if Mrs. Harris was sentenced according to one of those
14 standards, she might come out with one sentence, and if
15 she was sentenced according to a different one of those
16 standards in a different courtroom, she might come out
17 with a different sentence.

18 QUESTION: So you're really making kind of an
19 equal protection argument based on disparate legal
20 standards, rather than simply a variety of treatment.

21 MS. FRIEDMAN: I think we're making both of
22 those arguments.

23 QUESTION: Or you're making a sort of Furman
24 argument that sentencing shouldn't be flukish, and that
25 it's flukish unless all of the judges are treating the

1 jury's recommendation the same way.

2 MS. FRIEDMAN: It is flukish, Justice Scalia,
3 because Alabama has announced no standard to guide the
4 discretion, that's exactly right.

5 QUESTION: But the same flukishness occurs
6 whenever you allow a jury or a judge sentencer to take
7 account of mitigating circumstances.

8 I mean, haven't we gone down that road in
9 Lockett, and isn't, in effect, allowing the judge to have
10 a jury recommendation which may say, you know, in our view
11 you should let this person get off without the death
12 sentence, isn't that simply the addition of an additional
13 mitigating factor which, to be sure, provides for more
14 flukishness, but always to the benefit of the defendant?

15 MS. FRIEDMAN: Alabama --

16 QUESTION: And I would say in Lockett that
17 that's not only okay, but it's required, at least -- well.

18 MS. FRIEDMAN: I think we have a very different
19 system here, Justice Scalia, than just the consideration
20 of aggravation and mitigating factors.

21 The -- calling the jury verdict --

22 QUESTION: May I ask you if you think the
23 provision of the two sentencers as you describe them
24 actually increases or decreases the likelihood of a death
25 sentence across the uniform -- the universe of cases in

1 Alabama?

2 MS. FRIEDMAN: I'm not sure it's possible to say
3 whether it increases or decreases.

4 QUESTION: Well, one might ask, which way does
5 the override more frequently go?

6 MS. FRIEDMAN: There's no question, 95 percent
7 of the overrides in the State are life-without-parole
8 verdicts of a jury overridden to death.

9 QUESTION: Whereas if a jury does return a
10 recommendation of death, normally the judge accepts that?

11 MS. FRIEDMAN: That's absolutely right, Justice
12 Stevens.

13 QUESTION: Do we have any indication -- we don't
14 have any indication of how many times the jury recommends
15 life and the judge leaves it alone, although he might come
16 in, if he were left without the jury, might have imposed a
17 death sentence on his own. We don't know, and without
18 knowing that, we really can't project, can we, whether
19 this system on the whole favors defendants, or not.

20 MS. FRIEDMAN: We don't know the answer to that
21 question, but I don't think we can talk about whether the
22 system favors defendants when the system has a built-in
23 arbitrary aspect to it.

24 QUESTION: What did -- the Alabama supreme
25 court, at least it said this statute makes the jury

1 recommendation advisory only, and courts have had
2 experiences with advisory-only juries, but you're saying
3 in the death context an advisory-only jury is inherently
4 arbitrary?

5 MS. FRIEDMAN: It's -- not necessarily. It's
6 inherently arbitrary under Alabama's system because of
7 what Alabama has created. It has created a constituent
8 sentencer by all of the case law and all of the provisions
9 that are addressed to that first sentencer.

10 Certainly the Eighth Amendment requires
11 something different from what may be required in other
12 contexts where some advisory judgment is made, but
13 certainly there are other contexts in the law as well,
14 where a second decisionmaker is asked -- is given some
15 rule or regulation for knowing how to take that first
16 decisionmaker's judgment into account.

17 QUESTION: What's the rule in an equity court?

18 MS. FRIEDMAN: I'm afraid I don't know the rule
19 in equity court, Justice --

20 QUESTION: Do you know whether there is a rule?

21 MS. FRIEDMAN: I don't know the answer to that.

22 QUESTION: Ms. Friedman, did you raise your
23 equal protection claim before the supreme court of
24 Alabama?

25 MS. FRIEDMAN: We raised a Fourteenth Amendment

1 and an Eighth Amendment claim, Chief Justice Rehnquist.

2 QUESTION: But with the Fourteenth Amendment,
3 was that just because the Fourteenth Amendment
4 incorporated the Eighth Amendment, or was it in so many
5 words a reliance on the Equal Protection Clause of the
6 Fourteenth Amendment?

7 MS. FRIEDMAN: We did not rely specifically on
8 the Equal Protection Clause.

9 QUESTION: Well then you can't raise an Equal
10 Protection Clause here, claim here.

11 MS. FRIEDMAN: I don't know that we have to
12 separate --

13 QUESTION: Well, but you answered Justice
14 Souter's question, I thought, that you were raising an
15 equal protection claim here.

16 MS. FRIEDMAN: Perhaps I understood exactly what
17 question I was being asked. I think the analysis is the
18 same, that -- and really the most direct analysis I think
19 is under the Eighth Amendment arbitrariness jurisprudence
20 of this Court, which is that capital defendants in Alabama
21 are being subjected to an arbitrariness process, and are
22 being treated inconsistently because of that arbitrary
23 process, and that, I think, is the basis for
24 decisionmaking here.

