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EIGHTH AMENDMENT—THE CONSTITUTIONALITY OF THE ALABAMA CAPITAL SENTENCING SCHEME

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

I. INTRODUCTION

In *Harris v. Alabama*, the United States Supreme Court upheld the constitutionality of the Alabama capital sentencing scheme.¹ Chief among the provisions of the sentencing scheme is that the jury issues an advisory sentence which the sentencing judge must consider in imposing a sentence. Although the provision does not specify the weight a judge must give to the jury's advisory verdict,² the majority concluded that this provision does not violate the Eighth Amendment since it does not result in arbitrary or capricious sentences.³

This Note concludes that, contrary to the majority's assertions, Alabama's scheme violates the Eighth Amendment since it results in arbitrary and capricious sentences. This Note examines Alabama's scheme in light of (1) statements made by the Court in earlier death penalty cases regarding the constitutional requirements imposed by the Eighth Amendment, (2) sentencing processes in general, and (3) the consequences of Alabama's scheme. This Note argues that the standards imposed by the Eighth Amendment as interpreted by the Court mandate a scheme that provides more guidance to the sentencer than the Alabama scheme. This necessity, recognized in previous holdings and statements in dicta issued by the Court, is evident given the fact that a certain amount of arbitrariness already exists in any sentencing procedure as a result of the incalculable number of outside factors that can effect a judge's sentence. This Note further maintains that an examination of the differing standards employed by the Alabama trial court judges in their sentencing opinions is direct evidence of the arbitrary results of the Alabama sentencing scheme. Although the Court is not responsible for providing this guidance, the

¹ 115 S. Ct. 1031 (1995).

² *Id.* at 1032-33.

³ *Id.* at 1036.

Court must serve as a watchdog to ensure that the individual states do provide it. Finally, this Note argues that the majority opinion avoided a thorough examination of precedent and of the realities of sentencing in Alabama by simply concluding that the Court does not have the power to legislate.

II. BACKGROUND

A. THE ALABAMA SENTENCING SCHEME IN CAPITAL MURDER CASES

The Alabama capital sentencing scheme is set forth in the Alabama Code.⁴ The Code provides that defendants convicted of capital murder are entitled to a sentencing hearing before the trial jury.⁵ At the sentencing hearing, the state must disprove, by a preponderance of the evidence, any mitigating factors proffered by the defendant, and the state must prove any statutory aggravating factors beyond a reasonable doubt.⁶ The jury then evaluates the evidence. If ten of the twelve jurors agree that the aggravating circumstances outweigh the mitigating circumstances, the jury recommends a death sentence; otherwise, the jury recommends life imprisonment with no possibility of parole.⁷

The jury's recommended sentence and the jury's vote tally is then reported to the judge,⁸ whereupon the judge is required to "consider" the jury's advisory sentence along with all of the evidence available.⁹ The judge must then issue a written sentence which describes the defendant's crime and details the aggravating and mitigating circumstances.¹⁰ Finally, the judge must impose a sentence.¹¹ The statute also provides for a mandatory appellate process if the defendant is sentenced to death.¹²

⁴ See ALA. CODE § 13A-5-46 (1994).

⁵ *Id.* In fact, in order for the jury to be excluded from participation in the sentencing process each party must agree to waive its participation, and the court must approve the waiver. ALA. CODE § 13A-5-44 (1994).

⁶ ALA. CODE § 13A-5-45(g) (1994).

⁷ ALA. CODE § 13A-5-46(e), (f).

⁸ *Harris v. Alabama*, 115 S. Ct. 1031, 1033 (1995).

⁹ ALA. CODE § 13A-5-47(e) (1994).

¹⁰ ALA. CODE § 13A-5-47(d) (1994).

¹¹ ALA. CODE § 13A-5-47(e).

¹² If the judge sentences the defendant to death, there is an automatic review process whereby the defendant's conviction and sentence are automatically reviewed by an appellate court. ALA. CODE § 13A-5-53(b) (1994). If the appellate court affirms the trial court's conviction and sentence, as a matter of right the Alabama Supreme Court grants a writ of certiorari. *Id.* The appellate courts are required, in addition to reviewing the record for errors, to independently weigh the aggravating and mitigating circumstances and to determine whether the death penalty in the case at hand is disproportionate to the punishments meted out in similar cases. *Id.*

B. CONSTITUTIONAL PROTECTIONS AND THE DEATH PENALTY

The Eighth Amendment to the Constitution protects against cruel and unusual punishment.¹³ This Eighth Amendment protection has been held applicable to the states by its incorporation into the Due Process Clause of the Fourteenth Amendment.¹⁴ The Supreme Court, in setting forth the goals of the Eighth Amendment, has stated that the "primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings."¹⁵

The Eighth Amendment, prior to 1972, was never successfully used to challenge a capital punishment statute.¹⁶ In fact, the Eighth Amendment frequently was not even mentioned in the Court's opinions in death penalty cases before 1972.¹⁷ During this time, therefore, the states enacted and implemented their death penalty schemes with no guidance or control from the federal government.¹⁸

In 1972, however, the Court expanded the scope of the Eighth Amendment in *Furman v. Georgia*¹⁹ when it applied the Eighth Amendment in a constitutional challenge to state capital punishment schemes. Since then, the Court has consistently used the Eighth Amendment, with its prohibition against cruel and unusual punishments, and the standards developed by the Court in *Furman v. Georgia* to evaluate capital sentencing schemes.²⁰ In *Furman*, three cases were reviewed by the Court simultaneously.²¹ In each of the cases the defendant had been sentenced to death.²² The Supreme Court granted certiorari so it could determine whether the sentencing schemes under which the defendants were sentenced to death were constitutional.²³ The Court held that a death sentence may not be imposed where the sentencing procedures in place create a substantial risk that the punishments will be inflicted arbitrarily and capriciously.²⁴ The

¹³ U.S. CONST. amend. VIII. The full text of the Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

¹⁴ See *Robinson v. California*, 370 U.S. 660, 666 (1962); *Woodson v. North Carolina*, 428 U.S. 280, 287 n.8 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

¹⁵ *Furman v. Georgia*, 408 U.S. 238, 271 (1972) (Brennan, J., concurring).

¹⁶ Stephen R. McAllister, *The Problem of Implementing a Constitutional System of Capital Punishment*, 43 KAN. L. REV. 1039, 1044 (1995).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 408 U.S. 238 (1972).

²⁰ For a more in-depth look at the Court's treatment of the death penalty throughout history, see Hugo A. Bedau, *The Death Penalty in America: Yesterday and Today*, 95 DICK. L. REV. 759 (1991).

²¹ *Furman*, 408 U.S. at 240 (Douglas, J., concurring).

²² *Id.* (Douglas, J., concurring).

²³ *Id.* (Douglas, J., concurring).

²⁴ *Id.* at 309 (Stewart, J., concurring). But see Scott W. Howe, *The Constitution and Capi-*

Court deemed that such arbitrariness violated the constitutional protection against cruel and unusual punishment.²⁵ As a result of the *Furman* decision, all existing death penalty statutes were declared unconstitutional by the Court²⁶ since the statutes were being selectively applied.²⁷

Following the *Furman* decision, states revised their capital sentencing schemes.²⁸ Various defendants challenged these revised sentencing schemes, arguing that they were unconstitutional under the new mandates set forth in *Furman*.²⁹ Importantly, in *Proffitt v. Florida*,³⁰ the Supreme Court declared that the death penalty is not *per se* cruel and unusual punishment.³¹

For instance, in *Gregg v. Georgia*, the defendant was convicted of two counts of murder and two counts of armed robbery,³² and was sentenced to death by the jury.³³ This sentence was upheld by the Georgia Supreme Court.³⁴ The Supreme Court granted certiorari in order to determine the constitutionality of the Georgia capital sentencing scheme.³⁵ The Court stated, "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."³⁶

In *Woodson v. North Carolina*,³⁷ the Court addressed the constitutionality of the North Carolina capital sentencing scheme. The defendants in *Woodson* were found guilty of murder and armed robbery and were sentenced to death by the jury, as was required by state statute.³⁸ The Supreme Court granted certiorari in order to determine

tal Sentencing: Pursuing Justice and Equality, 60 *FORDHAM L. REV.* 749 (1992) (stating that mandates of *Furman* are unclear).

²⁵ *Id.* (Stewart, J., concurring).

²⁶ *Id.* at 239-40.

²⁷ *Id.* at 309-10 (Stewart, J., concurring).

²⁸ Thirty-five states enacted new capital sentencing schemes in the four years following the *Furman* decision. Kathryn K. Russell, *The Constitutionality of Jury Override in Alabama Death Penalty Cases*, 46 *ALA. L. REV.* 5, 7 (1994).

²⁹ See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 287 n.8 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

³⁰ 428 U.S. 242 (1976).

³¹ *Id.* at 247.

³² *Gregg*, 428 U.S. at 160.

³³ *Id.* at 161.

³⁴ *Id.* at 161-62.

³⁵ *Id.* at 162.

³⁶ *Id.* at 189.

³⁷ 428 U.S. 280 (1978).

³⁸ *Id.* at 284. The North Carolina statute under which the defendants were sentenced

whether a sentencing scheme which mandated the death penalty for a broad category of offenses—first degree murders, generally—constituted cruel and unusual punishment.³⁹ Reasoning that the scheme failed to take individual defendants and their individual circumstances into account and determining that there is a “need for reliability in the determination that death is the appropriate punishment in a specific case,” the Court concluded that the North Carolina sentencing scheme violated both the Eighth and Fourteenth Amendments.⁴⁰ Moreover, the Court stated that there was no way for the North Carolina sentencing scheme to keep a check on the arbitrary impositions of sentences.⁴¹

The Supreme Court, in *Gregg*, *Woodson*, and the other cases addressing the constitutionality of the states’ new sentencing schemes, continued to demand that states meet the standards the Court had put forth in *Furman*. That is, the Court required that the sentencing schemes, regardless of their specific provisions, not result in arbitrary and capricious sentences.⁴²

C. STATE SENTENCING SCHEMES

Four states, Alabama,⁴³ Florida,⁴⁴ Indiana,⁴⁵ and Delaware,⁴⁶ have developed capital sentencing systems whereby the jury issues an advisory sentence, but the judge imposes the final sentence and, in doing so, can override the jury’s advisory sentence.⁴⁷ The Supreme Court first analyzed the constitutionality of such sentencing systems under Florida’s sentencing statute.⁴⁸ The specific provisions of the Florida

to death provided, in part, “A murder which shall be . . . committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary, or other felony, shall be deemed murder in the first degree and shall be punishable by death.” N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975).

³⁹ *Woodson*, 428 U.S. at 287.

⁴⁰ *Id.* at 305.

⁴¹ *Id.* at 303.

⁴² As demonstrated by *Gregg* and *Woodson*, the Court upheld some capital sentencing statutes and rejected others. See also *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality opinion) and *Woodson*, 428 U.S. 280 (plurality opinion). The Court found that the schemes adopted in both of these states violated the Eighth Amendment because they mandated the death penalty for defendants convicted of certain crimes. Russell, *supra* note 28, at 9. For a complete discussion of the new sentencing schemes, see Russell, *supra* note 28, at 9-10.

⁴³ ALA. CODE § 13A-5-47(e).

⁴⁴ FLA. STAT. ANN. ch. 921.141(2)-(3) (Harrison 1991 & Supp. 1993).

⁴⁵ IND. CODE ANN. § 35-50-2-9(e) (West Supp. 1994).

⁴⁶ DEL. CODE ANN. tit. 11, § 4209(d) (Supp. 1992).

⁴⁷ This is different than all of the other states’ capital sentencing schemes where either the judge or the jury makes the entire sentencing decision. See § V.B. *infra*.

⁴⁸ *Proffitt v. Florida*, 428 U.S. 242 (1976).

capital sentencing scheme are similar to those in Alabama's scheme, but in Florida, further restrictions were placed on sentencing judges by the Florida Supreme Court⁴⁹ in *Tedder v. State*.⁵⁰ In *Tedder*, the Florida Supreme Court held that "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 no reasonable person could differ."⁵¹ The *Tedder* court further provided that the sentencing judge must accord "great weight" to the jury's recommendation.⁵² In *Proffitt v. Florida*,⁵³ the Supreme Court upheld the constitutionality of the Florida sentencing scheme.⁵⁴ The Supreme Court concluded that given the combination of the statutory provisions by the Florida Code and the common law provisions provided by *Tedder*, Florida's capital sentencing scheme did not result in arbitrary and capricious sentences and therefore was constitutional.⁵⁵

In subsequent cases readdressing the constitutionality of the Florida sentencing scheme, the Supreme Court continued to uphold and praise what has become known as the *Tedder* standard.⁵⁶ For example, in *Parker v. Dugger*,⁵⁷ the Court stated, "We have held specifically that the Florida Supreme Court's system of independent review of death sentences minimizes the risk of constitutional error, and have noted the 'crucial protection' afforded by such review in jury override cases."⁵⁸ In *Spaziano v. Florida*,⁵⁹ the Court declared that Florida could allow the jury to play an advisory role in sentencing, vesting sentencing authority in the judge.⁶⁰ The Court reasoned that the "Eighth Amendment is not violated every time a state reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws."