No. 20-193

IN THE
Supreme Court of the United States

CALVIN MCMILLAN, PETITIONER,

V.

STATE OF ALABAMA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

BRIEF OF AMICI CURIAE FRANCIS MILES AND JANET JOHNSON, FORMER ALABAMA JURORS WHOSE LIFE RECOMMENDATIONS JUDGES OVERRODE, IN SUPPORT OF PETITIONER

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INTERESTS OF AMICUS CURIAE[1]

Amicus party Francis Miles served as a juror in the Alabama capital trial of Ulysses Sneed. *See generally Sneed v. State*, 1 So. 3d 104, 112 (Ala. Crim. App. 2007). At sentencing, Mr. Miles and six other jurors formed a majority that voted to recommend life imprisonment. The trial judge, however, overrode the recommendation, and sentenced Mr. Sneed to death.

Amicus party Janet Johnson served as a juror in the 1992 capital trial of Larry Padgett. *See Padgett v. State*, 668 So. 2d 78 (Ala. Crim. App. 1995). After the jury convicted Mr. Padgett, at sentencing, Ms. Johnson and eight others agreed to a recommendation of life imprisonment. Here, too, the trial judge overrode the recommendation.

Mr. Miles and Ms. Johnson are two of hundreds of Alabama jurors who have duly answered the call of the Alabama courts to serve, conscientiously participated in capital trials, deliberated, and made a recommendation of whether a capital defendant should live or die. *See* Equal Justice Initiative, *Alabama Overrides from Life to Death & Alabama Overrides from Death to Life* (Jan. 12, 2016), https://eji.org/wp-content/uploads/2019/11/list-alabama-override-

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[1] Pursuant to this Court's Rule 37, *Amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici* made a monetary contribution to the preparation or submission of the brief. Both Petitioner and Respondent granted consent. The parties received timely notice.

cases.pdf (documenting 101 overrides from life to death, and 11 from death to life).

In this case in which the Court is asked to answer whether the Eighth Amendment permits the execution of a person whose jury recommended life, based on judicial override to death, amici present the views of the jurors whose faithful work and well-considered recommendations are cast aside by judicial override.

SUMMARY OF ARGUMENT

Just as executing prisoners based on judicial override of a jury's life recommendation would go against the practices of every state in this Nation (and even against Alabama's current law), *see* Pet. at 14-16, the disrespect of juries inherent in the process of judicial override goes against everything this Court has ever said in praise of the vital role juries play in our system of justice. See also Michael Radelet, G. Ben Cohen, *The Decline of Judicial Override*, Annual Review of Law and Social Science, October 2019; ("Judge imposed sentences in these cases stem from an anachronistic vestigial process from a period from which the country has evolved… the most significant question remaining is retroactivity: whether the evolving standards of decency prohibit the execution of judge-imposed sentences.").

While the petition focuses on the harm in the Eighth Amendment context of executing a person sentenced to death by judicial override, *amici* notes the interrelation between the protection against cruel and unusual punishments and the guarantee

that the jury perform the function of the conscience of the community.

Juries represent the voice of the community, without whose assent the government's deprivation of life and/or liberty as criminal punishment would violate basic constitutional norms as old as the Bill of Rights. *See generally* 2 Collected Works of James Wilson 954-1012 (K. Hall & M. Hall eds., 2007) (Justice's Wilson's lecture on juries).

Juries serve as both bulwark of our civil liberties, *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2002), and, in capital cases in particular, the conscience of our communities. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). Our justice system depends on their respect for its legitimacy. *See Gregg v. Georgia*, 428 U.S. 153, 225 (1976).

The role jurors play in our justice system could not be more vital. And that role is never more significant than when a jury is selected to serve in the trial that will decide whether a fellow community member may live out the remainder of his life in prison, or must, as criminal punishment, die at the hands of the government.

In *Beck v. Alabama*, respondents argued that juries should not be trusted with lesser included offense instructions because "the preclusion of lesser included offense instructions heightens, rather than diminishes the reliability of the guilt determination." *Beck v. Alabama*, 447 U.S. 525 (1980). Now, respondent argues that juries cannot

be trusted to make the determination that death is the appropriate punishment.

Judicial override represents a fundamental threat to these cherished principles, and to the legitimacy of the justice system. As practiced in Alabama, and detailed in this brief, the theory of judicial override is that juries are not up to the task. Juries are too emotional. Juries, at least when they recommend life over death, have not faithfully executed their responsibilities. As shown in this brief, none of these assumptions are based on anything more than speculation. The unwarranted disparagement of jurors contained in judicial override orders clashes with the high regard this Court, this Nation, and our founders have always held for this venerated institution.