25 Because Alabama has created a dual sentencing

1 system, that is why the advisory verdict rises to a
2 certain level. It is true that, as Justice Ginsburg
3 mentioned before, that the statute itself says this
4 advisory verdict is an advisory verdict, it is a
5 recommendation, it isn't binding, but because Alabama has
6 created a second sentencer, that second sentencer is also
7 subject to the Eighth Amendment, and because of that,
8 Alabama has left a piece out of regulating the
9 relationship.

10 We are not saying that Alabama need make that
11 advisory verdict binding on the trial court, but what it
12 need do is regulate the relationship between the
13 sentencers.

14 When there is a disagreement between the
15 sentencers, that second sentencer has no idea how to
16 factor it in, and the problem that arises, as can be seen
17 in the different orders of the trial courts, is that
18 without some standard, without some guidance from the
19 Alabama supreme court, they just don't even know what it
20 is.

21 They don't know how to make it part of the
22 process at all, and therefore some treat it as a
23 mitigating factor, some treat it as a prior judgment, some
24 try and weigh it into the balance, even though they're not
25 treating it as a mitigating factor, and some have a

1 variety of legal standards under which to reject or accept
2 that verdict. That is an inconsistent and arbitrary
3 process.

4 QUESTION: If we assume that that's true, then
5 reweighing by the Alabama appellate court is insufficient?

6 MS. FRIEDMAN: It is insufficient, and for two
7 reasons.

8 First of all, what the Alabama supreme court
9 does in its discussion of reweighing is never addressed,
10 what the jury's role was in the process, and that's
11 certainly what happened in Mrs. Harris' case, and
12 secondly, Alabama does not reweigh aggravation and
13 mitigation in the way that this Court has understood that
14 term in cases such as Clemons.

15 It has said specifically in Longhorn v. State
16 that it does not reweigh, and if there are errors below,
17 that sentence is sent back to the trial court for the
18 trial court to impose sentence.

19 QUESTION: I was referring to the intermediate
20 appellate court.

21 MS. FRIEDMAN: And that's true for the
22 intermediate appellate court as well, Justice Kennedy.

23 The language of the statute is, we do an
24 independent reweighing, and that language certainly goes
25 to the appellate court's review, which also involves

1 proportionality.

2 But what it does not do is address part of the
3 process that happened below, which is, because the judge
4 was required to do more than consider aggravation and
5 mitigation, but also to make that jury verdict a part of
6 the process, which is mandated by statute, the appellate
7 review is insufficient because it does not review what
8 actually happened below.

9 And as to reweighing, the Alabama appellate
10 courts do not do that in the traditional way that this
11 court understands reweighing to take place.

12 And as I mentioned before, in cases such as
13 Espinosa, or in cases such as Gardner v. Florida, the fact
14 that aggravation is found to outweigh mitigation does not
15 address an arbitrary element in the process, and that's
16 what we have here, with the disconnection between the two
17 sentencers.

18 This Court has said, in cases going as far back
19 as Gregg, that the Eighth Amendment limits the discretion
20 of the sentencers to minimize the risk of arbitrary
21 action, and what we have in this case is arbitrary action.
22 Because Alabama has required that two sentencers be
23 involved in this process, it creates, without some
24 connection between them, the risk of arbitrariness because
25 there is no standard for that second sentencer to --

1 QUESTION: What is your response to the State's
2 argument that the history in Alabama shows that juries
3 were predisposed to acquit white defendants of murdering
4 black victims, or committing crimes against them, the
5 jury's prejudice would tilt the scales in favor of the
6 white defendant, and that they needed the judge override
7 to override life -- arbitrary recommendations of life in
8 that category of cases? They argue that in their brief.

9 MS. FRIEDMAN: Certainly the judge can form
10 that -- can provide that role if the Alabama supreme court
11 were to announce such a standard as racial prejudice, if
12 there was some evidence or suggestion of racial prejudice,
13 or some other kind of improper action on the part of the
14 jury, but that has not happened.

15 The Alabama supreme court has announced no such
16 standard, and there is certainly no evidence or suggestion
17 in this case that there's any such impropriety in the
18 forming of the jury verdict here.

19 It is very critical for this Court to understand
20 that Alabama has created a dual sentencing scheme, and the
21 role of that jury, while it is not binding, while it is
22 advisory, is just like the penalty phase juries in other
23 States in which there is no final, ultimate authority by a
24 judge. Therefore, because it has --

25 QUESTION: Excuse me. Do I understand your

1 answer to Justice Stevens to be that yes, that probably
2 was the object of this scheme, and that it's a legitimate
3 object --

4 MS. FRIEDMAN: It could be a legitimate object.

5 QUESTION: -- it simply came down in the wrong
6 way?

7 MS. FRIEDMAN: It absolutely could be a
8 legitimate object.

9 QUESTION: So on your -- going back to your
10 answer to Justice Ginsburg, in which you thought one
11 standard might be that the judge could not override unless
12 no reasonable jury could have come to the conclusion that
13 the trial jury did, you would make it more difficult for
14 the judge to perform that function.

15 MS. FRIEDMAN: I'm not sure I understand exactly
16 where Your Honor's going.

17 QUESTION: Well, you -- you accept the
18 legitimacy, I guess, of the State's argument that one of
19 the justifications for this scheme is that there tends to
20 be a racial prejudice in favor of white defendants, and I
21 go back to your answer to Justice Ginsburg's first
22 question in which she said, well, what might the standard
23 be?

