

COMMENTS

THE JURY OVERRIDE: A BLEND OF POLITICS AND DEATH

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TABLE OF CONTENTS

Introduction	1404
I. Eighth Amendment Jurisprudence	1407
II. The Override Statutes	1418
A. Florida's Death Penalty Statute	1418
B. Case Law Interpreting Florida's Capital Sentencing Statute	1420
C. Alabama's Death Penalty Statute	1425
D. Case Law Interpreting Alabama's Capital Sentenc- ing Statute	1427
III. <i>Harris v. Alabama</i>	1428
IV. Incompatibility of the Supreme Court's Eighth Amend- ment Jurisprudence and Override Laws	1432
A. The Deficiencies in Florida's Death Penalty Statute: Florida's Statute in Practice	1432
B. The Deficiencies of Alabama's Death Penalty Law: Alabama's Statute in Practice	1434
V. How Politics Factors into the Override Equation	1440
VI. Recommendations	1446

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A. Limit Overrides to Situations in Which Juries Impose Death	1446
B. Limit Use of Override to Reducing Jury Recommendations of Death-to-Life	1448
C. The Deference Test	1450
Conclusion	1452

INTRODUCTION

Of the thirty-seven states that sanction capital punishment,¹ only

1. See Michael Mello, *The Jurisdiction to Do Justice: Florida's Jury Override and the State Constitution*, 18 FLA. ST. U. L. REV. 923, 924-25 n.2 (1991) (documenting status of Florida death sentencing laws). The following states allow a death sentence only if the jury rules that the defendant should die: Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. *Id.*; see ARK. CODE ANN. § 5-4-603 (Michie 1995); CAL. PENAL CODE § 190.3 (West 1988); COLO. REV. STAT. § 16-11-103 (1986 & Supp. 1995); CONN. GEN. STAT. § 53a-46a (1985 & Supp. 1995); DEL. CODE ANN. tit. 11, § 4209 (1995); GA. CODE ANN. §§ 17-10-30 to -32 (Michie 1990 & Supp. 1995); ILL. REV. STAT. ch. 38, para. 9-1 (1979 & Supp. 1995); KY. REV. STAT. ANN. § 532.025 (Michie/Bobbs-Merrill 1990); LA. CODE CRIM. PROC. ANN. art. 905.8 (West 1984 & Supp. 1995); MD. CODE ANN. § 413 (1987 & Supp. 1995); MO. STAT. ANN. § 565.032 (Vernon 1979 & Supp. 1996); MASS. GEN. LAWS ANN. ch. 279 § 68 (West 1989); MD. CODE ANN., CRIM. LAW § 71 (1987); N.H. REV. STAT. ANN. § 630:5 (1986 & Supp. 1995); N.J. REV. STAT. § 2C:11-3 (1995); N.M. STAT. ANN. § 31-20A-3 (Michie 1990); N.C. GEN. STAT. § 15A-2000 (1983); OHIO REV. CODE ANN. § 2929.03 (Baldwin 1987); OKLA. STAT. ANN. tit. 21, § 701.11 (West 1983 & Supp. 1995); 42 PA. CONS. STAT. § 9711(f) (1996); S.C. CODE ANN. § 16-3-20 (Law. Co-op. 1985 & Supp. 1995); S.D. CODIFIED LAWS ANN. § 23A-27A-4 (1988); TENN. CODE ANN. § 39-13-204 (Supp. 1995); TEX. CRIM. PROC. CODE ANN. § 76-3-207 (West 1981 & Supp. 1995); UTAH CODE ANN. § 76-3-207 (Supp. 1995); VA. CODE ANN. § 19.2-264.4 (Michie 1990); WASH. REV. CODE ANN. § 10.95.030 (1990 & Supp. 1996); WYO. STAT. § 6-2-102 (1988).

In Nevada, a three-panel team of judges may impose the sentence in a capital case only if the jury cannot agree on the proper sentence. NEV. REV. STAT. §§ 175.554, 175.556 (1957 & Supp. 1995).

Only four states—Arizona, Idaho, Montana, and Nebraska—authorize the judge to impose independently death without any jury input in the sentencing process. ARIZ. REV. STAT. ANN. § 13-703 (1989); IDAHO CODE § 19-2515 (1987); MONT. CODE ANN. § 46-18-301 (1989); NEB. REV. STAT. § 29-2520 (1985); see also Kathryn K. Russell, *The Constitutionality of Jury Override in Alabama Death Penalty Cases*, 46 ALA. L. REV. 5, 9-10 & n.36 (1994) (summarizing status of death penalty laws in states with capital punishment).

Only in Alabama, Delaware, Florida, and Indiana do juries deliver nonbinding advice or recommendations to the court. ALA. CODE § 13A-5-46(e) (1994), DEL. CODE ANN. tit. 11, § 4209(d) (Supp. 1992), FLA. STAT. ch. 921.141 (2)-(3) (1993 & Supp. 1996), IND. CODE § 35-20-2-9(e) (1993 & Supp. 1996). Although Kentucky and Ohio both categorize the jury's sentencing determination as a recommendation, neither state allows a trial judge to enhance a life recommendation to a sentence of death. Mello, *supra*, at 925 n.2. Thus, trial judges in these states are allowed only to soften what they believe are excessive jury recommendations. KY. REV. STAT. ANN. § 532.025 (Michie/Bobbs-Merrill 1990); OHIO REV. CODE ANN. § 2929.03(D) (Baldwin 1987). Despite their ability to override jury recommendations of death, trial judges in both states have rarely exercised this option. See, e.g., *Ward v. Commonwealth*, 695 S.W.2d 404, 408 (Ky. 1985) (observing that "[i]f the jury so recommends [death], almost without exception the trial judge has followed the jury's recommendation by imposing the death penalty").

four provide for a jury override.² The jury override is a unique procedural device in capital sentencing cases that treats the jury's sentencing verdict as a "recommendation."³ The jury override gives trial judges in capital cases the awesome power to impose death even when the jury has concluded that life imprisonment is the proper sentence. Generally, the override has been used in just this fashion—to impose death on a capital defendant despite the jury's recommendation that the defendant's life be spared.⁴

In two states, Alabama and Florida, the override has been used in this manner with great frequency. Although Florida juries are "death-prone,"⁵ Florida trial judges have used the override 140 times to place capital defendants on death row after jury life imprisonment recommendations.⁶ In Alabama, approximately thirty percent of the death row population is comprised of capital defendants whose jury life recommendations were overridden by trial judges.⁷ Rather than spending their lives behind bars, as their juries recommended, these inmates have received the ultimate sanction known to man—death.

Due to the small number of persons on death row as a result of judicial override in Indiana and Delaware, this Comment does not analyze their death penalty statutes. See Russell, *supra*, at 11 (noting that less than 10 persons in each state have been sentenced to death by jury overrides). Similar to Florida, both Indiana and Delaware require that trial judges attach substantial deference to jury penalty recommendations in capital sentencing cases. See, e.g., *Martinez-Chavez v. State*, 534 N.E.2d 731, 735 (Ind. 1989) (announcing that in order to "sentence a defendant to death after jury has recommended against death, facts justifying death sentence should be so clear and convincing that virtually no reasonable person could disagree that death was appropriate in light of offender and his crime"); see also *Pennell v. State*, 604 A.2d 1368, 1377 (Del. 1992) (citing *Tedder* standard with approval and noting that its application was proper in overriding case at issue); *Buford v. State*, 570 So. 2d 923, 925 (Fla. 1990) (holding that for judge to override jury recommendation of life imprisonment and impose death penalty, life recommendation must have been unreasonable).

2. ALA. CODE § 13A-5-47(c) (1994); DEL. CODE ANN. tit. 11, § 4209(d) (1995); FLA. STAT. ch. 921.141 (1993 & Supp. 1996); IND. CODE § 35-50-2-9 (1993 & Supp. 1996).

3. See, e.g., ALA. CODE § 13A-5-47(e) (1994) (explaining that "[w]hile the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court").

4. Alabama Prison Project, Alabama Jury Override Information Sheet (July 1995). A total of 47 prisoners have been placed on death row because of jury override in Alabama. *Id.* Commentators state that in Florida, which has the third largest death row population in the country, approximately 25% of the death row inmates were sentenced to death over a jury recommendation of life. See, e.g., Michael L. Radelet, *Rejecting the Jury: Imposition of the Death Penalty in Florida*, 18 U.C. DAVIS L. REV. 1409, 1412-13 (1985) (illustrating that between 1972 and 1984, jury overrides comprised 25.7% of Florida death sentences); Russell, *supra* note 1, at 11.

5. Mello, *supra* note 1, at 925-26 (noting that between 1972, when Florida enacted jury override, and 1988, Florida juries opted for death penalty in 526 cases).

6. Letter from Professor Michael L. Radelet, to Scott Erlich, Member, *The American University Law Review* (Sept. 1995) (providing Florida override statistics) (on file with *The American University Law Review*).

7. See Russell, *supra* note 1, at 6 (relating that by 1991, 40 out of 120 inmates on Alabama death row received jury life recommendations that were overridden by trial judges).

In the recent case of *Harris v. Alabama*,⁸ the Supreme Court endorsed Alabama's override scheme.⁹ After convicting Louise Harris of murder, a jury of her peers recommended that she receive the penalty of life imprisonment.¹⁰ The trial judge disagreed with the jury and invoked the override to impose death.¹¹ As a result, Louise Harris is scheduled to die. Thus, the Supreme Court in *Harris* espoused the view that one man's simple disagreement with the decision of twelve provides a valid basis for the imposition of the death penalty.

This Comment focuses on the capital sentencing laws of Alabama and Florida, the two states that most frequently override jury life recommendations.¹² Particular attention is paid to the role politics plays in Alabama's and Florida's capital sentencing schemes. Part I traces the evolution of the Supreme Court's Eighth Amendment jurisprudence.¹³ Part II analyzes in detail the override statutes of Florida and Alabama. Part III discusses the recent Supreme Court case of *Harris v. Alabama* and notes that it strays from the Court's framework for administering the death penalty. Part IV illuminates the practical problems which pervade each of the state's statutes. It further critiques the capital sentencing schemes of Alabama and Florida and illustrates how each collides with the Court's Eighth Amendment jurisprudence. Part V discusses the political nature of death penalty decisions and details the political pressures faced by

8. 115 S. Ct. 1031 (1995).

9. *Harris v. Alabama*, 115 S. Ct. 1031, 1037 (1995) (upholding Alabama death penalty statute that provides trial judges with absolute discretion to reject jury penalty recommendations in death penalty cases).

10. *Id.* at 1033. By a seven to five vote, the jury recommended that Ms. Harris be sentenced to life imprisonment without possibility of parole. *Id.*

11. *Id.* Although the jury found that Ms. Harris was an avid churchgoer, worked three jobs, and independently reared seven children, the trial judge ruled that because Ms. Harris murdered for pecuniary gain she deserved to die, thus overriding the jury's life imprisonment recommendation. *Id.*

12. See Russell, *supra* note 1, at 11 (describing prominent use of override in Alabama and Florida as contrasted with limited use of override in Delaware and Indiana). Indiana and Delaware, the two other override states, rarely have exercised the override procedure. In fact, they have utilized the override less than 20 times combined. *Id.*

13. U.S. CONST. amend. VIII. The Eighth Amendment provides: "Excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.* For illustrations of how the Supreme Court has interpreted the ban on cruel and unusual punishments, see *Robinson v. California*, 370 U.S. 660, 660 (1962) (ruling that California law jailing anyone addicted to narcotics violated proscription on cruel and unusual punishments because it impermissibly punished status); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (outlawing penalty of loss of citizenship because it did not comport with basic tenets of human dignity and, therefore, was cruel and unusual punishment); *Weems v. United States*, 217 U.S. 349, 377 (1910) (striking down punishment of years in chains at hard labor as excessive and torturous under Eighth Amendment); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879) (stating that punishments of torture and similar forms of unnecessary cruelty are forbidden by Eighth Amendment).

judges in the capital sentencing realm. Finally, Part VI offers recommendations to conform Alabama's and Florida's override statutes and their application to the Court's pre-*Harris* Eighth Amendment precedent.

I. EIGHTH AMENDMENT JURISPRUDENCE

The Supreme Court has repeatedly held that the penalty of death may be inflicted as a punishment for certain crimes.¹⁴ As long as capital punishment complies with constitutional safeguards, the Court will not strike it down.¹⁵ Contending that the death penalty is unconstitutional, typically capital defendants assert that the manner in which the death penalty is administered denies them due process and equal protection under the Fourteenth Amendment.¹⁶ These defendants state that the right to due process includes the right to a fair trial and fair sentencing procedures.¹⁷ Capital defendants argue that the death penalty is inherently unfair because it deprives them of life without due process of law.¹⁸

In addition to Fourteenth Amendment claims, many capital defendants also contend that the death penalty violates the Eighth Amendment's ban on cruel and unusual punishments.¹⁹ Mostly, the Supreme Court has blended the Eighth and Fourteenth Amendment arguments together and analyzed them in a three-part inquiry.²⁰ First, the Court asks whether the punishment of death comports with

14. See JOHN E. NOWACK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.3, at 492 (4th ed. 1991) (citing *Proffitt v. Florida*, 428 U.S. 242 (1976), *Jurek v. Texas*, 428 U.S. 262 (1976), *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Baldwin v. Alabama*, 472 U.S. 372 (1985)).

15. *Id.* (noting that death penalty must be imposed in setting that provides for procedural safeguards to protect against violations of Due Process Clause of Fourteenth Amendment and to comply with Eighth Amendment's prohibition of cruel and unusual punishments).

16. U.S. CONST. amend XIV. The Fourteenth Amendment provides in pertinent part: "No person shall be deprived of life, liberty, or property without due process of law . . ." *Id.* Because a capital defendant risks loss of life, a capital defendant's trial and sentencing procedures must comply with the due process obligations of the Fourteenth Amendment. REX E. LEE, A LAWYER LOOKS AT THE CONSTITUTION 175 (1981).

17. See Rebecca A. Rafferty, *In the Shadow of McCleskey v. Kemp: The Discriminatory Impact of the Death Sentencing Process*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 271, 281 (1995) (relating that right of due process includes right to fair and impartial hearing, trial, and sentencing process).

18. See *id.* at 282 (recounting due process arguments made to overturn death sentences).

19. See John Christopher Johnson, Note, *When Life Means Life: Juries, Parole, and Capital Sentencing*, 73 N.C. L. REV. 1211, 1224-25 (1995) (analyzing Eighth and Fourteenth Amendment arguments against death penalty and asserting that "the Eighth Amendment has been the Court's primary tool in regulating the death penalty").

20. See Jeffrey Allan Welleck, *Supreme Court Review: Eighth Amendment—Trial Court May Impose Death Sentence Despite Jury's Recommendation of Life Imprisonment: Spaziano v. Florida*, 104 S. Ct. 3154 (1984), 75 J. CRIM. L. & CRIMINOLOGY 813, 814 (1984) (discussing framework for analyzing death penalty cases in light of Eighth and Fourteenth Amendment attacks).

community values and evolving standards of decency.²¹ Second, the Justices determine whether the sentence is proportionate to the offense for which it is given.²² Last, the Court scrutinizes each death sentence to ensure it was administered in a non-arbitrary manner.²³

Under the common law, jurors were required to impose death on all convicted felons.²⁴ This rigid procedure led to widespread jury nullification.²⁵ Jury nullification occurs when a jury acquits a defendant regardless of the strength of evidence against him.²⁶ Because of the inflexibility of the common law, many jurors acquitted otherwise guilty capital defendants in order to circumvent the automatic death sentence that accompanied a conviction.²⁷ This motivated most states to abolish mandatory death statutes and replace them with statutes conferring complete, unguided discretion in the hands of capital juries to impose the appropriate sentence.²⁸

The constitutionality of unguided capital juror discretion statutes was first addressed by the Supreme Court in *McGautha v. California*.²⁹ In this case, two defendants, McGautha and Wilkinson, together robbed two different shops on the same day.³⁰ During the second robbery, Wilkinson punched one clerk while McGautha shot and killed another clerk.³¹ Both men were convicted of armed robbery and first degree murder.³² In the penalty phase of the trial, the same jury sentenced McGautha to death and Wilkinson to life imprisonment.³³ In his instructions to the jury regarding their choice of life imprisonment or death, the judge stated that the jurors were "entirely free to act on their own judgment, conscience, and absolute discretion."³⁴ In addition, the judge acknowledged that the law prescribed no standards to guide the jury in its penalty determina-

21. *Id.*

22. *Id.*

23. *Id.*

24. See *McGautha v. California*, 402 U.S. 183, 197-98 (1971) (discussing rigidity and unworkability of common law rule requiring that all convicted felons receive automatic death sentence).

25. *Id.*

26. BLACK'S LAW DICTIONARY 231-32 (6th ed. 1990).

27. *McGautha*, 402 U.S. at 199.

28. *Id.* at 199-202.

29. 402 U.S. 183 (1971), *aff'g* *People v. McGautha*, 452 P.2d 650 (Cal. 1969).

30. *Id.* at 187.

31. *Id.*

32. *Id.* at 185.

33. *Id.*

34. *Id.* at 189-90.

tion.³⁵ The California Supreme Court unanimously affirmed McGautha's conviction and death sentence.³⁶

In his appeal to the Supreme Court, McGautha claimed that California's death penalty procedure was unconstitutional because it failed to provide any standards to guide the jury's discretion in its choice of penalty.³⁷ McGautha asserted that this unguided discretion violated the Fourteenth Amendment by depriving him of life without due process of law.³⁸ In denying petitioner McGautha's claims, the Supreme Court, by a six to three vote, held that unbridled jury discretion passed constitutional muster.³⁹ Justice Harlan, writing for the majority, focused on the difficulty of drafting a death penalty statute that meaningfully guided the sentencer's discretion.⁴⁰ Such a statute would need to encompass, in advance, those characteristics of murders and their perpetrators that are deserving of the death penalty.⁴¹ Noting that "history reveals continual efforts, uniformly unsuccessful, to identify before the fact those homicides for which the slayer should die,"⁴² Justice Harlan concluded that it was impossible to clearly and understandably formulate a death penalty statute that guided sentencers' discretion.⁴³ Because there were no intelligible means of channeling jury discretion, the Court ruled that committing to the jury the unbridled authority to prescribe life or death in capital cases was not repugnant to any constitutional provision.⁴⁴

Just one year after *McGautha*, in the landmark case of *Furman v. Georgia*,⁴⁵ the Supreme Court effectively overruled the law of *McGautha*,⁴⁶ and, for the first time, explicitly ruled on the constitution-

35. *Id.* at 190 (recounting jury instructions that stated that "the law itself provides no standard for the guidance of the jury in the selection of the penalty, but rather, commits the whole matter . . . to the . . . absolute discretion of the jury").

