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REFORMING THE JURY OVERRIDE: PROTECTING CAPITAL DEFENDANTS' RIGHTS BY RETURNING TO THE SYSTEM'S ORIGINAL PURPOSE

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I. INTRODUCTION

The death penalty has been justified as the "community's judgment . . . [of] the defendant's outrageous affront to humanity."[1] In Alabama and Florida,[2] the two states that use the so-called "jury override"[3] in capital cases, the ultimate decision of life or death is left to the trial judge, not to the jury, as the best reflection of the "community's judgment." After the guilt phase of the trial, the jury issues only an advisory sentence of life or death, which the trial judge has the authority to override.[4] In Alabama and Florida, judges have used their override power eighty-three and 167 times respectively, to sentence a defendant to death after a jury recommended

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[1] Harris v. Alabama, 513 U.S. 504, 518 (1995) (Stevens, J., dissenting).

[2] ALA. CODE § 13A-5-39 (1994); FLA. STAT. ANN. § 921.141 (West 2001). In addition, Delaware and Indiana had previously used the override scheme in capital cases, but the legislatures in these states have recently passed legislation changing their systems. *See infra* note 41.

[3] Justice O'Connor called it a "hybrid sentencing scheme" in *Ring v. Arizona*, 536 U.S. 584, 620 (2002) (O'Connor, J., dissenting), yet the vast majority of scholarly literature refers to it as the "jury override." *See* Fred B. Burnside, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 WIS. L. REV. 1017; Scott E. Erlich, *The Jury Override: A Blend of Politics and Death*, 45 AM. U. L. REV. 1403 (1996); Michael Mello, *The Jurisdiction to Do Justice: Florida's Jury Override and the State Constitution*, 18 FLA. ST. U. L. REV. 923 (1991); Michael Radelet & Michael Mello, *Death-to-Life Overrides: Saving The Resources of the Florida Supreme Court*, 20 FLA. ST. U. L. REV. 196 (1992).

[4] ALA. CODE § 13A-5-46 (1994).

life.[5] Originally envisioned by the legislatures as a way for judges to safeguard the capital sentencing process by reversing outraged, "inflamed" juries set on imposing death,[6] the data supports a different conclusion: When judges use their override power, they use it to impose death in the vast majority of cases.[7]

The override has been the subject of legal scholarship over the past decade,[8] but recent events make a re-examination of the issue and reform suggestions timely. In June 2002, the U.S. Supreme Court held in *Ring v. Arizona* that a trial judge alone could not determine the presence of aggravating and mitigating factors for imposing the death penalty without violating the defendant's Sixth Amendment right to a jury trial.[9] The Court held that a jury must make the fact findings required to increase a defendant's sentence.[10] In Arizona, where judges made sentencing decisions alone, *Ring* struck down the state's capital sentencing law.[11] Scholars maintain there is little difference between the Arizona system and the override as the judge retains the ultimate power for sentencing in both.[12] Yet appellate courts in Alabama and Florida that have reviewed cases brought under *Ring* have been reluctant to strike down their own laws for fear of "seriously undermining citizens' faith in [their] judicial system[s]."[13] Florida Supreme Court Justice Charles Wells warned that if *Ring*

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[5] Adam Liptak, *Fewer Death Sentences Likely if Juries Make Ultimate Decision, Experts Say*, N.Y. TIMES, June 25, 2002, at A21 (citing Stephen B. Bright of the Southern Center for Human Rights on the number of Alabama overrides); E-mail from Michael L. Radelet, Professor, University of Colorado (Nov. 4, 2003, 03:20:15 CST) (on file with author) (providing data on the Florida overrides).

[6] LaTour Rey Lafferty, *Florida's Capital Sentencing Jury Override: Whom Should We Trust to Make the Ultimate Ethical Judgment?*, 23 FLA. ST. U. L. REV. 463, 475-76 (1995) (citing Sue Carlton, *Juries Could Lose Court Clout*, ST. PETERSBURG TIMES, May 22, 1995, at B9).

[7] *See infra* notes 88-89.

[8] *See* Burnside, *supra* note 3; Erlich, *supra* note 3; Mello, *supra* note 3; Radelet & Mello, *supra* note 3.

[9] 536 U.S. 584, 607 (2002).

[10] *Id.* at 607-08.

[11] *Id.*

[12] Liptak, *supra* note 5, at A21 (quoting Professor Lawrence Marshall, Northwestern University School of Law and Professor James S. Liebman, Columbia University School of Law); *see also* Brad Smith, *A Say in Matters of Life and Death*, TAMPA TRIB., Dec. 29, 2002, at 1 (discussing how the Court's invalidation of the Arizona law "casts a long shadow" on the Florida system).

[13] Smith, *supra* note 12, at 3. Two recent cases in Alabama and Florida where the courts have refused to invalidate the override are *Martin v. State*, No. CR-99-2249, 2003 WL 21246587 (Ala. Crim. App. May 30, 2003) and *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) (per curiam).

invalidates the Florida system, most of Florida's death row inmates would have a new basis for challenging their sentences, which would have a "catastrophic effect on the administration of justice."[14]

Fearing the worst, state legislators have introduced bills to reform the override, believing that ultimately the current system will have to change.[15] Thus, with speculation surrounding the override's future,[16] it is appropriate to review long-standing constitutional concerns about the system and to further explore why the state courts are upholding the override, despite the seemingly obvious dictates of *Ring*.

Equally important, this Comment sets forth reasons why the override should not be completely overhauled, as some have advocated, and why a return to the system's original purpose is needed.[17] The controversial life-to-death override should be abolished, but the death-to-life override, where the trial judge acts as a check on the sentencing process, should be retained. In fact, the Illinois Commission on Capital Punishment recently recommended adopting a variation on the death-to-life override as part of that state's capital sentencing reform process.[18] The "catastrophic effect" of striking down the override laws can be avoided with common-sense reforms that retain many of the safeguards that served as the impetus for the override design.[19]

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[14] *Bottoson*, 833 So. 2d at 698 (Wells, J., concurring).

[15] Jackie Hallifax, *State Lawmakers Consider Giving Life Decision to Capital Juries*, ASSOCIATED PRESS NEWSWIRES PLUS, Jan. 8, 2003 (citing Florida State Senator Rod Smith's bill, S.B. 120, Reg. Sess. (Fla. 2003), which would have prohibited judges from overriding jury recommendations of life sentences). Senate Bill 120 died in the Committee on Criminal Justice on May 2, 2003. In Alabama, State Senator Rodger Mell Smitherman proposed similar legislation on Feb. 3, 2004 "to prohibit a court from overriding a jury verdict." S.B. 190, Reg. Sess. (Ala. 2004).

[16] John Gibeaut, *States Revisit Death Sentence Cases, Prosecutors Look to Preserve Capital Rulings in Wake of High Court Decision*, ABA J. E-REPORT (June 28, 2002), *at* http://www.abanet.org/journal/ereport/j28death.html (last visited Mar. 3, 2003).

[17] *See* Burnside, *supra* note 3; Erlich, *supra* note 3; Mello, *supra* note 3.

[18] COMM'N ON CAPITAL PUNISHMENT, STATE OF ILL., REPORT OF THE GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, GEORGE H. RYAN, GOVERNOR 152 (2002), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_11.pdf ("In cases where the trial judge does not concur in the imposition of the death penalty, the defendant shall be sentenced to natural life as a mandatory alternative . . . .").

[19] See Part III, *infra*, for a discussion of the original policy rationales set forth for adopting the override. Justice Stevens in *Harris v. Alabama*, 513 U.S. 504, 521 n.6 (1995) (Stevens, J., dissenting), noted: "I have always believed the legislative decision to authorize an override was intended to protect the defendant from the risk of an erroneous jury decision to impose the death penalty." This Comment provides reform suggestions in Part V that make the system consistent with this original understanding.