24 One of the examples, as I recall, that you gave
25 was the standard that the judge could only override if he

1 found that no reasonable jury could have concluded as this
2 jury did, so what I'm saying is, I guess it follows on
3 your theory that it would be more difficult on your -- on
4 a scheme that would be acceptable to you for the judge to
5 perform this kind of function of eliminating the racial
6 bias in the sentencing juries.

7 MS. FRIEDMAN: I don't think so. I think there
8 could be a standard, clearly, where if there was --

9 QUESTION: It's pretty tough to meet a standard
10 that requires a finding that no reasonable jury could have
11 concluded as they did. That's a high standard. That's
12 higher than Tedder.

13 MS. FRIEDMAN: Well, I use that language because
14 it was language in Tedder. There can also be a more
15 minimal standard.

16 QUESTION: Tedder required just clear and
17 convincing demonstration.

18 MS. FRIEDMAN: That could be a standard as well.
19 That could certainly be a standard. There's also no
20 evidence that in any case -- you know, Hays was one case
21 which a standard that was set out in the Alabama system,
22 were Alabama to announce one, that Hays could certainly
23 meet.

24 There is no evidence that that standard applies
25 to any other case, and particularly Mrs. Harris' case,

1 where there is no evidence of racial prejudice whatsoever
2 on the part of the jury, and there's no reasonable basis
3 evident in this record to determine why that jury's life-
4 without-parole verdict wasn't reasonable, and why it was
5 rejected in this case.

6 If there are no further questions at this time,
7 I'll reserve the rest of my time for rebuttal.

8 QUESTION: Very well, Ms. Friedman.

9 MS. FRIEDMAN: Thank you.

10 QUESTION: Mr. Bjurberg, we'll hear from you.

11 ORAL ARGUMENT OF P. DAVID BJURBERG

12 ON BEHALF OF THE RESPONDENT

13 MR. BJURBERG: Mr. Chief Justice and may it
14 please the Court:

15 In Espinosa v. Florida, this Court upheld
16 Florida's capital murderers sentencing scheme which also
17 included a jury override provision. In doing so, this
18 Court held that the Eighth Amendment does not prevent a
19 State from providing for the so-called dual sentencers.

20 I take exception to that characterization of
21 what Alabama law truly is on that. The statute is clear
22 that only the judge is the sentencer in Alabama. The
23 jury's advisory verdict is just that, it's an advisory
24 recommendation as to perhaps what the final sentence
25 should be.

1 Espinosa, this Court said that this concept of
2 jury override was constitutional. Now, the question
3 probably really boils down in this Court is, in Florida
4 they have the Tedder standard that we've touched on
5 already. In Alabama, we have a standard announced by our
6 supreme court, the Alabama supreme court, saying that if
7 the whole catalogue of aggravating circumstances outweigh
8 the mitigating circumstances, then the judge is allowed
9 to -- to --

10 QUESTION: Is it correct --

11 MR. BJURBERG: -- to sentence others differently
12 from --

13 QUESTION: Is it correct, as Justice Scalia put
14 it in one of his questions, that your basic position is
15 that if the judge disagrees with the jury that's a
16 sufficient basis for a different result?

17 MR. BJURBERG: Yes, because the judge is the
18 sentencer, and as the sentencer, under the Eighth
19 Amendment -- we have to keep in mind we're on the
20 sentencing side of the Eighth Amendment business, which as
21 I understand this Court's precedents allows for
22 discretion, and this Court's been very careful to -- any
23 procedure that cuts back that discretion has been found to
24 violate Eddings and Lockett.

25 QUESTION: Is -- do you agree with your

1 opponent's view of what the statistics would show that if
2 a jury recommends death, in 95 percent of the cases the
3 judge will accept the recommendation, whereas if the jury
4 recommends life, there are a substantial number of cases
5 in which the judge will disagree and act independently,
6 impose death?

7 MR. BJURBERG: To date I believe we have
8 approximately 26 cases in which the judge has chosen to
9 sentence to death over a life-without-parole
10 recommendation, so I don't -- we have -- approximate --

11 QUESTION: Two or three where the judge has set
12 aside the -- has imposed a life sentence on the jury?

13 MR. BJURBERG: I cited two or three in the
14 brief. I didn't cite them all, but I'm not going to argue
15 with the numbers, because I don't think we're here about
16 today. We rejected the statistical approach to these
17 cases in McClesky.

18 QUESTION: Well, but could you tell us in that
19 period where you had 26 overrides, how many cases, capital
20 cases were there -- potential capital cases were there in
21 which there was no override?

22 MR. BJURBERG: No override? I don't know that
23 number, which was the universe, I think, that Justice
24 Ginsburg was talking about. To get a true picture of it,
25 you would have to know that number where the judge accepts

1 the life-without-parole recommendation.

2 QUESTION: A sentence where the jury recommended
3 life and the jury left it alone.

4 MR. BJURBERG: Yes. You'd have to know that
5 number, but I don't think we ought to decide --

6 QUESTION: Even that number would not be
7 significant unless you knew how often the judge
8 independently might have reached a different conclusion.
9 I mean, you have to have a case in which he said, well, I
10 would have imposed death, but given the jury's
11 recommendation I'll go along. Do you know of any such
12 cases?

13 MR. BJURBERG: Well, not to my knowledge, no,
14 and I'm not sure we could ever know that, frankly, so I
15 take great exception with the argument that Alabama does
16 not have a standard, it does. The aggravating
17 circumstances must outweigh the mitigating circumstances.