36. *Id.* at 191.

37. *Id.* at 196.

38. *Id.*

39. *Id.* at 207 (ruling that complete jury discretion is "not offensive to anything in the Constitution").

40. *Id.* at 204 (arguing that task of channeling capital sentencing discretion is "beyond present human ability"). For a thorough analysis of the holding in *McGautha*, see *Furman v. Georgia*, 408 U.S. 238, 245-48 (1972) (Douglas, J., concurring).

41. *McGautha*, 402 U.S. at 204.

42. *Id.* at 197.

43. *Id.*

44. *Id.* at 207.

45. 408 U.S. 238 (1972).

46. See *Furman v. Georgia*, 408 U.S. 238, 248 n.11 (1972) (Douglas, J., concurring) (describing tension between *Furman* decision and *McGautha* holding and reasoning that *Furman* essentially adheres to Justice Brennan's dissent in *McGautha*, which bolsters argument that *McGautha* is essentially overruled).

ality of the death penalty under the Eighth Amendment.⁴⁷ In a single swoop, the Court invalidated the death penalty laws of thirty-nine jurisdictions and reversed more than 600 death sentences.⁴⁸

In *Furman*, three petitioners, one from Texas and two from Georgia, challenged the capital sentencing statutes in their respective states.⁴⁹ Like the statutes in *McGautha*, these statutes vested absolute discretion in sentencers to determine a capital defendant's punishment, but provided no guidance or standards to properly channel the sentencer's penalty decision.⁵⁰ The Court in *Furman* held⁵¹ that the states' death penalty laws were constitutionally infirm as applied under the Cruel and Unusual Punishments Clause of the Eighth Amendment and the Fourteenth Amendment's Due Process Clause.⁵² The Court felt that the ultimate sanction was being imposed in an

47. See *id.* at 314 (Marshall, J., concurring) (framing issue as whether death penalty is cruel and unusual punishment prohibited by Eighth Amendment); Kathleen D. Weron, Comment, *Rethinking Utah's Death Penalty Statute: A Constitutional Requirement for the Narrowing of Aggravating Circumstances*, 1994 UTAH L. REV. 1107, 1108. The Eighth Amendment's proscription of "cruel and unusual punishments," which originated in the English Bill of Rights, was focused on eliminating the myriad of ghastly punishments inflicted on criminal defendants in England. Nicholas John Spinelli, *Eighth Amendment—From Cruelly Restrictive to Unusually Broad Protections Against Punishments—Hudson v. McMillian*, 112 S. Ct. 1995 (1992), 3 SETON HALL CONST. L.J. 607, 608 & n.17 (1993). Most historians believe that in borrowing this precise language from the English Bill of Rights, our Founding Fathers sought to prevent barbarism and torture. *Id.*

48. Patrick E. Higginbotham, *Colloquy, Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047, 1056 (1991) (describing how retroactive application of *Furman* decision took hundreds of condemned inmates off death row).

49. *Furman*, 408 U.S. at 238. The two Georgian petitioners were sentenced to death for murder and rape, respectively. The Texan petitioner was sentenced to die for rape. *Id.*

50. *Id.* at 240 (Douglas, J., concurring) (asserting that in cases before Court, decision to impose death was left to absolute discretion of sentencers).

51. *Furman* is a brief per curiam opinion, holding that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 240.

In *Furman*, every Justice filed an opinion. The plurality, Justices Stewart, Stevens, and Powell, form the holding of the Court because their opinions represented "that position taken by those members of the Court who concurred in the judgments on the narrowest grounds." *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (summarizing *Furman* decision). This created some confusion because none of the plurality Justices joined the others' opinions. Five Justices supported the per curiam opinion. *Id.* Moreover, each of the five filed concurrences to explain their views. *Id.* Justices Brennan and Marshall contended that the death penalty was per se unconstitutional. *Furman*, 408 U.S. at 305-06, 371 (Brennan, J., per curiam). Justice Douglas argued that the death penalty was constitutionally infirm as applied because it was riddled with discrimination. *Id.* at 255-56 (Douglas, J., concurring). Justice Stewart also believed that the penalty was unconstitutional as applied because of the "freakish" and "wanton" manner in which it was imposed. *Id.* at 310 (Stewart, J., concurring). Focusing on the rarity of its use, Justice White argued that the death penalty was pointless. *Id.* at 311 (White, J., concurring). The dissent, authored by Chief Justice Burger and joined by Justices Blackmun and Rehnquist, maintained that the application of the death penalty in the cases before the Court survived constitutional scrutiny. *Id.* at 375 (Burger, C.J., dissenting).

52. *Furman*, 408 U.S. at 239-40; see Charles L. Black, Jr., *The Death Penalty: A National Question*, 18 U.C. DAVIS L. REV. 867, 869 (1985). Professor Black posited that because there were no sentencing guidelines under the existing capital sentencing statutes, there was no controlling law and, thus, there could be no due process of law accorded to capital defendants. *Id.*

arbitrary manner.⁵³ Arbitrary imposition of the death penalty ran counter to the Court's belief that because death is different from all other punishments, courts were required to accord heightened scrutiny to the procedures followed in its imposition.⁵⁴

The Court disliked that the sentencer in capital cases possessed the unguided discretion to impose the death penalty whenever it was an available punishment.⁵⁵ In situations where the defendant was eligible for the death penalty, there was no reliable way to differentiate cases in which death would be imposed from cases in which it would not. The Court recognized that the death penalty arbitrarily produced too great a variance between those capital defendants who

53. See *Furman*, 408 U.S. at 253 (Douglas, J., concurring) (discussing arbitrariness that some tribunals employ in inflicting death penalty).

[W]e deal with a system of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants . . . should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.

Id. (Douglas, J., concurring); see *id.* at 293 (Douglas, J., concurring) ("When the punishment of death is inflicted in a trivial number of the cases in which it is legally available . . . it is being inflicted arbitrarily . . . [and] smacks of little more than a lottery system"); *id.* at 257 (Douglas, J., concurring) (categorizing current death penalty statutes as "pregnant with discrimination," and stating that this discrimination did not comport with "idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual punishments'"); *id.* at 364 (Marshall, J., concurring) (noting that "capital punishment is imposed discriminatorily against certain identifiable classes of people . . . [.] usually the poor, the illiterate, the underprivileged, the member of [a] minority group . . . who becomes society's sacrificial lamb"); *id.* at 310 (Stewart J., concurring) (analogizing application of death penalty to being struck by lightning and arguing that we "cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed").

54. See *Furman*, 408 U.S. at 286 ("I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the constitution in a capital case. The distinction is by no means novel, . . . nor is it negligible, being literally that between life and death.") (Brennan, J., concurring) (citing *Reid v. Covert*, 354 U.S. 1, 77 (1957) (Harlan, J., concurring)); see also *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) (reversing imposition of death sentence because jury felt imposition of capital punishment would be evaluated by another judicial body and not administered as result of their findings); *Mills v. Maryland*, 486 U.S. 367, 383-84 (1983) (requiring high threshold of reliability before imposing death penalty); see also *Furman*, 408 U.S. at 306 (discussing death's finality and uniqueness in that it is an "absolute renunciation of all that is embodied in our concept of humanity") (Stewart, J., concurring); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment.").

The decision to exercise the power of the state to execute a defendant is unlike any other decision citizens and public officials are called on to make. Evolving standards of decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case.

Furman, 408 U.S. at 306.

55. See *Furman*, 408 U.S. at 293 (taking issue with total discretion vested in sentencers to impose death penalty).

were spared and those who were sentenced to death.⁵⁶ For example, some murderers who committed less atrocious crimes or who were less morally culpable were sentenced to die, while others who were seemingly more culpable and acted more egregiously had their lives spared.⁵⁷ Moreover, the Justices acknowledged that racial discrimination played a significant role in the administration of the death penalty.⁵⁸ Justice Douglas noted that “[i]n several instances where a white and a[n] [African American] were co-defendants, the white defendant was sentenced to life imprisonment or a term for years, and the [African American] was given the death penalty.”⁵⁹ These findings led the Supreme Court in *Furman* to conclude that when a sentencer is granted the power to determine whether a fellow human being should live, that sentencer’s discretion must be properly channeled and guided so as to minimize the risk that death will be imposed arbitrarily or capriciously.⁶⁰

Although the Court in *Furman* invalidated the death penalty laws of every state, it did not rule that the death penalty was unconstitutional per se.⁶¹ Therefore, the states had the opportunity to re-draft their statutes to conform to *Furman*.⁶² Because each of the nine Justices

56. See *id.* at 313 (White, J., concurring) (noting that arbitrariness of death penalty was reflected by courts’ inability to “distinguish the few cases in which [the death penalty was] imposed from the many cases in which it [was] not”); *id.* at 309-10 (Stewart, J., concurring) (relating that *Furman* petitioners were “among a capriciously selected, random handful upon whom the sentence of death has in fact been imposed”). Stephen Gillers, *The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing*, 18 U.C. DAVIS L. REV. 1037, 1048 (1985) (discussing inability to reconcile similar criminal conduct and convictions with dissimilar sentences).

57. Gillers, *supra* note 56, at 1048 (describing how Court in *Furman* was disgusted with application of current death penalty because it led to imposition of death sentences for widely disproportionate crimes).

58. See *Furman*, 408 U.S. at 251 (noting disparity in death penalty sentences between black and white co-defendants).

59. *Id.* (Douglas, J., concurring) (quoting Rupert C. Koeninger, *Capital Punishment in Texas, 1924-68*, 15 CRIME & DELINQ. 132, 141 (1969)). See also *McClesky v. Kemp*, 481 U.S. 279, 328 (1986) (Brennan, J., dissenting) (warning that when race is considered by sentencers in capital cases risk of capricious decisionmaking infects process so as to render imposition of death antithetical to our constitutional tenets).

60. *Furman*, 408 U.S. at 313 (White, J., concurring) (indicating that when death is not imposed according to meaningful criteria penalty is employed arbitrarily); *Gregg v. Georgia*, 428 U.S. 153, 154 (1976) (highlighting *Furman* mandate that capital sentencers’ discretion be channelled so as to reduce risk of capricious death sentences).

61. See, e.g., Alan I. Bigel, *Justice William Brennan and Thurgood Marshall on Capital Punishment: Its Constitutionality, Morality, Deterrent Effect, and Interpretation by the Court*, 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 11, 66 (1995) (explaining that in limiting its decision to jury pronouncements “in these cases,” Court avoided holding that capital punishment was per se unconstitutional); Rafferty, *supra* note 17, at 287 (enunciating that although Court invalidated all existent death penalty statutes, it specifically allowed States option to create post-*Furman* death penalty statutes that would comply with constitutional requirements).

62. See Rafferty, *supra* note 17, at 287 (contending that *Furman* gave states options of creating “mandatory death sentences for crimes carefully defined by statute; develop[ing]

filed a separate opinion, the states had difficulty gleaning exactly what the Supreme Court was looking for in *Furman*.⁶³ The states could be certain of one thing—unlimited discretion was intolerable because it enabled sentencers to inflict death arbitrarily. Did this mean that the states should create mandatory capital punishment statutes so as to remove discretion from the process altogether? Or, should the states seek to do what the Court in *McGautha* thought was humanly impossible—establish guidelines by which sentencers could properly decide when to administer the death penalty?⁶⁴

After *Furman*, thirty-five states revised their death penalty statutes by decreasing sentencers' discretion in an attempt to minimize the arbitrariness of the decision to impose death.⁶⁵ These revisions took two forms. The first, adhered to by ten states, entailed mandatory death sentences whereby the sentencer's discretion was eliminated entirely.⁶⁶ These mandatory statutes envisioned automatic death sentences for certain specified forms of murder.⁶⁷

The second type of revised statute, enacted by twenty-five states, established a bifurcated proceeding that required sentencers to analyze certain specified aggravating and mitigating factors in a separate hearing after they convicted the defendant of a capital crime.⁶⁸ Most of these statutes required capital sentencers to find at least one out of a list of statutorily provided aggravating factors attached to the defendant's crime before they could impose the death penalty.⁶⁹ Aggravating factors are circumstances that make the crime

guidelines to standardize jury discretion; and outright abolition").

63. See Hugo Adam Bedau, *Thinking of the Death Penalty as Cruel and Unusual Punishment*, 18 U.C. DAVIS L. REV. 873, 874 (1985) (observing that nine opinions in *Furman* created "utter disarray," and that *Furman* did little to clarify unsettled status of death penalty laws). Along the same lines, Chief Justice Burger, speaking of the "less than self defining" nature of the Eighth Amendment's language, stated that the *Furman* opinions "reveal[ed] the haze that surround[ed] this constitutional command." *Furman*, 408 U.S. at 375-76 (Burger, C.J., dissenting). As Professor Bedau noted, "those who had hoped that the Court would dispel this haze and provide new and useful tools which might be used to help the unenlightened jury to see why the death penalty is cruel and unusual punishment . . . found *Furman* disappointing." Bedau, *supra*, at 874.

64. See Weron, *supra* note 47, at 1122 (analyzing states' choices regarding redrafting death penalty statutes in wake of *Furman*).

65. Bigel, *supra* note 61, at 66. For a list of the states that re-drafted their capital sentencing statutes in response to *Furman*, see *Gregg v. Georgia*, 428 U.S. 153, 179-80 n.23 (1976).

66. See Bigel, *supra* note 61, at 67 (discussing that mandatory statutes sought to eliminate possibility of arbitrary imposition of death penalty).

67. See Bigel, *supra* note 61, at 67-68.

68. See Weron, *supra* note 47, at 1112-13 (discussing guided discretion statutes that limited sentencer discretion).

69. See, e.g., ALA. CODE § 13A-5-45(f) (1994) (providing that sentencer must find that minimum of one aggravating factor exists in order to invoke death penalty); GA. CODE ANN. § 17-10-30 (Michie 1990 & Supp. 1995) (same). See also *infra* notes 111 and 160 (providing statutory aggravating factors for Florida and Alabama, respectively). Two statutory aggravators common to both states are: (1) committing the murder for pecuniary gain and (2) committing

and the criminal seem more culpable if they are found to exist.⁷⁰ Aggravating factors force the sentencer to ask questions about the crime to determine whether the defendant has a prior felony record, killed for money, or killed in such a way as to subject several people to grave danger.⁷¹

Under this type of statute, aggravating factors were weighed against those factors in mitigation of a death sentence. Mitigating circumstances require the sentencer to examine the totality of the circumstances in which the crime was committed. Sentencers analyze whether the defendant was provoked, mentally impaired, or acted under the domination of another when determining the proper sentence to impose.⁷² Statutes consisting of aggravating and mitigating factors were aptly called "guided discretion statutes" because, through the mechanism of aggravating and mitigating circumstances, they provided sentencers with guidance as to when to impose the death penalty.⁷³

On July 2, 1976, the Supreme Court was called upon to pass on the validity of the states' attempts to conform their death penalty statutes to *Furman's* unclear requirements.⁷⁴ In *Gregg v. Georgia*⁷⁵ and its companion cases, the Supreme Court upheld the guided discretion statutes of Georgia,⁷⁶ Texas,⁷⁷ and Florida,⁷⁸ but struck down the mandatory death schemes of Louisiana⁷⁹ and North Carolina.⁸⁰

In *Woodson v. North Carolina*⁸¹ and *Roberts v. Louisiana*⁸² the Court explained that the mandatory death sentences embodied in these

the murder while under a life imprisonment sentence. FLA. STAT. ANN. § 921.141(5) (Harrison 1991); ALA. CODE § 13A-5-45 (1994).

70. See Bedau, *supra* note 63, at 1090 (describing how additional factors or conduct of defendant can increase defendant's culpability).

71. See *infra* note 160 (listing eight aggravating factors in current Alabama death penalty statute, ALA. CODE § 13A-5-49 (1994)).

72. See *infra* note 160 (providing seven mitigating factors in current Alabama death penalty statute, ALA. CODE § 13A-5-51 (1994)).

73. See Weron, *supra* note 47, at 1113 (alluding to states' attempts to dispense greater guidance to capital sentencing bodies).

74. See Bedau, *supra* note 63 (discussing confusion spawned by *Furman* "holding").

75. 428 U.S. 153 (1976).

76. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (upholding Georgia statute that resulted in "freakish" results after proper judicial review).

77. *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (upholding Texas statute requiring that jury consider five categories of aggravating factors and circumstances along with mitigating factors).

78. *Proffitt v. Florida*, 428 U.S. 242, 253 (1976) (upholding as constitutional statutory requirement of state supreme court review).

79. *Roberts v. Louisiana*, 428 U.S. 325, 333 (1976) (reversing mandatory death penalty statute that provided no room for jury to consider mitigating circumstances).

80. *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976) (reversing death penalty statute because it failed to provide objective standards to preclude arbitrary and wanton jury decisions).

81. 428 U.S. 280 (1976).

82. 428 U.S. 325 (1976).

states' statutes were impermissible because they precluded sentencers from taking the individual and the circumstances surrounding his offense into account.⁸³ This lack of individualized consideration did not comport with the notion that capital defendants must receive individualized treatment in the sentencing process because death is different in kind from any other punishment.⁸⁴ In sum, because mandatory sentencing schemes prevented consideration of "the character and record of the individual offender," they were unconstitutional under the Eighth Amendment.⁸⁵

In contrast to the mandatory capital sentencing schemes discussed above, the Court approved the guided discretion statutes of Georgia, Texas, and Florida.⁸⁶ These statutes possessed two common threads. First, they provided for bifurcated proceedings⁸⁷ in which guilt or innocence would be determined in the first stage, and penalty in the second.⁸⁸ Second, they required that in order to impose death, at least one out of a statutorily prescribed list of aggravating factors must exist in each capital defendant's case.⁸⁹

In *Gregg*, the petitioners argued that Georgia's revamped guided discretion capital punishment statute⁹⁰ was unconstitutional because

83. *Woodson v. North Carolina*, 428 U.S. 280, 298-304 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 332-36 (1976). The Supreme Court took issue with the mandatory statute because it "treat[ed] all persons convicted of a given offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Id.* at 304. Moreover, the Court reasoned that by ignoring the various facets of the individual's character and the circumstances of the offense, mandatory statutes "exclude[d] from consideration in fixing the ultimate punishment of death the possibility of compassion or mitigating factors stemming from the diverse frailties of humankind." *Id.*

84. *Id.* at 298-305 (discussing how individual traits, circumstances, and conditions should be considered). A mandatory death sentence would be "regressive and of an antique mold." *Id.* at 298.