True, over two decades ago, this Court rejected a constitutional challenge to judicial override. *See*, *e.g.*, *Harris v. Alabama*, 513 U.S. 504 (1995). But as Petitioner has shown, the time has come to revisit that decision, Pet. at 18-22, including for the reasons set out in this brief. While overturning *Harris* may require the Alabama courts to revisit the death sentences of up to 32 prisoners, Pet. at 1, the Court should not "perpetuate something we all know to be wrong only because we fear the consequences of being right." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1408 (2020).

The Court should grant certiorari to determine if the practice of disrespecting juries, and undermining confidence in our legal system, should

be permitted to continue by the execution of any person sentenced to death by judicial override.

ARGUMENT

I. PUBLIC CONFIDENCE IN THE JUSTICE SYSTEM, AND IN THE DEATH PENALTY, DEPENDS ON RESPECT FOR THE JURY.

Heralded from before the time of our Nation's founding, to this day, juries play a vital role in the American system of justice. That role merits no greater respect than when the jury's decision is whether the government may execute a fellow community member.

Today, the jury remains "critical to public confidence in the fairness of the criminal justice system." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). This institution brings ordinary people, from all walks of life, into the justice process and requires respect for their judgment. The jury's judgment, in turn, stands as "one of the Constitution's most vital protections against arbitrary government." *United States v. Haymond*, 139 S. Ct. 2369, 2373 (2019) (plurality opinion). It is the "'the great bulwark of [our] civil and political liberties.'" *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2002) (quoting 2 J. Story, Commentaries on the Constitution of the United States 540-41 (4th ed. 1873)).

The benefit runs not only to the community, but also to the jurors themselves. From the juror's

perspective, "[o]ther than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019) (citing *Powers v. Ohio*, 499 U.S. 400, 407 (1991)). The process "affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for the law." *Duncan v. Louisiana*, 391 U.S. 145, 187 (1968) (Harlan, J., dissenting).

Nowhere does our system of justice depend more on juries than in capital trials, where juries "express the conscience of the community on the ultimate question of life or death." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968); *see also Woodward v. Alabama*, 571 U.S. 1045, 1048 (2013) (Sotomayor J., dissenting from denial of certiorari).

"Capital punishment is an expression of society's moral outrage at particularly offensive conduct," *Gregg v. Georgia*, 428 U.S. 153, 183 (1976), and a sentence of death thus "expresses the community's judgment that no lesser sanction will provide an adequate response to the defendant's outrageous affront to humanity." *Harris v. Alabama*, 513 U.S. 504, 518 (1995) (Stevens, J., dissenting and citing *Gregg*, 428 U.S. at 184). Jurors "express the 'conscience of the community' on the ultimate question of life or death." *Ring v. Arizona*, 536 U.S. 584, 615-16 (2002) (Breyer, J., concurring in judgment); *see also Woodward v. Alabama*, 571 U.S. 1045, 1051 (2013) (Sotomayor, J., dissenting from denial of certiorari) (noting the advantage "of a jury representing a cross-section of the community").

As this Court has noted, "one of the most important functions any jury can perform in making . . . a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system." *Witherspoon,* 391 U.S. at 519 n.15; *see also Schriro v. Summerlin*, 542 U.S. 348, 360 (2004) (Breyer, J., dissenting) (describing the requisite "community-based judgement that the [death] sentence constitutes proper retribution"—as is required by the Eighth Amendment).

This process requires full engagement and thorough deliberation, worthy only of gratitude from our communities, and respect from the bench. Moreover, the process enhances the legitimacy of capital sentencing. Instead of rubber stamping a prosecutor's request for a death sentence, the jury wades through the weightiest issues in our justice system to render a decision for the community.

Whether a defendant has potential for rehabilitation or redemption, whether the circumstances of her life or of the crime deserve leniency or mercy, all depend upon the full conscience of the entire community. *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989); *see also Satterwhite v. Texas*, 486 U.S. 249, 261 (1988) (Marshall, J., concurring) ("Unlike the determination of guilt or innocence, which turns largely on an evaluation of objective facts, the question whether death is the appropriate sentence requires a profoundly moral evaluation of the defendant's character and crime.").

Furthermore, within this process, a capital jury's guilty verdict does not necessarily mean each member is *certain* of the defendant's guilt—some residual doubt might remain. As this Court has explained, "residual doubt . . . refer[s] to doubts that may have lingered in the minds of the jurors who were convinced of [the defendant's] guilt beyond a reasonable doubt but who were not absolutely certain of his guilt." *Franklin v. Lynaugh*, 487 U.S. 164, 187 (1988). Residual doubt is the most significant reason jurors vote for life sentences. *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?,* 98 Colum. L. Rev. 1538, 1563 (1998); Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 Ariz. St. L.J. 769, 775 (2006).

The jury also serves as "a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'" *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017). Cf. *Turner v. Murray*, 476 U.S. 28, 36–37 (1986) ("We hold that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias.").

In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Court observed that a "capital sentencing jury representative of a criminal defendant's community assures a diffused impartiality." *Id* at 310. As the Court explained: "[i]ndividual jurors bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is

unknown and perhaps unknowable.' . . . it is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system.'" *Id.* at 311 (quoting *Peters v. Kiff*, 407 U.S. 493, 503 (1972) (Marshall, J.) (plurality) & H Kalven & H. Zeisel, The American Jury 498 (1966)).

As capital juries fulfill these functions, serving as both bulwark and conscience, the goal is not only fairness in the process but also respect for it. In *Gregg*, the Court concluded that the death penalty ensured confidence in the administration of justice: "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law." 428 U.S. at 225.

A fundamental premise of jury involvement in capital sentencing is to ensure organized society's approval before the State may exact the ultimate punishment. *Cf. Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) (holding death sentence must be reversed if jury is misled to believe it does not have responsibility for death sentence, because a court may review it). As petitioner has shown, and as detailed further below, judicial override threatens this premise; if anything, it promotes disrespect for the justice system.

II. OVERRIDDEN ALABAMA JURIES HAVE PERFORMED THE VERY SAME WORK THIS COURT HAS LONG PRAISED, BUT WITHOUT THE SAME RESPECT.

From their experience, *amici* are confident that Alabama jurors faithfully perform the vital tasks described above. Alabama jurors weigh both the circumstances of the crime and the circumstances of the offenders' life and history – all before rendering thoughtful recommendations on whether the offender may live or must die. Although documentation of what has transpired within Alabama jury rooms is limited, including in override cases, some examples are available.

Amicus party Francis Miles was a juror in the case of Ulysses Sneed. *See generally Sneed v. State*, 1 So. 3d 104, 112 (Ala. Crim. App. 2007). The jury convicted Mr. Sneed for his codefendant's killing of a store clerk in the course of their robbery of a store, under a theory of felony murder. *Id.* A surveillance camera captured the killing and showed that while Mr. Sneed took money from the cash register, his codefendant shot the clerk. *Id.* at 112-13.

Mr. Miles thought long and hard about the right punishment. He and other jurors took into account that Mr. Sneed didn't kill, considered the opportunity for Mr. Sneed to rehabilitate and become saved by God, and concluded that life imprisonment was a serious enough punishment. Another group of jurors wanted death. The jury deliberated, talking through the evidence and

arguments in support of both life and death. Ultimately, the life-favoring jurors convinced some who originally wanted death, and the jury recommended life by a vote of seven to five.

Receiving the news that the judge overrode the jury's recommendation frustrated Mr. Miles and left his confidence in the system shaken. For him, the whole process appeared to have been a waste of taxpayer dollars. Empty votes.

Amicus party Janet Johnson served as a juror in the 1992 capital trial of Larry Padgett, accused of sexually assaulting and stabbing to death his wife. *See Padgett v. State*, 668 So. 2d 78 (Ala. Crim. App. 1995). At the guilt phase, she initially voted to acquit, but other jurors persuaded her to change her vote to guilty (a decision she later came to regret). At sentencing, still doubting Mr. Padgett's guilt, Ms. Johnson voted for life, as did eight other jurors. The trial judge, however, overrode the life recommendation and sentenced Mr. Padgett to death. For Ms. Johnson, the override was devastating.

Ms. Johnson knew that the jury's recommendation was well considered. But then why did the judge reject it? With the life recommendation rejected, Ms. Johnson believed the trial and deliberations were a waste of time, unfair to the jury, and unfair to Mr. Padgett.

After the trial, Mr. Padgett's conviction was reversed, because the State had suppressed material exculpatory information in its possession – blood

found at the scene that was neither Mr. Padgett's nor the victims. *Id.* at 83. On retrial, Ms. Johnson's doubts about Mr. Padgett's guilt were vindicated. Mr. Padgett was acquitted. *See State v. Larry Padgett*, Marshall Cty. No. CC-91-38.

Empirical research with former capital jurors opens a window on the experiences of overridden jurors. Researchers with the Capital Jury Project interviewed hundreds of capital jurors, including those from the case of William Knotts, sentenced to death by a judge who overrode the jury's nine to three vote for life. *See generally Knotts v. State*, 686 So.2d 431, 442 (Ala. Crim. App. 1995); Bowers, et al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 Wash. & Lee L. Rev. 931, 995-96 (2006).

One of the jurors explained that the jurors, following this Court's law, *see*, *e.g., Lockett v. Ohio*, 438 U.S. 586, 604 (1978), focused on both the circumstances of the crime and the circumstances of Mr. Knotts' life. Bowers, *supra*, at 995-96. They discussed whether the murder was "pre-meditated." *Id.* at 995. They discussed records concerning "his behavior and his childhood. *Id.* The records that they produced from the other facility that he had been to played a large part, a tremendous part in our verdict for life without parole." *Id.*

Another juror from Knotts' case recounted the jury's deep look at records that appeared to be "more

than four or five hundred pages." *Id.* From the records they believed it appeared that Knotts, as a child, "wasn't getting the kind of treatment he was supposed to be getting." *Id*. Teachers on the jury had dealt with children in similar circumstances. "They said a lot of things that influenced us, so that I think the child's, the boy's background had a lot to do with our decision." *Id.* at 995-96.

In Shonelle Jackson's case, the jury unanimously recommended life. The judge overrode. *See Jackson v. State*, 836 So.2d 915, 962 (Ala. Crim. App. 1999). As in the Sneed case discussed above, the overridden jurors had "'concerns about whether Mr. Jackson was responsible.'" Paige Williams, Double Jeopardy, New Yorker, Nov. 10, 2004, https://www.newyorker.com/magazine/2014/11/17/double-jeopardy-3 (quoting juror's sworn deposition). As one juror explained in her post-trial deposition, "I had concerns about whether Shonelle Jackson was the shooter." *Id.*

As *amici* can attest, the jurors whose careful work is overturned by override feel shock, dismay, and betrayal of the system. Allene Evans was one of nine jurors who recommended life for Herbert Williams, only to have the trial judge overrule the recommendation. *See generally Williams v. State*, 782 So.2d 811, 816 (Ala. Crim. App. 2000). Speaking publicly of his reaction to the override, he stated: "I was very shocked to know that the judge had

changed our decision." Henry Weinstein, *Judges Ignore Juries to Impose Death*, L.A. Times, June 16, 2002, https://www.latimes.com/archives/la-xpm-2002-jun-16-me-override16-story.html.

III. JUDICIAL OVERRIDE DISRESPECTS THE ROLE OF JURIES.

The very same institution this Court and our founders have always revered is one Alabama's override judges have frequently dismissed. Whereas Justice Wilson proclaimed that the accused shall not suffer unless the jury, acting for the community, says "without hesitation – he deserves to suffer," Wilson, *supra*, at 986, override judges have cited a jury's perceived hesitation to convict as a basis for overriding a life sentence. While this Court has lauded the jury, representative of a criminal defendant's community, bringing "diffused impartiality" and "qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable" to make "uniquely human judgments that defy codification," *McCleskey*, 481 U.S. at 311 (internal quotation marks and citation omitted here), Alabama's override judges have dismissed life-recommending juries as too emotional. Where override is concerned, the esteemed tradition of honoring the jury simply does not match up with the practice.

For example, in petitioner's case, eight jurors recommended life imprisonment. Overriding their recommendation, the judge dismissed them with nothing more than speculation that they had become "tired of the process." The judge wrote:

> [I]t is not easy to determine why eight members of the jury voted against the death penalty in this case. It is highly possible that fewer than eight jurors initially voted for life without parole and that the number of those jurors voting for life without parole only increased as they grew tired of the process and with the weight that a death recommendation would have on each of them. In the end, this Court is unable to specifically say why the jury was unable to follow the law to make a recommendation of death in this case.

Pet. App. 40a. Why the override judge thought that the jury was "unable to follow the law" – or any indication that the jury did not follow the law -- neither he nor the record discloses. But more to the point, as in the *Sneed* case, in which amicus party Miles participated, the deliberation process *anticipates* jurors asking one another to reconsider their initial positions. That is in fact, following the law. And it is part and parcel of the process this Court has repeatedly described. *See*, *e.g.*, *McCleskey*, 481 U.S. at 310 (describing jury's "diffused impartiality"). The jury's life vote in *McMillian*'s case appears well-justified by the record, and the jury's consideration of mitigating circumstances was not only within the boundaries of the law – the consideration was required by it.

The override judge in this case disrespected the jury when it dismissed their recommendation with speculation and obfuscation. The judge's lack of faith in the jury clashes with the jury this Court has

envisioned. *See Duncan*, 391 U.S. at 187 (1968) (Harlan, J., dissenting) (noting that juries "afford[] ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for the law").

Regrettably, this judge has not been the only one to have dismissed the work of the Alabama juries called to make life and death recommendations. In *Ex parte Taylor*, 808 So.2d 1215, 1219 (Ala. 2001), the Alabama Supreme Court approved judicial override where the trial judge stated as follows: while "the jurors in this case were cooperative, harmonious, diligent, and attentive, some jurors' outbursts of emotion after they found the defendant guilty of capital murder indicated that they were overwhelmed by their impending duty to consider the death penalty as required by law." *Id.*

Judicial override orders have largely followed this approved pattern – heaping empty praise on the jury, while dismissing it as having been too emotional or overwhelmed to have made a proper decision. For example, the jury in Clayton Shanklin's case was unanimous in recommending life. The trial judge overrode. *See Shanklin v. State*, 187 So.3d 734, 799 (Ala. Crim. App. 2014). The trial judge surmised that the jury was ruled by its emotions, and speculated that the twelve "cooperative, diligent, and attentive" jurors (here too) were, yet, somehow unable to fulfill their obligations:

> [It] is not easy to understand why all twelve members of the jury voted

> against the death penalty in this case. There is evidence that several jurors [sic] emotions may have hindered their ability to follow the law and impose the death penalty . . . [I]t is very likely these jurors, although very cooperative, diligent, and attentive throughout the trial, were unable to carry out their sworn legal obligation during sentencing.

State v. Shanklin, Walker Cty. No. CC-10-76, Sentencing Order at 22, 28-29 (Apr. 4, 2012). The override judge replicated the reasoning the Alabama Supreme Court had previously approved in *Taylor*.

Overriding the unanimous recommendation of a life sentence in *Doster v. State*, 72 So.3d 50, 120 (Ala. Crim. App. 2010), the judge concluded that "the jury's verdict was overly impacted by the emotionalism in the courtroom environment during the sentencing hearing." *State v. Doster*, Covington Cty. No. CC-03-156, Sentencing Order at 51-52 (Nov. 22, 2006). Here, too, a life-recommending jury was deemed too emotional to render an acceptable recommendation.

Indeed, on the one hand, this Court has stated that a death verdict expresses "society's moral outrage at particularly offensive conduct." *Gregg*, 428 U.S. at 183, where a juror's weighty burden is to "do nothing less . . . than express the conscience of

the community on the ultimate question of life or death." *Witherspoon*, 391 at 519. And yet, on the other, override judges have routinely purported to see jurors' emotionality in in this daunting task – at least where the end result was not a death recommendation – as a basis for dismissing capital jury's sentencing recommendations. *See State v. Scott*, Franklin Cty. No. CC-08-344, Sentencing Order at 9 (Aug. 5, 2009) ("The jury was probably emotionally and mentally worn out. The jury may have given too much weight to the mitigating factor of the emotional testimony of family and friends of the Defendant."); *State v. Woodward*, Montgomery Cty. No. CC 07-1388-TMH, Sentencing Order at 6 (Oct. 22, 2008) ("Finally, when the jury returned with a verdict of guilty, the Court observed that several of the jurors were visibly distraught. Since the evidence of Defendant's guilt was overwhelming, the Court surmises that at least some of the jurors were daunted by the task which they would face upon a finding of guilt.").

In sum, judicial override has, without warrant, marked Alabama capital juries with a stamp of inferiority, as overly emotional and incapable. It has cast the service of jurors as empty votes. Judicial override undermines confidence in the administration of the justice system's most serious work. Granting petitioner's request to review this case will offer an opportunity for the

Court to reconsider whether the lack of respect for juries inherent in this process is compatible with our Nation's traditions and this Court's law.

CONCLUSION

For the forgoing reasons, *amici* respectfully suggest that the Court grant certiorari in this case to determine whether the Eighth Amendment permits the execution of a person based on the judicial override of a jury's life recommendation.

Respectfully submitted,

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