18 Now, that's a different standard before the
19 judge can impose the death sentence, which is entirely
20 consistent with this Court's Eighth Amendment precedent of
21 1) on the narrowing side, we narrow people who are
22 selected for the death penalty through the use of
23 aggravating circumstances --

24 QUESTION: Under your system, can the defendant
25 waive the right to have a jury advisory verdict?

1 MR. BJURBERG: Yes, sir, it can. It can, and if
2 a --

3 QUESTION: And if a defendant does that, is the
4 judge's standard in imposing the death sentence any
5 different than if there had been an advisory verdict of
6 life, namely that in either event the aggravating must
7 outweigh the litigating?

8 MR. BJURBERG: No. It's the same standard, and
9 I take exception to the characterization that there is two
10 different legal standards going on here. There aren't.
11 One standard consistently applied by all sentencers in
12 Alabama is the aggravating circumstances must outweigh the
13 mitigating --

14 QUESTION: Suppose it were shown in this case
15 that in County Number 1 a judge says, I accept the
16 advisory verdict unless there's a reasonable grounds for
17 upsetting it. County Number 2, the judge said, I give
18 very little weight to what the advisory jury says, and
19 similar disparate approaches in various other counties.
20 Would that be a violation of the Eighth Amendment?

21 MR. BJURBERG: No, it would not, because the
22 sentencer is vested with discretion, and that's the
23 essence of the discretionary process and whatever weight
24 the sentencer wishes to give to these various factors that
25 come in in mitigation.

1 QUESTION: Isn't there a distinction between the
2 discretion to give weight according to what the evidence
3 warrants in a given case on the one hand, and discretion
4 to consider an aspect of the process as either of no value
5 or of great value?

6 And I thought the implication of the way Justice
7 Kennedy phrased his question was that the -- there was a
8 difference not specific to cases, but a difference which
9 amounted to a different legal standard in the manner in
10 which the judges from county to county were evaluating the
11 fact, we'll call it, of the jury recommendation.

12 The first kind of discretion to take evidence
13 for what it's worth is undoubted. The second kind of
14 discretion is different. Why doesn't that raise a problem
15 either of equal protection, or of arbitrariness, or of
16 arbitrary variation in sentencing?

17 MR. BJURBERG: Well I -- first of all, I don't
18 think the Fourteenth Amendment equal protection issue is
19 before the Court. We're up here on an Eighth Amendment --

20 QUESTION: I grant you it doesn't --

21 MR. BJURBERG: Okay.

22 QUESTION: -- but I'd like to know what you
23 would say.

24 MR. BJURBERG: The arbitrariness versus
25 discretion is what we're really at, and if Sentencer A

1 says, I accept the jury's verdict and I'm going to give it
2 some weight, is that a different legal standard than
3 saying, well, I -- there's a sliding scale here. I'm
4 going to give it --

5 QUESTION: Well, let me make it clearer, then.

6 MR. BJURBERG: Okay.

7 QUESTION: In County 1, the judge says, I always
8 accept a jury's recommendation unless no reasonable jury
9 could have come to that conclusion. In County 2, the
10 judge says, I never accept a jury's recommendation as
11 carrying any more weight than in fact I think it's worth,
12 based on the individual circumstances of the case.

13 Assuming you have that kind of a variation,
14 a) do you have an Eighth Amendment problem, b) if it were
15 before us, would you have an equal protection problem?

16 MR. BJURBERG: a) I don't think you have an
17 Eighth Amendment arbitrariness, because what you have is
18 the sentencer giving this particular fact --

19 QUESTION: No, no, you're changing my hypo.
20 Either that, or I'm not making my hypo clear.

21 In the first case, in County A the judge says,
22 my legal standard is, I always accept the recommendation
23 unless I conclude that no reasonable jury could have
24 concluded as this one did.

25 In County B the judge says, I accept it or

1 reject it, depending on the weight that I think it's
2 worth. I don't have in effect any override standard at
3 all.

4 Now, those are two different legal standards.
5 Is there an Eighth Amendment problem or an equal
6 protection problem?

7 MR. BJURBERG: Perhaps it would be an equal
8 protection problem in that similarly situated defendants
9 are being treated differently.

10 QUESTION: Why shouldn't we consider the same
11 disparity under our nonarbitrariness jurisprudence under
12 the Eighth Amendment?

13 MR. BJURBERG: Because I think what you have to
14 look at is how the process in Alabama works. I mean,
15 certainly under that hypothetical --

16 QUESTION: Well, I am. It's working on
17 different legal standards in different counties.

18 MR. BJURBERG: Well, that's the crux --

19 QUESTION: Doesn't that infect the validity of
20 the standard, of the process under the Eighth Amendment?

21 MR. BJURBERG: Well, I don't think there are
22 different legal standards. Each --

23 QUESTION: No, but my -- stick to my hypo. My
24 hypo does involve two different legal standards. Eighth
25 Amendment problem?

1 MR. BJURBERG: Yes, it would be.

2 QUESTION: There's one aspect of this case I
3 wish you would address.

4 You have taken the position very clearly that
5 the jury is advisory only, the judge gives it whatever
6 credit she thinks it deserves, and yet this very
7 sentencing judge that has full responsibility for the
8 sentence says, as far as guilt or innocence, that the jury
9 came in with a guilty verdict, the court has no reason to
10 go behind the guilty verdict of the jury and will not do
11 so.