85. *Id.* at 303-05.

86. See *Proffitt v. Florida*, 428 U.S. 262 (1976); *Jurek v. Texas*, 428 U.S. 252 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

87. The Court in *Gregg* explained that bifurcated proceedings were necessary in capital sentencing cases in order to separate information prejudicial to the issue of the defendant's guilt but relevant to the issue of the proper penalty. *Gregg*, 428 U.S. at 195. The Court asserted,

When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated [proceeding] is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*.

Id. at 191-92; see also Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183, 1187 (1995) (contending that if courts adhere to rules of evidence, bifurcated proceedings will prevent prejudicial information regarding sentence from tainting question of guilt).

88. *Proffitt*, 428 U.S. at 245-46; *Jurek*, 428 U.S. at 267; *Gregg*, 428 U.S. at 158.

89. *Proffitt*, 428 U.S. at 250 n.6; *Jurek*, 428 U.S. at 269; *Gregg*, 428 U.S. at 165 n.9.

90. GA. CODE ANN. § 17-10-30 (Michie 1990 & Supp. 1995). This statute retained the death penalty for six crimes. *Id.* (listing aircraft hijacking, treason, murder, rape, armed robbery and kidnapping as offenses which allow imposition of death sentence). It entails a bifurcated proceeding, with guilt or innocence being decided in the initial stage. *Id.* If guilt is found, the

Americans' standards of decency⁹¹ had evolved to the point where capital punishment could no longer be tolerated.⁹² Looking to "objective indicia" of the public's opinion on the death penalty, the Court concluded that the petitioners' argument must fail.⁹³ Alluding to the swiftness with which the vast majority of the states redrafted their capital sentencing statutes to rectify the inadequacies identified in *Furman*, the Court's plurality held that Americans' standards of decency had not evolved to such a degree as to warrant abolition of the death penalty.⁹⁴

The Court in *Gregg* concluded that Georgia's death penalty statute satisfied *Furman*'s central concern that death not be imposed in an arbitrary or capricious manner.⁹⁵ This was accomplished through procedures that focused the jury's attention on the specifics of the crime. In weighing the existence or nonexistence of mitigating and aggravating circumstances, the jury was forced to answer meaningful

sentencing portion of the trial begins. The judge must consider or include in his instructions to the jury the duty to take into account any mitigating circumstances and any of the 10 statutorily prescribed aggravating circumstances authorized by law or supported by the evidence. *Id.* The sentencer is thus free to consider an infinite number of statutory and nonstatutory mitigating circumstances, together with any statutory aggravating factors. *Id.* Only when the sentencer has found at least one of the statutorily prescribed aggravating factors, elects death as the appropriate sentence, and specifies the aggravating circumstance(s) in writing, may a defendant be sentenced to die. *Id.* Further, the jury recommendation is binding on the court. *Id.* Finally, Georgia set up an automatic appeal process whereby a defendant scheduled to die receives automatic review from Georgia's Supreme Court. *Id.* The Georgia Supreme Court is statutorily bound to check the record for bias and prejudice, and to do a proportionality test to determine whether the sentence of death was disproportionate to the sentence imposed in factually similar cases. GA. CODE ANN. § 17-10-35.1 (Michie 1990 & Supp. 1995).

91. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The theory is that if a punishment fails to comport with current standards of decency, then it runs afoul of the Eighth Amendment's ban on cruel and unusual punishments. *Id.* In *Trop*, the defendant was convicted of war-time desertion and received the sentence of expatriation, meaning loss of citizenship. Remarketing that the cruel and unusual punishments clause "must draw its meaning from the evolving standards of human decency that mark the progress of a maturing society," Chief Justice Warren ruled that this punishment violated the Eighth Amendment. *Id.* at 101. Thus, as Justice Marshall has explained, adherence to the evolving standards of decency yardstick means that a sanction that was allowed at one time in our nation's past "is not necessarily permissible today." *Furman v. Georgia*, 408 U.S. 238, 329 (1972) (Marshall, J., concurring).

92. *Furman*, 408 U.S. at 329.

93. *Gregg*, 428 U.S. at 179 (stating that "[p]etitioners . . . renew the 'standards of decency' argument, but developments during the four years since *Furman* have undercut substantially the assumptions upon which their argument rest[s]").

94. *Id.* at 179-81 (recounting that society has endorsed death penalty through numerous codifications).

The most marked indication of society's endorsement of the death penalty . . . is the legislative response to *Furman*. . . [Thirty-five] states have enacted new statutes that provide for the death penalty. . . [In addition,] the Congress . . . [has] enacted a statute providing the death penalty for aircraft piracy. . . [Therefore,] all of the post-*Furman* statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people.

Id.

95. *Id.* at 195 (emphasizing that objective standards are key to constitutionality).

questions in its deliberations regarding the proper sentence to impose.⁹⁶ If a minimum of one aggravating circumstance were not linked to a particular defendant, that defendant could not be sentenced to die.⁹⁷ The statute, therefore, permissibly limited the class of defendants eligible to receive the death penalty. While jury discretion remained, the Court concluded that it was adequately "controlled by clear and objective standards so as to produce non-discriminatory application."⁹⁸ Furthermore, the Court in *Gregg* noted that by requiring sentencers to weigh aggravating and mitigating factors, Georgia's statute struck a near-perfect balance; it allowed jurors to retain substantial discretion, while simultaneously channeling and focusing that discretion.⁹⁹ In addition, Georgia's capital statute directed sentencers to consider the particular attributes of the accused.¹⁰⁰ Unlike the mandatory statutes, the guided discretion statutes required the sentencer to "consider the circumstances of the crime and the criminal before . . . render[ing] a sentence."¹⁰¹ Moreover, unlike the rigid mandatory sentence statutes, jurors, under the guided statutes, had the option of refraining from imposing death even after convicting the defendant of a capital crime.¹⁰²

In sum, *Gregg* and its companion cases formulate the foundation of the Supreme Court's jurisprudence as to how the death penalty may be imposed within the parameters of the Eighth Amendment.¹⁰³ If the sentencer's discretion is adequately channeled and confined, and the focus of the sentencer's inquiry is on the individual characteristics of the defendant and the circumstances surrounding his offense, the

96. *Id.* at 197. Examples of these questions are the following: "Was [the crime] committed in the course of another capital felony? Was it committed for money? Was it committed upon a peace officer or judicial officer? Was it committed in a particularly heinous way or in a manner that endangered the lives of many persons? Does [the defendant] have a record of prior convictions for capital offenses? Are there any special facts about this defendant that militate against imposing capital punishment?" GA. CODE ANN. § 17-10-31 (Michie 1990 & Supp. 1995).

97. GA. CODE ANN. § 17-10-31 (Michie 1990 & Supp. 1995).

98. *Gregg*, 428 U.S. at 198.

99. *Id.* at 196-98.

100. *Id.* at 198.

101. Higginbotham, *supra* note 48, at 1056.

102. See Bigel, *supra* note 61, at 12 (commenting that capricious sentencing is fostered under mandatory statute where jurors may circumvent mandate to impose death penalty by acquitting otherwise guilty capital defendant if jurors believe defendant does not deserve to die).

103. In the years after *Gregg*, the Supreme Court has refined the administration of the death penalty. See, e.g., *Enmund v. Florida*, 458 U.S. 782, 788 (1982) (abolishing death sentence for accomplice to felony murder who does not kill, attempt to kill, or intend that killing take place); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that death sentence for rape of adult woman was grossly disproportionate punishment violative of Eighth Amendment); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (ruling that sentencer must be permitted to consider all possible mitigating circumstances proffered by defendant and not just those mitigating factors statutorily prescribed).

imposition of death is constitutional. As long as "discretion [was] channeled," the belief was that a sentencer can "[n]o longer . . . wantonly and freakishly impose the death sentence."¹⁰⁴ The Court in *Gregg* believed that the arbitrariness and capriciousness that permeated the death penalty could be minimized to an acceptable level by such procedures.¹⁰⁵

II. THE OVERRIDE STATUTES

A. Florida's Death Penalty Statute

Florida's capital sentencing statute¹⁰⁶ was redrafted in 1973 to comport with the Court's 1972 ruling in *Furman*.¹⁰⁷ The revised statute contains a bifurcated proceeding. Once a defendant is found guilty of a capital offense,¹⁰⁸ a separate hearing is held before the same judge and jury to decide the appropriate sentence.¹⁰⁹ At this evidentiary hearing, both sides are given an opportunity to present evidence and argue whether death should be imposed.¹¹⁰ Upon the

104. *Gregg*, 428 U.S. at 206-07.

105. *Id.* at 193-95.

106. FLA. STAT. ANN. § 921.141 (Harrison 1991).

107. *Furman v. Georgia*, 408 U.S. 238 (1972) (invalidating FLA. STAT. ANN. §§ 775.082, 921.141 (Harrison 1971), Florida's prior death penalty statute); see Michael Mello & Ruthann Robson, *Judge over Jury: Florida's Practice of Imposing Death over Life in Capital Cases*, 13 FLA. ST. U. L. REV. 31, 35 (1985) (discussing Florida's post-*Furman* death penalty statute and reasons for invalidation of pre-*Furman* statute). Florida's pre-*Furman* statute was called a mercy statute because it required that all persons convicted of a capital offense receive the penalty of death unless the jury recommended mercy. *Id.* A jury mercy recommendation was binding on the trial judge. *Id.* at 36. The statute was struck down because it failed to guide or structure the jury's decision whether to recommend mercy. *Id.* Thus, it did not comport with *Furman* in that the sentencer's discretion under the mercy statute was not adequately guided to minimize the risk of arbitrary imposition of death. *Id.*

108. FLA. STAT. ANN. § 782.04(1) (Harrison 1991). Under Florida's statute, only those criminals convicted of first-degree murder are eligible for the sanction of death. *Id.* The murder statute reads in relevant part:

(1)(a) The unlawful killing of a human being, 1. When perpetrated from a premeditated design to effect the death of the person killed or any human being; or 2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any . . . b. arson, c. sexual battery, d. robbery, e. burglary, f. kidnapping, g. escape h. aggravated child abuse, i. aircraft piracy, or j. unlawful throwing, placing, or discharging of a destructive device or bomb; or 3. Which resulted from the unlawful distribution of . . . cocaine . . . or opium . . . by a person 18 years of age or older when such drug is proven to be the proximate cause of the death of the user, is murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082.

Id.

109. FLA. STAT. ANN. § 921.141(1) (Harrison 1991). See *Proffitt v. Florida*, 428 U.S. 242, 248-51 (1976) (providing concise description of Florida's sentencing procedure); see also Mello & Robson, *supra* note 107, at 36-37 (same).

110. See Mello & Robson, *supra* note 107, at 36 (contending that "many trial procedures have been imported" into this penalty phase). Both sides can enter into evidence matter that relates

hearing's conclusion, the jury is directed to determine "[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death."¹¹¹ The jury's sentencing verdict is by majority vote,¹¹² and is only advisory and not binding on the court.¹¹³

After the jury gives its advice, the statute directs the trial judge to weigh independently the statutory aggravating and mitigating circumstances¹¹⁴ and arrive at the proper sentence.¹¹⁵ After receiv-

to any of the statutorily prescribed aggravating and mitigating circumstances. *Id.* This second phase is essentially a trial on the issue of penalty. *Id.*

111. FLA. STAT. ANN. § 921.141(2) (Harrison 1991). To reach a death vote, a majority of the jury must find that at least one of the following aggravating factors exists:

- (a) The capital felony was committed by a person under sentence of imprisonment.
- (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
- (c) The defendant knowingly created a great risk of death to many persons.
- (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
- (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- (f) The capital offense was committed for pecuniary gain.
- (g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- (h) The capital felony was especially heinous, atrocious, or cruel.

Id. § 921.141(5).

If at least one of these aggravating circumstances is found to exist, the jury must determine whether any of the following mitigating circumstances exist and, if any do exist, whether they outweigh the aggravating factors found. *Id.* § 921.141(6). The mitigating factors are:

- (a) The defendant has no significant history of prior criminal activity.
- (b) The capital felony was committed while the defendant was under the influence of extreme emotional or mental disturbance.
- (c) The victim was a participant in the defendant's conduct or consented to the act.
- (d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
- (e) The defendant acted under extreme duress or under the substantial domination of another person.
- (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.
- (g) The age of the defendant at the time of the crime.

Id.

112. Although the statute declares that the jury's vote must be by majority, a 6-6 deadlock is construed to be a life imprisonment recommendation. *See, e.g.,* Mello, *supra* note 1, at 928 n.22 (listing cases in which split vote translated into life recommendations); Mello & Robson, *supra* note 107, at 36 n.26 (same).

113. FLA. STAT. ANN. § 921.141(3) (Harrison 1991). The statute reads, in pertinent part: "Notwithstanding the recommendation of the majority of the jury, the court, after [independently re-]weighing the aggravating and mitigating circumstances," enters a sentence of life or death. *Id.*

114. *Id.* The statute has been interpreted to mean that the judge need not independently weigh aggravating and mitigating factors in one circumstance—when following the jury's recommendation of life imprisonment. *See, e.g.,* Mello & Robson, *supra* note 107, at 36 ("If the sentence is death, or if the judge imposes a life sentence despite the jury's recommendation of death, the court must set forth . . . aggravating and mitigating circumstances."). Thus, whenever

ing the jury's recommendation, the trial judge possesses the authority to weigh individually aggravating and mitigating factors and impose either life imprisonment or death.¹¹⁶ Whenever the judge's sanction is death, the Florida Supreme Court grants automatic review to determine whether the death sentence was appropriate.¹¹⁷

B. Case Law Interpreting Florida's Capital Sentencing Statute

As previously discussed, a capital sentencing statute will be upheld if it successfully channels and guides the sentencer's discretion by focusing the penalty inquiry on the defendant's background and character, and the aggravating and mitigating circumstances surrounding the case.¹¹⁸ Florida's capital statute differs from most states' death penalty statutes in that it includes an override provision that allows the trial judge to veto the jury's penalty recommendation.¹¹⁹ Nonetheless, it has consistently been upheld in both the United States and Florida Supreme Courts.¹²⁰

The key case for reconciling the Florida statute with the Supreme Court's strictures is *Tedder v. State*.¹²¹ The petitioner in *Tedder* was convicted of first degree murder for killing his ex-wife's mother.¹²² The Florida Supreme Court found that petitioner had snuck out from behind a tree and shot toward his ex-wife and her mother, who were

the sentence is death or the judge lessens the jury's advisory death sentence to life, the judge must provide written findings as to aggravating and mitigating factors. *Id.* The mandate that judges provide written findings when lessening a death recommendation to a sentence of life imprisonment is explained in *State v. Dixon*, 283 So. 2d 1, 8 (Fla. 1973), *cert. denied sub nom. Hunter v. Florida*, 416 U.S. 943 (1974).

115. FLA. STAT. ANN. § 921.141(3) (Harrison 1991), requires the judge, when imposing death, to "set forth in writing [the] findings upon which the sentence of death is based as to the facts: (a) [t]hat sufficient aggravating circumstances exist . . . and (b) [t]hat there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances." *Id.*

116. *Id.*

117. FLA. STAT. ANN. § 921.141(4) (Harrison 1991); see *Dixon*, 283 So. 2d at 10 (commenting that appellate review ensures "that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case . . . [because] this Court can review that case in light of the other decisions and determine whether or not the punishment is too great"); Welleck, *supra* note 20, at 821 (stating that "the [trial] judge's determination is then reviewed by the Florida Supreme Court to determine whether the aggravating and mitigating circumstances found by the trial judge are supported by the evidence and justify a sentence of death").

118. See *supra* notes 45-105 and accompanying text (discussing Court's holdings and rationales in *Furman*, *Gregg*, and their progeny).

119. Of the 39 states that endorse capital punishment, only Florida, Alabama, Indiana, and Delaware possess jury override provisions. See Russell, *supra* note 1, at 10 & n.52 (alluding to uniqueness of statutes and providing that Indiana has used override less than 10 times and Delaware has never used override to impose death over jury recommendation of life).

120. Spaziano v. Florida, 468 U.S. 447 (1976); *Tedder v. State*, 322 So. 2d 908 (Fla. 1975).

121. 322 So. 2d 908 (Fla. 1976).

122. *Tedder v. State*, 322 So. 2d 908, 909 (Fla. 1976).

gardening forty yards away from the petitioner.¹²³ Petitioner's gunshot struck the mother, who fell to the ground.¹²⁴ Petitioner made matters worse by running toward the scene and grabbing his ex-wife, thereby preventing her from assisting her injured mother.¹²⁵ The mother died from her wound one month after the shooting.¹²⁶ On these facts, the jury deliberated for sixteen minutes and recommended a sentence of life imprisonment.¹²⁷

The next day the trial judge conducted a hearing to determine his sentence recommendation.¹²⁸ Finding one mitigating and three aggravating circumstances, the judge overrode the jury's life imprisonment recommendation and imposed the death penalty.¹²⁹ As neither the statute nor the case law required the judge to attach any weight to the jury's recommendation, he could disregard the jury's recommendation provided he found at least one aggravating circumstance.¹³⁰ Because he found at least one aggravating factor, the trial judge was free to enter a sentence of death. Because the death penalty was imposed, the case was automatically reviewed by the Florida Supreme Court.¹³¹

The Florida Supreme Court set a new statewide precedent by ruling that in order for a trial judge to impose death over a jury recommendation of life, "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."¹³² Thus, under what has come to be known as the *Tedder* standard,¹³³ Florida trial judges were now obligated to ascribe great weight to a capital jury's recommended sentence.¹³⁴ Applying this

123. *Id.*

124. *Id.*

125. *Id.* (explaining that petitioner physically took ex-wife away from site of murder).

