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THE EFFECT OF *HURST V. FLORIDA* ON JUDICIAL OVERRIDE IN ALABAMA

CAROLYN SCHORR*

INTRODUCTION

Montez Spradley should be dead. A trial judge in Alabama overrode a jury's decision to sentence Mr. Spradley to life in prison and sentenced him to die for a crime that he did not commit.¹ The judge was well aware of the unreliability of a key witness in the case against Mr. Spradley and that information regarding the witness' reliability had been withheld from his attorneys.² In 2011, Mr. Spradley entered into an Alford plea, pleading guilty to the crime while maintaining his innocence, and escaped death row and prison after nine and a half years.³ Walter McMillian, a Black man, was sentenced to die for the murder of a white woman in Monroe County, Alabama.⁴ Like the judge in Montez Spradley's case, Judge Robert E. Lee Key overrode the jury's life verdict and imposed the death penalty on Mr. McMillian.⁵ He spent six years on death row before being exonerated due to the fact that the State's witnesses had lied on the stand, and the prosecution suppressed exculpatory evidence.⁶ Equal Justice Initiative asserted in 2011 that of the ninety-three people sentenced to death by judicial override in the

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¹ Andrew Cohen, *'I'm Just Happy to Be Alive,'* THE MARSHALL PROJECT (Sept. 20, 2015), <https://www.themarshallproject.org/2015/09/10/i-m-just-happy-to-be-alive>.

² *Id.*

³ *Id.*

⁴ BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 66 (Spiegel & Grau 2015) (2014).

⁵ EQUAL JUSTICE INITIATIVE, THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE 22 (2011), <https://eji.org/sites/default/files/death-penalty-in-alabama-judge-override.pdf> [hereinafter DEATH PENALTY IN ALABAMA]. The Equal Justice Initiative, founded in 1989 by Bryan Stevenson, is "committed to ending mass incarceration and excessive punishment in the United States, to challenging racial and economic injustice, and to protecting basic human rights for the most vulnerable people in American society." *About EJI*, EQUAL JUSTICE INITIATIVE, <https://eji.org/about-eji> (last visited Jan 3, 2019).

⁶ *Id.*

state of Alabama, “37% left death row after their convictions or sentences were reversed.”⁷

Capital punishment in the United States has been on the decline with regards to public perception, with a 2017 Gallup poll indicating that support for the death penalty is at its lowest since 1972.⁸ The institutions supporting the death penalty have had to react to this change in the American consciousness, enacting slow reform to a broken system.⁹ In the midst of the bipartisan push for criminal justice reform,¹⁰ Alabama remained the only state utilizing the archaic process of judicial override.¹¹ Judicial override was enacted as a political response to the abolition of the death penalty by the Supreme Court in *Furman v. Georgia*.¹² Judicial override gives a trial judge the ability to override a jury’s advisory sentence in a capital punishment case,¹³ and in the majority of judicial override cases in Alabama, a judge has overridden a jury’s recommendation of life in prison with the death sentence.¹⁴ A recent Supreme Court case, *Hurst v. Florida*, holds that the Sixth Amendment requires a jury to be the ultimate fact-finder in order to sentence a defendant to death.¹⁵ As a result, Alabama’s legislature amended its capital

⁷ *Id.*

⁸ Brett Samuels, *Support for Death Penalty at Lowest Level in 45 Years*, THE HILL (Oct. 26, 2017, 9:56 AM), <http://thehill.com/blogs/blog-briefing-room/news/357285-support-for-death-penalty-at-lowest-level-in-45-years> (noting that in 1972, 50% of people supported the death penalty for convicted murderers).

⁹ Jon Herskovitz, *U.S. Death Penalties, Executions Slow as Capital Punishment is Squeezed*, REUTERS (Nov. 15, 2015, 9:06 AM), <https://www.reuters.com/article/us-usa-execution/u-s-death-penalties-executions-slow-as-capital-punishment-is-squeezed-idUSKCN0T40OV20151115> (discussing state, prosecutorial, and lawmaker responses to instituted death penalty reforms).

¹⁰ Seung Min Kim, *Senators Unveil Bipartisan Criminal Justice Reform Package*, POLITICO (Oct. 4, 2017, 3:10 PM), <https://www.politico.com/story/2017/10/04/senate-bipartisan-bill-criminal-justice-reform-243455>; Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html?login=email&auth=login-email>.

¹¹ Gigi Douban, *Alabama Lawmakers Move to Abolish Judicial Override*, NPR (Mar. 2, 2017, 4:35 PM), <https://www.npr.org/2017/03/02/518197090/alabama-lawmakers-move-to-abolish-judicial-override>.

