IN THE SUPREME COURT OF ALABAMA

EX PARTE RONALD BERT SMITH In re: State of Alabama, Petitioner, v. Ronald Bert Smith, Respondent.	No. 1041321 **CAPITAL CASE** **EXECUTION SET FOR DECEMBER 8, 2016**

PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS[1]

Ronald Smith was never sentenced to death by a jury. A judge made factual findings contrary to the jury's findings and sentenced him to death. The United States Supreme Court has made it plain that such a system and such a sentence violates the Constitution. The question before this Court is: How can Mr. Smith's sentence stand? The answer: It cannot. Mr. Smith's death sentence must be vacated, and the jury's verdict of life without parole must be reinstated.

I. Mr. Smith's death sentence is unconstitutional because a judge, not a jury found that the aggravating factors outweighed the mitigating factors in this case.

[1] This Court has jurisdiction to hear and grant an original writ of habeas corpus pursuant to § 140 of the Alabama Constitution and Alabama Code § 12-2-7(3). It also has the authority to hear writs when no other lower state court has jurisdiction. Ala. Code § 12-2-7(2). Because Mr. Smith is presently subject to a death warrant entered by this Court, this Court is the only state court that may take action related to his sentence.

"The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough."[2] Here, the jury did not recommend death. The jury's verdict was for life. That means that either the jury did not find the aggravators proven beyond a reasonable doubt or it did not find that the aggravators outweighed the mitigators. Both of those findings must be made in order to impose a death sentence in Alabama.

The judge ignored the jury's verdict and made factual findings that both aggravators presented to the jury existed, and that they outweighed the mitigating factors. Therefore, the judge, not the jury, found a necessary fact required to impose a sentence of death. Mr. Smith's death sentence must be vacated and the jury's verdict of a sentence of life without parole must be entered.

A. The Supreme Court's *Hurst* decision invalidates Alabama's one-of-a-kind sentencing scheme and Mr. Smith's sentence.

[2] *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016).

Hurst applies the reasoning from *Apprendi v. New Jersey*[3] and *Ring v. Arizona*[4] to conclude that a death penalty system that allows a judge to impose a death sentence based on his own fact-finding is unconstitutional. The United States Supreme Court held in *Apprendi* that if a State increases a defendant's authorized punishment contingent on a finding of fact, that fact must be found by a jury unanimously and beyond a reasonable doubt.[5] Likewise, "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."[6] This rule, the Court held, applies to capital and non-capital defendants alike.[7]

The Court later clarified in *Ring* that "[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in

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[3] 530 U.S. 466 (2000).

[4] 536 U.S. 584 (2002).

[5] *Id. at* 482-83.

[6] *Id.* at 490 (quoting *Jones v. United States*, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring)).

[7] *Id.* at 497.

their maximum punishment."[8] Without such findings, "the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty."[9]

Applying these precedents, the Court faced the question of whether Florida's death penalty system is constitutional.[10] It concluded that it wasn't. The Court found in *Hurst* that:

> The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's. Like Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. § 921.141(3). Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating

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[8] *Ring*, 536 U.S. at 590. (quotations omitted).

[9] *Id*. at 596.

[10] Alabama's system has been described as being based on Florida's system. *Harris v. Alabama*, 513 U.S. 504, 508 (1995). More recently, the State has reiterated the equation: "States like Florida and Alabama responded to *Furman* by creating hybrid systems under which the jury recommends an advisory sentence, but the judge makes the final sentencing decision." Brief of *Amici Curiae* Alabama and Montana in Support of Respondent at 4, *Hurst v. Florida*, No. 14-7505, 136 S. Ct. 616 (2016), 2015 WL 4747983. *See also id.* at 7 ("Three states – Delaware, Florida, and Alabama – allow a judge to impose a sentence regardless of a jury's recommendation. *See* Ala. Code § 13A-5-47; Fla. Stat. § 921.141; Del. Code tit. 11, § 4209(d).").

> circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton v. Arizona,* 497 U.S. 639, 648, 110 S. Ct. 3047, 111 L.Ed.2d 511 (1990); accord, *State v. Steele,* 921 So.2d 538, 546 (Fla.2005) ("[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely").
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> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own fact finding. In light of *Ring,* we hold that Hurst's sentence violates the Sixth Amendment.[11]

Alabama's capital punishment statute, like Florida's, establishes a trifurcated capital trial consisting of a guilt phase trial before the jury,[12] an advisory jury penalty phase,[13] and finally, the actual sentencing hearing before the judge only.[14] During the advisory jury penalty phase, the State must establish at least one of the eight

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[11] *Hurst*, 136 S. Ct. at 621-22.

[12] *See* Ala. Code § 13A-5-40(a).

[13] *See* Ala. Code §§ 13A-5-45(a) & 13A-5-46(a).

[14] See Ala. Code § 13A-5-47(c).

statutory aggravating circumstances[15] beyond a reasonable doubt.[16]

The defendant may then offer any mitigating circumstance before the jury, and the State can attempt to disprove such mitigating circumstances by a preponderance of the evidence.[17] If the jury finds no aggravating circumstance, it must recommend a sentence of life imprisonment.[18] If the jury unanimously finds the existence of an aggravating circumstance beyond a reasonable doubt, the jury then weighs the aggravating and mitigating circumstances.[19] If at least ten members of the jury find that the aggravating circumstances outweigh the mitigating circumstances, the jury verdict is for death.[20] If between seven and nine members of the jury vote for death, there is no verdict.[21] If the majority of jurors find that the

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[15] Ala. Code § 13A-5-49.

[16] Ala. Code §§ 13A-5-45(e) & (f).

[17] Ala. Code § 13A-5-45(g).

[18] Ala. Code § 13A-5-46(e)(1).

[19] Ala. Code § 13A-5-46(e)(2-3).

[20] Ala. Code § 13A-5-46(f).

[21] *Id.*

mitigators outweigh the aggravators, the jury verdict is for life.[22] The jury is not required to note its findings of fact or specify which aggravating or mitigating circumstances, if any, it has found.