12 So the judge is taking no responsibility at all
13 for the basic conviction, and yet says, as far as the jury
14 is concerned on sentencing, there I'm not going to give it
15 any credit because I find that the aggravating
16 circumstances outweigh the mitigating circumstances.

17 I can understand the system that says, the judge
18 has to say yes, I agree with the basic conviction and then
19 go on, but here, the judge is saying, I'm going to leave
20 it to the jury on the basic guilt or innocence.

21 MR. BJURBERG: Well, I think on the basic guilt
22 or innocence, I think a reasonable interpretation of that
23 is, I find that the evidence is sufficient not to grant a
24 motion for a new trial.

25 QUESTION: Isn't that Alabama law, that a judge

1 could not set aside a jury verdict on a question of guilt
2 or innocence unless the motion -- or unless there were
3 sufficient to grant a motion for a new trial or a judgment
4 of acquittal under a traditional standard?

5 MR. BJURBERG: Correct. I mean, I think that's
6 what he's saying there. I think in the sentencing
7 portion --

8 QUESTION: I have no question about that, that
9 he has to leave the jury verdict of guilty alone. My
10 question is, can he sentence a person to death unless he
11 is also prepared to say, I would have reached the same
12 result that the jury did on guilt?

13 MR. BJURBERG: On guilt --

14 QUESTION: So I'm speaking about his authority
15 when it comes to sentencing. Is it rational? Is it
16 acceptable for a judge to say, without committing myself
17 on the question of guilt or innocence -- in other words,
18 to say, I might have found this person innocent, yet I'm
19 going to give him the death sentence?

20 MR. BJURBERG: Yes, I think it is consistent,
21 because when you go to the sentencing hearing, additional
22 information concerning the defendant, his character and --
23 or her character in this case -- and involvement in the
24 crime, in otherwise those mitigating and aggravating
25 circumstances come before the sentencer, the judge, and

1 that judge can then weigh those factors back and forth,
2 and that's what this judge did in this case.

3 Let me just quote on page 6 of the joint
4 appendix --

5 QUESTION: Well, even without those, I don't
6 suppose it's irrational to say, you know, I'm not sure who
7 did this, but whoever did it deserves the death penalty.
8 This was a horrible, heinous crime.

9 I could conceive that, and if the judge says
10 it's really not my -- not my role in this State system to
11 decide who did it, but I do know that whoever did it
12 deserves the death penalty, the jury having found that
13 this person did it, this person deserves the death
14 penalty. There's nothing irrational about that, is there?

15 MR. BJURBERG: No, there isn't, and in fact I
16 think that's what -- the judge said in this particular
17 case, quoting from page 6 of the Joint Appendix, while
18 there is evidence that others were involved, and this
19 defendant did not pull the trigger, her participation was
20 such that but for her there probably would have never been
21 a killing. She planned it, provided the financing, and
22 stood to benefit the most, so I think that was one of the
23 questions brought up below.

24 QUESTION: I thought that the question here --
25 I'm going back to your statement that there is a

1 standard --

2 MR. BJURBERG: Yes.

3 QUESTION: -- because of the mitigating -- and I
4 thought that their point is that the Alabama courts have
5 not told their judges a simple thing: judge, consider
6 this a mitigating factor like the other ones and weigh it,
7 as you would any other mitigating factor.

8 Alternative to, judge, this isn't a mitigating
9 factor. What this is, just keep in mind that other human
10 beings hearing this evidence have decided differently and
11 give that whatever weight in your mind you feel ought to
12 be given to the fact that 1, 2, 3, 4, 5, 6, 7, 8, 9, 10,
13 11, or 12 have decided differently from you.

14 Now, those really are different things. Judges
15 in the first case do know how to weigh, and judges in the
16 second case, all the time, know how to take into account
17 the fact that other human beings might decide this matter
18 differently.

19 But the Alabama supreme court, they say, has not
20 told the judges whether to do the one, or the other, or a
21 third, and what they think is appropriate as guidance.

22 MR. BJURBERG: And the question then boils down
23 to, does the Eighth Amendment require that guidance --

24 QUESTION: They're not saying a lot of guidance.
25 They're saying just that much. Tell them whether it's

1 another mitigating factor, or tell them whether you go to
2 it with the state of mind that you might have with new
3 trial, directed verdict, any other situation where you
4 know that other jurors -- give them that much guidance, is
5 what they're saying, and what I'm -- I'm putting their
6 argument, I think, as I understand, or at least one of
7 their arguments, and I want to see what your response is
8 directly.

9 MR. BJURBERG: My response would be that the
10 Alabama supreme court in effect has given that guidance.

11 QUESTION: Where? I didn't see that one. That
12 I didn't see. I did see that in a case which didn't
13 involve an advisory jury they talked about aggravating and
14 mitigating circumstances, but what's the case where they
15 say, judge, treat this jury recommendation as you would
16 any other mitigating factor? What's the name of the case
17 where they say that?