Part II reviews the history of how the override developed in response to the U.S. Supreme Court's landmark decision in *Furman v. Georgia*[20] and details the capital sentencing process in Florida and Alabama, the only two states to use the override. Part III explores the various policy rationales for the system, explaining how it was adopted as a check on "inflamed" juries and how the data suggests it is used differently in practice. Part IV reviews constitutional challenges made by defendants who have had jury recommendations of life overridden, including arguments made on Sixth, Eighth and Fourteenth Amendment grounds. Finally, Part V concludes that the life-to-death override fails to adequately safeguard capital defendants' constitutional rights and makes suggestions for how the system can be improved with modifications.

II. BACKGROUND ON THE OVERRIDE AND A REVIEW OF THE STATUTORY SCHEME

A. *FURMAN* REQUIRED GUIDED DISCRETION

In *Furman v. Georgia*, the U.S. Supreme Court held that juries alone could not have complete discretion over sentencing a defendant to death.[21] Motivated by concern that racial discrimination was influencing the sentencing process,[22] the *Furman* Court held that by not providing proper guidance to jurors, state and federal death penalty laws in 1972 violated the Eighth Amendment's ban on cruel and unusual punishments as it is applied to the states through the Fourteenth Amendment.[23]

Justice Stewart's concurrence noted that jury discretion was being administered in a "freakish" and "wanton"[24] manner, providing no clear explanation for why some defendants are sentenced to death and others

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[20] 408 U.S. 238 (1972).

[21] *Id.* at 239-40.

[22] *Id.* at 249-53 (Douglas, J., concurring). Justice Douglas expressed concern that the system singled out minorities and the poor:

> [W]e know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position . . . . [T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual" punishments.

Id. at 255-57 (Douglas, J., concurring).

[23] *See id.* at 238.

[24] *Id.* at 310 (Stewart, J., concurring) (characterizing death as "'wantonly and . . . freakishly' inflicted").

spared.[25] The *Furman* Court thus required that a "[s]entencer's discretion . . . be properly channeled and guided so as to minimize the risk that death will be imposed arbitrarily and capriciously."[26] While not a per se constitutional violation, the inconsistent manner in which death was handed down ran contrary to the Court's mandate that it be imposed with heightened scrutiny.[27] The *Furman* ruling struck down state and federal death penalty laws, requiring that all new statutory schemes be "reasoned and controlled, rather than capricious and discriminatory."[28]

As a result, thirty-five states responded by enacting new laws that either created mandatory death sentences for certain offenses or provided more guidance for capital juries.[29] In *Woodson v. North Carolina*, the

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[25] Generally, in death penalty cases, the Court asks: (1) whether death comports with community values and evolving standards of decency; (2) whether the sentence is proportionate to the offense; and (3) whether the death sentence was administered in a non-arbitrary manner. Erlich, *supra* note 3, at 1407-08. The jury override was developed as an attempt to meet the standards associated with the "non-arbitrary" factor. *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, 52-55 (1985).

[26] Erlich, *supra* note 3, at 1412 (citing *Furman*, 408 U.S. at 313 (White, J., concurring)).

[27] *See* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (the Court noted that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed").

[28] State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973) (citing *Furman*'s effect).

[29] Erlich, *supra* note 3, at 1413 (citing Alan 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, 66-67 (1995)); *see* Gregg v. Georgia, 428 U.S. 153, 179-80 n.23 (1976) (citing the following state statutes that were enacted to establish new death penalty laws in the wake of *Furman*, including: ALA. H.B. 212, §§ 2-4, 6-7 (1975); ARIZ. REV. STAT. ANN. §§ 13- 452 to 13-454 (Supp. 1973); ARK. CODE ANN. § 41-4706 (Supp. 1975); CAL. PENAL CODE §§ 190.1, 209, 219 (Supp. 1976); COLO. REV. STAT. 1974, c. 52, § 4; CONN. GEN. STAT. §§ 53a-25, 53a-35(b), 53a-46a, 53a-54b (1975); DEL. CODE ANN. tit. 11, § 4209 (Supp. 1975); FLA. STAT. ANN. §§ 782.04, 921.141 (Supp. 1975-1976); GA. CODE ANN. §§ 26-3102, 27-2528, 27-2534.1, 27-2537 (Supp. 1975); IDAHO CODE § 18-4004 (Supp. 1975); ILL. COMP. ANN. STAT. c. 38, §§ 9-1, 1005-5-3, 1005-8-1A (Supp. 1976-1977); IND. CODE ANN. § 35-13-4-1 (1975); KY. REV. STAT. ANN. § 507.020 (1975); LA. REV. STAT. ANN. § 14:30 (Supp. 1976); MD. ANN. CODE, ART. 27, § 413 (Supp. 1975); MISS. CODE ANN. §§ 97-3-19, 97-3-21, 97-25-55, 99- 17-20 (Supp. 1975); MO. ANN. STAT. §§ 559.009, 559.005 (Supp. 1976); MONT. REV. CODES ANN. § 94-5-105 (Spec. Crim. Code Supp. 1976); NEB. REV. STAT. §§ 28-401, 29-2521 to 29-2523 (1975); NEV. REV. STAT. § 200.030 (1973); N.H. REV. STAT. ANN. § 630:1 (1974); N.M. STAT. ANN. § 40A-29-2 (Supp. 1975); N.Y. PENAL LAW § 60.06 (1975); N.C. GEN. STAT. § 14-17 (Supp. 1975); OHIO REV. CODE ANN. §§ 2929.02-2929.04 (1975); OKLA. STAT. ANN. tit. 21, §§ 701.1-701.3 (Supp. 1975-1976); 1974 Pa. Laws, Act No. 46; R.I. GEN. LAWS ANN. § 11-23-2 (Supp. 1975); S.C. CODE ANN. § 16-52 (Supp. 1975); TENN. CODE ANN. §§ 39-2402, 39-2406 (1975); TEX. PENAL CODE ANN. § 19.03(a) (1974); UTAH CODE ANN. §§ 76-3-206, 76-3-207, 76-5-202 (Supp. 1975); VA. CODE ANN. §§ 18.2-10, 18.2-31

Court struck down the mandatory death penalty statutes for certain offenses that had been enacted in ten states, citing their failure to take defendants' individual circumstances into account, as required by the Eighth Amendment.[30]

Citing the presence of clear standards for guiding jury discretion,[31] the Court in *Gregg v. Georgia*, *Profitt v. Florida*, and *Jurek v. Texas*[32] upheld the statutes enacted in the other twenty-five states,[33] all of which provided for a bifurcated trial, where the jury first determines the defendant's guilt, and then determines the existence of specific aggravating and mitigating factors in a separate hearing during the sentencing phase.[34] By focusing the jury on aggravating and mitigating factors, these so-called "guided discretion statutes"[35] prohibited juries from deciding the issue of life or death based on gut reaction alone.[36]

Furthermore, the Court detailed the features of the new laws that better protect defendants' constitutional rights. The Court in *Gregg* specified three safeguards that must be present: bifurcation (having two successive phases of conviction and then sentencing);[37] balancing of aggravating and mitigating circumstances where at least one aggravating factor must be found to justify death;[38] and direct review of death penalty verdicts by the

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(1976); WASH. REV. CODE §§ 9A.32.045, 9A.32.046 (Supp. 1975); WYO. STAT. ANN. § 6-54 (Supp. 1975)).

[30] 428 U.S. 280, 304 (1976); *see also* Erlich, *supra* note 3, at 1414-15 (citing *Woodson*, 428 U.S. at 298-304).

[31] *Gregg*, 428 U.S. at 198 (quoting Coley v. State, 204 S.E. 2d 612, 615 (Ga. 1974)).