Mr. Smith was found guilty of one count of capital murder, specifically, murder committed during a robbery in the first degree.[23] The State presented two aggravating factors, that the murder was committed during a robbery, and that the murder was "especially heinous, atrocious, or cruel."[24] Mr. Smith presented one statutory mitigating factor (that he had no prior criminal history) and 16 non-statutory mitigating factors.[25] The jury, after hearing all

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[22] *Id.*

[23] *Smith v. State*, 756 So. 2d 892, 945 (Ala. Crim. App. 1997).

[24] *Id.*

[25] *Id.* at 945-46. ("The trial court found one statutory mitigating circumstance: 1) the appellant had no significant prior criminal history, § 13A-5-51(1), Ala. Code 1975. The trial court found 16 nonstatutory mitigating circumstances: (1) prior to November 8, 1994, the appellant had no history of assaultive behavior; (2) after his arrest, the appellant did not show any tendencies of violence towards others; (3) with the exception of the events on November 8, 1994, the appellant had always been a quiet, polite individual; (4) the appellant did not resist arrest; (5) the appellant voluntarily confessed after being advised of his right to remain silent and without asking for assistance of counsel; (6) upon his arrest, the appellant cooperated with law enforcement officials; (7) the crime was out

the evidence, returned a verdict of seven votes for life and five votes for death.[26]

By rendering a verdict in favor of life, the jury found that aggravating circumstances did not outweigh the mitigating circumstances proven by Mr. Smith. The unconstitutionality of Alabama's capital sentencing scheme is especially apparent when one examines what next happened to Mr. Smith.

The Court, substituting its own fact finding for that of the jury, concluded that the mitigating circumstances proven by Mr. Smith did not outweigh the aggravating circumstances found by the jury.[27] The powers vested in the

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of character for the appellant; (8) the appellant had adapted well to life in custody; (9) the appellant had become a "model prisoner"; (10) while in custody, the appellant had made improvements in his mental and emotional problems; (11) while in custody, the appellant had helped other inmates; (12) the appellant had made improvements with the help of his religious faith; (13) while in prison, the appellant would be able to make a contribution to society by helping other inmates; (14) the appellant had served in the United States military; (15) the appellant had maintained a good work record; and (16) the appellant had a son.").

[26] *Id.* at 949.

[27] *Id.* at 957. ("Therefore, following careful and deliberate consideration of all circumstances, this Court is convinced beyond a reasonable doubt that the aggravating circumstances substantially outweigh the mitigating circumstances and jury verdict.").

sentencing judge by Alabama's capital sentencing scheme - to both make additional findings of fact necessary to impose punishment and substitute its own findings of fact for that of the jury – violate *Hurst*.

Mr. Smith's trial judge overrode the jury's verdict and sentenced him to death. To do so, he had to make a finding that the jury did not find. He had to find that the aggravating factors outweighed the mitigating factors in this case. Because the Sixth Amendment requires a jury to find all facts necessary to impose a sentence of death, Mr. Smith's death sentence violates his Sixth Amendment rights and must be vacated.

III. *Hurst* applies to judge-imposed death sentences rendered prior to the ruling.[28]

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[28] In *Ex parte Harris,* 947 So.2d 1139, 1143-47 (Ala.2005), this Court recognized that, in determining whether a new rule of constitutional law applies retroactively, Alabama had adopted the analysis provided by the United States Supreme Court in *Teague v. Lane,* 489 U.S. 288 (1989). Recently, the United States Supreme Court held: "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. *Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises. *Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises. That constitutional command is, like all federal law, binding on state courts. This holding is limited to *Teague*'s first exception for substantive rules; the constitutional status of *Teague*'s exception for watershed rules of procedure need not

Mr. Smith's challenges to his death sentence ended prior to January 2016, when *Hurst* was decided. However, *Hurst* applies to invalidate Mr. Smith's sentence for two reasons. First, *Hurst* applies to Mr. Smith's sentence because it is not a mere application of *Ring*, it is a new watershed rule implicating the accuracy and fairness of the death-sentencing portion of a capital trial. Second, *Hurst* renders the death penalty unconstitutional for an entire class of defendants, namely those who do not have a jury verdict of death; therefore, it applies retroactively. Mr. Smith's death sentence must be vacated and the jury's verdict of life without parole imposed.

A. *Hurst* applies retroactively because it is a watershed rule implicating the accuracy and fairness of the death-sentencing portion of a capital trial.

In *Teague v. Lane*,[29] the United States Supreme Court clarified the framework for retroactive application

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be addressed here." *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016), *as revised* (Jan. 27, 2016). The Court's decision in *Montgomery* does not restrict this Court from granting greater retroactive effect to a watershed rule of procedure than it would under *Teague*.

[29] 489 U.S. 288 (1989).

of case law. Under *Teague*, a new constitutional rule of criminal procedure generally does not apply to convictions that were final when the new rule was announced. However, there are two categories of rules that are not subject to *Teague's* general bar.

First, courts must give retroactive effect to new substantive rules of constitutional law. Substantive rules are "rules forbidding criminal punishment of certain primary conduct," and "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."[30] While *Teague* calls substantive rules an exception to the bar on retroactive application of procedural rules, substantive rules "are more accurately characterized as . . . not subject to the bar."[31]

Second, courts must give retroactive effect to new "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[32] Mr. Smith's case implicates both *Teague*

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[30] *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989); *see also Teague*, *supra*, at 307.

[31] *Schriro v. Summerlin*, 542 U.S. 348, 352 n.4 (2004).

[32] *Id.* at 352; *see also Teague*, 489 U.S. at 312–313.

exceptions. It is a watershed rule of criminal procedure because it goes beyond *Ring* and holds, for the first time, that death sentences can only be imposed by a jury. It is also substantive as to Mr. Smith because it bars the imposition of a death sentence on anyone for whom the jury did not decide that punishment.[33]

B. *Hurst* is a watershed rule of criminal procedure.

Hurst constitutes a "watershed rule[] of criminal procedure" and accordingly is not prohibited by *Teague*'s general bar against applying new rules retroactively.[34] To fall under *Teague*'s exception for watershed rules, a procedural ruling must "implicate the fundamental fairness of the trial" and "significantly improve . . . pre-existing fact-finding procedures."[35] *Hurst* satisfies this exception.

In *Hurst*, the Supreme Court invalidated Florida's death penalty sentencing scheme, one that is "much like" Alabama's,[36] because it required the judge alone to find the

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[33] *See supra*.