126. *Id.*

127. *Id.*

128. *Id.* at 909-10. The judge received a pre-sentence investigation report to assist him in his penalty decision. *Id.* This report included information that the jury was not aware of, such as a history of petitioner's criminal background. *See id.* (stating that petitioner had one prior conviction of petit larceny).

129. *Id.* at 909-10 (stating three aggravating circumstances: (1) knowingly creating risk of death for many persons, (2) murder committed while defendant attempting kidnapping, and (3) crime "especially heinous, atrocious or cruel").

130. FLA. STAT. ANN. § 921.141(3), (5) (Harrison 1991) (providing that trial judge is precluded from imposing death unless he finds at least one aggravating circumstance).

131. Florida's capital statute provides for automatic state supreme court review of all death sentences. *Id.* § 921.141(4).

132. *Tedder*, 322 So. 2d at 910.

133. *See, e.g.,* Johnson v. Singletary, 640 So. 2d 106, 109 (Fla. 1994) (discussing "the trial judge's application of the *Tedder* standard"); Christmas v. State, 632 So. 2d 1368, 1371 (1994) (discussing whether *Tedder* standard had been met); Russell, *supra* note 1, at 13 (discussing application of *Tedder* standard in Spaziano v. Florida, 104 S. Ct. 3154 (1984)).

134. *Tedder*, 322 So. 2d at 910.

standard in *Tedder* for the first time to the facts, the court ruled that the death penalty did not comport with petitioner's crime.¹³⁵ Reasoning that the Florida legislature intended that the death penalty apply only to the most cruel killings, the court commented that although petitioner's act was "atrocious," it did not warrant the death penalty.¹³⁶ Consequently, the court quashed the death sentence and ordered the trial judge to reinstate the jury's recommended sentence of life imprisonment.¹³⁷

The *Tedder* standard played a crucial role in the first Supreme Court case to deal expressly with the constitutionality of the jury override. In the 1976 case of *Proffitt v. Florida*,¹³⁸ the petitioner contended that the jury override smacked of the very arbitrariness and unbridled discretion against which *Furman* had warned.¹³⁹ The crux of petitioner's argument was that because Florida's death penalty statute was silent as to the weight the trial judge must accord the jury's recommended sentence,¹⁴⁰ it ran afoul of *Furman's* teachings.¹⁴¹ The Court, however, was unpersuaded by petitioner's argument. The Court held that Florida's judicially created *Tedder* standard sought "to assure that the death penalty [would] not be imposed in an arbitrary or capricious manner."¹⁴² Therefore, the Supreme Court did not

135. *Id.*

136. *Id.*

137. *Id.* at 910-11 (contending that there was no reason for trial judge to override jury's life sentence recommendation).

138. 428 U.S. 242 (1976).

139. *Proffitt v. Florida*, 428 U.S. 242, 247 (1976).

140. See Mello, *supra* note 1, at 30 (citing Brief for Petitioner at 63-64, *Proffitt v. Florida*, 428 U.S. 242 (1976)) (arguing that "jury's advisory sentencing verdict introduces unnecessary discretion into the sentencing procedure because the statute gives no guidance regarding its relevance"). Further, the brief argues that "[t]he verdict is merely an enigmatic statement that the jury recommended life or death [because t]he basis for the recommendation need not be given." *Id.*; Russell, *supra* note 1, at 12 (characterizing petitioner's argument as attack on statutory guidelines that "neither tailored nor prescribed how the jury's advisory verdict was to be weighed").

141. See *supra* notes 45-63 and accompanying text (providing detailed discussion of *Furman*).

142. *Proffitt*, 428 U.S. at 252-53. The Court also praised Florida's appellate review of death overrides. *Id.* at 253. Florida's Supreme Court "has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed." *Id.* Further, the Court noted that the Florida Supreme Court "has vacated 8 of the 21 death sentences it has reviewed to date." *Id.* The Court was convinced that Florida had done its best to ensure that the irrevocable penalty of death was not imposed in a "freakish" manner. *Id.*

The Court also followed the line of reasoning enunciated in *Dixon*, i.e., that trial judges are more experienced in sentencing than juries. *Id.* at 252. Thus, Justice Powell, announcing the judgment of the Court, proclaimed, "judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment . . ." *Id.* But see *Spaziano v. Florida*, 104 S. Ct. 3154, 3167-68 (1984) (Stevens, J., dissenting) (explaining that because punishment of death "cannot be prescribed by a rule of law as judges normally understand such rules," death can only be understood to represent community's outrage, and thus should be imposed by a jury, "rather than by a single governmental official"); Mello, *supra* note 1, at 936-37 (relating that as of 1990, 83 out of 112 life-to-death overrides were reversed on

agree that the override tainted Florida's capital procedure with the element of unlawful arbitrariness.¹⁴³

In *Spaziano v. Florida*,¹⁴⁴ the second case to address Florida's override procedure, the Supreme Court expressly upheld the constitutionality of Florida's jury override provision.¹⁴⁵ The convicted petitioner in *Spaziano* asserted that the justification behind the death penalty was mainly retribution.¹⁴⁶ Because retribution was essentially society's expression of moral outrage, the petitioner argued that juries comprising a cross section of the community were more capable than judges of expressing the community's position on whether a capital defendant deserved to be put to death.¹⁴⁷

The Court rejected petitioner's reasoning and declared Florida's law constitutional.¹⁴⁸ First, the Court disagreed that the sole justification for the death penalty was retribution.¹⁴⁹ Second, the Court maintained that even if retribution were the primary purpose behind the death penalty, this would not mandate jury sentencing in all

automatic appeal by Florida's Supreme Court). Welleck, *supra* note 20, at 834 (revealing 1980 study showing that average Florida trial judge made only three capital sentencing decisions in seven-year existence of new statute). These facts tear gaping holes in the rationale that judges should possess capital sentencing authority because of their wide ranging sentencing expertise.

143. See Mello, *supra* note 1, at 930 (relating Court's finding that override did not spawn capricious imposition of death).

144. 468 U.S. 447 (1984). A jury convicted the petitioner of first degree murder. *Spaziano v. Florida*, 468 U.S. 447, 451 (1984). At the conclusion of the sentencing hearing, the same jury recommended by majority vote that he be sent to jail for life. *Id.* The trial judge, however, disagreed with the jury and sentenced the petitioner to death. *Id.* at 451-52.

145. *Id.* at 462.

146. *Id.* at 461. For a well grounded argument that retribution is the sole purpose behind the death penalty, see *Harris v. Alabama*, 115 S. Ct. 1031, 1038 (1995) (Stevens, J., dissenting) (stating that "[i]n capital sentencing decisions . . . rehabilitation plays no role; incapacitation is largely irrelevant, at least when the alternative of life imprisonment without possibility of parole is available; and the assumption that death provides a greater deterrent than other penalties is unsupported by persuasive evidence"). Therefore, Justice Stevens posits, the principal justification for the death penalty is retribution. *Id.*; see also Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 53-54 (1980) (stating that "three of the reasons generally used to justify imprisonment do not support capital punishment—rehabilitation is inapplicable, incapacitation too conjectural . . . and deterrence, at the sentencing stage, an uninformed guess and at odds with the need for individualization and the recognition of the finality of death"). Gillers argues that this leaves retribution as the exclusive motive for the imposition of the death sentence. *Id.*

147. *Spaziano*, 468 U.S. at 461; see also Mello & Robson, *supra* note 107, at 42 (summarizing *Spaziano's* argument as follows: "Since the death penalty is society's expression of outrage at especially offensive conduct, the jury, as representative of the community whose outrage is being expressed, is more likely to reliably rank the offender and his offense on the yardstick of community outrage.").

In addition, the petitioner in *Spaziano* contended that Florida's capital sentencing scheme violated the Fifth Amendment's Double Jeopardy Clause, the Sixth Amendment's right to trial by jury, and the Fourteenth Amendment's Due Process Clause. *Spaziano*, 468 U.S. at 457-58.

148. *Spaziano*, 468 U.S. at 467 (affirming judgement of Supreme Court of Florida).

149. *Id.* at 461-62 (finding that deterrence and incapacitation also serve as justifications for death penalty).

capital cases.¹⁵⁰ To the Court, the community's voice and outrage had already been afforded adequate consideration through the representative process under which Florida's death penalty law was enacted. Finally, the Court rejected petitioner's argument that Florida's override violated the Fourteenth Amendment.¹⁵¹ Dismissing petitioner's claim that the *Tedder* standard led to arbitrary and discriminatory imposition of death, the Court stated: "[We] already ha[ve] recognized the significant safeguard the *Tedder* standard affords a capital defendant in Florida. We are satisfied that the Florida Supreme Court takes that standard seriously and has not hesitated to reverse a trial court if it derogates a jury's role."¹⁵²

150. *Id.* at 462 (noting that "[i]mposing the sentence in individual [death penalty] cases is not the sole or even the primary vehicle through which the community's voice can be expressed. . . . The community's voice is heard at least as clearly in the legislature when the death penalty is authorized").

151. *Id.* at 466 (noting "[w]e see nothing that suggests that the application of the jury override procedure has resulted in arbitrary or discriminatory application of the death penalty. . . .").

152. *Spaziano*, 468 U.S. at 465 (citations omitted). In concluding its opinion, the Court stated that its duty was not "to second-guess the deference accorded the jury's recommendation in a particular case, but to ensure that the result of the process [was] not arbitrary or discriminatory." *Id.* But see Russell, *supra* note 1, at 14 (criticizing Court for making this statement and interpreting it to denote that Court "appears to be more impressed with the fact that a standard is in place than with the *Tedder* standard itself").

Justice Stevens, with Justices Brennan and Marshall, submitted a ringing dissent from the majority's treatment of the jury override issue. *Spaziano*, 468 U.S. at 467-90 (Stevens, J., concurring in part and dissenting in part). The crux of the dissenters' argument is captured in the following caption:

Because it is the one punishment that cannot be prescribed by a rule of law as judges normally understand such rules, but rather is ultimately understood only as an expression of the community's outrage—its sense that an individual has lost his moral entitlement to live—I am convinced that the danger of an excessive response can only be avoided if the decision to impose the death penalty is made by a jury rather than by a single governmental official. This conviction is consistent with the judgment of history and the current consensus of opinion that juries are better equipped than judges to make capital sentencing decisions . . . the question whether a sentence of death is excessive in the particular circumstances of any case is one that must be answered by the decision maker that is best able to "express the conscience of the community on the ultimate question of life and death."

Spaziano, 468 U.S. at 469-70 (Stevens, J., concurring in part and dissenting in part) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)) (footnote omitted).

In addition, Justice Stevens questioned the majority's grant of deference to the Florida legislature's revamped capital sentencing procedure. *Spaziano*, 468 U.S. at 470-71 (Stevens, J., concurring in part and dissenting in part). Pointing out that Florida's override was enacted during the confusing aftermath of *Furman*, a period in which no one knew what sort of death penalty statute would pass constitutional scrutiny, Justice Stevens stated that a "legislative choice based on such a misunderstanding is not entitled to the same presumption of validity as one that rests wholly on a legislative assessment of sound policy . . ." *Id.* at 475 (Stevens, J., concurring in part and dissenting in part).

The statements made by Florida State Senator Ed Dunn, one of the drafters of the post-*Furman* statute providing for judicial override, certainly substantiate Justice Stevens' concerns. Senator Dunn described the Conference Committee that drafted the death penalty bill as follows:

We went to Conference Committee and I can remember to this day that Conference Committee going to about one-third or two o'clock in the morning. I remember

C. Alabama's Death Penalty Statute

In Alabama, the defendant must commit one of eighteen statutorily prescribed "death eligible" offenses¹⁵³ before a punishment of death can be imposed.¹⁵⁴ Alabama's capital punishment statute¹⁵⁵ comprises three phases: guilt, advisory verdict, and sentencing.¹⁵⁶

talking to some of the members of the Senate whom I respect today and did then, and some of them are still in the Senate. And going out in the hall I remember one of them asking me, do you really think it is better to go to judges [to impose capital sentences] as opposed to the jury. No, we don't. We think we have to because *Furman* requires it. What we sat down or really at that point stood there and worked out was a compromise, a cross if you will, a hybrid between what was done in the Senate version and the House version. And that cross was the utilization of the jury as a recommending authority on the question of the ultimate sentence The question to me from the [S]enator was, well how do we try to make . . . the role of the jury consistent with the tradition in this state? And frankly we found no way to do it. At that time we were of the opinion that we had to have symmetry in the system, that we had to have [a] consistent role of the judge and the jury, that we had to therefore permit a judge to overturn a recommended sentence of mercy by the jury.

Mello & Robson, *supra* note 107, at 70 n.187.

Echoing Senator Dunn's sentiments, Professors Radelet and Mello stated:

Florida's statutory provision that a judge may override a jury's life recommendation is not based upon any legislative or judicial judgment that the life-to-death override serves a crucial state interest. Rather, the provision is a product of the Legislature's reasonable misunderstanding that such an override provision was required by the . . . Court's decision in *Furman v. Georgia*.

Michael L. Radelet & Michael Mello, *Death-to-Life Overrides: Saving the Resources of the Florida Supreme Court*, 20 FLA. ST. U.L. REV. 196, 197 (1992).

153. See ALA. CODE § 13A-5-40 (1994). The statute lists those capital offenses for which death is sanctioned as: (1) murder during "kidnaping in the first degree or an attempt thereof"; (2) murder during "robbery in the first degree or an attempt thereof"; (3) murder during "rape in the first or second degree or an attempt thereof," or "during sodomy in the first or second degree or an attempt thereof"; (4) murder during "burglary in the first or second degree or an attempt thereof"; (5) "[m]urder of any police officer, sheriff, deputy, state trooper, federal law enforcement officer, or any other state or federal peace officer . . . or prison jail guard" while on duty or because of such guard or officer's official or job-related act; (6) murder while "defendant is under sentence of life imprisonment"; (7) murder for pecuniary gain or "pursuant to a contract for hire"; (8) murder "during sexual abuse in the first or second degree or an attempt thereof"; (9) murder during "arson in the first or second degree," or by means of explosives or explosion; (10) murder wherein "two or more persons" are killed; (11) murder where the victim is a present or former state/federal public official because of that person's "official position, act, or capacity"; (12) murder during unlawful assumption of "control of any aircraft" by force or threat to obtain money for release of persons on board; (13) murder by one who has been convicted of any other murder within the previous 20 years, subject to certain requirements; (14) murder of victim who was to be witness in any court proceeding; (15) murder of a victim under 14 years of age; (16) murder where the victim in a dwelling is killed by a weapon fired from outside that dwelling; (17) murder where victim is killed in a vehicle by weapon fired from outside the vehicle; and, (18) murder where the victim is killed from a weapon fired from within a vehicle. *Id.*

154. ALA. CODE § 13A-5-45 (1994).

155. ALA. CODE § 13A-5-39 to -59 (1994).

156. See Russell, *supra* note 1, at 25 (summarizing Alabama's capital sentencing procedure and characterizing statute as "tripartite").

In the guilt phase, a jury of twelve determines the guilt or innocence of the capital defendant.¹⁵⁷ If the defendant is convicted, the trial moves to the advisory verdict stage.¹⁵⁸ During this second phase, the jury decides whether to sentence the convicted defendant to death or life imprisonment without the possibility of parole.¹⁵⁹ The bulk of the hearing is devoted to offers of evidence by both the prosecution and the defense as to the existence or nonexistence of statutory aggravating, statutory mitigating, and nonstatutory mitigating circumstances.¹⁶⁰ To recommend death, the jury must find that at least one aggravating factor exists.¹⁶¹ Further, the jury must determine that the aggravating factor(s) found outweigh any mitigating circumstances.¹⁶² The jury can only recommend death if at least ten of the twelve jurors vote for death.¹⁶³ For life imprisonment, however, a simple majority vote is required.¹⁶⁴ In the event that

157. ALA. R. CRIM. P. 18.1(a). To convict, there must be jury unanimity. *Id.* § 23.1(a).

158. ALA. CODE § 13A-5-45 (1994).

159. *Id.* § 13A-5-45(a). Much like Florida's second phase, Alabama's procedure consists of "a due process hearing of the highest magnitude." Joseph A. Colquitt, *The Death Penalty Laws of Alabama*, 33 ALA. L. REV. 213, 232 (1982) (quoting *Richardson v. State*, 376 So. 2d 205, 224 (Ala. Crim. App. 1978), *aff'd*, 376 So. 2d 228 (Ala. 1979)).

160. ALA. CODE § 13A-5-45 (1994). Alabama lists eight statutory aggravating circumstances:

- (1) The capital offense was committed by a person under sentence of imprisonment;
- (2) The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person;
- (3) The defendant knowingly created a great risk of death to many persons;
- (4) The capital offense was committed while the defendant was engaged or was the accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary, or kidnaping;
- (5) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
- (6) The capital offense was committed for pecuniary gain;
- (7) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or
- (8) The capital offense was especially heinous, atrocious or cruel compared to other capital offenses.

Id. § 13A-5-49.

Alabama's sentencing system also includes seven statutory mitigating circumstances:

- (1) The defendant has no significant history of prior criminal activity;
- (2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;
- (3) The victim was a participant in the defendant's conduct or consented to it;
- (4) The defendant was an accomplice in a capital offense committed by another person and his participation was relatively minor;
- (5) The defendant acted under extreme duress or under the substantial domination of another person;
- (6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; and
- (7) The age of the defendant at the time of the crime.

Id. § 13A-5-51.

While limited to the aggravating circumstances listed in the statute, the sentencer may consider additional nonstatutory mitigating circumstances that relate to the defendant's crime, character, and background. *Id.* § 13A-5-52.

161. *Id.* § 13A-5-46(e)(3).

162. *Id.*

163. *Id.* § 13A-5-46(f).