¹² See DEATH PENALTY IN ALABAMA, *supra* note 5, at 9–10. “States responded to *Furman* by implementing new capital sentencing statutes that established procedures to regularize imposition of the death penalty and minimize the risk that death sentences will be imposed in error or in an arbitrary and capricious manner.” *Id.*

¹³ *Id.* at 10.

¹⁴ *Id.* at 4 (“Since 1976, Alabama judges have overridden jury verdicts 107 times. Although judges have authority to override life or death verdicts, in 92% of overrides elected judges have overruled jury verdicts of life to impose the death penalty.”).

¹⁵ *Hurst v. Florida*, 136 S.Ct. 616, 622 (2016).

punishment statute to remove judicial override as an option in death sentencing.¹⁶

This Comment examines the history of judicial override in Alabama, the impact of *Hurst v. Florida*¹⁷ on capital punishment sentencing, and the steps that Alabama has taken to remove the last remnants of judicial override.¹⁸ It also examines how the legislation has struggled to fully eradicate the process from the state's criminal justice system. Specifically, Alabama's prosecutors have pushed to have judicial override as an option for defendants who were charged, but not convicted, of capital murder prior to the legislation enactment date.¹⁹ However, this Comment argues that by looking at the legislative intent and language of the act, the judiciary has an obligation to no longer utilize judicial override to uphold the Constitutional standards set forth in *Hurst*.²⁰ Part II provides an overview of the judicial override system and how it was enacted in Alabama after the seminal case of *Furman v. Georgia*.²¹ It also examines the politicized role of judges in the state of Alabama and how that has affected the use of judicial override.²² Part III.A. provides an overview of the landmark Supreme Court case *Hurst v. Florida*, and how it struck down Florida state's capital sentencing scheme that included judicial override.²³ Part III.B. examines how Delaware proactively removed judicial override from its sentencing procedures post-*Hurst* and how that set the stage for Alabama's groundbreaking legislation.²⁴ Part IV focuses on the Alabama legislation and breaks down what the legislation consists of and its effect on the sentencing structure.²⁵ Part V examines the status of capital sentencing in Alabama today and the conflict that remains in the application of the legislation.²⁶

¹⁶ Ryan Lovelace, *Alabama Knocks Down Judicial Override in Death Penalty Cases*, WASH. EXAMINER (Apr. 12, 2017, 11:44 AM), <https://www.washingtonexaminer.com/alabama-knocks-down-judicial-override-in-death-penalty-cases>; Kim Chandler & Anthony Izaguirre, *Lawmakers Bar Alabama Judges from Overriding Juries*, ASSOCIATED PRESS (Apr. 5, 2017), <https://www.usnews.com/news/best-states/alabama/articles/2017-04-04/alabama-house-to-vote-on-ending-judicial-override>.

¹⁷ 136 S.Ct. 616 (2016).

¹⁸ See *infra* Part IV.

¹⁹ See *infra* Part V.

²⁰ See *infra* Part III.A.

²¹ See *Furman v. Georgia*, 408 U.S. 238 (1972); *infra* Part II.

²² See *infra* Part II.

²³ See *infra* Part III.A.

²⁴ See *infra* Part III.B.

²⁵ See *infra* Part IV.

²⁶ See *infra* Part V.

II. ALABAMA'S USE OF JUDICIAL OVERRIDE POST-*FURMAN* AND THE POLITICIZATION OF ALABAMA'S JUDICIARY

In the historic case of *Furman v. Georgia*,²⁷ the Supreme Court set the stage for today's death penalty sentencing structure. The Court ruled that in order for the death penalty to adhere to the constitutional standard set forth in the Eighth Amendment, death penalty sentencing needs to be "evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups."²⁸ In attempts to comply with *Furman*, the states scrambled to adjust their death penalty statutes and the Court approved numerous death penalty schemes in 1976.²⁹ While executions had increasingly become less frequent in the United States prior to the *Furman* decision, states leapt at the chance to fight back against the federal government, seeing the *Furman* decision as an affront to states' rights.³⁰ Within the 1976 capital punishment decisions, the Court laid out four guiding principles to ensure that states' death penalty schemes would remain constitutional:

[S]tates must guide sentencing discretion and narrow the class of offenders subject to the punishment; (2) the death penalty must be proportionate to the offense triggering the punishment; (3) defendants must receive an individualized assessment of the appropriateness of the

²⁷ 408 U.S. 238 (1972).

²⁸ *Id.* at 256.