[34] *See Teague*, 489 U.S. at 311.

[35] *Id.* at 312-13.

[36] *Harris v. Alabama*, 513 U.S. 504, 508 (1995).

existence of an aggravating circumstance.[37] The Court stated unequivocally: "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough."[38] This ruling goes beyond the Court's ruling in *Ring*.

In *Ring*, the Supreme Court concluded that Arizona's capital sentencing scheme was unconstitutional because the jury had no role in the sentencing process and a defendant could not be sentenced to death unless a judge found at least one aggravating circumstance.[39] The Court held that "'the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict.'"[40] *Ring* did not hold that systems like Alabama's and Florida's (which were in existence at the time) were unconstitutional because a jury only recommended a sentence.

Hurst's conclusion that a jury recommendation is

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[37] *Hurst*, 136 S. Ct. at 624.

[38] *Id.* at 619.

[39] *Ring*, 542 U.S. at 592–593.

[40] *Id.* at 604 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000) (alterations omitted)).

insufficient to impose a death sentence is based on the Sixth Amendment's guarantee of a right to a jury trial.[41] This right is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure."[42]

Hurst invalidated Florida's death penalty sentencing scheme. That scheme had been upheld in two previous Supreme Court cases.[43] Those two decisions formed the basis for upholding Alabama's death sentencing scheme.[44] *Hurst* specifically overruled *Hildwin* and *Spaziano*.[45] This indicates that Alabama's system is equally infirm.[46] The watershed nature of the *Hurst* ruling is evident from the direct repudiation of cases that were 30 years old, and the

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[41] *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) ("The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.").

[42] *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

[43] *See Hildwin v. Florida*, 490 U.S. 638 (1989); *Spaziano v. Florida*, 468 U.S. 447 (1984).

[44] *See Harris v. Alabama*, 513 U.S. 504 (1995).

[45] *Hurst*, 136 S. Ct. at 623.

[46] *See Brooks v. Alabama*, No. 15-7786 (Jan. 21, 2016) (Sotomayor, J., concurring in denial of certiorari).

implied repudiation of *Harris*, which was based on that case.

It has long been recognized that juries generally are more accurate fact finders than are judges, particularly when it comes to the imposition of the death penalty.[47] That Alabama's capital sentencing scheme implicates the fundamental fairness of the trial is all the more stark because this life-and-death decision is being made by judges facing intense electoral pressure.[48]

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[47] *See, e.g.*, *Ring*, 536 U.S. at 618 (Breyer, J., concurring) ("[T]he danger of unwarranted imposition of the [death] penalty cannot be avoided unless the decision to impose the death penalty is made by a jury rather than by a single government official." (internal quotations and citation omitted)); *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) ("The Court has said that 'one of the most important functions any jury can perform in making . . . a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system.'" (citation omitted)). Stephen Gillers, *Deciding Who Dies*, 129 U. Pa. L. Rev. 1, 60-69 (1980) ("The jury is substantially more likely than the judge to reliably reflect community feelings on the need for a retributive response to the offender and the offense.").

[48] *See* Equal Justice Initiative, *The Death Penalty in Alabama: Judge Override* 4, 8, 16 (July 2011), *available at* http://eji.org/files/Override_Report.pdf (last visited March 16, 2016) ("Because trial judges have almost unlimited discretion in capital sentencing, and because reviewing judges also are subject to reelection pressure, the override decision is perhaps the most vulnerable to political pressure."; "[R]ecent studies show that elections exert significant direct influence on decision-making in death penalty cases."; "[P]olitical pressure injects unfairness and arbitrariness into override decisions."; "The data suggests that override in Alabama is heavily

That is especially true in Alabama. Alabama's capital sentencing scheme — particularly with respect to life-to-death overrides — produces unreliable results. As Justice Sotomayor recently concluded after surveying the death sentences imposed under Alabama's capital sentencing scheme:

> There is no evidence that criminal activity is more heinous in Alabama than in other States, or that Alabama juries are particularly lenient in weighing aggravating and mitigating circumstances. The only answer that is supported by empirical evidence is one that, in my view, casts a cloud of illegitimacy over the criminal justice system: Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures. . . . By permitting a single trial judge's view to displace that of a jury representing a cross-section of the community,

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influenced by arbitrary factors such as the timing of judicial elections . . . ."); Paul Brace & Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 Am. J. Pol. Sci. 360, 370 (2008) ("[E]lections and strong public opinion [in support of capital punishment] exert a notable and significant direct influence on judge decision making in [capital] cases . . . ."); Karin E. Garvey, *Eighth Amendment—the Constitutionality of the Alabama Capital Sentencing Scheme*, 86 J. Crim. L. & Criminology 1411, 1434-35 (1996) (observing the political pressure on elected judges to support the death penalty "simply increases the arbitrariness of the sentences imposed by Alabama judges"); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 759, 792-93 (1995) (observing "[t]he political liability facing judges who enforce the Bill of Rights in capital cases undermines the independence, integrity, and impartiality of the state judiciary," including in deciding whether to exercise judicial override in capital cases).

> Alabama's sentencing scheme has led to curious and potentially arbitrary outcomes.[49]

In addition, as of late 2013, Alabama judges were responsible for 26 of the 27 instances since 2000 in which a judge in any state has overridden a jury's advisory sentencing verdict of life without parole.[50] It is apparent that Alabama is a "clear outlier" among states administering the death penalty — even among those few states that permitted judicial override.[51]

Teague holds that watershed rules of criminal procedure are to be applied retroactively to cases on collateral review. *Hurst* is such a case. It completely invalidates Alabama's death sentencing scheme as violative of the Sixth Amendment. In doing so, it implicates fundamental fairness and makes Alabama's system more accurate. *Hurst* invalidates Mr. Smith's death sentence. This Court should grant his habeas corpus petition and enter judgment imposing the jury's verdict of life without parole.

C. *Hurst* is retroactive for individuals like

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[49] *Woodward v. Alabama*, 134 S. Ct. 405, 408-09 (2013) (Sotomayor, J., dissenting from denial of certiorari).

[50] *Id.* at 407.

[51] *Id.*

Mr. Smith who received a life without the possibility of parole recommendation from the jury.