164. *Id.*

fewer than ten jurors choose death and fewer than seven seek life imprisonment, the statute allows the judge to declare a mistrial.¹⁶⁵

In the sentencing hearing phase, the trial judge first hears both sides' arguments as to the proper sentence¹⁶⁶ and then chooses the death penalty or life imprisonment without parole, irrespective of the jury's recommended sentence.¹⁶⁷ The trial court is instructed:

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*, unless such a verdict has been waived . . . [w]hile the jury's recommendation concerning sentence shall be given consideration, it is *not binding* upon the court.¹⁶⁸

Alabama trial judges are required to provide written findings in all capital cases.¹⁶⁹ These findings must be predicated on all aspects of the trial, from evidence presented in the guilt phase, to the presentence report.¹⁷⁰ In addition, judges must make findings relating to the existence or nonexistence of both statutory aggravating and mitigating factors as well as nonstatutory mitigating factors.¹⁷¹ If the punishment is death, judges must note that the aggravating factor(s) found to exist outweigh the mitigating circumstances.¹⁷² All death sentences receive automatic appellate review.¹⁷³ This review entails a proportionality test and an independent reweighing of the aggravating and mitigating circumstances.¹⁷⁴

D. Case Law Interpreting Alabama's Capital Sentencing Statute

Unlike Florida, Alabama courts have not developed a standard to guide trial judges' determinations of whether to upset juries' advisory

165. *Id.* § 13A-5-46(g).

166. *Id.* § 13A-5-47(c).

167. *Id.* § 13A-5-47(e) (stating that jury's recommended sentence must be considered but is not binding on court).

168. *Id.* (emphasis added).

169. *Id.* § 13A-5-47(d).

170. *Id.* The judge must also consider the pre-sentence investigation report that is furnished by the prosecution. *Id.* § 13A-5-47(b). It includes facts about the defendant's mental health and upbringing, which provide the court with a more detailed description of the person whose life is at stake. Colquitt, *supra* note 159, at 330-31. Once the report is lodged with the court, it must be made available to the defense. Colquitt, *supra* note 159, at 330-31.

171. ALA. CODE §13A-5-47(d).

172. *Id.* § 13A-5-47(e).

173. *Id.* § 13A-5-53.

174. *See id.* (requiring review for influence of passion or prejudice on sentencing and to determine if death sentence is excessive or disproportionate to penalty imposed in similar cases).

verdicts.¹⁷⁵ As the Supreme Court of Alabama noted in *Ex parte Jones*:¹⁷⁶

It appears to this Court . . . that the United States Supreme Court . . . [has] not f[ound] the *Tedder* rule to be a general constitutional requirement under a statutory scheme similar to that of Florida. Instead . . . the Court merely approved the standard which the Florida courts have adopted providing for additional protection to the defendant. . . . Therefore, [Alabama is] not required by the United States Constitution to adopt the *Tedder* rule.¹⁷⁷

As *Ex parte Jones* reveals, Alabama trial judges possess the complete power to override jury recommendations subject to the terms of the capital sentencing statute. Unlike Florida, there is no judicially created standard that constrains a trial judge's ability to disregard the advice of the jury. It is against this backdrop that Louise Harris challenged the Supreme Court to strike down Alabama's death penalty statute.

III. *HARRIS V. ALABAMA*¹⁷⁸

Louise Harris, an African-American mother of seven, was convicted of capital murder by a jury of her peers.¹⁷⁹ The jury found that she arranged for her lover, Lorenzo McCarter, to kill her husband, Isaiah Harris, so that she and McCarter could share the proceeds of Mr. Harris' retirement benefits and life insurance.¹⁸⁰ McCarter consummated the killing by ambushing Mr. Harris and shooting him once in the head.¹⁸¹ McCarter struck a deal with the State and agreed to testify against Ms. Harris in exchange for leniency.¹⁸²

Prior to delivering its penalty recommendation, the jury learned that Ms. Harris had no prior criminal record, was a responsible

175. See Russell, *supra* note 1, at 26-27 (noting that of four override states Alabama is "sole jurisdiction without an override standard"). The Supreme Courts of Indiana and Delaware have created a standard similar to Florida's *Tedder* standard. See, e.g., *Martinez Chavez v. State*, 534 N.E.2d 731, 735 (Ind. 1989) (holding that "in order to sentence a defendant to death after the jury has recommended against death, the facts justifying a death sentence should be so clear and convincing that virtually no reasonable person could disagree that death was appropriate in light of the offender and his crime"); *Pennell v. State*, 604 A.2d 1368 (Del. 1992) (same); see also Michael Mello, *Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Statutes that Divide Sentencing Responsibility Between Judge and Jury*, 30 B.C. L. REV. 283, 312 (1989) (characterizing Indiana override standard as "functional equivalent" of *Tedder* standard).

176. 456 So. 2d 380 (Ala. 1984), *cert. denied*, 470 U.S. 1062 (1985).

177. *Ex parte Jones*, 456 So. 2d 380, 381-82 (Ala. 1984), *cert. denied*, 470 U.S. 1062 (1985).

178. 115 S. Ct. 1031 (1995).

179. *Harris v. Alabama*, 115 S. Ct. 1031, 1033 (1995).

180. *Id.*

181. *Id.*

182. Brief for Petitioner at 5 n.4, *Harris v. Alabama*, 115 S. Ct. 1031 (1995) (No. 93-7659) [hereinafter *Petitioner's Brief*].

parent, worked three jobs to support her children, and was an avid churchgoer.¹⁸³ The trial judge instructed the jury that upon weighing the aggravating and mitigating factors, it was to recommend a sentence of either life imprisonment without possibility of parole or death.¹⁸⁴ The jury, by a seven to five count,¹⁸⁵ rejected the death penalty and recommended that Ms. Harris be sentenced to life imprisonment without possibility of parole for her role in orchestrating the killing of her husband.¹⁸⁶

The trial judge disagreed with the jury's recommendation.¹⁸⁷ Although he linked only one aggravating circumstance to the offense,¹⁸⁸ and found several mitigating factors to exist,¹⁸⁹ the trial judge nevertheless overrode the jury and sentenced Ms. Harris to death.¹⁹⁰ In his sentencing order, the trial judge made only cursory mention of the jury's recommended verdict without explaining why he disregarded it.¹⁹¹ It is impossible to ascertain why the judge rejected the jury's advice or what role, if any, the jury's recommendation played in influencing the judge's penalty decision.

On appeal, the Alabama Court of Criminal Appeals and the Alabama Supreme Court both dismissed Ms. Harris' assertions that Alabama's standardless jury override was unconstitutional and that the judge's use of the override in her case was arbitrary and capricious.¹⁹² This was no surprise. No Alabama appellate court has ever reversed a trial judge's use of the override to impose death.¹⁹³ The U.S. Supreme Court granted certiorari to determine whether

183. *Id.* at 3.

184. *Harris*, 115 S. Ct. at 1033.

185. *Id.*

186. *Id.* The trial court, however, in overriding the jury, placed substantial weight on the money that Ms. Harris stood to gain from the proceeds of her husband's life insurance policy.

Id.

187. *Id.*

188. *Id.* The trial judge found that Ms. Harris had her husband killed for pecuniary gain, one of the eight aggravating circumstances listed in statute. *Id.*; see ALA. CODE §13A-5-49(6) (1994) (providing that "capital offense . . . committed for pecuniary gain" is considered aggravating circumstance).

189. *Harris*, 115 S. Ct. at 1033. The trial judge found one statutory mitigating factor existed: Ms. Harris had no prior criminal record. *Id.* The judge also found three nonstatutory mitigating factors—Harris was: (1) hardworking; (2) a respected member of the church; and (3) well regarded in the community. *Id.*

190. *Id.*

191. Petitioner's Brief, *supra* note 182, at 4.

192. *Ex parte Harris*, 632 So. 2d 543 (Ala. 1993); *Harris v. State*, 632 So. 2d 503 (Ala. Ct. Crim. App. 1992).

193. See *id.* at 29-30 (noting that Alabama courts have never reversed death override and stating that sometimes these death overrides are affirmed without any reference to jury's life recommendation).

Alabama's standardless override scheme violated the Eighth Amendment.¹⁹⁴

The crux of petitioner's argument to the Supreme Court was that Alabama's complete failure to provide guidelines as to the role that the jury's recommendation should play in the judge's ultimate penalty decision allowed for arbitrary treatment of the jury's advice.¹⁹⁵ Petitioner argued that this failure to regulate the sentencing relationship between the judge and jury introduced arbitrariness into the process of administering death.¹⁹⁶ Armed with complete discretion to treat the jury's advice in any manner they desire, trial judges randomly and capriciously override jury life recommendations.¹⁹⁷ Certainly such arbitrariness ran contrary to *Furman's* concern that a validly administered death penalty enabled one to distinguish "the few cases in which [death] is imposed from the many cases in which it is not."¹⁹⁸ In addition, petitioner pressed the argument that Florida's *Tedder* standard, under which trial judges were required to ascribe great weight to the jury's recommended verdict, was constitutionally required.¹⁹⁹ Petitioner argued that the only way to rid the override of its arbitrary element was to define clearly the role of the jury's recommendation in the sentencing process.²⁰⁰

In an eight to one vote, the Supreme Court upheld Alabama's standardless jury override scheme.²⁰¹ The Court ruled that the heart of the Eighth Amendment analysis was not what sort of weight a state chooses to attach to the jury's recommendation, but whether the statute sufficiently limited the sentencer's discretion in order to minimize arbitrary outcomes.²⁰² Noting that Alabama successfully guided the sentencing decision by requiring the jury and judge to weigh independently aggravating and mitigating factors,²⁰³ the Court warned that it would be acting as legislators rather than judges if they

194. See *Harris*, 115 S. Ct. at 1032 ("We granted certiorari to consider petitioner's argument that Alabama's capital sentencing statute is unconstitutional because it does not specify the weight the judge must give to the jury's recommendation and thus permits arbitrary imposition of the death penalty.")

195. Petitioner's Brief, *supra* note 182, at 7.

196. Petitioner's Brief, *supra* note 182, at 7.

197. See Petitioner's Brief, *supra* note 182, at 7 (asserting that Alabama jury recommendations are treated in wholly inconsistent manner by trial judges).

198. *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring).

199. *Harris v. Alabama*, 115 S. Ct. 1031, 1035 (1995).

200. *Id.*

201. *Id.* at 1037 (ruling that Constitution is not offended when sentencing judge is required to consider jury recommendation without having to treat it with specific degree of weight). Justice Stevens was the lone dissenter. *Id.*

202. *Id.* at 1035.

203. *Id.*

demanded that Alabama place a specific degree of weight on the jury's advisory verdict.²⁰⁴

The Court also rejected petitioner's claim that the *Tedder* standard was constitutionally required for capital sentencing schemes that included judicial override provisions.²⁰⁵ The Court's approval of the *Tedder* standard²⁰⁶ did not militate a conclusion that the *Tedder* standard was a constitutional requirement.²⁰⁷ Moreover, citing to a principle enunciated in *Franklin v. Lynaugh*,²⁰⁸ and followed in *Blystone v. Pennsylvania*,²⁰⁹ the Court observed that there was no constitutional requirement that a state place any specific weight on particular aggravating or mitigating factors to be considered by the sentencer.²¹⁰ By analogy, the Court concluded that requiring that a certain weight be ascribed to Alabama jury recommendations would "offend this established principle."²¹¹

The ruling in *Harris* represents a huge departure from twenty years of Supreme Court jurisprudence. The Court's prior demand that death be imposed in the manner that most reliably prevents arbitrary results was trampled by the *Harris* decision. *Harris* endorsed the view that one person should have the unbridled power to impose death over the collective judgment of twelve. This arrangement is problematic for two reasons. First, it tends to dilute the community's voice as represented by the collegial body—the jury. Second, it gives judges the unchecked power to impose death.

204. *Id.* at 1036 (invoking principle of federalism and arguing that requiring certain degree of weight be attached to jury recommendation would "place within constitutional ambit micro-management tasks that properly rest within the State's discretion to administer its criminal justice system").

205. *Id.* at 1035.

206. The *Tedder* standard obligates Florida trial judges to pay substantial deference to jury recommendations in capital sentencing cases. *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1976); see *supra* notes 121-37 and accompanying text (discussing in detail *Tedder* decision).

207. *Harris*, 115 S. Ct. at 1035.

208. 487 U.S. 164, 179 (1988) (dismissing petitioner's argument that his death sentence was tainted by jury's failure to accord proper weight to mitigating circumstances and holding that specific method for "balancing mitigating and aggravating factors . . . is [not] constitutionally required").

209. 494 U.S. 299, 306-07 (1990) (rejecting condemned petitioner's argument that state must prescribe weight to individual aggravating circumstances on ground that once aggravating circumstances have been found to exist, "the Eighth Amendment does not require that those aggravating circumstances be further refined . . . by a jury").

210. *Harris*, 115 S. Ct. at 1035.

211. *Id.* at 1036.

IV. INCOMPATIBILITY OF THE SUPREME COURT'S EIGHTH AMENDMENT JURISPRUDENCE AND OVERRIDE LAWS

A. *The Deficiencies in Florida's Death Penalty Statute: Florida's Statute in Practice*

Florida's capital sentencing procedure, like Alabama's, is riddled with practical problems. First, it is extremely inefficient.²¹² Data indicates that between two-thirds to three-fourths of all Florida life-to-death overrides have been reversed or remanded on appeal.²¹³ Dr. Michael Radelet, an authority on Florida's override practices, revealed that in the fifteen years since the decision in *Furman*, life-to-death overrides have been reversed in seventy-four percent of the cases.²¹⁴ Another commentator concluded that "[o]ver the past half decade . . . overrides have been reversed in more than ninety-three percent of the relevant cases [and] . . . overrides of life recommendations have survived appellate review in less than seven percent of the cases."²¹⁵ Such statistics led Florida Governor Lawton Chiles to conclude that "I think we'd be better . . . if we did away with the override."²¹⁶ Addressing the override's inefficiency, a Florida court of appeals judge wrote, "[I]t makes no sense to continue to allow the judge to override the jury's recommendation of life . . . when such cases result in reversal eighty to ninety percent of the time. . . . As a practical matter, most such defendants end up with a life [imprisonment] sentence."²¹⁷

212. Mello, *supra* note 1, at 936.

213. Mello, *supra* note 175, at 290.

214. Mello, *supra* note 1, at 937 (citing letter written by Professor Radelet that contained chart detailing final result, on appeal, of all life-to-death override cases in Florida).

215. Mello, *supra* note 1, at 938 (emphasis omitted).

216. Ellen McGarrah, *State Ponders Changing Steps to Execution*, MIAMI HERALD, Mar. 3, 1991, at 6B. Ironically, Governor Chiles' supposed dissatisfaction with the override did not prevent him from signing a death warrant for Robert Francis, who was sentenced to death despite the jury's recommendation for mercy in his case. *Id.*

217. Gerald B. Cope, Jr., *Discretionary Review of the Decisions of the Intermediate Appellate Courts: A Comparison of Florida's System with Those of Other States and the Federal System*, 45 FLA. L. REV. 21, 100 (1993). In his article, Mr. Cope, a former Florida appellate judge, suggests that eliminating trial judges' life-to-death override power would decrease the Florida Supreme Court's death penalty docket by 21%. *Id.* at 101. This is because the district courts of appeal, not the supreme court, hear all life sentence appeals. *Id.* at 100. If the judge could use only the override to impose life over a recommendation of death, all override appeals would deal with the propriety of the life sentence, and be handled by the district courts of appeal. *Id.* In sum, if death overrides were eliminated, the Florida Supreme Court's overall workload would be reduced by approximately six to eight percent. *Id.* at 101. For a detailed analysis on the inefficiency of this procedure, see generally Radelet, *supra* note 4, at 1422-24 (analyzing cost of override to defendants and criminal justice system). Professor Radelet states:

The second inadequacy with Florida's jury override provision is that it derogates the jury's primary role in determining the appropriateness of a death sentence.²¹⁸ The *Tedder* standard demands that before overriding a jury's verdict, the judge must determine that no reasonable person could have sentenced the capital defendant to life imprisonment instead of death.²¹⁹ Thus, when a trial judge overrides a jury's life-sentence recommendation, he or she is, in effect, declaring that the jury is comprised of unreasonable people.²²⁰ This process has a tendency to make jurors feel that they are meaningless

From the state's perspective, one must question whether the number of hours invested in cases with a jury recommendation of life are justifiable given that so few of the cases will result in execution. Had the financial costs of unwarranted override cases been foreseen by the 1972 Legislature, it is difficult to believe that the override provision would have been included in the statute.

Id. at 1424.

218. In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the Supreme Court held that prosecutorial statements that had the effect of lessening the jury's sense of responsibility for imposition of the death penalty ran afoul of the Court's position that because death is qualitatively different from any other punishment, a correspondingly greater degree of scrutiny and reliability of the capital sentencing procedure is required. *Id.* at 340-41.

In *Caldwell*, the prosecutor told the jury that the true arbiter of the capital defendant's punishment was the appellate court. *Id.* at 333. Agreeing that such a comment may well have diminished the jury's sense of responsibility for its actions, Justice Marshall concluded that these jurors had been tempted to believe that the appellate court had more of a right to decide whether the defendant's life should be spared than the jury. *Id.* Such an invitation to rely on judicial review "generat[ed] a bias toward returning a death sentence that [was] simply too great." *Id.*

Applying the holding of *Caldwell* to the override statutes, Professor Michael Mello contends that when the jury learns that its verdict is only advisory, it is "left, at best, with the sense that its sentencing decision will not necessarily be followed. . . [and] [a]t worst, it may believe that its determination is only *pro forma*, of little relevance to the defendant's fate." Mello, *supra* note 175, at 303. Much like the jury in *Caldwell*, the override jury is infected with a diminished sense of responsibility that leads to the same death bias that the Court in *Caldwell* struck down as unconstitutional. *Id.*

219. *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1976).