[32] *See* David A. Scheffel, Harris v. Alabama—*A Portrait of Deference to the States in Capital Punishment*, 19 T. JEFFERSON L. REV. 39, 40 (1997) (providing the background for these cases: *Gregg*, 428 U.S. 153; Profitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976)).

[33] Erlich, *supra* note 3, at 1409-10 (citing Kathleen Weron, *Rethinking Utah's Death Penalty Statute: A Constitutional Requirement for the Narrowing of Aggravating Circumstances*, 1994 UTAH L. REV. 1107, 1112-13, for a list of the twenty-five states whose schemes were upheld).

[34] *Id.* at 1415.

[35] *Id.* at 1414 (citing Weron, *supra* note 35, at 1113 (referring to states' attempts to give greater guidance to jurors)).

[36] *Gregg*, 428 U.S. at 197.

[37] Jason C. Tran, *Death by Judicial Overkill: The Unconstitutionality of Overriding Jury Recommendations Against the Death Penalty*, 30 LOY. L.A. L. REV. 863, 865 (1997) (citing *Gregg*, 428 U.S. at 195).

[38] *Id.* (citing *Gregg*, 428 U.S. at 196-97). For example, under section 921.141(1)-(5) of the Florida statute, a majority of the jury must find that at least one aggravating factor exists to recommend death. The list of aggravating factors under section 921.141(5) include: (a) the felony was committed by a defendant under sentence of imprisonment; (b) the defendant was previously convicted of another capital felony involving the use of violence; (c) the defendant knowingly created a great risk of harm to many persons; (d) the capital felony was

state's highest court.[39] In *Gregg*, *Profitt*, and *Jurek*, the Court upheld the re-enacted statutes in Georgia, Florida, and Texas respectively, as having encompassed these safeguards.[40]

Among the states that adopted "guided discretion statutes," three distinct types of capital sentencing schemes emerged, where either juries have exclusive sentencing authority; judges have exclusive sentencing authority; or juries play an advisory role to the judge, who ultimately renders the final verdict.[41] Thus, while states differed in their approach to complying with *Furman*, the systems developed by the states to avoid arbitrary sentencing either gave the judge or jury exclusive power, or combined power in both. The latter approach—the override—combines the features of the two extremes in its hybrid scheme.

B. THE STATUTORY SCHEME

The override complies with the *Furman* decision by requiring separate trial and sentencing phases, followed by automatic appellate review.[42] After a defendant is found guilty of a capital crime as prescribed by state law,[43] a sentencing hearing is held before the same judge and jury to

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committed during the commission of a robbery, sexual battery, arson, burglary, or kidnapping; (e) the felony was committed for the purpose of avoiding law enforcement; (f) the felony was committed for pecuniary gain; (g) the offense was committed to disrupt or hinder the enforcement of the laws; or (h) the offense was especially heinous, atrocious, or cruel. FLA. STAT. ANN. § 921.141 (West 2001).

[39] *Id.* (citing *Gregg*, 428 U.S. at 198, 204).

[40] *Gregg*, 428 U.S. at 207; Profitt v. Florida, 428 U.S. 242, 259-60 (1976); Jurek v. Texas, 428 U.S. 262, 276-77 (1976).

[41] Tran, *supra* note 37, at 866-67 (noting that of the thirty-eight states that have the death penalty today, thirty give sole sentencing discretion to the jury; four states, including Arizona, Idaho, Montana, and Nebraska, give this authority to the judge; Nevada gives sentencing authority to a three-judge panel; and four states used to give juries an advisory role and allow judges to override the jury recommendation, including Alabama, Delaware, Florida, and Indiana). The Delaware and Indiana legislatures, however, passed legislation changing their systems such that the trial judge must now accept the jury's findings with respect to aggravating factors, thus transforming the jury's advisory role. *See* DEL. CODE ANN. tit. 11 § 4209 (2001) ("A sentence of death shall not be imposed unless the jury, if a jury is impaneled, first finds unanimously and beyond a reasonable doubt the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of this section. . . ."); IND. CODE ANN. § 35-50-2-9(d) (Michie 1998) ("The court shall instruct the jury that, in order for the jury to recommend to the court that the death penalty or life imprisonment without parole should be imposed, the jury must find at least one (1) aggravating circumstance beyond a reasonable doubt . . . .").

[42] *See* ALA. CODE § 13A-5-39, 40, 43, 47, 53 (1994); FLA. STAT. ANN. § 921.141(1)-(8).

[43] Under section 13A-5-40 of the Alabama Code, the defendant must be found guilty of one of five enumerated capital offense categories before the death penalty will be imposed. ALA. CODE § 13A-5-40.

determine whether the defendant receives life imprisonment or death.[44] At the conclusion of the hearing, the jury weighs aggravating and mitigating circumstances in rendering an advisory verdict.[45] In Florida, a simple majority of the jury determines the advisory verdict, after which the judge hands down the final verdict.[46] In Alabama, the jury's advisory recommendation must be based on a vote of at least ten jurors.[47] The judge in each state is also required to weigh aggravating and mitigating circumstances in making a written decision, to better facilitate appellate review.[48]

Under section 921.141(4) of the Florida Statutes, all death sentences must be reviewed by the Florida Supreme Court. By contrast, section 13A-5-53 of the Alabama Code calls for appellate review of death sentences by the Alabama Court of Criminal Appeals only, although this court's findings may be reviewed by the Alabama Supreme Court. Appellate review under section 13A-5-53 includes a proportionality test and "weighing of the aggravating and mitigating circumstances,"[49] but the weighing of factors is based on the judge's factual findings, not on the jury's.

As an additional protection in Florida, the state supreme court held in *Tedder v. State*[50] that a trial judge may only override a jury's advisory verdict if the facts are "so clear and convincing that virtually no reasonable person could differ."[51] Alabama has not adopted the same standard. In *Harris v. Alabama*,[52] the defendant argued the *Tedder* standard was required, but the U.S. Supreme Court disagreed: "The Constitution . . . [is] not offended when a State requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight."[53] Alabama judges are thus given enormous discretion, leading to the perception that the override gives them "unchecked power."[54] As the next sections discuss, the vesting of ultimate authority to sentence death with the

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[44] ALA. CODE § 13A-5-46; FLA. STAT. ANN. § 921.141(1)-(2).

[45] ALA. CODE § 13A-5-46; FLA. STAT. ANN. § 921-141(1)-(2).

[46] FLA. STAT. ANN. § 921.141(3).

[47] ALA. CODE § 13A-5-46(f).

[48] *Id.* § 13A-5-46(d); FLA. STAT. ANN. § 921.141(3).

[49] ALA. CODE § 13A-5-53(b)(2).

[50] 322 So. 2d 908, 910 (Fla. 1975) ("In order to sustain a sentence of death following 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.").

[51] *Id.*

[52] 513 U.S. 504, 506 (1995).

[53] *Id.* at 515; *see* Erlich, *supra* note 3; Tran, *supra* note 37.

[54] Erlich, *supra* note 3, at 1431.

trial judge has proven problematic on both policy and constitutional grounds.