As discussed *infra*, courts must give retroactive effect to new substantive rules of constitutional law. Substantive rules are "rules forbidding criminal punishment of certain primary conduct," and "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."[52] In Mr. Smith's case, the jury recommended a life sentence with a seven to five vote. Mr. Smith's trial judge overrode the jury's recommendation and sentenced him to death. Thus, there was no finding by the jury of all facts necessary to impose a sentence of death, which *Hurst* ruled the Sixth Amendment requires.[53]

Based on the life recommendation from the jury and the Supreme Court's ruling in *Hurst*, Mr. Smith should be considered part of a "class of defendants" for whom the death penalty is prohibited. In *Summerlin*, the Court made this distinction when holding that *Ring* is not retroactive,

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[52] *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989); *see also Teague*, *supra*, at 307.

[53] *Hurst*, 136 S. Ct. at 619.

stating:

> This Court's holding that, *because Arizona* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as *this Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive.[54]

For individuals like Mr. Smith, *Hurst* has made a finding by the jury that aggravating factors outweigh mitigating factors "essential to the death penalty." Thus, since no such finding is present, the Sixth Amendment requires Mr. Smith receive the sentence handed down by the jury in his case, which is life without the possibility of parole.

In *Montgomery v. Louisiana*,[55] the Supreme Court considered whether its ruling in *Miller v. Alabama*[56] that juveniles convicted of homicide offenses could not automatically be sentenced to life without parole applied retroactively. In its ruling, the Court noted that "[w]hether a new rule bars States from proscribing certain conduct or from inflicting a certain punishment, '[i]n both

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[54] 542 U.S. at 354 (emphasis in original).

[55] 136 S. Ct. 718 (2016).

[56] 132 S. Ct. 2455 (2012).

cases, the Constitution itself deprives the State of the power to impose a certain penalty.'"[57]

Hurst deprives the State of the power to impose a death penalty when a jury does not make all the findings necessary to impose death. Therefore, for death-sentenced inmates who were sentenced to death by a judge, not a jury, *Hurst* is substantive, not procedural. Mr. Smith fits in that category, therefore, his death sentence must be vacated and the jury's verdict of life without parole must be imposed.

III. A judicially imposed death sentence in the face of a jury verdict for life violates the Eighth Amendment.

"In Alabama, unlike any other State in the Union, the trial judge has unbridled discretion to sentence the defendant to death – even though a jury has determined that death is an inappropriate penalty."[58] The jury in Mr. Smith's case determined by a vote of seven to five, that death was inappropriate for this case and recommended a sentence of life without the possibility of parole. The trial judge overrode this decision and sentenced Mr. Smith

[57] *Montgomery*, 136 S. Ct. at 729 (citation omitted).
[58] *Harris v. Alabama*, 513 U.S. 504, 515 (1995) (Stevens, J., dissenting.)

to die.[59] Prior to *Hurst*, the United States Supreme Court upheld Alabama's death sentencing statute against an Eighth Amendment challenge. *Hurst* overruled the cases that provided the support for finding Alabama's statute unconstitutional. *Hurst* calls into question the continued constitutionality of Alabama's statute against an Eighth Amendment challenge, particularly in a situation where the jury voted for life and the judge overrode that verdict. Because the judge, not the jury, determined the appropriate sentence was death, Mr. Smith's sentence violates the Eighth Amendment to the United States Constitution.

A. *Hurst* explicitly overruled *Spaziano* and implicitly overruled *Harris*, both of which upheld judicially imposed death sentences against Eighth Amendment challenges.

The United States Supreme Court has twice considered whether allowing a judge to override a jury's recommendation of a life sentence violates the Eighth

[59] This process, a judge sentencing a defendant to death when the jury returned a verdict of life without parole, will be referred to as judicial override throughout this section. Although judicial override can refer to a judge changing the jury sentence from life to death or from death to life, unless otherwise specified, in this argument it refers only to a judge overruling a jury sentence of life without the possibility of parole and instead sentencing the defendant to death.

Amendment[60]. In both cases, the Court concluded there was no Eighth Amendment violation. However, the reasoning and precedent relied upon in *Spaziano* and *Harris* has drastically changed in the 21 years since *Harris* was decided.

In *Spaziano*, the Court held that a death sentence, imposed after a jury recommended a life sentence, complied with the Sixth and Eighth Amendments to the United States Constitution. The Court first decided that the Sixth Amendment did not guarantee the right to have a jury determine the sentence in a capital case. The Court then used this decision to frame the Eighth Amendment result, ultimately holding:

> [i]n light of the fact that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.[61]

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[60] See *Spaziano v. Florida*, 468 U.S. 447 (1984); *Harris v. Alabama*, 513 U.S. 504 (1995).
[61] *Spaziano*, 468 U.S. at 464.

The Court was not "persuaded that placing the responsibility on a trial judge to impose the sentence in a capital case is so fundamentally at odds with contemporary standards of fairness and decency that [the state] must be required to alter its scheme and give final authority to the jury to make the life-or-death decision."[62]

In *Harris*, the Court considered "whether the Eighth Amendment to the Constitution requires the sentencing judge to ascribe any particular weight to the verdict of an advisory jury."[63] The Eighth Amendment is not violated if "the [sentencing] scheme adequately channels the sentencer's discretion so as to prevent arbitrary results."[64] Relying on *Spaziano*, the Court held that because "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence," the Eighth Amendment does not require the state to prescribe the weight the judge should give to the sentencing verdict of an advisory jury.[65]

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[62] *Id.* at 465.

[63] *Harris*, 513 U.S. at 509.

[64] *Id.* at 511.

[65] *Id.* at 515.