220. See Colquitt, *supra* note 159, at 327 ("Strict adherence to the *Tedder* standard would prohibit a trial judge from ever disagreeing with a sentence recommended by the jury."); accord Mello & Robson, *supra* note 107, at 62 (suggesting that differences between reasonable people deciding death penalty cases are unavoidable); Russell, *supra* note 1, at 16-17 (noting that *Tedder* does little to help judges determine whether jury acted reasonably). Professors Mello and Robson bolster this statement by revealing that in 17 of 24 cases in which the Florida Supreme Court has affirmed death overrides, there was a dissent registered from at least one Florida Supreme Court Justice. Mello & Robson, *supra* note 107, at 62. Thus, according to *Tedder*'s reasonable person standard, these Florida Supreme Court Justices must not be reasonable people. *Id.* at 64. If true, this notion renders the *Tedder* standard inoperable because "unless one is willing to conclude that majorities of various juries, numerous circuit court judges, and all the justices of the Florida Supreme Court are [unreasonable] . . . their differing conclusions militate against any reasonable person accepting the validity of the *Tedder* standard." *Id.* In addition, Professors Mello and Robson state that the decision to grant mercy is a subjective one, not based on a "wholly rational, calculated, and logical process." *Id.* at 61 (quoting *Washington v. Watkins*, 655 F.2d 1346, 1376 n.57 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982)). Therefore, if sentencers must choose the punishment of life over death by following their instincts, such choices are simply not amenable to the reasonable person language of *Tedder*. *Id.*

components of the trial.²²¹ As one Florida capital juror complained, "If [the trial judge] wasn't going to follow our sentencing verdict, why did he ask us for our opinion in the first place?"²²²

B. The Deficiencies of Alabama's Death Penalty Law: Alabama's Statute in Practice

Alabama's failure to create a standard that specifically defines situations in which the override should be invoked leads to arbitrary results.²²³ Moreover, this deficiency has created a situation in which the conscience of the community—the jury—has been all but removed from Alabama's capital sentencing process.²²⁴ As previous-

221. See Radelet, *supra* note 4, at 1425 (suggesting that override using *Tedder* standard "insults those jurors who have tried to do their jobs as conscientiously as possible, but who then see their collective judgments ignored"). Dr. Radelet believes that some jurors are compelled to acquit in the guilt phase because they fear that if they convict and recommend life, the trial judge will impose death anyway. *Id.* at n.40. Thus, even though the juror may feel that the defendant is guilty and should spend his life in jail, he votes to acquit to circumvent the power of judicial override. *Id.* at 1427 n.46 (citing Letter from Professor Ernest van den Haag to Dr. Michael L. Radelet (Apr. 22, 1985) (on file with *U.C. Davis Law Review*)).

222. Mello, *supra* note 1, at 927 (quoting from memory).

223. See *infra* notes 243-67 and accompanying text (illustrating how absence of override standard leads to confusion among Alabama judges as to weight they should accord to jury recommendation); see also Russell, *supra* note 1, at 39 (contending that Court erred in *Harris* because Alabama scheme leads to disproportionate sentences in like cases). Professor Russell also argues that such variance cuts against rationale of *Furman* wherein Justice Douglas stated, "[T]he Due Process Clause of the Fourteenth Amendment would render unconstitutional capital sentencing procedures that are purposely constructed to allow the maximum possible variation from one case to the next, and provide no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice." (quoting *Furman v. Georgia*, 408 U.S. 238, 248 n.11 (1972) (Douglas, J., concurring)).

224. It is widely accepted that the jury is more representative of the community in which it sits than the judge. Gillers, *supra* note 146, at 63. Professor Giller commented:

Intuitively, juries chosen in accordance with rules calculated to assure that they reflect a "fair cross section of the community" are more likely to accurately express community values than are state trial judges. This is true because twelve people are more likely than one person to reflect public sentiment, because jurors are selected in a manner enhancing that likelihood, and because trial judges collectively do not represent—by race, sex, or economic or social class—the communities from which they come. The response of a representative jury of acceptable size is consequently taken to be the community response. The jury does not try to determine what the community would say but, in giving its conclusion, speaks for the community. The judge, on the other hand, must either assess the community's "belief" or "conscience" and impose it or must impose his own and assume it is the community's. Whichever the judge does, the representative jury would seem to have a substantially better chance of identifying the community view simply by speaking its mind. [This notion is borne out] in cases treating jury composition at culpability trials. In this related area, the Court has stressed the importance of a representative jury as an aid in assuring "meaningful community participation," and has accepted the idea that different segments of the community will bring to the representative jury "perspective and values that influence both jury deliberation and result." In addition, the Court has said that juries of decreasing size have a reduced chance of reflecting minority viewpoints. The Court's conclusions that the size and representativeness of juries influence their ability to reflect community values support an inference that a representative jury of adequate

ly demonstrated, the most legitimate rationale for the death penalty is retribution.²²⁵ Because retribution is society's device against those deviants who are deemed morally undeserving of life, capital punishment must be doled out by society. A representative cross section of the community should, therefore, bear the responsibility to "express the conscience of the community on the ultimate question of life or death."²²⁶ Consequently, Alabama's scheme, whereby the judge may single-handedly impose death over the jury's verdict, runs contrary to the tenets of the Court's Eighth Amendment teachings that the sanction of death should represent the community's choice that a person has "lost [his] right to have rights."²²⁷

Justice Stevens echoed these sentiments in his *Harris* dissent.²²⁸ Emphasizing the prevailing view that juries are better equipped to make capital sentencing determinations, he argued that:

the men and women of the jury may be regarded as a microcosm of the community, who will reflect the changing attitudes of society as a whole to the infliction of capital punishment, and that there could therefore be no more appropriate body to decide whether the fellow-citizen whom they have found guilty of murder should . . . [die] or receive a lesser punishment.²²⁹

Similarly, because the sentencing decision is unavoidably moral and emotional in nature, both judges and juries will interject personal views into their penalty decisions.²³⁰ Much like jurors, judges are

size is also more likely than a single judge to reflect the community's retributive sentiment. Indeed, since capital sentencing involves application of community values, whereas guilt determination predominantly demands fact-finding, the Court's conclusions would seem to apply with even greater force in the capital sentencing area.

Gillers, *supra* note 146, at 63-65 (citations omitted).

Professor Russell revealed that in Alabama, 99% of all trial judges are white males earning approximately \$72,000 per year. Russell, *supra* note 1, at 44 n.253. In comparison, the citizens of Alabama are 48% male, 52% female. *Id.* Seventy-five percent of the Alabama population is black and the average yearly income is \$13,700. *Id.* It is plain to see that these Alabama judges are not representative of the communities in which they sit. *Id.* at 45. *Accord* Mello & Robson, *supra* note 107, at 47-48 (contrasting composite sketch of average Florida circuit judge with attributes of Florida population and concluding that wide chasm existed between two groups).

225. See *supra* note 146 and accompanying text (postulating that retribution is sole penal purpose of death penalty).

226. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

227. *Cf. Trop v. Dulles*, 356 U.S. 86, 102 (1958) (holding that penalty of expatriation is functional equivalent of saying that defendant has lost right to have rights).

228. See *Harris v. Alabama*, 115 S. Ct. 1031, 1037 (1995) (Stevens, J., dissenting) (criticizing unbridled discretion of judges to override jury determination in death penalty cases).

229. *Id.* at 1038 (quoting *Royal Commission on Capital Punishment 1949-1953, Report* 200 (1953)).

230. See Vivian Berger, *Black Box Decisions on Life or Death—If They're Arbitrary, Don't Blame the Jury: A Reply to Judge Patrick Higginbotham*, 41 CASE W. RES. L. REV. 1067, 1085 (1991) (arguing that personal considerations are undoubtedly involved in capital sentencing).

apt to possess their own prejudices toward certain discrete groups.²³¹ In addition, upcoming elections may motivate some judges to "skew their verdicts against leniency" in an attempt to portray themselves as "tough on crime."²³² These personal biases and political motivations are better tempered within a deliberative collegial body of twelve than by a single government official.²³³ It is the jury that serves the important function as a safeguard between the government (the biased judge) and the capital defendant.²³⁴ As Justice Stevens commented, when a trial judge imposes death over the jury's recommendation of life the "critical 'link between contemporary community values and the penal system'" is severed.²³⁵ Further, overrides tend to erode the legitimacy of jury verdicts.²³⁶ While the public presumes that a death sentence imposed by the jury embodies the community's view that death is appropriate in light of the defendant and his crime, this same presumption of validity does not exist when a lone government official orders death.²³⁷

Unlike judges, juries are free from the cynicism that judges acquire due to the passage of countless convicts before their eyes.²³⁸ Judges, because of their extensive exposure to criminals, may become jaded and callous toward all capital defendants.²³⁹ Rather than honing in on the particular capital defendant and the facts attendant to his case, judges may lump the defendant together with "a global category of faceless criminals who, in the abstract, may appear unworthy of life."²⁴⁰ The jury's fresh perspective enables it to focus "on a particular case involving the fate of one fellow citizen."²⁴¹ By

231. See *id.* (discussing Senate Judiciary Committee's rejection of Federal Circuit Court of Appeals nominee because of her demonstrated racial prejudices).

232. See *id.* at 1085 n.107 (suggesting that where judges are elected they impose death more frequently on defendants whose trials take place in election years); see also Steven B. Bright, *The Politics of Crime and the Death Penalty: Not "Soft on Crime," but Hard on the Bill of Rights*, 39 ST. LOUIS U. L.J. 479, 483-85 (1995) (referring to "soft on crime" rhetoric as admonition to make prison life harsher and inflict death penalty more often).

233. See *Harris*, 115 S. Ct. at 1039 (Stevens, J., dissenting) (concluding that jury sentencing in capital cases is more legitimate because jury is composed of twelve people who check and balance each other's views).

234. See *Berger*, *supra* note 230, at 1067 (referring to Judge Higginbotham's characterization of jury as "global buffer" between defendant and government official).

235. *Harris*, 115 S. Ct. at 1040 (Stevens, J., dissenting) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968)).

236. *Id.* at 1042.

237. *Id.* at 1041. Discussing several studies regarding the effect that executions have on the public, Justice Stevens opined that government-sanctioned executions not predicated on the judgment of a representative jury "may undermine respect for the value of human life itself and unwittingly increase tolerance of killing." *Id.*

238. *Id.* at 1039.

239. *Id.*

240. *Id.*

241. *Id.*

upholding Alabama judges' practice of ignoring jury recommendations in capital cases, the Supreme Court in *Harris* broke from the teachings of *Furman* and its progeny.²⁴²

Alabama's capital sentencing scheme is also problematic because the courts of Alabama, unlike those of Florida, have not articulated a standard to guide the trial judge in determining when to override the jury's recommended verdict.²⁴³ The trial judge is free to disregard the jury's advice if he simply disagrees with it.²⁴⁴ This failure to regulate the relationship between judge and jury has created a sentencing process which invites arbitrary imposition of capital punishment.²⁴⁵ Adherence to standardless overrides has transformed meaningful appellate review into a charade in which cursory affirmances of trial judges' decisions to disregard life recommendations are the norm.²⁴⁶ Alabama appellate courts amplify this lack of

242. See *supra* notes 197-98 and accompanying text (discussing *Furman* and its teachings related to imposition of death penalty).

243. See *Harris*, 115 S. Ct. at 1032 (discussing fact that Alabama's capital sentencing provision does not prescribe weight or deference judge must use in assessing jury's recommendation in capital case).

244. Petitioner's Brief, *supra* note 182, at 23. Although the statute gives trial judges the discretion to use the override to impose life over a death recommendation, 95% of Alabama overrides consist of the judicial imposition of death over jury life recommendations (47 death, 5 life overrides). *Id.* at 23 n.26.

Such lopsided use of the override does not comport with Justice Stevens' belief that "the legislative decision to authorize an override was intended to protect the defendant from the risk of an erroneous jury decision . . . to impose death." *Harris*, 115 S. Ct. at 1040 n.6 (Stevens, J., dissenting) (emphasis added).

245. See Petitioner's Brief, *supra* note 182 ("Because Alabama trial judges use haphazard and capricious procedures in assessing and rejecting jury life recommendations, it is impossible to distinguish . . . between those who receive death and those who do not.").

246. The absence of meaningful review is exemplified in the appeals of Ms. Harris' death sentence. Both appellate courts made only casual reference to the fact that Ms. Harris' jury recommended that her life be spared. *Ex parte Harris*, 632 So. 2d 543 (Ala. 1993); *Harris v. Alabama*, 115 S. Ct. 1031 (1995), *aff'g sub nom. Ex parte Harris*, 632 So. 2d 543 (Ala. 1993), *aff'g sub nom. Harris v. State*, 632 So. 2d 503 (Ala. Crim. App. 1992). Moreover, neither court examined the trial judge's treatment of the jury's recommendation. See *Ex parte Harris*, 632 So. 2d 543 (Ala. 1993); *Harris v. State*, 632 So. 2d 503 (Ala. Crim. App. 1993).

In many cases, condemned petitioners argue that because Alabama lacks an override standard, the capital sentencing statute is unconstitutional. See, e.g., *Frasier v. State*, 562 So. 2d 543 (Ala. Crim. App.), *rev'd on other grounds*, 562 So. 2d 560 (Ala. 1989), *cert. denied*, *Frazier v. State*, No. CR-89-1334, 1994 Ala. LEXIS 263 (Feb. 25, 1994); *Tarver v. State*, 553 So. 2d 631 (Ala. Crim. App.), *aff'd*, 553 So. 2d 633 (Ala. 1989), *cert. denied*, 494 U.S. 1090 (1990); *Crowe v. State*, 485 So. 2d 351 (Ala. Crim. App. 1984), *rev'd on other grounds*, 485 So. 2d 373 (Ala. 1985), *cert. denied*, 477 U.S. 909 (1986).

In *Ex parte Jones*, 456 So. 2d 380 (Ala. 1984), the Alabama Supreme Court once again refused to adopt a *Tedder*-like standard. *Id.* at 382. The court held that they "[were] not required by the United States Constitution to adopt the *Tedder* rule." *Id.* The court concluded by telling the Petitioner to address his concerns to the state legislature. *Id.* at 383, *cited in Russell, supra* note 1, at 36-37.

meaningful review. No Alabama trial judge's decision to override the jury's life recommendation has ever been reversed.²⁴⁷

This complete lack of guidance as to when to use the override has led Alabama trial judges to confront the jury's advisory verdict in several confusing ways and to accord it divergent degrees of deference. Professor Katheryn Russell's research on this subject is instructive. Professor Russell analyzed Alabama's standardless jury override by obtaining sentencing orders for eighty-one percent of the cases in which Alabama trial judges overrode jury life recommendations.²⁴⁸ She sought to determine how these judges treated jury recommendations in capital cases.²⁴⁹ Professor Russell found that the jury's recommended sentence was treated differently from judge to judge.²⁵⁰ In fact, in some instances the same judge has accorded the advisory verdict different treatment from case to case.²⁵¹ Some judges treated the jury recommendation as a mitigating factor.²⁵² Some viewed the jury's advice as an "aspect" of mitigation that must be weighed as something less than one of the statutorily provided mitigating circumstances.²⁵³ Others did not factor it into the aggravation-mitigation equation at all.²⁵⁴ Last, Professor Russell's

247. See Petitioner's Brief, *supra* note 182, at 8 ("The Alabama Court of Criminal Appeals and the Alabama Supreme Court have failed to scrutinize death sentences following jury life recommendations and have *never* reversed a sentence of death due to improper judicial override.") (emphasis added); see also Russell, *supra* note 1, at 38-39 (discussing how standardless overrides prevent meaningful appellate review because appellate courts do not know reasons why trial judge overrode jury life recommendation).

248. Professor Russell concluded that the procedure in which the override is employed is haphazard and random. Russell, *supra* note 1, at 31-35. In conclusion, she stated:

"Guided discretion" is not met by a scheme which permits one judge to employ the override only where aggravating circumstances outweigh mitigating ones "to a moral certainty," another judge who need only find a "reasonable basis" for the override, and still another who does not enunciate any standard for overriding the jury verdict.

Id. at 35.

249. Russell, *supra* note 1, at 28-35.

250. Russell, *supra* note 1, at 42-43.

251. See Petitioner's Brief, *supra* note 182, at 24 (describing inconsistent practices of individual judges in capital sentencing). For example, Randall Thomas, Ms. Harris' trial judge, merely stated that he "considered" the jury's life recommendation in his order sentencing Ms. Harris to death. *Id.* This was the extent to which the jury's advice was discussed in Judge Thomas' sentencing order. In the case of *State v. Coral*, No. CC-88-741-THE (Cir. Ct. Montgomery County, Ala. June 26, 1992), cited in Petitioner's Brief, *supra* note 182, at 24-25, however, Judge Thomas treated the jury's life recommendation as a mitigating factor and accorded it "great weight," despite his disagreement with it. Exactly why Judge Thomas classified the jury's advice as mitigating in one case but not in the other will never be known. See Petitioner's Brief, *supra* note 182, at 25 (finding no "discernible distinguishing principle" that led judge to give weight to verdict in some cases but not in Ms. Harris').

252. See Petitioner's Brief, *supra* note 182, at 22-23 (listing Alabama cases in which judge treated jury life recommendation as mitigating factor).

253. See Petitioner's Brief, *supra* note 182, at 23 n.28 (listing cases in which trial court treated advisory verdict "not as a full mitigating circumstance under the law").

254. See Petitioner's Brief, *supra* note 182, at 24.

research revealed that some judges treated the jury's advice in a distinct manner, separate from the weighing of aggravating and mitigating factors.²⁵⁵

To make matters worse, Alabama trial judges accord varying degrees of weight to the jury's recommendation.²⁵⁶ Although the statute only requires that they consider the jury's recommendation, some judges have factored it into their sentencing decision.²⁵⁷ Others stated that they afforded it substantial consideration or great deference.²⁵⁸ Some imposed death without even mentioning that they considered it,²⁵⁹ and some appear to have ignored it in practice and merely recited it in their sentencing orders.²⁶⁰

The case of *State v. Murry*²⁶¹ illustrates the arbitrariness that dominates Alabama's capital sentencing process. In *Murry*, the trial judge overrode the jury's recommendation in the first trial, and after the case was reversed on appeal, he accepted it in the second trial.²⁶² In the initial trial to determine guilt or innocence, the judge began by classifying the jury's recommendation as a judgment deserving great weight.²⁶³ In the judge's penalty phase ruling, however, he switched positions and concluded that the jury's recommendation was only a mitigating factor.²⁶⁴ The Alabama Court of Criminal Appeals reversed and remanded for a new trial.²⁶⁵

255. See Petitioner's Brief, *supra* note 182, at 23 nn.24 & 28 (citing Sentencing Order, *State v. Johnson*, No. CC-84-0331 (Cir. Ct. Morgan County, Ala. Nov. 8, 1985)). In *Johnson*, the trial judge categorized the jury's recommendation as an "aspect of mitigation separate and apart and in addition to" the weighing of aggravating and mitigating circumstances. *Id.*; see also Russell, *supra* note 1, at 30 n.188 (discussing this feature of *Johnson* case).