²⁹ See *Gregg v. Georgia*, 428 U.S. 153, 207 (1976) (noting the new sentencing procedures "focus the jury's attention" and avoid the jury from "wantonly and freakishly impos[ing] the death sentence"); *Proffitt v. Florida*, 428 U.S. 242, 259–60 (1976) (holding Florida's post-*Furman* legislation "passes constitutional muster"); *Woodson v. North Carolina*, 428 U.S. 280, 302 (1976) (finding North Carolina failed to "provide a constitutionally tolerable response to *Furman*'s rejection of unbridled jury discretion in the imposition of capital sentences"); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (noting that by "narrowing its definition of capital murder[.]" Texas' capital sentencing procedures do not violate the Eighth and Fourteenth Amendments); *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976) (holding Louisiana's "mandatory death sentence statute also fails to comply with *Furman*'s requirement that standardless jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of death sentences").

³⁰ Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 289 (2008); see also DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 248 (2010) ("*Furman*'s invalidation of capital punishment was read in the South as an illegitimate attack on the region's cultural traditions by outside elites."); CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 75 (2016) ("By 1972, the controversy over busing and President Nixon's successful politicization of criminal justice issues intensified the backlash [of *Furman*] in ways that likely would have been avoided a half decade earlier.").

death penalty that includes consideration of their character, background, and the circumstances of the offense; and (4) the categorical difference between death and all other punishments (“death is different”) requires that capital proceedings be especially fair and reliable.³¹

Essentially, all of the death penalty states enacted a bifurcated capital trial system, creating two separate trials: the guilt-innocence phase and the sentencing phase.³² This created a new responsibility for prosecutors in cases where the death penalty was on the table, as they needed to be able to prove to the jury the presence of specific aggravating factors in order to justify putting a defendant to death.³³

The Supreme Court in 1976 did not create a clear standard for whether the burden of capital sentencing relies on the judge or the jury.³⁴ In fact, in *Proffitt v. Florida*, the Court recognized the “important societal function” of “jury sentencing in a capital case,” but that it is not “suggested that jury sentencing is constitutionally required.”³⁵ Through various decisions, the Court clarified that capital cases required a weighing of aggravating and mitigating factors, regardless of who determined the sentence, in order to decide if someone should be sentenced to death.³⁶ This weighing of aggravating and mitigating factors was to ensure that the capital punishment system remained consistent and constitutional.³⁷

³¹ STEIKER & STEIKER, *supra* note 30, at 71.

³² *Gregg*, 428 U.S. at 195. In *Gregg*, the Court stated:

In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

Id.

³³ Smith, *supra* note 30, at 290.

³⁴ See, e.g., *Gregg*, 428 U.S. 153; *Proffitt*, 428 U.S. 242; *Jurek*, 428 U.S. 262; *Roberts*, 428 U.S. 325.

³⁵ 428 U.S. at 252 (citing *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968)).

³⁶ See *Spaziano v. Florida*, 468 U.S. 447, 462 (1984); see also *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (discussing the importance of “relevant facets of the character and record of the individual offender or circumstances”).

³⁷ *Spaziano*, 468 U.S. at 459–60.

Due to the Court's vague stance on a capital sentencing standard, the Alabama legislature enacted judicial override.³⁸ Under this legislation, after a jury decided whether to sentence a defendant charged with a capital crime to death, the trial judge only needed to treat this decision as advisory, giving judges the ability to override a jury's sentencing decision.³⁹ Alabama's practice of judicial override was indirectly protected by the Court's decision in *Spaziano v. Florida*,⁴⁰ where the Court upheld Florida's sentencing scheme, which allowed a judge to treat jury verdicts as merely advisory in nature and not binding on the court, as constitutional.⁴¹ The Court asserted that "[t]he 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 [the Court] cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional."⁴²

*Harris v. Alabama*⁴³ directly upheld Alabama's judicial override statute, with the Court using its decision in *Spaziano*⁴⁴ to assert that it was acceptable to "vest sentencing authority in the judge and relegate the jury to an advisory role."⁴⁵ While Florida and Alabama's sentencing statutes were extremely similar, they differed on one important part. Florida judges were required to give jury recommendations "great weight,"⁴⁶ while Alabama judges were required to "consider [only] the recommendation of the jury."⁴⁷ Through *Harris*, the Court declined to enforce the stricter standard used in Florida on Alabama, citing the fear of infringing on states' rights, as well as arguing that "the Eighth Amendment does not require the State to define the weight the sentencing judge must accord an advisory jury verdict."⁴⁸

³⁸ ALA. CODE § 13A-5-45-47 (1975).

³⁹ *Id.* at § 13A-5-46.

⁴⁰ 468 U.S. 447, 466 (1984).

⁴¹ *Id.* at 464.

⁴² *Id.*

⁴³ 513 U.S. 504 (1995).