Ultimately it found that allowing a judge to override a jury's recommendation of life was not "fundamentally at odds with contemporary standards of fairness and decency."[66]

Justice Stevens dissented in *Harris*. He noted that in the vast majority of jurisdictions, a jury, not a judge, provides the sentence in a capital case. He asserted that "[c]ommunity participation is . . . critical in life-or-death sentencing decisions" because capital judges are not solely motivated by retribution (the only viable societal interest for imposing death). [67] He observed that "present-day capital judges may be 'too responsive' [to] a political climate in which judges who covet higher office – or who merely wish to remain judges – must constantly profess their fealty to the death penalty."[68] He emphasized the danger that capital judges "will bend to political pressures when pronouncing sentence in highly publicized capital cases."[69]

Justice Stevens found that conversely, a jury answers "only to their own consciences; they rarely have any

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[66] *Id.* at 510 (internal quotations omitted).
[67] *Id.* at 519 (Stevens, J., dissenting).
[68] *Id.*
[69] *Id.*

concern about possible reprisals after their work is done . . . . A jury verdict expresses a collective judgment that we may fairly presume to reflect the considered view of the community."[70] He concluded that "[t]he most credible justification for the death penalty is its expression of the community's outrage. To permit the State to execute a [man] in spite of the community's considered judgment that [he] should not die is to sever the death penalty from its only legitimate mooring."[71]

Thirty two years after its decision in *Spaziano*, and 21 years after *Harris*, the Court revisited the issue of jury versus judge capital sentencing in *Hurst*. In *Hurst*, the Court held that "[t]he Sixth Amendment protects a defendant's right to an impartial jury. This right require[s] [the state] to base [a] death sentence on a jury's verdict."[72] The Court stated that "[t]ime and subsequent cases have washed away the logic of *Spaziano* . . . [which is] overruled to the extent [it] allow[s] a

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[70] *Id*. at 518-519.

[71] *Id*. at 536.

[72] *Hurst*, 136 S. Ct. at 624.

sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty."[73]

Although the holding in *Hurst* was based on the Sixth Amendment, this reversal casts serious doubt on the precedential effect of the Eighth Amendment analysis in *Spaziano* and *Harris*. Every justification given in *Spaziano* for rejecting the Eighth Amendment claim (Sixth Amendment does not require jury sentencing; fairness and reliability do not require jury sentencing; and the nature and purpose of the death penalty do not require jury sentencing) has now been contradicted or directly overruled.

It is now clear, 21 years after *Harris*, that Justice Stevens was right. Alabama's death penalty scheme does not "adequately channel[] the sentencer's discretion so as to prevent arbitrary results" and is "fundamentally at odds with contemporary standards of fairness and decency."[74] Therefore, "Alabama's capital sentencing scheme [is]

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[73] *Id.*

[74] *Harris*, 513 U.S. at 510.

fundamentally unfair and results in cruel and unusual punishment."[75]

B. Imposing a death sentence when the jury has returned a verdict for life violates the Eighth Amendment because it is contrary to evolving standards of decency.

Eighth Amendment analysis has changed since *Harris* was decided. The Supreme Court has refined and clarified the process for determining whether an Eighth Amendment violation exists.

In *Atkins v. Virginia*,[76] the Supreme Court held that it was cruel and unusual to execute a person with an intellectual disability. Although the Court had previously decided the opposite, it revisited this issue "in light of the dramatic shift in the state legislative landscape that ha[d] occurred in the past 13 years."[77] The Court started by reiterating that the Eighth Amendment "'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society."[78] To the extent possible,

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[75] *Id.* at 526 (Stevens, J., dissenting).
[76] 536 U.S. 304 (2002).

[77] *Id.* at 310; *See also Penry v. Lynaugh*, 492 U.S. 302 (1989).

[78] *Atkins*, 536 U.S. at 311-312 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958)).

objective factors should be used to determine the contemporary standards of decency[79]. However, "the objective evidence, though of great importance, [does] not 'wholly determine' the controversy, 'for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'"[80]

The Court expressed that "the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'"[81] In 1989, when the Court decided *Penry*, only two states and the federal government had prohibited the execution of a person with an intellectual disability[82]. The *Penry* Court said that this, even when combined with the 14 states that do not allow capital punishment, was not enough to show a national consensus.[83]

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[79] *Id.* at 312.

[80] *Atkins*, 536 U.S. at 312 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

[81] *Atkins*, 536 U.S. at 312 (quoting *Penry*, 492 U.S. at 331).

[82] *Id.* at 314.

[83] *Id.*

In the 13 years between *Penry* and *Adkins*, 16 additional states passed legislation forbidding the execution of a person with an intellectual disability.[84] The Court noted that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change."[85] Since *Penry*, no states had passed legislation reinstating the opportunity to execute a person with an intellectual disability. The Court also considered the frequency of the practice as objective evidence of the contemporary standards of decency. It noted that "even in those states that allow the execution of [intellectually disabled] offenders, the practice is uncommon."[86] In several of those states, the execution of a person with an intellectual disability had "not been carried out in decades."[87] Based on these objective factors, the Court determined that the practice "has become truly unusual, and

[84] *Id.* at 314-316.
[85] *Atkins*, 536 U.S. at 315.

[86] *Id.* at 317.

[87] *Id.* at 316.

it is fair to say that a national consensus has developed against it."[88]

The Court again conducted a detailed Eighth Amendment analysis in *Roper v. Simmons*.[89] There, the Court reconsidered its decision in *Stanford v. Kentucky*,[90] holding that the Eighth Amendment did not preclude the execution of juveniles who were under 18 at the time of their crime. The Missouri Supreme Court had found that a "national consensus has developed against the execution of juvenile offenders" since *Stanford*.[91] The United States Supreme Court affirmed. The Court applied the same two-part analysis it applied in *Atkins*.[92] First, it considered whether the contemporary standards of decency reflected that a national consensus had developed against executing juvenile offenders.[93] Second, it considered whether in its own judgment the

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[88] *Id.*

[89] 543 U.S. 551 (2005).

[90] 492 U.S. 361 (1989).

[91] *Roper*, 543 U.S. at 559-560.

[92] *Id.* at 561-564.

[93] *Id.* at 567.

practice of executing juvenile offenders was acceptable under the Eighth Amendment.[94]

The Court observed that 30 states prohibit the juvenile death penalty (12 that have abolished the death penalty and 18 that maintain the death penalty but prohibit the execution of juveniles).[95] "[E]ven in the 20 states without a formal prohibition on executing juveniles, the practice is infrequent. Since *Stanford*, six States have executed prisoners for crimes committed as juveniles. In the past 10 years, only three have done so."[96]

The Court recognized that unlike *Atkins*, there was not a remarkable rate of change. Only "[f]ive states that allowed the juvenile death penalty at the time of *Stanford* have abandoned it in the intervening 15 years."[97] However, it found that this slower pace was explained by the fact that when the Court heard *Stanford*, 12 death penalty states had already prohibited the execution of juveniles while

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[94] *Id.* at 568-574.