256. See Russell, *supra* note 1, at 32 ("[C]ompounding the Alabama override fog, is how the jury's advisory verdict is weighed. Here again, no manifest rule is discernible from the cases. In fact [an Alabama court] ha[s] expressly noted that there is 'no Alabama law that specifies the weight a trial court is to accord a jury's advisory sentence.'" (quoting *Sockwell v. State*, No. CR-89-225, 1993 WL 537450, at *23 (Ala. Crim. App. Dec. 30, 1993))).

257. See Russell, *supra* note 1, at 33 & n.199 (noting cases in which judges "considered the advisory verdict as one of many factors in the sentencing tally").

258. See Russell, *supra* note 1, at 33 & n.200 (listing cases where judges accorded advisory verdict greater weight).

259. See Petitioner's Brief, *supra* note 182, at 26 (citing Sentencing Order, *State v. Turner*, CC-83-340-SW (Cir. Ct. Etowah County, Ala. 1983) for proposition that Alabama trial judges impose death sentence without even noting jury's recommendation of life sentence). Ordinarily, however, the sentencing order will make "express reference" to the jury's sentencing verdict. Russell, *supra* note 1, at 32.

260. See Petitioner's Brief, *supra* note 182, at 26 (discussing Sentencing Order, *State v. Lindsay*, No. CC-82-212 (Cir. Ct. Mobile County, Ala. Sept. 8, 1982) in which court stated, in perfunctory manner, that it was "judicially aware" of jury's advisory verdict).

261. No. CC-82-211G (Cir. Ct. Montgomery County, Ala. June 18, 1982), cited in Petitioner's Brief, *supra* note 182, at 27-28.

262. Petitioner's Brief, *supra* note 182, at 27 (describing disposition of *Murry* case).

263. Petitioner's Brief, *supra* note 182, at 27 (detailing first decision by trial judge).

264. Petitioner's Brief, *supra* note 182, at 27-28.

265. *Murry v. State*, 455 So. 2d 82, 82 (Ala. Crim. App. 1984).

In this second hearing, the same judge assigned a different weight to the jury's recommendation and proclaimed that he was unaware of any reported decision suggesting how much weight should be accorded a jury's advisory verdict.²⁶⁶ This judge's treatment of the override illustrates the inherent unfairness which taints the override procedure. The Alabama capital sentencing scheme appears to be a "lottery" in which a capital defendant's fate is in the hands of an inconsistent judge with the absolute discretion to impose life or death.²⁶⁷

V. HOW POLITICS FACTORS INTO THE OVERRIDE EQUATION

Compounding the above articulated deficiencies in the Alabama and Florida statutes is the pressure exerted on elected judges by the political arena. Judges are far less likely to make unpopular rulings if they must run for re-election.²⁶⁸ In Alabama, trial judges face partisan elections every six years.²⁶⁹ The same is true for Florida trial judges.²⁷⁰ Given such political pressures, it should come as no surprise that judges impose death far more frequently than juries.²⁷¹ Justice Stevens highlighted the fear that politics plays a role in capital sentencing decisions. He warned:

[T]he Framers of our Constitution "knew from history and experience that it was necessary to protect . . . against judges too responsive to the voice of higher authority." The "higher authority" to whom present-day capital judges may be "too responsive" is 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.²⁷²

266. Petitioner's Brief, *supra* note 182, at 27-28 (citing Sentencing Order, *State v. Murry*, No. CC-82-211G (Cir. Ct. Montgomery County, Ala. June 18, 1989)). For a summary of both the procedural history and the facts of the *Murry* case, see *Murry v. State*, 562 So. 2d 1348, 1349-52 (Ala. Crim. App. 1988).

267. See *Furman v. Georgia*, 438 U.S. 238, 294 (1972) (characterizing pre-*Furman* death penalty statute as lottery because under statute capital defendants were arbitrarily selected for death).

268. See Thomas M. Ross, *Rights at the Ballot Box: The Effect of Judicial Elections on Judges' Ability to Protect Criminal Defendants' Rights*, 7 LAW & INEQ. J. 107, 108 (1988) (citing A.B.A. COMM'N ON PROFESSIONALISM, REPORT TO THE HOUSE OF DELEGATES, reprinted in 112 F.R.D. 243, 293 (1986), which concluded that state judges are constrained to follow wishes of electorate).

269. ALA. CONST. amend. 328 § 615.

270. FLA. CONST. art. 5 §10(b).

271. See HARRY KALVIN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 496 (1971) (noting that judges impose death penalty "somewhat more often" than juries); Paul Mancino, III, Note, *Jury Waiver in Capital Cases: An Assessment of the Voluntary, Knowing, and Intelligent Standard*, 39 CLEV. ST. L. REV. 605, 613 (1991) (insisting that judges are more likely to impose death penalty than juries).

272. *Harris v. Alabama*, 115 S. Ct. 1031, 1039 (1995) (Stevens, J., dissenting) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (citations omitted)).

Justice Stevens concluded that the "danger that [judges] will bend to political pressures" when making capital sentencing determinations in high profile cases "is the same danger confronted by judges beholden to King George III."²⁷³ Just like any other popularly elected official, judges are fair game for political criticism.²⁷⁴ The fear is that judges may use the override to impose death in order to escape attacks from political opponents and the media who prey eagerly on judges who are perceived to be soft on the death penalty.²⁷⁵ If judges capitulate to these attacks, then they are making capital sentencing decisions tainted by passion and prejudice.²⁷⁶ With no meaningful check on judges' decisions to override jury life recommendations, the reliability in sentencing procedures stressed in *Furman* is eviscerated. The process reverts to the arbitrary and capricious stage that *Furman* denounced.

A good example of the public pressure that judges face is the case of the Alday murders.²⁷⁷ Four convicts escaped a Maryland prison and drove to Donaldsonville, Georgia.²⁷⁸ Once there, two of the men entered the Alday's home and proceeded to pillage it.²⁷⁹ Soon after the robbery began, members of the Alday family began to arrive home.²⁸⁰ As the family returned to their home, the fugitives fatally shot all six of them.²⁸¹

273. *Id.* (Stevens, J., dissenting).

274. Today's political climate is evidenced by the numerous political attacks on senators, governors, and judges who are thought to be soft on crime and capital punishment. See *Harris*, 115 S. Ct. at 1039 n.5 (Stevens, J., dissenting) (collecting instances in which officials from all walks of public office have been subjected to election campaigns directed toward portraying them as soft on capital punishment).

275. See Steven 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, 765 (1995) (arguing that judge deciding capital cases may "sign his own political death warrant" by going against popular opinion).

276. See *Harris*, 115 S. Ct. at 1040 (Stevens, J., dissenting) (arguing that significant political pressures exerted on judges help explain why they are "far more likely" than juries to impose death sentence).

277. See *Ross*, *supra* note 268, at 113 & n.44 (citing *Dungee v. State*, 227 S.E.2d 746 (Ga.), *cert. denied*, 429 U.S. 986 (1976); *Issacs v. State*, 226 S.E.2d 922 (per curiam) (Ga.), *cert. denied*, 429 U.S. 986 (1976); *Coleman v. State*, 226 S.E.2d 911 (Ga. 1976), *cert. denied*, 431 U.S. 909 (1977)).

278. *Coleman v. State*, 226 S.E.2d 911, 913 (Ga. 1976).

279. *Id.*

280. *Id.*

281. See *Ross*, *supra* note 268, at 113 (highlighting facts of Alday murders); see also *Coleman*, 226 S.E.2d at 913 (detailing sequence and manner of killings).

The town was seething.²⁸² The defendants exhibited no remorse.²⁸³ In fact, one defendant testified that another defendant laughed at one of the helpless victims who had begged for mercy during the slaughter.²⁸⁴ Summarizing the community's desire for vengeance, the town sheriff stated publicly, "[I]f I had my way about it, I'd have me a large oven and I'd precook [the defendants] for several days, just keep them alive and let them punish [sic]. . . . And I don't think that would satisfy me."²⁸⁵ Each defendant's attorney moved for a change of venue to safeguard their clients' constitutional right to a fair trial.²⁸⁶ These motions were all denied.²⁸⁷ Subsequently, the defendants were found guilty of first degree murder and sentenced to death.²⁸⁸ The Georgia Supreme Court affirmed the convictions, the sentences, and the trial judge's refusals to grant defendants' motions for change of venue.²⁸⁹

After the federal district court denied their habeas petitions, the condemned petitioners filed for and received habeas corpus relief in the Eleventh Circuit Court of Appeals.²⁹⁰ Ruling that the trial judge abused his discretion by not granting the change of venue and that the Georgia Supreme Court erred in not reversing on this issue, the Eleventh Circuit remanded the cases for new trials.²⁹¹ This action sparked massive protest in Georgia, and more than 100,000 people signed a petition to impeach the federal judges who reversed the convictions.²⁹²

In retrospect, a clearer case for change of venue is difficult to imagine.²⁹³ In criminal cases, a change of venue is proper if the court in which the case takes place determines that the defendant(s)

282. See Ross, *supra* note 268, at 113 (stating that "the murder of the popular family outraged the town").

283. See Ross, *supra* note 268, at 113 (commenting on Billy Isaacs' trial testimony concerning his brother's callousness about the crime).

284. Ross, *supra* note 268, at 113 (citing *Coleman v. Kemp*, 778 F.2d 1487, 1498 (11th Cir. 1985)).

285. Ross, *supra* note 268, at 113 (quoting statements of sheriff Dan White to *Albany Herald* noted by Eleventh Circuit in *Coleman*, 778 F.2d at 1501).

286. Ross, *supra* note 268, at 114.

287. Ross, *supra* note 268, at 113.

288. *Isaacs v. Kemp*, 778 F.2d 1482, 1483 (11th Cir. 1985).

289. *Id.* at 1483 n.3 (citing *Dungee v. State*, 227 S.E.2d 746 (Ga.), *cert. denied*, 429 U.S. 986 (1976); *Isaacs v. State*, 226 S.E.2d 922 (per curiam) (Ga.), *cert. denied*, 429 U.S. 986 (1976); *Coleman v. State*, 226 S.E.2d 911 (Ga. 1976), *cert. denied*, 431 U.S. 909 (1977)).

290. *Coleman v. Kemp*, 778 F.2d 1487, 1489 (11th Cir. 1985); *Isaacs v. Kemp*, 778 F.2d 1482, 1483 7 nn.1-4 (11th Cir. 1985).

291. *Isaacs*, 778 F.2d at 1484 (ruling that it was prejudicial and erroneous for Georgia state court to deny defendants' change of venue motions).

292. Ross, *supra* note 268, at 114.

293. See Ross, *supra* note 268, at 114 (alluding to Georgia state court's erroneous decision not to move case out of jurisdiction).

cannot receive a fair trial because of prejudice.²⁹⁴ The trial judge and the Georgia Supreme Court justices must have known that the defendants would not receive a fair trial if they remained in Georgia. These judges, however, also must have known that the public wanted the defendants to die for their deeds.²⁹⁵ They understood that if they granted the defendants' motions, their fates in the next judicial election would have been sealed.²⁹⁶

Why did the state and federal courts come to conflicting conclusions on the venue issue? A former Georgia judge frankly provided a one word answer—politics.²⁹⁷ Pointing out that Georgia state judges are directly accountable to the public through regular elections, the former judge stated that he was not surprised that neither the trial judge nor the Georgia Supreme Court moved the trial of the Alday murderers.²⁹⁸ If the case had been moved, these judges' careers would have been in jeopardy. These Georgia judges crumbled under the political tide and ignored the law in the name of preserving their jobs.²⁹⁹ Other judges have not capitulated to the winds of politics; they have attempted to remain insulated from the will of the majority.³⁰⁰ Unfortunately, many of these judges are voted out of office for doing what they are supposed to do, namely, applying the law in a neutral and fair manner.

294. See *Coleman*, 778 F.2d at 1489 (explaining that change of venue standards derive from constitutional concern for trial by impartial jury and require that when trial court cannot "seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere," the court must grant motion for change of venue).

295. See Ross, *supra* note 268, at 114 ("The sensational nature of the case and the publicity it generated made a hostile public attitude foreseeable."). For a detailed recounting of the "saturation of publicity" that preceded the Alday murder trials, see *Coleman v. Kemp*, 778 F.2d at 1491-1537. The court in *Coleman* concluded that the Donaldsville community was undoubtedly "overwhelmed and saturated with prejudicial and inflammatory publicity." *Id.* at 1539.

296. See Ross, *supra* note 268, at 114 (postulating that despite knowledge that change of venue was appropriate, judges refused to move case out of fear that vengeful community would retaliate at polls).

297. Alex Crumbley, *Alday Outrage Should Prompt Changes*, ATLANTA CONST., Dec. 22, 1985, at D1.

298. Ross, *supra* note 268, at 114.

299. See Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 460 n.323 (1995) (providing examples of judges voted out of office because of their anti-death penalty positions).

300. See Ross, *supra* note 268, at 115-16 (highlighting episodes in which judges in criminal cases have followed the law and not the majority and found themselves voted out in the next election). See also Bright & Keenan, *supra* note 275, at 763 (discussing recent plight of Texas district court judge who was voted out of office after setting aside a death sentence in a post conviction hearing); *id.* at 765 ("[W]hen presiding over a highly publicized capital case, a judge who declines to [impose] death, or who insists on upholding the Bill of Rights, may thereby sign his own political death warrant.").

The story of ex-California Supreme Court Chief Justice Rose Bird is a prime example. In the 1986 California judicial elections, the incumbent Bird was opposed by a right-wing campaign that targeted Bird's record of reversing death penalty sentences.³⁰¹ The challengers attacked Chief Justice Bird with commercials designed to arouse resentment in the community.³⁰² One commercial depicted a mother looking at a picture of her young daughter and crying out that, if not for Bird, her daughter would still be alive—falsely suggesting that murderers whose death sentences were reversed by Bird were free and out on the streets killing again.³⁰³ This underhanded tactic worked, and Bird was soon voted out of office in a recall election by a two-to-one margin.³⁰⁴ Bird was not the only one to lose her seat. Justices Grodin and Reynoso, Bird's associate justices, also were voted out in the same election.³⁰⁵ All three California justices fell victim to politics. In speaking of the political beast, former California Supreme Court Justice Otto Kaus said:

I'm afraid the era of retaining judges on the basis of their character, without tallying up their votes, is a thing of the past. There's no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub.³⁰⁶

Former Florida Supreme Court Justice Rosemary Barkett would probably agree with Justice Klaus' statement.³⁰⁷ Barkett recently endured bitter Senate confirmation hearings on her nomination to the Eleventh Circuit Court of Appeals.³⁰⁸ Proclaiming that Barkett was a "liberal who coddles criminals," Republicans blasted her for an alleged refusal to invoke the death penalty.³⁰⁹ Observing that "it is vital that the President nominate judges . . . who view law and order as something more than just a slogan," republican presidential hopeful Bob Dole sought to block Barkett's appointment.³¹⁰ Further, Senator Strom Thurmond questioned Barkett's refusal to

301. Paul Reidingner, *The Politics of Judging*, 73 A.B.A. J. 52, 53 (Apr. 1987).

302. *Id.* at 52.

303. *Id.*

304. *Id.*

305. *Id.*

306. Ross, *supra* note 268, at 118.

307. See Paul Anderson, *Barkett Caught in Senate Cross-Fire over Crime*, MIAMI HERALD, Mar. 1, 1994, at 1A (describing scathing Senate hearings endured by Barkett in attempt to secure federal court of appeals judgeship).

308. *Id.*

309. *Id.*

310. *Id.* at 2A.

impose death in certain cases in which death was viciously inflicted.³¹¹ Barkett ultimately passed the Senate's scrutiny and currently sits on the Eleventh Circuit.³¹² Unlike Justice Bird, she was able to withstand the political heat focused on her death penalty record.

It is against this backdrop that Chief Justice Exum of the North Carolina Supreme Court was asked recently whether elected state judges can survive if they sometimes overturn death sentences.³¹³ Rephrasing the question to read "Is political death the inevitable consequence of opposing capital punishment?" Chief Justice Exum responded that it had become increasingly difficult for state judges to rule properly on capital cases.³¹⁴ He described a recent case in which the North Carolina Supreme Court reversed a death sentence for obvious constitutional error relating to preemptory challenges.³¹⁵ In protest, a prominent local newspaper printed a scathing article coupled with an editorial cartoon suggesting that Chief Justice Exum and his colleagues on the North Carolina Supreme Court were chipping away at the roots of North Carolina's judicial system.³¹⁶ The Chief Justice warned that "feeding the frenzy" generated by this sort of journalism could soon lead to the downfall of state judges who continued to overrule death sentences.³¹⁷ Concluding that he

311. *See id.* (discussing Thurmond's comment that Barkett's death penalty record was "strange").

312. *See* George F. Will, *Injustice on the Bench*, MIAMI HERALD, Mar. 14, 1996, at 19A (reflecting that Barkett won confirmation despite politically unpopular death penalty opinions in past cases).

313. *See* Symposium, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 FORDHAM URB. L.J. 239, 270 (1994) (discussing judicial opinion of role politics plays in death penalty cases at American Bar Association death penalty conference).

314. *Id.* at 270-72. Chief Justice Exum said that his 1986 campaign for the slot of Chief Judge was predicated on the death penalty. *Id.* at 271. His opponent sought to win the election by emphasizing Justice Exum's personal disdain for the death penalty. *Id.* The Chief Justice was able to fend off his challenger by informing the public that he had voted to sustain many capital sentences imposed by North Carolina's trial courts. *Id.*

315. *Id.* at 272. During voir dire, the defense challenged a potential juror for cause because the juror was confused about the State's duty to prove guilt beyond a reasonable doubt. *Id.* The challenge was denied. *Id.* Defendant removed this juror preemptorily, thereby exhausting its preemptory challenges. *Id.* Therefore, the defense was later unable to preemptorily challenge another juror who wound up sitting on the case. *Id.* The North Carolina Supreme Court held that the trial judge erred in not granting defendant's initial challenge for cause. *Id.* Further, this constituted harmful error because it led to a "juror sitting on the case who was unacceptable to defendant" and who defense would have been able to remove, absent the trial judge's error. *Id.*

316. *Id.* at 272-73. The cartoon depicted a briefcase on which the words "confidence in the North Carolina judicial system" were written. *Id.* at 273. Menacing over the briefcase was Chief Justice Exum, hatchet in hand, poised to smash the briefcase to pieces. *Id.*

317. *Id.*; *see also* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1856-58 (1994) (illuminating how trial judges appoint inadequate counsel to represent capital defendants so that prosecution has better chance of securing sentence of death and so that judge mollifies political backers who voted him

would not seek reelection when his term expires in 1998, Exum admitted that he was "glad [he did not] have to run again."³¹⁸

VI. RECOMMENDATIONS

A. *Limit Overrides to Situations in Which Juries Impose Death*

The best way to cleanse the process by which trial judges in Florida and Alabama override jury life recommendations is for both states' statutes to be struck down by the Supreme Court or repealed by the respective state legislatures. As previously developed, the rationale used in *Harris* to uphold the override statute is inconsistent with twenty years of the Supreme Court's Eighth Amendment jurisprudence. The Court's prior emphasis on guided discretion and meticulous consideration of the defendant's individual characteristics was disregarded in *Harris*. The *Harris* case is an aberration in which the Court endorsed unbridled judicial discretion.

In addition to its theoretical deficiencies, the jury override is impractical. In Florida, for example, the override is terribly inefficient. In the twenty-year span since the Florida override was enacted in 1973, seventy-five percent of overrides of jury life recommendations have been reversed by the Florida Supreme Court.³¹⁹ Moreover, it derogates the jury's role as the representative voice of the community.³²⁰ Jurors are far more representative of their communities than judges, who tend to be wealthy white males.³²¹ In addition, if the judge overrides the jury's life recommendation, jurors may become

onto bench to crack down on crime). Professor Bright conceptualized the problem that politics plays in the appointed counsel realm as follows:

[J]udges either are intentionally appointing lawyers who are not equal to the task or are completely inept at securing competent counsel in capital cases. The reality is that popularly elected judges, confronted by a local community that is outraged over the murder of a prominent citizen or angered by the facts of a crime, have little incentive to protect the constitutional rights of the one accused in such a killing. Many state judges are former prosecutors who won their seats on the bench by exploiting high-publicity death penalty cases. Some of those judges have not yet given up the prosecutorial attitude.

Bright, *supra*, at 1857; cf. Ross, *supra* note 268, at 114-15 (asserting that softness on death penalty is not only issue voters focus on when ousting judicial officers and providing examples of magistrates and judges who lost in re-election bids because opponents successfully labeled them "soft on crime" in campaign advertisements).

318. See Symposium, *supra* note 313, at 273.

319. See Radelet & Mello, *supra* note 152, at 205 (analyzing inefficiency of Florida jury override procedure).

320. See Radelet, *supra* note 4, at 1425 (postulating that jurors are insulted when judge overrides their collective judgment).

321. See Russell, *supra* note 1, at 43-44 (containing chart illustrating wide disparities between judges and citizens in terms of race, age, education, and income).

resentful of the judge and regret participating in a case in which they believe an erroneous death sentence has been rendered.³²² Florida State Senator Ed Dunn spoke candidly of the pressing need to re-draft Florida's capital sentencing scheme. Dunn argued:

It's not honorable for [the legislature] not to [fix] the system when we know, we have reason to know, that it's not working We have a duty as legislators in my opinion to fix that part of the system because we ought to know from statistics alone that it's not right. We ought to know when we compare the eighty-two [death penalty] cases in Florida with what is being done throughout the country, that something's awry in Florida Now I don't subscribe to the proposition that the standard enunciated by the Florida Supreme Court is even working. It obviously isn't working.³²³

There is even more reason to eliminate Alabama's override procedure than there is to abolish Florida's. First, because there is no override standard or degree of weight assigned to an Alabama jury recommendation, Alabama trial judges randomly and arbitrarily have assigned their own divergent standards to jury life recommendations.³²⁴ This is a clear indication that Alabama trial judges lack the statutory guidance to channel their authority effectively. As demonstrated, this lack of guidance has led to the arbitrary imposition of death sentences. Further, on a pragmatic level, there is no effective appellate review of death overrides in Alabama. Not once has an Alabama reviewing court taken issue with a trial judge's decision to disregard the jury's life recommendation.³²⁵ For example, in four separate cases, Alabama trial judges have overridden *unanimous* jury recommendations that a capital defendant's life be spared,³²⁶ the cases were all affirmed on appeal. Thus, in four cases, four separate

322. See Radelet & Mello, *supra* note 152, at 204 ("Under [the] *Tedder* [standard], if a judge overrides a jury's recommendation of life imprisonment, the judge is not-so-implicitly stating that the jury is not composed of 'reasonable people.' This message may not be well-received by jurors, who may . . . regret their participation in what turns out to be a case where a death sentence that they believe is morally unjustified is imposed.")

323. Mello & Robson, *supra* note 107, at 75.

324. See *supra* notes 244-67 and accompanying text (outlining confusion that exists in Alabama due to lack of override standard).

325. See *supra* notes 246-47 and accompanying text (detailing meager review conducted by Alabama appellate courts in life-to-death override cases).

326. See *Carr v. State*, 640 So. 2d 1064 (Ala. Crim. Ct. App. 1994); Sentencing Order, *State v. Crowe*, No. CC-83-2727 (Cir. Ct. Jefferson County, Ala. Jan. 6, 1994); Sentencing Order, *State v. Tomlin*, No. CC-89-000481 (Cir. Ct. Mobile County, Ala. Oct. 26, 1988); Sentencing Order, *State v. Freeman*, No. CC-83-1449FB (Cir. Ct. Madison County, Ala. Sept. 6, 1984); Russell, *supra* note 1, at 33 (charting jury vote counts in cases in which judges imposed death over jury life recommendations); see also Alabama Prison Project, Alabama Jury Override Information Sheet (June 1995) (on file with *The American University Law Review*) (charting overridden jury life recommendations and providing that four unanimous life recommendations were disregarded).

juries, each comprised of twelve people, unanimously decided that a capital defendant should live. Their collective judgments were accorded absolutely no weight by the courts of Alabama. This is not justice.

B. Limit Use of Override to Reducing Jury Recommendations of Death-to-Life

If the override procedure is neither ruled unconstitutional nor repealed, the best alternative is to limit its use to instances where the jury recommends death and the trial judge invokes the override to spare the defendant's life. Presently, the override is overwhelmingly used to impose death over jury recommendations of life.³²⁷ As Justice Stevens suggested, the lack of death-to-life overrides compared to the frequency of life-to-death overrides leads, "as a practical matter," to giving the prosecutor "two chances to obtain a death sentence."³²⁸ Justice Stevens contends that this violates the Double Jeopardy Clause of the Fifth Amendment.³²⁹ This inadequacy can be cured if the judge is obligated to honor jury life recommendations, but not jury death recommendations. The rationale behind this is sound. "[P]ermitting a judge to reject death and grant life is justified. The community sometimes becomes inflamed on debatable facts, and raises the hue and cry for vengeance. The judge should be permitted to act as a detached overseer to restrain passion-numbered judgments."³³⁰ The Florida Supreme Court bolstered this view in the first post-*Furman* override case it heard. Considering the legitimacy of a death-to-life override, the court in *State v. Dixon*³³¹ opined that this use of the override was valid because "the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience."³³² The Florida Supreme Court

327. See *Harris v. Alabama*, 115 S. Ct. 1031, 1040 (1995) (Stevens, J., dissenting) (observing that in Alabama, judicial override has been used to grant mercy to defendants five times, as compared to 47 instances where judge imposed death sentence over jury life recommendation); see also Radelet & Mello, *supra* note 152, at 213 (stating that in Florida, between 1972 and 1992, there were 3.6 times as many life-to-death overrides (134) as there have been death-to-life overrides (37)). These numbers indicate the reality of Alabama's and Florida's death penalty schemes. The bottom line is that some defendants whom the community would spare have been sentenced to death. *Harris*, 115 S. Ct. at 1039-41 (Stevens, J., dissenting).

328. *Spaziano v. Florida*, 468 U.S. 447, 475 n.14 (1984) (Stevens, J., concurring in part and dissenting in part).

329. U.S. CONST. amend. V. The Double Jeopardy Clause of the Fifth Amendment provides in relevant part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life and limb . . ." *Id.*

330. Joseph W. Little, *Another View*, 36 U. FLA. L. REV. 200, 204 (1984).

331. 283 So. 2d 1 (Fla. 1973).

332. *State v. Dixon*, 283 So. 2d 1, 8 (Fla. 1973).

expressly endorsed the use of judicial overrides to review jury recommendations of death.³³³ Justice Stevens claims that this view is consistent with the belief that the legislative decision to authorize an override was intended to insulate capital defendants from a prejudicial jury decision to impose the penalty of death.³³⁴

Professors Michael Radelet and Michael Mello look to the decision of the court in *Dixon* and Justice Stevens' reasoning to support their theory that the logic of the override is effective only when applied to cases in which the trial judge uses the override to lessen the jury's recommendation of death.³³⁵ They contend that the logic of death-to-life overrides is firmly embedded in Anglo-American jurisprudence.³³⁶ They assert that "Anglo-American legal traditions" have consistently treated the prosecution and defense differently: these traditions give the defendant the benefit of any doubt in a criminal proceeding.³³⁷ This is the reason why the Model Penal Code envisions a death penalty statute where jury recommendations of life, but not death, are binding on the trial judge.³³⁸ In sum, the power to override death recommendations aligns with our system of criminal jurisprudence as conceptualized by the fifteenth-century jurist Sir John Fortescue: "[I]ndeed, one would much rather that twenty guilty persons should escape the punishment of death, than that one innocent person should be condemned, and suffer capitally."³³⁹

Limiting the use of the override to death-to-life situations would abolish trial judges' powers to override life but not death recommendations, creating an asymmetry tending toward mercy.³⁴⁰ Such an asymmetry, however, is nothing new in the death penalty arena.³⁴¹ As Professors Radelet and Mello point out, asymmetry in the capital sentencing realm has been endorsed in the aggravating and mitigating factors context.³⁴² The U.S. and Florida Supreme Courts limit capital sentencers' consideration of aggravating factors to only

333. *Id.*

334. *Harris v. Alabama*, 115 S. Ct. 1031, 1040 n.6 (1995) (Stevens, J., dissenting).

335. Radelet & Mello, *supra* note 152, at 207-08.

336. See Radelet & Mello, *supra* note 152, at 205-06 ("In contrast to life-to-death overrides, procedures allowing for death-to-life overrides have a logic that is firmly rooted in Anglo-American jurisprudence.")

337. Radelet & Mello, *supra* note 152, at 206 (noting that Anglo-American "traditions give the benefit of any sizeable doubt to the defendant").

338. MODEL PENAL CODE § 210.6 cmt.7 (1980).

339. J. FORTESCUE, *DE LAUDIBUS LEGUM ANGLIE* 94 (F. Gregor trans., 1874).

340. *But see* Radelet & Mello, *supra* note 152, at 206 (justifying this asymmetry as "weighted on the side of mercy" because it comports with notion that defendant garners all benefits of doubt in criminal proceedings (quoting *Stanley v. Zant*, 697 F.2d 955, 960 (11th Cir. 1983))).

341. See Mello & Robson, *supra* note 107, at 67.

342. Mello & Robson, *supra* note 107, at 67.

those that are statutorily enumerated.³⁴³ On the other hand, in their penalty determination, capital sentencers are obligated to consider *any* possible mitigating circumstance, whether included in the capital sentencing statute or not.³⁴⁴ This scenario creates an asymmetry toward mercy that is in accordance with the basic notions of our system of criminal justice. Along the same lines, judges in both capital and noncapital cases may acquit a defendant despite a jury verdict finding the defendant guilty.³⁴⁵ There is no provision, however, whereby a judge can impose guilt on the defendant after the jury has rendered a not guilty verdict. If this fundamental principle were applied in the penalty phase of capital cases, judges could only use the override to extend mercy to the capital defendant. The override should be used in this manner.

C. *The Deference Test*

In the alternative to the foregoing, the *Tedder* standard should be abolished and a new deference test should be formulated and incorporated into both Alabama's and Florida's capital sentencing statutes. Simply requiring Alabama to adopt *Tedder* would be problematic because, as indicated, *Tedder* is the cornerstone of a Florida override procedure that is functionally an exercise in futility.³⁴⁶ Moreover, as Professor Joseph Colquitt noted, the Florida Supreme Court has frequently ignored *Tedder* while reviewing cases in which trial judges imposed death sentences over jury recommendations of life imprisonment.³⁴⁷ In addition, Professor Colquitt criticized *Tedder*'s "no reasonable person could differ" language.³⁴⁸ Colquitt noted that under *Tedder*, a judge's decision to disregard the

343. See *Purdy v. State*, 343 So. 2d 4, 6 (Fla. 1977).

344. See *Radelet & Mello*, *supra* note 152, at 207 n.61 ("The U.S. Constitution mandates that the capital sentencer be permitted to consider and give independent mitigating weight to any relevant mitigating circumstances, even if not enumerated in the capital statute."); see also *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) ("[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (quoting *Lockett*, 438 U.S. at 604)); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (striking down death penalty statute because it unconstitutionally blocked sentencer from considering nonstatutory mitigating factors).

345. *Mello & Robson*, *supra* note 107, at 67.

346. See *supra* notes 212-22 and accompanying text (explaining why *Tedder* standard has failed).

347. See Colquitt, *supra* note 159, at 327-28. Professor Colquitt identifies the cases of *Dobbert v. State*, 328 So. 2d 433 (Fla. 1976), *aff'd*, 432 U.S. 282 (1977), *Douglas v. State*, 328 So. 2d 18, 20 (Fla. 1976), and *Thompson v. State*, 328 So. 2d 1 (Fla. 1976), as three cases in which the Florida Supreme Court reviewed life-to-death overrides but failed to mention *Tedder*. *Id.*

348. Colquitt, *supra* note 159, at 327.

jury's recommendation means that the jury is comprised of twelve unreasonable people.³⁴⁹ If the jury is comprised of reasonable people, strict adherence to *Tedder* would literally prevent a trial judge from ever disagreeing with the jury's recommended punishment.³⁵⁰ Professor Colquitt suggested requiring "a reasonable basis" for a judge's decision to override a jury's recommendation.³⁵¹ Such a standard would be easier to comprehend and analyze objectively on appeal than the *Tedder* "no reasonable person could differ" standard.³⁵²

Along the same lines as Professor Colquitt's proposed modifications, Professor Russell has suggested a two-pronged "*Tedder* plus standard."³⁵³ First, the jury's recommended verdict would be treated with "presumptive weight."³⁵⁴ Second, "where the facts suggesting a sentence of death are so clear and convincing that no reasonable person could differ or where facts unknown to the jury [contained in the judge's pre-sentence report] enhance the existing aggravating circumstance(s), such that a sentence of death is appropriate," the trial judge could permissibly use the override.³⁵⁵

Both Professor Colquitt's and Professor Russell's theories improve on *Tedder*, but not enough to ensure that the override is applied in a consistent and nonarbitrary manner. A better proposal would be to: (1) require the jury to produce written reports of the aggravating and mitigating factors it found to exist;³⁵⁶ (2) require the jury to indicate how it arrived at its penalty recommendation by requiring it to record how it weighed mitigating and aggravating factors in relation to one another;³⁵⁷ (3) incorporate into the statute a standard which pro-

349. See Colquitt, *supra* note 159, at 327 (postulating that judge's decision to override jury life verdict under *Tedder* translates into assertion that jurors are unreasonable people).

350. Colquitt, *supra* note 159, at 327.

351. Colquitt, *supra* note 159, at 328.

352. Colquitt, *supra* note 159, at 328.

353. Russell, *supra* note 1, at 41.

354. Russell, *supra* note 1, at 41.

355. Russell, *supra* note 1, at 41.

356. In another proposed standard to which Alabama courts could adhere in the override context, Russell suggested that the jury be required to make written findings as to aggravating and mitigating factors. Russell, *supra* note 1, at 41. She stated that the findings would then be analyzed by the experienced judge to see whether the jury's recommendation should be followed. *Id.* Currently neither Alabama's nor Florida's capital sentencing statute requires the jury to make written findings as to the aggravating and mitigating factors it finds to exist. They both obligate the jury to find at least one aggravating circumstance and provide that the jury cannot recommend death unless it deems that the aggravating factor(s) found outweigh any mitigating factors found to exist. ALA. CODE § 13A-5-45 (1994); FLA. STAT. ch. 921.141(2) (1991).

357. The U.S. Constitution does not require that the jury state how it weighed aggravating and mitigating factors. See *Hildwin v. Florida*, 490 U.S. 638, 640 (1989) (ruling that jury need not make specific findings regarding its reasons for imposing death sentence).

vides that the trial judge may not reject the jury's recommended punishment unless the jury had no rational basis for (a) finding certain aggravating and/or mitigating factors to exist, and (b) weighing the aggravating and mitigating factors as it did. This deference test would present a steep challenge for those judges seeking to reject the jury's recommendation. This test would also lead to more effective appellate review of cases in which overrides occur. The appellate courts would have access to both the jury's and the judge's written findings. This would lead to a more objective and realistic review of death sentences imposed by a jury override.

CONCLUSION

In *Harris v. Alabama*, the Supreme Court upheld the constitutionality of Alabama's jury override statute. The Court's ruling is problematic for several reasons. First, the decision is anomalous to and inconsistent with twenty years of existing Supreme Court Eighth Amendment jurisprudence. Second, the decision disregards practical evidence that the override is completely inefficient. Third, the decision ignores the pervasive judicial confusion surrounding the implementation of the override. Fourth, the decision creates a jurisprudential means by which political motivations, judicial biases, and public sentiment may be interjected into the sacrosanct realm of capital sentencing. Finally, the Court's decision in *Harris* derogates the jury, the sole voice of public sentiment, to a role inconsistent with American jurisprudential notions of fairness, equity and justice. For these reasons, the override must be overridden.