⁴⁴ *See generally* *Spaziano v. Florida*, 468 U.S. 447 (1984).

⁴⁵ *Harris*, 513 U.S. at 509.

⁴⁶ *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975).

⁴⁷ ALA. CODE § 13A-5-47(e) (2005). In the 2017 amendment, subsection (e) was deleted. *See* ALA. CODE § 13A-5-47 (2017).

⁴⁸ *Harris*, 513 U.S. at 512 (asserting that forcing Alabama to follow Florida's sentencing structure "would offend these established principles and place within constitutional ambit micromanagement tasks that properly rest within the State's discretion to administer its criminal justice system").

Historically, the use of judicial override in Alabama was seemingly applied arbitrarily, with inconsistent patterns of reasoning emerging from the bench for their decisions to override a jury's recommendation.⁴⁹ Between 1976 and 2011, Alabama judges overrode jury sentences in capital punishment cases 107 times.⁵⁰ Of those overrides, 92 percent of the cases ended in a judge overriding a jury's recommendation of life in prison to sentence the defendant to death.⁵¹ Under the statute, Alabama judges needed to give the jury recommendation some consideration, but the extent to which judges considered the jury's advisory sentence remained ambiguous and subject to inconsistencies.⁵² These inconsistencies include differing judicial weighing of mitigating factors such as the jury's decision to sentence the defendant to life,⁵³ the defendant's age,⁵⁴ and the defendant's mental capacity.⁵⁵ Historically,

⁴⁹ See Katheryn K. Russell, *The Constitutionality of Jury Override in Alabama Death Penalty Cases*, 46 ALA. L. REV. 5, 28–32 (1994). Between 1981 and 1991, thirty out of thirty-six judicial override sentencing orders were available. *Id.* at 28. In ten of the cases, the trial court offered varied reasons for the override. *Id.* at 31. Russell further provides that:

In four of these cases, the trial court stated that it found that the aggravating circumstances outweighed mitigating ones to a moral certainty In five of these cases, the trial court concluded that the heinousness of the crime was pivotal to its decision to override. Three of these cases where the trial court took into account a crime's heinousness also cite the deterrence rationale for capital punishment. In the single remaining case . . . the trial court offered a standard for its decision to override: '[T]he Court finds that there is a *reasonable basis* for enhancing the jury's recommendation of sentence.'

Id. at 31–32 (emphasis in original).

⁵⁰ DEATH PENALTY IN ALABAMA, *supra* note 5, at 7.

⁵¹ *Id.* at 14.

⁵² See ALA. CODE § 13A-5-47 (2009) ("In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.").

⁵³ DEATH PENALTY IN ALABAMA, *supra* note 5, at 19 ("In the majority (57) of life-to-death overrides, judges did not consider the jury's life verdict as a mitigating factor weighing against imposition of the death penalty.").

⁵⁴ *Id.* ("Nine judges have refused to find that the defendant's age of 20-22 was mitigating at all; four judges found that same age range to be mitigating; and one found it mitigating that the defendant was as old as 26.").

⁵⁵ *Id.* at 20. ("In his order condemning John Neal to death despite the jury's life verdict, Baldwin County Judge Charles Partin determined that Mr. Neal's 65 IQ classified him as having mild mental retardation, but the judge asserted that '[t]he sociological literature suggests Gypsies intentionally test low on standard IQ tests' Macon County Judge Dale Segrest relied on his own reading about personality disorders to conclude that Edward Evans was attempting to 'stage insanity' and did not in fact suffer from a mental disease or defect . . . because it would be 'dangerous policy for the law to suggest that the very factors that propel a defendant into a life

the application of judicial override disproportionately affected African-American defendants.⁵⁶ These inconsistencies indicate judicial override was applied arbitrarily, without a standard that could be easily recognized by defendants or their attorneys.

A major flaw in the judicial override system that is omnipresent in Alabama is the politicization of the judiciary within the state.⁵⁷ Following *Furman*,⁵⁸ support for capital punishment weakened on a national level; it was not until politicians turned capital punishment into a partisan battle that support for the death penalty rose.⁵⁹ Death sentences rose greatly after *Furman*.⁶⁰ Citizens of states began to look closer at judges and where they stood on the death penalty in criminal cases.⁶¹ Carol and Jordan Steiker analyzed why the United States remains the only Western democracy to keep capital punishment as law, writing that our culture is one focused on punitiveness mostly because “[c]riminal justice in the United States is primarily a local function, and the politics surrounding criminal justice tend to be more populist than bureaucratic”⁶² That culture is prominent in Alabama local judicial elections.