[95] *Id.* at 564-566.

[96] *Id.* at 564-565.

[97] *Id.* at 565.

when the Court heard *Penry*, only two death-penalty states had prohibited the execution of the intellectually disabled.[98] The Court further recognized that the consistency of direction supported a national consensus against juvenile executions, noting that "[s]ince *Stanford*, no State that previously prohibited capital punishment for juveniles has reinstated it."[99] The Court concluded that

> the objective indicia of consensus in this case – the rejection of the juvenile death penalty in the majority of states; the infrequency of its use even where is remains on the books; and the consistency in the trend toward abolition of the practice – provide sufficient evidence that today our society views juveniles . . . as categorically less culpable than the average criminal.[100]

The Court further limited the application of the death penalty in *Kennedy v. Louisiana*,[101] holding that the Eighth Amendment forbids a sentence of death for the rape of a child. The Court observed that post-*Furman* only six states reintroduced the death penalty for the rape of a child.[102]

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[98] *Id.* at 566-567.

[99] *Roper*, 543 U.S. at 566.

[100] *Id.* at 567 (internal quotations omitted).

[101] 554 U.S. 407 (2008).

[102] *Kennedy*, 554 U.S. at 423.

The Court noted that there was still a "divided opinion" but found it extremely significant that "in 45 jurisdictions [the] petitioner could not be executed for child rape of any kind. That number surpasses the 30 states in *Atkins* and *Roper* and the 42 states in *Enmund* that prohibited the death penalty under the circumstances those cases considered."[103] The Court rejected the argument that there was a "consistent direction of change in support of the death penalty for child rape."[104] In doing so, it clarified how "consistent change" informs the Eighth Amendment analysis, noting that "[c]onsistent change might counterbalance an otherwise weak demonstration of consensus."[105] Finally, the Court found persuasive the fact that there are only two people on death row for the crime of child rape and that no one has been executed for this crime since 1964. Based on all these factors, the Court concluded that "there is a national consensus against capital punishment for the crime of child rape."[106]

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[103] *Id.* at 426.

[104] *Id.* at 431.

[105] *Id.* at 431.

[106] *Id.* at 434.

It is evident that Eighth Amendment analysis has greatly evolved since *Harris*. These cases provide a clear two-part analysis the Court must follow in this case. First, the Court must ask if there is a national consensus against the process of judicial override from life to death. Second, the Court must ask whether, in its own judgment, the Eighth Amendment forbids this type of judicial override. The answer to both of these questions is yes. A judicial sentence of death, when the jury has returned a verdict of life, is not permissible under the Eighth and Fourteenth Amendments to the United States Constitution.

C. There is a national consensus against judicial override of a jury's verdict for life.

This Court should look to the following factors to determine the contemporary standards of decency: the number of jurisdictions that have banned judicial override; the direction of change of legislation concerning judicial override; and the frequency judicial override is used in jurisdictions where it is allowed.

It is important to emphasize that this Court must look for objective evidence of a national consensus. Here, there is no question that a national consensus exists. Every single state, other than Alabama, has abolished the ability for a judge to sentence a defendant to death when the jury recommended a life sentence.

At the time of *Harris,* 37 states authorized capital punishment.[107] In 33 of the 37 states, the jury participated in the sentencing decision.[108] "In 29 of those states, the jury's decision [was] final; in the other 4 – Alabama, Delaware, Florida, and Indiana – the judge [had] the power to override the jury's decision."[109]

Today, 34 states and the federal government have statutes that authorize capital punishment.[110] In 33 of the

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[107] *Harris v. Alabama*, 513 U.S. 504, 516 (1995) (Stevens, J., dissenting).

[108] *Id.*

[109] *Id.*

[110] *States with and without the Death Penalty*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Oct. 12, 2016). It is also relevant to consider that support for the death penalty overall has declined. In 2015 executions reached the lowest level in 25 years. *Facts About The Death Penalty*, Death Penalty Information

34 states, the jury participates in the sentencing process.[111] Of those 33 states, Alabama is the only state that allows a judge to sentence a defendant to death when the jury has recommended a sentence of life. Indiana abolished judicial override in 2002.[112] Florida and Delaware abolished judicial override from life to death in 2016.[113]

It is very telling that Alabama is the only state that allows this practice. This weighs heavily in favor of this Court finding a national consensus against judicial override. The "'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'"[114] Nationwide, legislatures

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Center, http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (last visited 10-11-2016).

[111] Montana is the only state where juries have no involvement in capital sentencings. It is likely that Montana's statute is unconstitutional in light of *Hurst*.

[112] In Indiana, the judge is not allowed to override the sentencing decision of the jury; however, if the jury cannot reach a decision, the judge is authorized to sentence the defendant alone. Ind. Code Ann. § 35-50-2-9.