III. POLICY CONSIDERATIONS

A. THE DEATH-TO-LIFE OVERRIDE: A NECESSARY SAFEGUARD

The states envisioned the override as a check against the arbitrary manner in which the U.S. Supreme Court believed the death penalty was being handed down in *Furman*.[55] By permitting the trial judge to override an "inflamed" jury,[56] the state in theory was adding protection for capital defendants. In fact, in *Dobbert v. Florida*,[57] a case in which the Court upheld the Florida override scheme, Justice Rehnquist emphasized this point:

> [T]he new statute affords significantly more safeguards . . . . Death is not automatic, absent a jury recommendation of mercy, as it was under the old procedure. . . . [U]nlike the old statute, a jury determination of death is not binding. Under the new statute, defendants have a second chance for life with the trial judge and a third, if necessary, with the Florida Supreme Court.[58]

In rejecting a jury's advisory sentence, the judge is called upon to set aside emotion and to apply the law consistently. The most recent case of a death-to-life override in Florida illustrates how the system is designed to work. Walter Morris, the defendant, was sentenced to death for the 1997 beating of two-year-old Dustin Gee.[59] Morris, the boyfriend of the boy's mother, beat the child to death after Gee blocked his view of the television as he watched professional wrestling.[60] Standing over six feet tall and weighing 260 pounds, Morris struck the child several times, stepped on his head, kicked him in the stomach, and shook him violently, snapping his neck before Gee eventually died.[61] Despite these gruesome facts, the judge ruled that a death sentence was not appropriate as the boy's death "was not planned or done with premeditation [and] came about as a result of [Morris's] inability to control his temper."[62] Morris's own history of

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[55] *See* Mello & Robson, *supra* note 25, at 52-55.

[56] Lafferty, *supra* note 6, at 476.

[57] 432 U.S. 282, 295 (1977).

[58] *Id.* at 295-96.

[59] State v. Morris, No. CRC9722749CFANO (Fla. Cir. Ct. Feb. 15, 2001); William R. Levesque, *2-Year-Old Boy's Killer Avoids Death Penalty*, ST. PETERSBURG TIMES, Feb. 16, 2001, at 1B.

[60] Levesque, *supra* note 59, at 1B.

[61] *Id.*

[62] *Id.*

emotional and physical abuse as a child played a factor in the judge's decision.[63]

Given Morris's savage crime against such a helpless victim, it was not surprising that the jury recommended death. The trial judge, however, acted as a check on the jury's emotional response in deciding that Morris's conduct, although despicable, did not rise to the level of a capital offense under the law.

In practice, judges have used their authority in this way on limited occasion. In Florida, there have been over 800 cases in which a trial judge sentenced a defendant to death following a jury's recommendation of death,[64] but only sixty-four cases[65] where a judge used the death-to-life override. In Alabama, there have been only seven cases in which a judge used the death-to-life override altogether.[66]

While the death-to-life override has been rarely used, the need for such a safeguard is underscored by research finding that juries often fail to apply the law correctly to the facts and circumstances in capital cases.[67] The Capital Jury Project[68] (CJP) has concluded that jurors make up their minds whether to impose life or death well before the sentencing phase begins, frequently misunderstand the trial judge's instructions, and report in surveys that they "lower the level of their responsibility at the sentencing

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[63] *Id.*

[64] Michael Radelet, Recent Developments in the Death Penalty in Florida, Paper Presented at a Conference of the Florida Public Defender Association (Sept. 7, 2001), *at* http://www.cuadp.org/florida/fldpinfo.html (last visited Mar. 4, 2004) ("819 post-*Furman* cases decided by the Florida Supreme Court on direct appeal in which a defendant was sentenced to death following a jury recommendation of death").

[65] E-mail from Michael L. Radelet, *supra* note 5.

[66] Liptak, *supra* note 5, at A21 (citing Stephen Bright of the Southern Center for Human Rights for the figure of seven death to life overrides); *see also* EQUAL JUSTICE INITIATIVE OF ALABAMA, REPRESENTATION OF DEATH ROW PRISONERS, *at* http://www.eji.org/representation.html (last visited Mar. 4, 2004) (noting that 190 inmates currently sentenced to death in Alabama).

[67] Lafferty, *supra* note 6, at 477 ("[F]indings suggest that an experienced trial judge, rather than a reluctant jury, is better equipped to reflect community sentiment.").

[68] Lafferty explains that the Capital Jury Project is:

> an attempt to analyze how capital juries decide between life or death sentences. The intent is to examine 'the extent to which jurors' exercise of capital sentencing discretion is still infected with, or now cured of, the arbitrariness which the United States Supreme Court condemned in *Furman v. Georgia*, and the extent to which the principal kinds of post-*Furman* guided discretion statutes are curbing arbitrary decision-making—as the Court said they would in *Gregg v. Georgia* and its companion cases.

Id. at 476 (quoting William Bowers, *The Capital Jury Project; Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1043 (1995)).

stage."[69] The CJP researchers, who conducted interviews with eighty-three jurors in the early 1990's, also report that jurors do not adequately understand death penalty instructions.[70] Given these findings, the trial judge's oversight and authority to override a confused jury is a welcome safeguard. As the late Governor Lawton Chiles noted, the override presents "a unique and delicate balance of a jury's expression of community values and a judge's expertise regarding the application of the law."[71]

Other scholars have noted another significant benefit of the death-to-life override: judicial efficiency.[72] As outlined in Part II.B, both override states provide for automatic appellate review when a defendant is sentenced to death.[73] In cases where the jury recommends death, the Florida Supreme Court more often than not reduces these sentences to life imprisonment based on proportionality concerns.[74] By providing for immediate "judicial intervention" at the trial level, the death-to-life override "allows an early and efficient means to filter out cases for which the death penalty is inappropriate."[75]

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[69] Scheffel, *supra* note 32, at 50 (citing Bowers, *supra* note 68, at 1044); *see also* Tran, *supra* note 37, at 884 (quoting Caldwell v. Mississippi, 472 U.S. 320, 331 (1985) (Stevens, J., dissenting) ("This desire [to 'send a message'] might make the jury very receptive to the prosecutor's assurance that it can more freely 'err because the error may be corrected on appeal.'")). In *Caldwell*, the Supreme Court held that it is "constitutionally impermissible" to sentence a defendant to death by jurors who were "led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29. The Florida Supreme Court upheld the right of prosecutors, however, to mention the advisory role of the jury in *Card v. State*. 803 So. 2d 613, 628 (Fla. 2001) (quoting Brown v. State, 721 So. 2d 274, 283 (Fla. 1998) ("holding that the standard jury instructions fully advise the jury of the importance of its role, correctly state the law, do not denigrate the role of the jury, and do not violate *Caldwell*")).

[70] Scheffel, *supra* note 32, at 50.

[71] Lafferty, *supra* note 6, at 477 (quoting Florida Governor Lawton Chiles' Veto of Fla. House Bill 1319 (1995) and a letter from Gov. Chiles to Secretary of State Sandra B. Mortham, June 14, 1995) (on file with Sec'y of State, the Capitol, Tallahassee, Fla.); *see also Chiles Vetoes Jury Recommendation Bill*, FLA. TIMES-UNION, June 15, 1995, at B5. However, Governor Chiles was later quoted as saying, "I think we'd be better . . . if we did away with the override." Erlich, *supra* note 3, at 1452 (quoting Ellen McGarrahan, *State Ponders Changing Steps to Execution*, MIAMI HERALD, Mar. 3, 1991, at 6B). But, as Erlich notes, this did not stop Gov. Chiles from signing a death warrant for Robert Francis, who had his life sentence increased to death pursuant to the override statute. *Id.*

[72] Radelet & Mello, *supra* note 3, at 208.

[73] FLA. STAT. ANN. § 921.141(4) (West 2001); ALA. CODE § 13A-5-53 (1994).

[74] Radelet & Mello, *supra* note 3, at 208 n.72 (citing cases where the Florida Supreme Court reduced sentences to life).