Alabama’s use of judicial override can be linked to the fact that trial court judges in Alabama are elected, and the “tough on crime” platform has consistently resonated with Southern voters.⁶³ Trial judges in

of crime in some way mitigate a defendant’s personal responsibility for the criminal activity.’ Mr. Evans hanged himself shortly after Judge Segrest overrode and sentenced him to death.”)

⁵⁶ *Id.* at 18 (“African Americans in Alabama constitute 26% of the total population . . . [and] more than half of the overrides in Alabama have imposed the death penalty on African-American defendants.”).

⁵⁷ See *Judicial Selection*, EQUAL JUSTICE INST. (last visited Jan. 5, 2019), <https://eji.org/judicial-selection> (noting that Alabama selects all their judges through partisan elections).

⁵⁸ *Furman v. Georgia*, 408 U.S. 238 (1972).

⁵⁹ Smith, *supra* note 30, at 291–92 (discussing the “dramatic decline in the percentage of voters who opposed capital punishment” after *Furman* and President Richard Nixon’s efforts to “move the Supreme Court to the right on criminal justice issues”) (internal quotation marks omitted).

⁶⁰ *Id.* 290–91 (“After a slow start in 1973, death sentences hit a three-decade high of 149 in 1974. In 1975, a whopping 298 death sentences were imposed—at the time, the highest year-end figure ever recorded.”).

⁶¹ See *id.* at 328–29 (noting that voters are “likely to pay close attention to how judges approach the criminal side of their dockets”).

⁶² STEIKER & STEIKER, *supra* note 30, at 72.

⁶³ DEATH PENALTY IN ALABAMA, *supra* note 5, at 8 (“The data suggests that override in Alabama is heavily influenced by arbitrary factors such as the timing of judicial elections, the politics of the county where the accused is prosecuted, and the outsized enthusiasm of certain judges for overriding jury life verdicts.”). The report further states:

Alabama face elections every six years,⁶⁴ making voter appeasement a constraining concern. The Equal Justice Initiative reports that “[s]cholars observe that, in a state where the majority of people favors the death penalty, ‘a judge who declines to hand down a sentence of death, or who insists on upholding the Bill of Rights, may thereby sign his own political death warrant.’”⁶⁵ Research has shown that during election years, judicial overrides increase in Alabama, indicating that sentencing someone to death is one of the most important political tools Alabama judges wield.⁶⁶

Prior to the legislation removing judicial override from Alabama’s statutory sentencing scheme, there was no language that required a judge to provide a clear reason behind the decision to override a jury’s verdict.⁶⁷ The judge did not have to follow a formula, unlike the jury, in determining whether or not the aggravating circumstances outweighed the mitigating ones.⁶⁸ In *Ex Parte Taylor*,⁶⁹ the Supreme Court of Alabama enforced the notion that a judge needs to lay out the specific reasons for overriding a jury’s verdict.⁷⁰

In one campaign ad, Alabama Supreme Court candidate Claud Neilson boasted that he “looked into the eyes of murderers and sentenced them to death.” Another candidate for the state’s highest court, incumbent Kenneth Ingram, ran a TV ad that opened with grainy videotape footage from inside a convenience store where, 20 years earlier, a teenager had murdered the owner. Here, said the ad’s narrator, “a 68-year-old woman, working alone, was robbed, raped, stabbed 17 times, and murdered. Without blinking an eye, Judge Kenneth Ingram sentenced the killer to die.” The victim’s daughter appears on screen to give her personal endorsement: “It was my mother who was killed, and Judge Ingram gave us justice. Thank heaven Judge Ingram is on the supreme court.” Former Alabama Supreme Court Justice Harold See ran an ad in 2000 showing a newspaper headline that read, “Court upholds death sentences in two slayings” while the narrator stated that See was “fighting against minor technicalities that would let criminals off” and that “Justice See knows that drug dealers are dangerous criminals who threaten our children . . . [He] has the tough on crime record to be Chief Justice.”

Id. at 14–15.

⁶⁴ ALA. CODE § 17-14-6 (1975).

⁶⁵ DEATH PENALTY IN ALABAMA, *supra* note 5, at 16.

⁶⁶ STEVENSON, *supra* note 4, at 70 (“Judge overrides are an incredibly potent political tool. No judge wants to deal with attack ads that highlight the grisly details of a murder case in which the judge failed to impose the most severe punishment. Seen in that light, it’s not surprising the judge overrides tend to increase in election years.”).

⁶⁷ See ALA. CODE § 13A-5-47 (1975).

⁶⁸ *Id.*

⁶⁹ 808 So.2d 1215 (Ala. 2001).