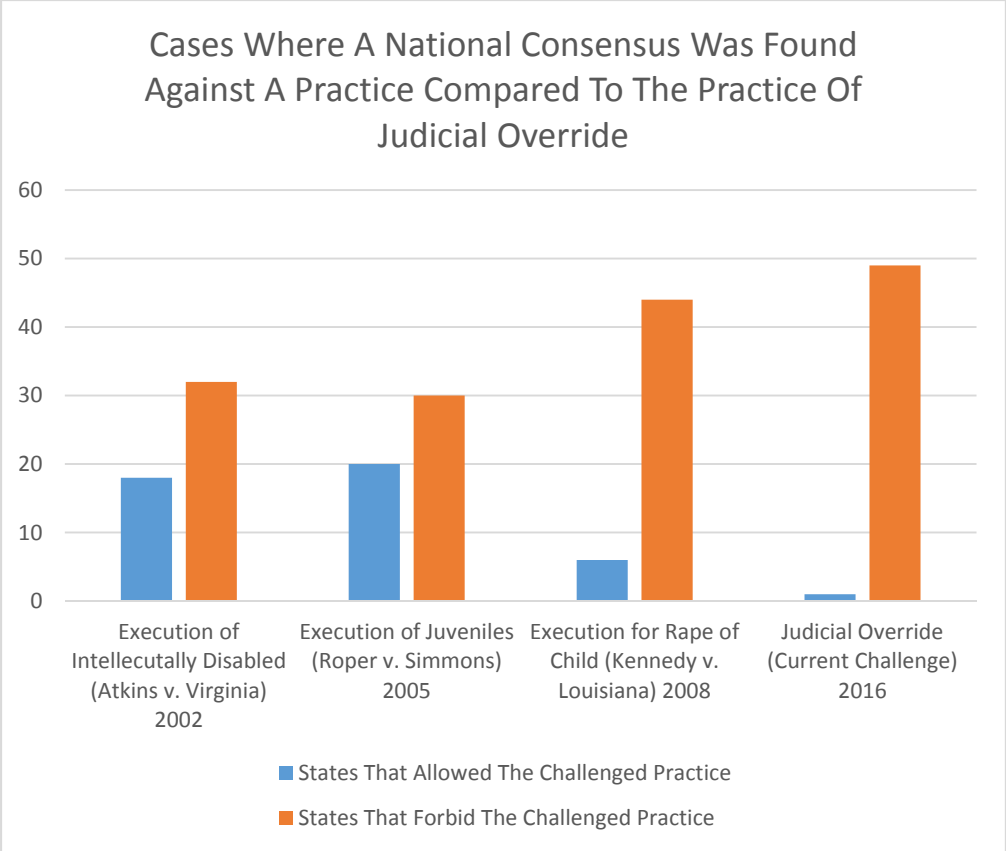
[113] The Florida legislature passed a law that mandates a life sentence unless at least 10 jurors recommend a sentence of death. FL ST §921.141. The Delaware Supreme Court held that Delaware's sentencing scheme violated the Sixth Amendment based on *Hurst*. *Rauf v. State*, No. 39, 2016, 2016 WL 4224252 (Del. Aug. 2, 2016).

[114] *Atkins*, 536 U.S. at 312 (quoting *Penry*, 492 U.S. at 331).

have been clear: contemporary standards of decency forbid a sentence of death when a jury recommends a life sentence.

A punishment may be regarded as unusual if "tangible evidence of societal standards" leads to a determination that "there is a 'consensus against' a given sentencing practice."[115] Under this definition, there is no question that the practice of judicial override is unusual. This is especially clear when this practice is compared to the practices found unusual in *Atkins*, *Roper*, and *Kennedy*. The graph below shows the breakdown of the number of states that allowed/forbade the challenged practice that was found to be unusual compared to the number of states that allow/forbid judicial override.

[115] *Miller*, 132 S. Ct. at 2478 (Roberts, J., dissenting.)



Looking at these numbers it is impossible to deny that a national consensus exists against judicial override. Unlike every other cases where a consensus was found, there is not even a divided opinion: Alabama stands alone. "The practice . . . has become truly unusual, and . . . a national consensus has developed against it."[116]

The infrequent use of judicial override outside of Alabama and the direction of change of the legislative

[116] *Atkins*, 536 U.S. at 316.

enactments also support the conclusion that a national consensus against judicial override exists. No state allows judicial override now that did not allow judicial override in 1995. Moreover, even before its abolition in Indiana, Delaware, and Florida, judicial override was extremely rare in those states. In 2013, in a dissent from a denial of certiorari in *Woodward v. Alabama*,[117] Justice Sotomayor discussed the decline in the use of judicial override noting that,

> [i]n the 1980's, there were 125 life-to-death overrides: 89 in Florida, 30 in Alabama, and 6 in Indiana. In the 1990's there were 74: 26 in Florida, 44 in Alabama, and 4 in Indiana. Since 2000, by contract, there have been only 27 life-to-death overrides, 26 of which were by Alabama judges.[118]

It is indisputable that a national consensus exists against judicial override. Contemporary standards of decency do not allow a judge to sentence a defendant to death when a jury has recommended a sentence of life.

D. The trial court's override of the jury's life verdict is unacceptable under the Eighth Amendment.

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[117] 134 S. Ct. 405 (2013).

[118] *Id.* at 407.

For the second part of the Eighth Amendment analysis this Court must determine whether, in its own judgment, the practice of judicial override violates the Eighth Amendment. In making this judgment, this Court should consider: whether the practice of judicial override contributes to the penological goals advanced by the death penalty; whether defendants a jury determined did not deserve to die are less culpable for the crime; whether the process of judicial override is non-arbitrary and reflects moderation and restraint of the application of capital punishment; and whether judicial override offends Eighth Amendment principles of dignity.

1. The practice of judicial override does not serve any legitimate penological goals.

"[C]apital punishment is excessive when . . . it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes."[119] Executing Mr. Smith, a person who a jury determined should live, does not further either of these goals.

> In considering whether retribution is served...[the court looks] to whether capital punishment 'has the potential ... to allow the

[119] *Kennedy*, 554 U.S. at 441.

> 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."[120]

The jury is the voice of the community. The Supreme Court has said that "one of the most important functions any jury can perform in making a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system."[121] "In respect to retribution, jurors possess an important comparative advantage over judges.... [T]hey are more attuned to the community's moral sensibility ... because they reflect more accurately the composition and experiences of the community as a whole."[122]

When a judge sentences a defendant to death after a jury returns a recommendation of life, the judge severs the link to the community. Without this connection, the case

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[120] *Id.* at 442 (quoting *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007)).

[121] *Gregg v. Georgia*, 428 U.S. 153, 181, (1976) (internal quotations and citations omitted).

[122] *Ring v. Arizona*, 536 U.S. 584, 615-616 (2002) (Breyer, J., concurring) (internal quotations and citations omitted).

for retribution falls apart. The community never made a determination that "the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed."[123] In fact, the community made the opposite determination. When a jury determines the appropriate sentence is life, retribution is not advanced by sentencing the person to death. This is why "the danger of unwarranted imposition of the [death] penalty cannot be avoided unless the decision to impose death is made by a jury rather than by a single government official."[124]

Moreover, like *Kennedy*, there is a "special risk of wrongful execution" in judicial override cases.[125] Jury studies reflect that residual doubt often motivates a juror to vote for a life sentence.[126] This suggests that override cases "are more likely to involve weaker evidence and wrongful convictions when compared to other death penalty

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[123] *Kennedy*, 554 U.S. at 442 (internal quotations omitted).

[124] *Ring*, 536 U.S. at 618 (Breyer, J., concurring) (internal quotations omitted).