[75] *Id.*

B. HIGH ERROR RATES BOLSTER NEED FOR SAFEGUARDS

When former Illinois Governor George Ryan commuted the sentences of all of Illinois's death row inmates on January 11, 2003,[76] he cited his belief that Illinois's system "is haunted by the demon of error: error in determining guilt and error in determining who among the guilty deserves to die."[77] Concern over errors in capital punishment is certainly not limited to Illinois. As of December 2003, 112 death row inmates have been found innocent and released from prison.[78] As recently as August 2003, a federal judge in Boston noted that "substantial evidence has emerged to demonstrate that innocent individuals are sentenced to death, and undoubtedly executed, much more than previously understood,"[79] and that the crucial question left before declaring the death penalty unconstitutional is "how large a fraction of the executed must be innocent to offend contemporary standards of decency."[80]

The two override states have particularly poor records in this area. Florida ranks first among states in number of exonerations, with twenty-four death row inmates having been released due to evidence of their innocence.[81] Alabama's error rate is similarly high, where it is estimated that at least three-fourths of all capital cases have been subject to some form of error.[82] The high error rate in the override states is even more appalling considering that Florida ranks second in the nation for juvenile executions with thirty-one, and Alabama ranks third with eighteen.[83] The override states also lie in the heart of the "death belt," the region of the country

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[76] *See* Governor George Ryan, Address at Northwestern University College [sic] of Law (Jan. 11, 2003), *available at* http://www.cuadp.org/20030111ryan.html.

[77] *Id.*

[78] American Civil Liberties Union, *A Question of Innocence*, *at* http://www.aclu.org/DeathPenalty/DeathPenalty.cfm (Dec. 9, 2003). For an excellent discussion of wrongful convictions, see MICHAEL RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992) or BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000).

[79] Adam Liptak, *Judge Says Enough Doubt Exists to End Capital Punishment*, CHI. TRIB., Aug. 12, 2003, at C13 (quoting U.S. District Court Judge Mark Wolf).

[80] *Id.*

[81] American Civil Liberties Union of Florida, *Legal Issues, The Death Penalty System*, *at* http://www.aclufl.org/legalissuesdec2002.html (Dec. 2002).

[82] *Id.*

[83] *Id.* In addition, Alabama has been cited as having "the worst criminal defense system in the country, according to the American Bar Association." Chris Adams, *Faces of Innocence, Condemned to Die Alone: Injustice on Death Row in Alabama*, CHAMPION, Nov. 2001, at 13 (citing Ken Silverstein, *The Judge as Lynch Mob: How Alabama Judges Use Judicial Overrides to Disregard Juries and Impose Death Sentences*, AMERICAN SPECTATOR, May 7, 2001, at 26).

spanning from Texas to Virginia where over eighty percent of executions occur,[84] and thus safeguard efforts like the death-to-life override have the potential to cut error rates for a large portion of capital defendants.

C. THE LIFE-TO-DEATH OVERRIDE: A STEP BACKWARD

Where the death-to-life override provides additional safeguards, the life-to-death override provides an additional opportunity for the defendant to be put to death. Contrary to what many legislators thought when they drafted the override laws,[85] judges use the life-to-death override more frequently. As of November 2003, there have been 167 life-to-death overrides in Florida compared to just sixty-four death-to-life overrides.[86] In Alabama, as of late 2002, there had been eighty-three life-to-death overrides compared to just seven death-to-life overrides.[87]

In addition to subjecting capital defendants to another opportunity to be sentenced to death, the life-to-death override is inefficient, as one author reports that in roughly eighty percent of the cases where the judge overrode the jury's life recommendation in Florida, the state supreme court reversed the trial judge.[88] The Florida Supreme Court spends about half of its time on death penalty cases, which places considerable strain on its ability to efficiently handle its docket.[89] In fact, the court appointed a Supreme Court Workload Commission in 2000 to suggest reforms.[90] By giving trial judges the life-to-death override, the legislature forces the state supreme court to spend its time inefficiently on cases it overwhelmingly reverses.

The strongest criticism of the life-to-death override scheme, however, has come on constitutional grounds. Since 1972, when Florida was the first

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[84] American Civil Liberties Union of Florida, *supra* note 81.

[85] Liptak, *supra* note 5, at A21:

> Mr. Tabak [co-chairman of the American Bar Association committee on the death penalty] said that proponents of the legislation giving judges the death penalty decision in Florida and Alabama were surprised by these trends [that judges override life to death more often than death to life]. They thought they were protecting defendants against inflamed juries.

[86] E-Mail from Michael L. Radelet, *supra* note 5.

[87] Liptak, *supra* note 5, at A21 (quoting Stephen B. Bright of the Southern Center for Human Rights).

[88] Carrie A. Dannenfelser, Burch v. State: *Maintaining the Jury's Traditional Role as the Voice of the Community in Capital Punishment Cases*, 60 MD. L. REV. 417, 436 (2001); *see also* Erlich, *supra* note 3, at 1432 ("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.").

[89] Martin Dyckman, *Death Penalty is Costly, Capricious*, ST. PETERSBURG TIMES, Feb. 11, 2001, at 3B.

[90] *Id.*

state to enact an override statute,[91] opponents have challenged the constitutionality of the system on Eighth and Fourteenth Amendment grounds.

IV. CONSTITUTIONAL CHALLENGES

A. EIGHTH AND FOURTEENTH AMENDMENT CONCERNS

Two strong challenges to the life-to-death override have been grounded in the Fourteenth Amendment due process guarantee[92] and the Eighth Amendment's ban on cruel and unusual punishments[93] as it is applied to the states through the Fourteenth Amendment.[94] One of the strongest due process challenges came in the case of *Profitt v. Florida*,[95] where the defendant was convicted of first-degree murder and sentenced to death.[96] Profitt argued that Florida's override statute did not adequately ensure due process guarantees because it failed to give the judge and jury specific sentencing guidelines for weighing aggravating and mitigating circumstances. The U.S. Supreme Court upheld the override, ruling that it adequately guides and channels sentencing discretion.[97] As part of its rationale, the Court noted that judges' experience and expertise are welcome additions to the capital sentencing process.[98]

The very nature of the death penalty, however, runs contrary to the spirit of the Fourteenth Amendment's guarantee of "life."[99] The Court applies heightened scrutiny when depriving citizens of this most fundamental right.[100] The central concern is that as elected officials, state

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[91] Tran, *supra* note 37, at 872.

[92] U.S. CONST. amend. XIV, § 1.

[93] *Id.* amend. VIII.

[94] *Id.* amend. XIV.

[95] 428 U.S. 242 (1976).

[96] *Id.* at 246.

[97] *Id.* at 258.

[98] *Id.* at 252:

> And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

[99] U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law . . . [that] deprive[s] any person of life, liberty, or property, without due process of law . . . .").

[100] Spaziano v. Florida, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part, dissenting in part) (remarking that "the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards").

judges are unable to stay objective in the face of political pressures.[101] In *Tumey v. Ohio*,[102] the Court held that where a judge is tempted by political reward and finds herself in two "inconsistent positions" (as a politician and as a judge), there "necessarily involves a lack of due process of law in the trial of defendants charged before [her]."[103] In addition, empirical evidence suggests that judges do, in fact, succumb to political pressure. According to The Equal Justice Initiative, "there is a statistically significant correlation between judicial override and election years in most counties where these overrides take place. . . . [I]t is [a clear] example of the precise dynamic of politics in the administration of the death penalty."[104]

Delaware provides an illustration of this point, as until recently it was an override state that appointed its judges. In all seven cases where the override was used, Delaware judges overrode jury recommendations from death-to-life.[105] This record is consistent with the results override advocates in Florida and Alabama predicted when drafting their laws.[106] Delaware's experience suggests politics plays a role in a judge's decision and that judges generally choose life in the absence of political pressure.

On Eighth Amendment grounds, the argument is that only the jury, as a reflection of the community, should assess what constitutes "cruel and unusual punishments."[107] Justice Stevens has written that the death penalty's only "credible justification" is that it is an "expression of the community's outrage. To permit the state to execute [the defendant] in

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[101] For an excellent discussion of judges who pandered to political constituencies and were rebuked by the federal courts, see Erlich, *supra* note 3, at 1442-45. *See also* Karin E. Garvey, *Eighth Amendment—The Constitutionality of the Alabama Capital Sentencing Scheme*, 86 J. CRIM L. & CRIMINOLOGY 1411, 1433-35 (1996).