⁷⁰ *Id.* at 1219 (“Under Alabama’s capital-sentencing procedure, the trial judge must make specific written findings regarding the existence or nonexistence of each aggravating circumstance and each mitigating circumstance offered by the parties.”).

However, that standard has not been upheld by the trial courts of Alabama.⁷¹ A defendant's life can depend entirely on which judge receives their case and how that judge feels about the sentencing process, as well as other inconsistent factors such as lack of competent counsel and racial bias.⁷²

III. *Impact of Hurst v. Florida*

A. *Hurst v. Florida Upholds the Sixth Amendment Right to a Jury Trial and Strikes Down Florida's Hybrid Capital Sentencing Scheme*

Prior to its landmark decision in *Hurst*,⁷³ the Supreme Court attempted to address the inconsistency that was present in capital sentencing with regards to a jury's responsibility in *Apprendi v. New Jersey*.⁷⁴ The Court held that under the Sixth Amendment right to a jury, a statute that allowed a judge to consider specific facts in order to sentence a defendant with a hate crime that included a higher sentence was unconstitutional.⁷⁵ Specifically, the Court held that it was "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"⁷⁶ Bryan Stevenson, founder and director of the Equal Justice Initiative, notes that the *Apprendi*⁷⁷ decision is especially important because by addressing the Sixth Amendment right to a jury trial in capital proceedings, "this broad characterization of the case cuts through any technical distinctions between the trial and sentencing stages of a capital case. It locates the right at issue to be the 'right to a jury trial,' and not merely the right to a fundamentally fair or consistent sentencing determination"⁷⁸

⁷¹ See, e.g., *Jackson v. State*, 169 So.3d 1, 115 (Ala. Crim. App. 2010); *Yancey v. State*, 65 So.3d 452, 480 (Ala. Crim. App. 2009).

⁷² Shannon Heery, *If It's Constitutional, Then What's the Problem?: The Use of Judicial Override in Alabama Death Sentencing*, 34 WASH. U. J.L. & POL'Y 347, 394–95 (2010) (discussing the "host of . . . issues" impacting Alabama's lack of "uniform[] . . . standard for imposing judicial override").

⁷³ *Hurst v. Florida*, 136 S.Ct. 616 (2016).

⁷⁴ 530 U.S. 466 (2000).

⁷⁵ *Id.* at 476.

⁷⁶ *Id.* at 490.

⁷⁷ *Id.*

⁷⁸ Bryan A. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 ALA. L. REV. 1091, 1110 (2003).

A few years later, the Court used this important precedent regarding the Sixth Amendment and applied it to a capital case in *Ring v. Arizona*.⁷⁹ In Arizona's capital punishment sentencing scheme, a judge held the power to decide whether or not the necessary aggravating factors were present in a case to warrant the imposition of the death penalty.⁸⁰ The Court held that this system did in fact violate a defendant's Sixth Amendment right to a jury, overruling prior precedent in *Walton v. Arizona*⁸¹ that held Arizona's sentencing scheme constitutional.⁸² The *Ring* decision looked at Justice Stevens' dissent in *Walton*, where he insisted that the Sixth Amendment did require "a jury determination of facts that must be established before the death penalty may be imposed."⁸³ However, *Ring* did not stop Alabama from utilizing judicial override, as the state courts in Alabama applied the *Ring* precedent very narrowly.⁸⁴ Regardless, *Ring* and *Apprendi* set the stage for the *Hurst* decision.

In *Hurst v. Florida*,⁸⁵ Timothy Lee Hurst was charged and found guilty of first degree murder in Florida.⁸⁶ The jury recommended the death penalty and the judge agreed.⁸⁷ Hurst appealed, arguing that the sentence violated his right to a jury trial, especially in a post-*Ring* world.⁸⁸ The majority opinion, written by Justice Sotomayor and joined by six other justices,⁸⁹ held that Florida's sentencing scheme was unconstitutional because 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."⁹⁰ The Court specifically pointed to the new precedent set forth in *Ring* to justify why these hybrid sentencing structures could not stand as constitutional.⁹¹ The Court firmly held that "the State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires," making

⁷⁹ 536 U.S. 584 (2002).

⁸⁰ *Id.* at 588.

⁸¹ 497 U.S. 639 (1990).

⁸² *Ring*, 536 U.S. at 589; *see also* *Walton v. Arizona*, 497 U.S. 639, 647 (1990).

⁸³ *Walton*, 497 U.S. at 709 (Stevens, J., dissenting).

⁸⁴ *See* ALA. CODE §§ 13A-5-43(a),(d), 13A-5-45, 13A-5-53 (2005).

⁸⁵ 136 S.Ct. 616 (2016).