[125] See *Kennedy*, 554 U.S. at 443.

[126] Mulvaney and Chamblee, *Innocence and Override*, The Yale Law Journal Forum, http://www.yalelawjournal.org/forum/innocence-and-override (last visited Oct. 13, 2016).

cases. Not surprisingly, in Alabama, override cases account for less than a quarter of death sentences but half of death row exonerations."[127] This increased risk of wrongful conviction further diminishes any retributive purpose.

Moreover, executing a person a jury determined should live serves absolutely no deterrent purpose. "The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct."[128] The Supreme Court has found that deterrence is not diminished if a person who commits a capital crime "continue[s] to face the threat of execution."[129] Banning judicial override does not change this threat. A death sentence is still available for these crimes; however, the jury, not the judge must be the body to decide.

The process of judicial override does not "measurably further the goal[s] of deterrence" and retribution.[130] The

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[127] *Id.*

[128] *Atkins*, 536 U.S. at 320.

[129] *Id.*

[130] *Id.*

sentence in this case therefore "is nothing more than the purposeless and needless imposition of pain and suffering."[131]

2. Demands of fairness and reliability in capital cases require jury sentencing.

It is unconstitutional for a death sentence to be applied in an arbitrary manner.[132] A sentence is non-arbitrary if the sentencing body had clear instructions to follow to ensure the sentencing verdict is fair and reliable.[133] In judicial override cases in Alabama a jury is instructed to weigh the mitigating and aggravating circumstances for each case. In this case, and other judicial override cases, the jury followed the instructions and determined the fair and reliable sentence was life without the possibility of parole. Despite this, judges arbitrarily overrode the juries' decisions and sentenced defendants to death. As a result, override death sentences, including Mr. Smith's, are unfair, unreliable, and unconstitutional.

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[131] *Atkins*, 536 U.S. at 319.

[132] See *Gregg v. Georgia*, 428 U.S. 153 (1976).

[133] *Id.*

The process of judicial override is unfair and therefore arbitrary. First, the procedure does not reflect "moderation or restraint in the application of capital punishment."[134] "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint."[135] Therefore, "the Eighth Amendment applies to it with special force."[136] The Eighth Amendment mandates that a death sentence can only be applied to a narrow class of offenders that have been determined to be the worst of the worst.[137]

The process of judicial override can never reflect the constitutional requirement that capital punishment must be used in moderation and with restraint. In every case where there was a judicial override from life to death, a jury determined that the defendant did not fall within the narrow class of offenders who deserved to die; yet the judge still sentenced each one of these defendants to

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[134] *Kennedy*, 554 U.S. at 435.

[135] *Id.* at 420.

[136] *Roper*, 543 U.S. at 568.

[137] *Kennedy*, 554 U.S. at 446-447.

death. These judges showed no restraint in overruling the juries' decisions. A judicial override expands the application of the death penalty and reverses the restraint a jury has determined is appropriate.

The unfairness of judicial override is further compounded by the fact that judges in Alabama are motivated by political gain and that motivation improperly influences override decisions. In his *Harris* dissent, Justice Stevens observed that judges seeking reelection or higher office "will bend to political pressure when pronouncing sentence in highly publicized capital cases."[138] "In 2008, an election year, 30% of the death sentences imposed in Alabama were the result of judge override."[139] Justice Sotomayor has observed that judicial override has led to "curious and potentially arbitrary outcomes."[140] Judges have justified overrides with reasons that "do not seem to square with . .

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[138] *Harris*, 513 U.S. at 519 (Stevens, J., dissenting).

[139] *The Death Penalty in Alabama: Judge Override*, Equal Justice Initiative, July 2011, available at: http://eji.org/sites/default/files/death-penalty-in-alabama-judge-override.pdf.

[140] *Woodward*, 134 S. Ct. at 409.

. Eighth Amendment jurisprudence."[141] For example, one judge sentenced a man with a 65 IQ to death, despite the fact that the jury unanimously recommended a life sentence, because "the sociological literature suggest Gypsies intentionally test low on standard IQ tests."[142] Judges are not well suited to make these life and death decisions. "Judges . . . are part of the State-and an increasingly bureaucratic part of it, at that."[143] Juries, on the other hand,

> answer only to their own consciences; they rarely have any concern about possible reprisals after their work is done. More importantly, they focus their attention on a particular case involving the fate of one fellow citizen, rather than on a generalized remedy for a global category of faceless violent criminals who, in the abstract, may appear unworthy of life. A jury verdict expresses a collective judgment that [the court] may fairly presume to reflect the considered view of the community.[144]

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[141] *Id.* at 409-410.

[142] *Id.* (internal quotations omitted).

[143] *Apprendi v. New Jersey*, 530 U.S. 266, 498 (2000) (Scalia, J., concurring).

[144] *Harris*, 513 U.S. at 518-519 (Stevens, J., dissenting).

Judicial override also renders the sentence unreliable. A sentence of death is only reliable when it "is an expression of society's moral outrage at particularly offensive conduct."[145] It is undisputed that a jury, not a judge, is best suited to represent society's view. "'[O]ne of the most important functions any jury can perform . . . is to maintain a link between contemporary community values and the penal system.'"[146] "Even in jurisdictions where judges are selected directly by the people, the jury remains uniquely capable of determining whether, given the community's views, capital punishment is appropriate in the particular case."[147]

The connection between the community and the penal system was severed in this case when the judge overrode the jury's decision. Mr. Smith's death sentence is unreliable because it reflects, not the view of the community, but the view of a single state actor.

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[145] *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

[146] *Id.* (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968)).

[147] *Ring*, 536 U.S. at 616 (Breyer, J., concurring).

In the years since *Spaziano* and *Harris* it has become extremely clear that fairness and reliability do in fact require a jury to make the decision to sentence a defendant to death. This provides strong support for this Court to determine, based on its own judgment, that the practice of judicial override violates the Eighth Amendment, and Mr. Smith's sentence must be vacated.

IV. Conclusion

Ronald Smith's death sentence violates the Sixth and Eighth Amendments because it was imposed by a judge in direct contradiction of what the jury found. His death sentence is illegal, and the jury's sentence of life without parole must be followed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2016, I electronically filed the foregoing pleading with the Clerk of the Court using the ACIS system, which will send notification of such filing to the attorney of record:

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