[102] 273 U.S. 510, 534 (1927).

[103] Burnside, *supra* note 3, at 1044-47 (citing *Tumey v. State*, 273 U.S. 510, 534 (1927)); *see also* Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. Rev. 308, 310 (1997) (quoting Justice Stevens's Opening Assembly Address on Aug. 3, 1996 at the American Bar Association meeting in Orlando: "[I]t was never contemplated that the individual who has to protect our individual rights would have to consider what decision would produce the most votes.").

[104] Burnside, *supra* note 3, at 1039 (quoting *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 FORDHAM URB. L.J. 239, 254 (1994)).

[105] Liptak, *supra* note 5, at A21 (citing Delaware as the only state with both an override scheme and appointed judges).

[106] *See id.* (quoting Robert Tabak regarding how override advocates thought they were protecting defendants against inflamed juries, not subjecting them to harsher punishment).

[107] U.S. CONST. amend. VIII, § 1.

spite of the community's considered judgment that [the defendant] should not die is to sever the death penalty from its only legitimate mooring."[108]

The Court, however, has rejected the argument that the override violates the Eighth Amendment. The leading challenge on Eighth Amendment grounds came in *Harris v. Alabama*,[109] where the defendant was convicted of having her husband killed for $250,000 in insurance benefits.[110] Because of the defendant's history as a hardworking, caring mother, the jury voted seven-to-five to sentence her to life in prison without parole, but the trial judge overrode the jury's advisory verdict finding that the one aggravating factor, murder for pecuniary gain, was sufficient to warrant death.[111]

The Court held that the "Eighth Amendment does not require the state to define the weight the sentencing judge must accord to an advisory verdict" nor does it require the *Tedder* rule, which the Court praised in earlier cases.[112] The majority decided it would not "micromanage"[113] the manner in which states drafted their capital sentencing laws. So long as the system avoided the arbitrariness warned against in *Furman,* the override would be constitutional.[114]

B. THE SIXTH AMENDMENT CHALLENGE

The Sixth Amendment provides a defendant "the right to a speedy and public trial, by an impartial jury of the State and district where the crime shall have been committed."[115] The language of the Sixth Amendment does not specify that sentencing be conducted by a jury. One commentator argues, however, that if you have a right to a public trial, it is more appropriate that jurors, as community representatives, "have the last say on whether a fellow citizen should live or die."[116] In addition, scholars argue the guilt and sentencing phases are part of the same public trial and thus jury protections should extend to both.[117]

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[108] Harris v. Alabama, 513 U.S. 504, 526 (1995) (Stevens, J., dissenting).

[109] 513 U.S. 504 (1995).

[110] *Id.* at 507.

[111] *Id.* at 508.

[112] Scheffel, *supra* note 32, at 53 (quoting *Harris*, 513 U.S. at 512).

[113] *Harris*, 513 U.S. at 524.

[114] *Id.* When *Harris* was decided, the Court upheld the schemes of the judge-only sentencing states and it thus would not have been likely to have found the override unconstitutional.

[115] U.S. CONST. amend. VI.

[116] Tran, *supra* note 37, at 885.

[117] See *id.* at 886 for this discussion.

The watershed case for challenging the override on Sixth Amendment grounds came in a seven-to-two decision by the Court in *Ring v. Arizona*,[118] where it ruled that a judge may not add to a sentence beyond what accords with a jury's verdict in death penalty cases. *Ring* extended the Court's earlier decision in *Apprendi v. New Jersey*,[119] where it held that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be . . . submitted to a jury, and proven beyond a reasonable doubt."[120]

The Court agreed to hear *Ring* to determine whether a trial judge, sitting alone, could determine the presence of aggravating and mitigating factors for death without violating the defendant's Sixth Amendment right to a jury trial.[121] The defendant, Timothy Ring, who was convicted in 1994 of felony murder for the death of a Wells Fargo armored truck driver in Glendale, Arizona, was sentenced to death by a trial judge under Arizona law.[122] In order to sentence Ring to death, the trial judge had to find at least one aggravating factor that distinguished Ring's crime from lesser ones.[123] The trial judge found two aggravating circumstances: the crime was committed for pecuniary gain and was particularly cruel and heinous.[124] He found only one mitigating factor, which was that Ring had a minimal criminal record.[125]

In the majority opinion, written by Justice Ginsburg, the Court held that any statute that required, following a jury's verdict of first-degree murder, that the trial judge alone determine the existence of the aggravating factors for the death penalty, violated the defendant's Sixth Amendment right to a jury trial in capital prosecutions.[126] The ruling was a logical extension of *Apprendi* in that the finding of aggravating circumstances increased the maximum sentence from life-to-death.[127] Noting the extension of *Apprendi* to *Ring*, Justice Ginsburg wrote, "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a

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[118] 536 U.S. 584, 608-09 (2002).
[119] 530 U.S. 466 (2000).
[120] *Id.* at 476.
[121] 536 U.S. at 588.
[122] *Id.* at 589-90.
[123] *Id.* at 593.
[124] *Id.* at 594-95.
[125] *Id.* at 595.
[126] *Ring*, 536 U.S. at 584.
[127] *Id.* at 609.

defendant's sentence by two years [as was the case in *Apprendi*], but not the fact-finding necessary to put him to death."[128]

In *Ring*, the Court struck down Arizona's judge-only capital sentencing law,[129] along with the judge-only sentencing schemes in four other states.[130] The question now is whether the *Ring* holding invalidates the override scheme in Alabama and Florida, where the judge is also the final arbiter with respect to the factual findings required to sentence death. If the Court accepts that the override system is essentially a judge-only sentencing scheme, as Justice Stevens did in *Harris*,[131] then the override laws should be struck down as well. The likely response is that in cases where the judge overrides the jury's sentence, she alone has made the factual determinations required for death, which on its face violates the Sixth Amendment as interpreted in *Ring*. However, state appellate courts have upheld the override, although on very tenuous grounds.

C. THE STATES INTERPRET *RING*

The case of *Bottoson v. Moore*[132] reflects the tenuous ground on which the override law in Florida has been upheld after *Ring*. The justices of the Florida Supreme Court in essence concluded that although all signs point to the Florida override being unconstitutional on Sixth Amendment grounds, it was unwilling to take that step without explicit instructions from the Court.[133]

Linroy Bottoson was convicted of first-degree felony murder in Florida in 1979 and was sentenced to death by the trial judge, who determined the aggravating outweighed the mitigating circumstances.[134] The U.S. Supreme Court denied his writ of certiorari as a post-conviction appeal, but stayed his execution in February 2002, placing it in abeyance until it issued its opinion in *Ring* and could determine whether he should be afforded relief under that decision.[135] After handing down *Ring* in June 2002, the Court lifted the stay and sent the case back to the Florida Supreme

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[128] *Id.*

[129] ARIZ. REV. STAT. ANN. §§ 13-452 to 454 (West Supp. 1973).

[130] *Ring*, 536 U.S. at 609 (the states included Idaho, Montana, Nebraska, and Colorado).

[131] Harris v. Alabama, 513 U.S. 504, 516-19 (1995) (Stevens, J., dissenting).

[132] 833 So. 2d 693 (Fla. 2002) (per curiam). The Florida Supreme Court issued an identical opinion in the case of *King v. Moore*, 824 So. 2d 127 (Fla. 2002), where the petitioner, a defendant sentenced to death like Bottoson, sought the same relief. The Florida Supreme Court issued its rulings in these cases on the same day, making the same arguments regarding *Ring*'s effect on the Florida override law.

[133] *Bottoson*, 833 So. 2d at 695.

[134] *Id.* at 693.

[135] *Id.*

Court without explicit instructions to reconsider the case in light of *Ring*.[136] The Florida Supreme Court took this as a sign that *Ring* did not invalidate the Florida override law.

In *Bottoson*, the justices of the Florida Supreme Court were divided over the implications of *Ring*, yet agreed in result that they would not presently invalidate the override.[137] Relying on the U.S. Supreme Court's lack of instruction for the case to be reconsidered in light of *Ring*, the Florida Supreme Court focused heavily on past U.S. Supreme Court precedents that have upheld the Florida override over the past quarter century.[138] The Florida court refused to invalidate the override, citing the rule that in cases where there appears to be a conflict between precedent that directly addressed the issue (i.e., the *Profitt* line of cases) and a separate line of cases where the reasoning might suggest overruling the precedent (i.e., *Ring*), the courts "should follow the case which directly controls, leaving to [the U.S. Supreme Court] the prerogative of overruling its own decisions."[139]

The Florida Supreme Court, in its plurality opinion, noted that the U.S. Supreme Court did not instruct it to reconsider *Bottoson* in light of *Ring*.[140] The Florida court also noted that Bottoson had a prior conviction in his record, which under *Apprendi* is the one allowed exception to the black letter rule.[141] A jury must determine all aggravating factors that lead to a sentence beyond that contemplated in the jury's verdict, except prior convictions.[142] Accordingly, the court held that the *Apprendi* and *Ring* holdings did not apply to Bottoson's specific case.[143] Others, like Justice Wells, focused on policy noting that any extension of *Ring* to the Florida override would have a "catastrophic effect on the administration of justice"

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[136] *Id.*

[137] *Id.*

[138] The Florida Supreme Court listed these U.S. Supreme Court precedents as upholding the override law: *Hildwin v. Florida*, 490 U.S. 638 (1989); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Barclay v. Florida*, 463 U.S. 939 (1983); and *Profitt v. Florida*, 428 U.S. 242 (1976).

[139] Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989).

[140] *Bottoson*, 833 So. 2d at 695 ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

[141] *Id.* at 718-19.

[142] *Id.* at 713 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)) ("*Other than the fact of a prior conviction,* any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

[143] *Id.*

because "all of the individuals on Florida's death row will have a new basis for challenging the validity of their sentences."[144] But several of the Florida justices signaled their concern that *Ring* is, in fact, applicable to the Florida law.[145] In due course, the Florida Supreme Court will likely encounter another case in which the defendant's life sentence has been overridden, but where the issue of a prior conviction is absent.

Chief Justice Anstead's opinion takes direct aim at the Sixth Amendment flaws in the Florida override law. Anstead writes that "*Ring* is clearly the most significant death penalty decision of the U.S. Supreme Court since the decision in *Furman*" and that the Florida court "cannot simply stand mute in the face of such a momentous decision."[146]

Conceding that the Florida Supreme Court had been wrong in its earlier prediction that the Court would not extend *Apprendi* to the death penalty, the Chief Justice cited numerous concerns for the Florida system in the wake of *Ring*.[147] His main concern was that because judges independently make the factual determinations on aggravating factors and then use those findings during sentencing, the scheme violates *Ring's* requirement that a jury make those factual findings.[148] Moreover, Florida juries never make any findings of fact regarding the existence of

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[144] *Id.* Justice Wells went on to note:

> These challenges could possibly result in entitlements to entire repeats of penalty phase trials, in turn leading to repeats of post conviction proceedings, and then new federal habeas proceedings. Evidence will clearly have grown stale or have been lost or destroyed, witnesses will be unavailable, and memories will surely have faded. Importantly, all of those involved in these human tragedies will have to relive horrid experiences in order to reestablish the factual bases of these cases, many which are undeniably heinous.

Id.

[145] *See, e.g.*, *Bottoson*, 833 So. 2d at 710 (Quince, J., specially concurring) ("We appear to be left with a judicial fact-finding process that is directly contrary to the U.S. Supreme Court's holding in Ring."); *id.* at 718 (Shaw, J., concurring in result only) ("When the dictates of *Ring* are applied to Florida's capital sentencing statute, I believe our statute is rendered flawed because it lacks a unanimity requirement for the 'death qualifying' aggravator.").

[146] *Id.* at 703 (Anstead, C.J., concurring in result only).

[147] *Id.* (Anstead, C.J., concurring in result only):

> The United States Supreme Court has now held in *Ring* that its prior decision in *Apprendi v. New Jersey*, requiring findings of fact by a jury of sentencing factors that may affect the ultimate penalty and sentence imposed, *does apply* to death penalty cases. That holding means that juries, not judges, must make the findings of fact that determine the existence of aggravating circumstances that in turn may be used as the justification and predicate for a death sentence. This holding, of course, conflicts with our previous denial of relief to Bottoson based on our erroneous conclusion that the Supreme Court would not apply *Apprendi* to death penalty cases. The decision in *Ring* makes our error apparent.

[148] *Id.* at 704-05 (Anstead, C.J., concurring in result only).

aggravating circumstances and therefore no jury fact-findings are ever considered by the state supreme court when conducting its *Tedder* review (when an override occurs).[149] Clearly, Anstead suggests that when presented with a suitable case, he would lean toward declaring the override unconstitutional for these reasons.[150] Another justice signaled his willingness to reach the same conclusion.[151] As Part V discusses, the Florida justices have even gone so far as to suggest possible legislative remedies to correct the flaws in the system.

The Alabama courts have not been as straightforward about the likely effect of *Ring* on that state's override law. In May 2002, an Alabama appeals court decided a petition invoking *Ring* in the case of *Tomlin v. State*,[152] where the defendant, Phillip Wayne Tomlin, was convicted of capital murder and sentenced to death for killing two people.[153] After *Ring* was decided, the appeals court allowed the parties an opportunity to file briefs addressing the effect of *Ring* on Tomlin's death sentence.[154] Tomlin argued that Alabama's override was unconstitutional because the aggravating circumstances in his case were decided by the trial judge, not the jury.[155] But the court held that because Tomlin was sentenced to death based on the aggravating circumstance of having killed two people,[156] the jury's verdict encompassed this factor. Thus, there was no *Ring* violation.[157]

In May 2003, an Alabama appeals court addressed the same issue in *Martin v. State*.[158] Martin had been convicted of murdering his wife for $377,000 in life insurance proceeds, which made the murder a capital offense under section 13A-5-40(a)(7) because it was committed for pecuniary gain.[159] The jury recommended life imprisonment without

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[149] *Id.* at 705 (Anstead, C.J., concurring in result only).

[150] *Id.* at 704-05 (Anstead, C.J., concurring in result only).

[151] *See id.* at 724 (Pariente, J., concurring in result only).

[152] Tomlin v. State, No. CR-98-2126, 2002 WL 1136439 (Ala. Crim. App. May 31, 2002), *overruled by Ex Parte* Tomlin, 2003 WL 22272851 (Ala. Oct. 3, 2003).

[153] *Id.* at *2.

[154] *Id.* at *56 (McMillan, J.) ("After *Ring* was released, we allowed the State and Tomlin an opportunity to file supplemental briefs.").

[155] *Id.* at *50-51.

[156] The aggravating circumstances were found pursuant to ALA. CODE § 13A-5-40(a)(10) (1994).

[157] *Tomlin*, at *50-51.

[158] Martin v. State, No. CR-99-2249, 2003 WL 21246587 (Ala. Crim. App. May 30, 2003).

[159] *Id.* at *1.

parole, but the trial judge overrode the jury's verdict.[160] Martin argued that because the trial judge made the findings of the existence of aggravating circumstances in his case, *Ring* rendered his sentence unconstitutional.[161]

The court rejected Martin's argument because he was eligible for death only because he had committed murder for pecuniary gain. Pecuniary gain is an aggravating circumstance under section 13A-5-49(6) and thus was found to have been proved to the jury as required by *Ring*.[162]

The court made a point of noting that the *Ring* Court did not address whether the judicial override was constitutional and that without direction, it would continue to rely on *Harris v. Alabama*,[163] a case which upheld the Alabama override in 1995. It seems only a matter of time though before the Alabama courts are presented with a case where a judge alone has found the existence of aggravating circumstances in violation of *Ring*. As the Alabama scheme has the fewest safeguards of the two override states,[164] it appears particularly susceptible to Sixth Amendment challenges.