⁸⁶ *Id.* at 619.

⁸⁷ *Id.*

⁸⁸ *Id.* at 620.

⁸⁹ *Id.* at 618.

⁹⁰ *Id.* at 619.

⁹¹ *Hurst v. Florida*, 136 S.Ct. 616, 621–22 (2016).

Florida's use of the jury recommendation as advisory only unconstitutional.⁹²

B. Delaware's Judiciary Takes Control and Strikes Down its Capital Sentencing Scheme in the Wake of Hurst

After *Hurst*,⁹³ Delaware's judiciary quickly ruled their own judicial override sentencing structure unconstitutional in *Rauf v. State*.⁹⁴ The decision found that Delaware's capital sentencing scheme, which allowed a judge to fact-find any aggravating circumstances, as well as weigh the mitigating and aggravating factors before sentencing a defendant to death, was unconstitutional.⁹⁵ Interestingly, Delaware also upended the part of the death penalty statute that did not require juror unanimity in sentencing someone to death.⁹⁶ The court's reasoning addressed the possibility that there could be a narrow view of *Hurst* that allows a judge to have some control over the sentencing portion of a death penalty case.⁹⁷ However, Chief Justice Strine wrote in his concurrence that he "find[s] it impossible to embrace a reading of *Hurst* that judicially draws a limit to the right to a jury in the death penalty context of having the jury make only the determinations necessary to make the defendant eligible to be sentenced to death by someone else, rather than to make the determinations itself that must be made if the defendant is in fact to receive a death sentence."⁹⁸ This decision in Delaware prepared the stage for Alabama's capital sentencing structure to be scrutinized and eventually upended.

IV. ALABAMA'S LEGISLATION REMOVING JUDICIAL OVERRIDE AND MAKING THE JURY THE ULTIMATE FACT-FINDER IN CAPITAL SENTENCING

Over the years, Alabama has received much scrutiny for its capital punishment system from public interest organizations, legal scholars, and even the United Nations.⁹⁹ The state's citizens even began to

⁹² *Id.* at 622.

⁹³ *Id.*

⁹⁴ 145 A.3d 430 (Del. 2016) (per curiam).

⁹⁵ *Id.* at 433.

⁹⁶ *Id.* at 434.

⁹⁷ *Id.* at 435 (Strine, J. concurring).

⁹⁸ *Id.* at 436.

⁹⁹ See *Embracing a Culture of Life*, BIRMINGHAM NEWS, Nov. 11, 2005 at 8A ("The Alabama system is under review by the American Bar Association, the Equal Justice Initiative of Alabama

exhibit hesitancy towards using the death penalty after numerous studies pointed out its flaws, beginning in 2005 when only 63 percent of the population polled in Alabama supported capital punishment, a smaller number than years before.¹⁰⁰

In the wake of *Hurst*¹⁰¹ and Delaware's decision in *Rauf v. State*,¹⁰² Alabama bore an unfortunate distinction: it became the only state in the country with judicial override, as well as having the highest per capita death sentencing rate and execution rate in the United States.¹⁰³ The time had come to make a decision about whether or not to address the override issue directly or wait for the Supreme Court to intervene. State Senator Dick Brewbaker, a Republican, sponsored the bill removing judicial override from the capital punishment sentencing statute and made it clear to his constituents that it was not a stand against the death penalty, but protection against federal intervention.¹⁰⁴ Other politicians discussed the moral implications of judicial override, while also professing respect for the judiciary of the state.¹⁰⁵

Senator Brewbaker introduced the legislation in February 2017 and Governor Ivey signed it into law on April 11, 2017.¹⁰⁶ The language

and the state chapter of the American Civil Liberties Union, among others."); see also Mike Hollis, *Revise Alabama's Death Penalty Law*, HUNTSVILLE TIMES (July 20, 2011), http://blog.al.com/times-views/2011/07/editorial_revise_alabamas_deat.html ("Because Alabama isn't likely to turn its back on capital punishment anytime soon, lawmakers and judges should reconsider [the part of judicial override] of the state's death penalty law. Justice demands fairness.").

¹⁰⁰ *State Polls and Studies*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-polls-and-studies#alabama> (last visited Jan. 4, 2019) (stating the results of a Mobile Register/University of South Alabama poll).

¹⁰¹ *Hurst v. Florida*, 136 S.Ct. 616 (2016).

¹⁰² 145 A.3d 430 (Del. 2016).

¹⁰³ DEATH PENALTY IN ALABAMA, *supra* note 5, at 4 (noting that in 2010 Alabama's population was 4.5 million and imposed "more new death sentences than Texas, with a population of 24 million").