18 MR. BJURBERG: Now, you won't find that case --

19 QUESTION: That's what I thought.

20 MR. BJURBERG: -- because the Alabama supreme
21 court has not determined that the advisory verdict is a
22 mitigating circumstance --

23 QUESTION: Exactly.

24 MR. BJURBERG: -- necessarily. It leaves that
25 to --

1 QUESTION: Well, is it or isn't it?

2 MR. BJURBERG: It leaves that to the discretion
3 of the sentencer, and we're saying that that dis -- that
4 that is the appropriate place to leave that discretion.

5 QUESTION: But I thought in answer to a series
6 of questions that Justice Souter and I were posing that
7 you said that if there were different prevailing practices
8 in different counties, on just this sort of legal issue,
9 there would be an Eighth Amendment violation.

10 MR. BJURBERG: We were hypothesizing different
11 legal standards.

12 QUESTION: But haven't we come now from the
13 hypothesis to reality, based on your answers to Judge
14 Breyer's questions, Justice Breyer's questions?

15 MR. BJURBERG: No, I don't believe we have, in
16 that we're still saying that the sentencer is free to
17 consider this jury's advisory verdict and consider it in a
18 manner which the Eighth Amendment allows that discretion
19 to do so.

20 QUESTION: That happens all the time, even with
21 a finding of guilt, but I suppose one jury might consider
22 that certain facts justify a particular inference, whereas
23 another jury would conclude that those same facts don't
24 justify another inference, and I suppose you'd have an
25 unjust system if the law required in different counties

1 those divergent findings, but not if a jury vested with
2 discretion happens to reach them, and that's what you say
3 is the situation here, that you may indeed have
4 divergences with different judges, but they are not
5 divergences required by law.

6 MR. BJURBERG: Exactly.

7 QUESTION: Oh, it's exactly, that's interesting,
8 that you find it happens all the time.

9 Can you think of another example where in fact
10 it isn't clear whether a judge has to consider what a jury
11 says as if it's -- the distinction I'm drawing, a
12 mitigating factor, I understand what kind of thing that
13 is, and it's quite a different thing in a judge's mind to
14 ask questions like, how do I treat this advisory jury in
15 admiralty? How do I treat the opinion of the advisory
16 jury in an equity matter where there's also a matter? How
17 do I treat it with directed verdict? How do I treat it on
18 new trial? How do I treat the fact that other people have
19 decided differently?

20 That's the kind of discrepancy they're trying to
21 draw a wedge between, and I can't think of any other
22 example in the law where I've seen this. They're saying,
23 give us that much guidance. Can you think of any other
24 comparable example?

25 What's your mind-set, judge? Is it the mind-

1 set of, another person has decided this differently than
2 you, or is it the mind-set of, there is another mitigating
3 factor out there? Aren't those different, or are they?

4 MR. BJURBERG: I don't -- I don't think they're
5 different, in that -- now, because the sentencer is
6 allowed this broad, Eighth Amendment discretion to
7 consider that advisory verdict as a mitigating
8 circumstance, and another sentencer might consider that
9 advisory verdict as not arising to that particular level,
10 in other words, but that's inherent in discretion. As
11 long as there is discretion in the sentencer, you're going
12 to get different treatments of essentially the same thing.

13 QUESTION: This judge can presumably give
14 greater degrees of discretion to some juries than to
15 others. He may trust one jury more than another. Can he
16 take that into account?

17 MR. BJURBERG: He can -- yes. I mean, the --
18 yes. I think he could -- he could say that --

19 QUESTION: Having sat with this jury for a
20 certain amount of time, he may have some views as to how
21 good the jury is.

22 MR. BJURBERG: And he might have some view as to
23 whether or not the life-without-parole recommendation is a
24 compromise verdict. As in this case --

25 QUESTION: Any rule would eliminate that degree

1 of discretion, wouldn't it? I mean, if you said --

2 MR. BJURBERG: Yes, I think it would. Yes. I
3 mean, certainly Tedder --

4 QUESTION: Well, there are two -- again, there
5 are two discretions involved. Assume -- assume, just to
6 keep it simple, a hypothetical case in which two judges
7 are sitting on the same case.

8 A jury recommendation comes in. Each judge
9 says, I really do not have very much confidence in this
10 jury, for various reasons. I don't think the jury's
11 qualifications are all that great, and so if I'm going to
12 weigh this for what it's worth, I'm going to give it much
13 less weight than I would normally give a jury
14 recommendation.

15 One of those judges, however, says, I believe
16 that that is binding on me unless there is clear and
17 convincing evidence or evidence rising to the
18 demonstration of irrationality that the jury's verdict is
19 wrong. The other one says, I'm just going to take it for
20 what it's worth. Those two judges are going to come to
21 different conclusions in following the jury's verdict, are
22 they not?

23 MR. BJURBERG: Yes, I would think so.

24 QUESTION: And the discretion about how much
25 weight to give the jury's verdict is inherent in the

1 function of weighing evidence, but the discretion of --
2 I'm sorry, I'm putting it badly.

3 The discretion to determine the sort of value in
4 the abstract of what the jury's recommendations were is
5 sort of inherent in the indiscretion to consider evidence,
6 but the discretion to override or not depends upon a legal
7 standard, and in my hypo, there were two different legal
8 standards, and I take it, as you conceded earlier, that
9 would rise, if there were such a disparity -- one county
10 has a judge taking the one position, one county has a
11 different one -- that would rise to the level of an Eighth
12 Amendment violation.

13 MR. BJURBERG: But in Alabama we don't have two
14 different legal standards.

15 QUESTION: You don't have any legal standard.
16 There's no basis for any judge considering himself bound
17 by any legal standard, is there?