V. RETURNING THE OVERRIDE TO ITS ORIGINIAL PURPOSE

Sixth Amendment challenges have gained traction in the courts as Part IV suggests. The U.S. Supreme Court has ruled that defendants, as a general proposition, are entitled to a jury determination on any fact that increases the maximum penalty contemplated by the jury's verdict and this rule has been extended to the death penalty context in *Ring*.[165] The Florida Supreme Court has signaled its willingness to correct the Sixth Amendment flaws in the override scheme.[166] The Fourteenth Amendment and Eighth Amendment challenges are also persuasive, although they have not been accepted by the courts thus far.[167]

The state court opinions and scholarly literature on the override suggest various ways of revising this troubled system. One way to avoid the constitutional problems would be to repeal the override in favor of a jury-only system.[168] The states are hesitant to overhaul their entire systems

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[160] *Id.*

[161] *Id.* at *17.

[162] *Id.*

[163] 513 U.S. 504, 506 (1995).

[164] The *Tedder* standard is not required in Alabama as it is in Florida. *See supra* Part II.B.

[165] Ring v. Arizona, 536 U.S. 584, 609 (2002).

[166] *See* Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002) (per curiam).

[167] *See supra* Part III.

[168] Tran, *supra* note 37, at 887 ("Due to the grave constitutional concerns posed by jury override statutes, it appears that the only feasible solution is to *repeal* such [override] schemes. Alabama, Delaware, Florida, and Indiana should follow the lead of their sister

for the obvious reason of not wanting to encourage more appeals and incur high administrative costs implementing a new system. In addition, many believe the life-to-death override adds an additional check on the jury's discretion.[169] However, for policy reasons,[170] and for the constitutional reasons outlined in Part IV, the override needs to be reformed.

One scholar has suggested that the states restructure the way they bifurcate the trial and sentencing phases by including the finding of aggravating circumstances in the trial phase.[171] For example, under Ohio's statutory framework, aggravating factors are pled in the indictment, considered by the jury at the trial phase, and are proven beyond a reasonable doubt, which passes the *Apprendi* and *Ring* requirements.[172]

The benefit of the Ohio system is that it "identifie[s] all the relevant aggravating circumstances to be placed before the sentencer" and "narrows the issues for the penalty phase."[173] Such a system avoids the duplication that exists in the override, where the judge and jury listen to separate hearings on sentencing factors, and provides the additional assurance that a unanimous jury has determined all aggravating factors.[174] Moreover, Justice Scalia has already endorsed this revised bifurcated system, which makes it more likely to meet with the Court's approval.[175]

Justices of the Florida Supreme Court suggest that, in the wake of *Ring*, at least one aggravating factor should be determined by the jury. This seems to be the minimum the states are required to do to satisfy *Ring*. Justice Shaw provided this recommendation in *Bottoson v. Moore* for correcting the "flaw" in the Florida override.[176] He suggests adding the

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states and adopt sentencing procedures that better protect the rights of criminal defendants.") (emphasis added). Note that the states would be taking Indiana's lead, as that state changed to a jury-only system on July 1, 2002. Liptak, *supra* note 5, at A21.

[169] Although the data presented by Liptak, *supra* note 5, would suggest the override has not worked as a check on "inflamed" juries in Alabama and Florida, where judges are elected.

[170] *See* Liptak, *supra* note 5, at A21.

[171] Margery Malkin Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. ILL. U. L. REV. 41, 104 (2001).

[172] *Id.* at 105.

[173] *Id.*

[174] *Id.* at 105-07.

[175] Ring v. Arizona, 536 U.S. 584, 612-13 (2002) (Scalia, J., concurring) ("Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factors in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.").

[176] 833 So. 2d 693, 710 (Fla. 2002) (Shaw, J., concurring in the result only).

following language to the Florida jury instructions for capital sentencing: "In order to recommend a sentence of death, you must unanimously find that *at least one* aggravating circumstance is present beyond a reasonable doubt; this finding must be based on the facts as you find them from the evidence."[177] Justice Shaw interpreted *Ring* to require that aggravating circumstances, of which at least one must be present to sentence death, must be subject to the same treatment as other elements of the offense.[178] The aggravating factor takes on the equivalent status of the other elements that must be proven to the jury beyond a reasonable doubt.

Justice Pariente made the same recommendation that jurors become the fact-finders as to the required aggravating circumstances. He also suggested that trial courts "utilize special verdicts that require the jury to indicate what aggravators the jury has found and the jury vote as to each aggravator."[179] As both Justices Shaw and Pariente note, the override scheme, at a minimum, can be corrected by making the jury the finder of any fact used to elevate the maximum sentence from life-to-death.

The best approach to reforming the override, however, would be to eliminate the life-to-death part of the scheme and retain the death-to-life option. The only change to the law would be that in the instance where the jury renders an advisory verdict of life, the decision would stand as the final sentence. Not only would this be easy to implement as it retains many of the same procedural features of the current system, but it would solve numerous constitutional flaws.

There are three main benefits to eliminating the life-to-death option. First, it would assuage Fourteenth Amendment concerns that judges use the override for political purposes. As studies suggest,[180] judges face political pressure by the electorate to sentence death;[181] by eliminating this option, the judge is not tempted to override a jury's life recommendation in order to keep her job. The judge would also retain the option to override a death verdict in the case of an "inflamed" jury, which was the original justification for the system.[182] At a time when we know innocent

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[177] *Id.* at 718 (Shaw, J., concurring in the result only).

[178] *Id.* (Shaw, J., concurring in the result only).

[179] *Id.* at 719, 723 (Shaw, J., concurring in the result only).

[180] *See* Burnside, *supra* note 3, at 1042-44.

[181] The facts from Delaware, where appointed judge have only overridden death sentences in favor of life, bears this out. *Id.* at 1043.

[182] Harris v. Alabama, 513 U.S. 504, 521 (1995) (noting that the override system "provid[es] capital defendants with more, rather than less, judicial protection").

defendants have been sentenced to death,[183] this feature of the override is particularly attractive.

Second, this suggested reform would mitigate against Eighth Amendment concerns as the judge would not be able to substitute her opinion for the jury's. As the best reflection of the community's judgment, the jury would play its proper role in determining whether the defendant's conduct warrants death. By limiting the judge's override of the jury's life verdict, the "link between contemporary community values and the penal system" is strengthened.[184]

Finally, this reform would correct the system's flaws with respect to the Sixth Amendment. By giving the trial judge override authority only in the death-to-life context, the judge would be reducing the jury's sentence in compliance with *Apprendi* and *Ring*, not increasing it.[185] The jury would be making its own unanimous independent fact-findings with respect to aggravating and mitigating circumstances, and these findings would only be overturned to decrease the maximum penalty.

There are real policy and constitutional concerns that need to be addressed with respect to the override scheme as it is currently administered in Florida and Alabama. As these recommendations suggest, the override states need to return to the system's original purpose by making these suggested changes to ensure capital defendants' constitutional rights are guaranteed.

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[183] *See* American Civil Liberties Union of Florida, *supra* note 81.

[184] Scheffel, *supra* note 32, at 47 (quoting Spaziano v. Florida, 468 U.S. 447, 483 (1984) (White, J., concurring in part and concurring in the judgment)).

[185] Ring v. Arizona, 536 U.S. 584, 609 (2002); Apprendi v. New Jersey, 530 U.S. 466, 497 (2000).