¹⁰⁴ See Chip Brownlee, *Bill to End Judicial Override in Alabama Clears Senate*, ALA. POLITICAL REPORTER (Feb. 24, 2017), <http://www.alreporter.com/2017/02/24/bill-end-judicial-override-alabama-clears-senate/> ("'It wasn't an anti-death-penalty vote,' [Senator] Brewbaker said . . . 'It was cleaning up a procedure that is detrimental to the jury system and calls into question jurisprudence in Alabama.'").

¹⁰⁵ See *id.* ("'This is not an indictment or somehow anything against our judges,' [Senator Cam] Ward said . . . 'At the end of the day, it is morally wrong for us to allow this to continue in our State. We have a jury system and a jury process for a reason.'").

¹⁰⁶ Kent Fault, *Alabama Gov. Kay Ivey Signs Bill: Judges Can No Longer Override Juries in Death Penalty Cases*, AL.COM (Apr. 11, 2017), https://www.al.com/news/birmingham/index.ssf/2017/04/post_317.html.

in the bill is crucial as it strikes all reference to “advisory” jury decisions and gives the jury back its decision-making and fact-finding powers.¹⁰⁷

V. JUDICIAL OVERRIDE IN ALABAMA IS NO MORE – WHAT NOW?

Judicial override is no longer a part of Alabama’s state law, but the application of the new sentencing structure is proving to be another fight for defendants. A conflict between defense attorneys and prosecutors in which defendants can benefit from the new sentencing scheme has already arisen.¹⁰⁸ The law became effective on April 11, 2017 and state prosecutors argue that defendants “who were charged but not convicted of capital murder” prior to that date can still face the possibility of judicial override.¹⁰⁹ Defense attorneys are fighting back, arguing that their clients who were charged, but not yet convicted, prior to April 11th are owed the same protection as any defendant who has been charged with a capital crime after the date.¹¹⁰

The issue arises out of the vagueness of the new law, which according to retired Judge John Carroll, “leaves open the question of someone who has been charged but not convicted It’s not crystal clear.”¹¹¹ Prosecutors have argued that the act’s language stating that it “shall not apply retroactively to any defendant who has previously been convicted of capital murder and sentenced to death prior to effective date of this act” indicates that it is unambiguous and clear—defendants who were charged with a capital crime prior to April 11th are still at risk of having their jury sentences removed and replaced by a trial judge.¹¹² The drafter of the act, State Senator Dick Brewbaker stated that “[t]he intent of the legislature, and what we thought we were doing with passing the bill, was that upon signature of the governor, it would end judicial override in Alabama . . . I think everyone in that chamber who voted for the bill thought, going forward, the juries’ wishes would be the last word in all case.”¹¹³

¹⁰⁷ See 2017 Alabama Laws Act 2017-131 (S.B. 16).

¹⁰⁸ See Ashley Remkus, *Did Judicial Override End in Alabama? Some Say Judges Can Still Overrule Jury Over Death Penalty*, AL.COM (July 21, 2017), https://www.al.com/news/huntsville/index.ssf/2017/07/death_penalty_judicial_overrid.html.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*; see also Ashley Remkus, *Lawyers Ask Judge to Ban Herself from Overriding Jury’s Sentence in Death Penalty Case*, AL.COM (July 19, 2018), https://www.al.com/news/huntsville/index.ssf/2018/07/stephen_stone_judicial_ov.html.

¹¹¹ Remkus, *Did Judicial Override End in Alabama*, *supra* note 109.

¹¹² *Id.*

¹¹³ *Id.*

The language in the act that needs to be analyzed is the phrase “convicted of capital murder and sentenced to death.”¹¹⁴ The use of the words “convicted” and “sentenced” clearly only applies to defendants whose criminal cases were finalized prior to the enactment of the new sentencing structure, meaning defendants who had already been convicted and sentenced in a court of law. For those defendants who were pending trial after being charged with a capital eligible offense, the protection against judicial override applies to them. The legislative language and intent is clear: it is time for judicial override to be eradicated in Alabama, and essentially, the United States.

CONCLUSION

Alabama should ensure that the legislation enacted in the wake of *Hurst* should be applied to all defendants charged with capital murder who are currently awaiting trial. The date of when they were charged does not mean that the legislation does not apply to them. In fact, they are exactly the defendants whom the legislation was intending to protect. Alabama’s long, robust history with the death penalty is enough for the judiciary to approach this new sentencing structure with consistency. While Alabama’s legislation removing judicial override is a step forward in the right direction, it needs to ensure that the effects of the law affect all its citizens equally.

¹¹⁴ 2017 Alabama Laws Act 2017-131 (S.B. 16).