18 MR. BJURBERG: Except to consider it.

19 QUESTION: Except to consider it.

20 MR. BJURBERG: The statute says, consider this.
21 Take this into account when you ultimately decide your
22 sentence. That's --

23 QUESTION: Then do -- is there not at least an
24 obligation for the State to say, you should not, judges,
25 give this a kind of prima facie weight simply by virtue of

1 the fact that it's a jury recommendation? You should
2 never give it any weight beyond what you think it's worth
3 in the abstract? Isn't a capital defendant at least
4 entitled to that degree of illumination?

5 MR. BJURBERG: The question is, does the Eighth
6 Amendment require that?

7 QUESTION: That's right, and --

8 MR. BJURBERG: And - but imposing --

9 QUESTION: -- if the Eighth Amendment doesn't
10 require that, then the door is open for the imposition not
11 merely of different weights to give a verdict, but
12 different standards for judging what the verdict of a
13 given weight is worth, isn't that so?

14 MR. BJURBERG: Well, perhaps the best way I know
15 how to answer --

16 QUESTION: Isn't that so? The door is open to
17 that, if the Alabama supreme court gives no guidance at
18 all.

19 MR. BJURBERG: Yes, it would be open to that.

20 QUESTION: Is there any indication in this case
21 that the sentencing judge gave any prima facie weight
22 beyond just considering it to this jury's verdict?

23 MR. BJURBERG: No, there isn't.

24 QUESTION: In fact, would you --

25 QUESTION: Did this judge in another case

1 indicate that he gives great weight to a jury
2 recommendation?

3 MR. BJURBERG: In a different case, Coral, or
4 Coral, he did.

5 QUESTION: Said that was his normal practice?
6 We don't know whether he gave great weigh to it here.

7 MR. BJURBERG: I think it's fair to say he did
8 not give great weight, because in other sentencing
9 recommendations that this particular judge has written, he
10 has said, I give the jury's recommendation great weight,
11 but that was based on the facts of that particular case,
12 and in Coral at least the defendant proffered the jury's
13 life-without-parole recommendation as a mitigating
14 circumstance, and the residual doubt, as in -- because of
15 the length of the deliberations of the jury concerning the
16 sentence, as mitigation.

17 QUESTION: I suppose if a case is tried to a
18 judge instead of to a jury on the guilt phase, a judge --
19 one judge could say, you know, I consider this factor
20 crucial, and another judge could say, I consider this
21 factor of no significance, and that wouldn't render the
22 State's system arbitrary or unconstitutional, would it?

23 MR. BJURBERG: No, it wouldn't. I mean, that's
24 inherent in any fact-finding.

25 QUESTION: Well, then I'm not sure if --

1 QUESTION: It's apparently the conferral of
2 discretion on the fact-finder.

3 MR. BJURBERG: Yes, sir.

4 QUESTION: Well, then I'm not sure why you
5 concede that there would be an Eighth Amendment violation,
6 under our earlier hypothesis.

7 MR. BJURBERG: Because as I understood it we
8 were hypothesizing different legal standards to be applied
9 by the sentencer when considering it.

10 QUESTION: Well, if the law in effect says a
11 judge can do what you say the law -- what the judges in
12 reality do, what difference does it make? Why is there
13 equal protection -- or an Eighth Amendment violation in
14 one case and not the other?

15 MR. BJURBERG: Well, because if you have --
16 well, the discretion is in the sentencer. I guess I don't
17 completely follow. If we're hypothesizing different legal
18 standards, which we don't have in Alabama, then there's
19 this perhaps arbitrariness coming in.

20 QUESTION: And you do not concede that merely
21 the perception of different legal standards is enough to
22 render it unconstitutional, or do you concede that?

23 MR. BJURBERG: No, I don't, absolutely not.

24 QUESTION: Could you tell me -- I just don't --
25 I should know this, and I don't. Did the petitioner in

1 this case ask the judge to adopt a specific ruling of law
2 which would state or articulate the weight that was going
3 to be given by him to the jury verdict?

4 MR. BJURBERG: Not to my remembrance.

5 QUESTION: If thee were an Eighth Amendment
6 violation of the sort that we've been discussing, would it
7 be cured by the independent reweighing that the appellate
8 court did at page 101 of the transcript?

9 MR. BJURBERG: I believe so, and let me clarify
10 that. The appellate -- the intermediate appellate court
11 doesn't reweigh, it independently weighs the aggravating
12 and mitigating circumstances on appeal.

13 QUESTION: Yes. It says at page 101 that after
14 an independent weighing, we find that it's the proper
15 sentence.

16 MR. BJURBERG: And in Alabama, the appellate
17 courts, both the --

18 QUESTION: Does the appellate court give any
19 weight at all to the judge's determination of the
20 sentence?

21 MR. BJURBERG: What the appellate court reviews,
22 Justice Stevens, is the death sentence.

23 QUESTION: I understand, but when it does that
24 review, does it adopt any sort of presumption that the
25 judge was right?

1 MR. BJURBERG: No presumption, no, sir.

2 QUESTION: It just starts from scratch, as
3 though it were the original sentencer?

4 MR. BJURBERG: It does, yes.

5 QUESTION: As if it were the jury? In other
6 words, it doesn't give the jury recommendation any weight
7 one way or the other, either?

8 MR. BJURBERG: It doesn't. It just starts
9 again, right.

10 QUESTION: Well, but it place -- I take it, it
11 places itself in effect in the position of the jury but
12 not the position of the judge?

13 MR. BJURBERG: No, I think it --

14 QUESTION: That can't be right, because it
15 considers the presentence report, doesn't it?

16 MR. BJURBERG: Yes. Between the two, the
17 appellate court puts itself in the position of the judge,
18 because at that point it has the presentence report and
19 these other --

20 QUESTION: But does the appellate -- the
21 appellate court then considers the jury verdict in some
22 sense.

23 MR. BJURBERG: In the sense -- yes, in the sense
24 that it's reviewing the death sentence, the imposition of
25 the death sentence, and if they find --

1 QUESTION: But it does not articulate the
2 standard it uses to determine whether any particular prima
3 facie weight is to be given to the jury recommendation, or
4 whether no prima facie weight should be given.

5 MR. BJURBERG: Right, it did not.

6 QUESTION: Does it just merely say in our
7 opinion the aggravating circumstances outweigh the
8 mitigating, ergo the death sentence is proper?

9 MR. BJURBERG: No. It's a fairly elaborate
10 scheme of appellate review. First, they have to determine
11 whether or not there was any error in the sentencing
12 proceeding.

13 QUESTION: No, assuming no procedural error, but
14 just on the ultimate determination, is it just a totally
15 de novo determination that in the judgment of the
16 appellate tribunal the aggravating outweigh mitigating and
17 that's the end of it?

18 MR. BJURBERG: Yes.

19 QUESTION: What does it do with the presentence
20 report? Doesn't it consider that?

21 MR. BJURBERG: It -- yes, it would consider that
22 in this process of the appellate weighing of the
23 aggravating and mitigating circumstances.

24 QUESTION: Okay, but that's more than just
25 reweighing. In other words, it goes through a sentencing

1 process that goes beyond reweighing what the jury weighed.

2 MR. BJURBERG: Yes, and that's why I wanted to
3 get away from the term, reweighing. I mean, that implies
4 that it's just a new -- or, repeating the process, and I
5 think our statute -- our -- well, it does say that it's a
6 independent weighing of the aggravating and mitigating
7 circumstances at the appellate level, plus we have
8 proportionality review that was alluded to by Ms.
9 Friedman.

10 Thank you. The State of --

11 QUESTION: Let me just ask one last question.
12 You made reference to this being a compromise verdict, and
13 I didn't quite understand that, because I thought the jury
14 just had two choices, either life without parole, or
15 death.

16 MR. BJURBERG: Compromise in the sense that,
17 Justice Stevens, it took them approximately 25 minutes to
18 reach a sentencing decision in this. Perhaps, and I'll
19 admit that I'm speculating on this point, that once they
20 returned the guilty verdict, then the compromise, if you
21 will, was to return the life-without-parole
22 recommendation, and in that sense a compromise, but you're
23 correct, there are only two possible sentences, yes.

24 The State of Alabama would ask this Court to
25 affirm the Alabama supreme court and uphold Louise Harris'

1 death sentence.

2 QUESTION: Thank you, Mr. Bjurberg.

3 Ms. Friedman, you have 2 minutes remaining.

4 REBUTTAL ARGUMENT OF RUTH FRIEDMAN

5 ON BEHALF OF THE PETITIONER

6 MS. FRIEDMAN: To respond to the earlier
7 questions about appellate review, the Alabama supreme
8 court does not see itself as having the authority to
9 impose a sentence de novo, or to do that kind of
10 reweighing analysis whenever independent of some kind of
11 error below. If there is an error below, the appellate
12 court always sends the case back, so it is not a de novo
13 sentencing that the Alabama courts have ever seen
14 themselves authorized to perform.

15 QUESTION: The opinion does say, after an
16 independent weighing of the aggravating and mitigating
17 circumstances. You say that's not an independent
18 decision?

19 MS. FRIEDMAN: It's not a de novo review of the
20 evidence below. If there is some kind of error below, the
21 appellate courts in Alabama do not see themselves as
22 authorized to fix that. What they do is, they send the
23 case back if there is some problem below.

24 To address also Justice O'Connor's point earlier
25 about the Coral case and the treatment regarding how much

1 weight was given to the jury life-without-parole verdict,
2 the same judge not only gave it different weight, but
3 treated it as a mitigating factor in one case and not a
4 mitigating factor in another.

5 So that question of, from county to county, it's
6 so irregular that even the same judge is treating the
7 verdict in a different way, and I think one thing we can
8 tell, certainly from the practice in history of override
9 in Alabama, is that Alabama defendants certainly are not
10 benefiting from it. 95 percent of those overrides are
11 jury life-without-parole verdicts overridden into death
12 verdicts.

13 What Alabama has is an otherwise constitutional
14 process that is operating in an arbitrary manner, and all
15 the Alabama court needs to do is state a rule and fix that
16 arbitrary problem.

17 If there are no further questions --

18 CHIEF JUSTICE REHNQUIST: Thank you,
19 Ms. Friedman. The case is submitted.

20 (Whereupon, at 12:02 p.m., the case in the
21 above-entitled matter was submitted.)
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23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

LOUISE HARRIS, Petitioner v. ALABAMA

CASE NO.:93-7659

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Ann Marie Federico*

(REPORTER)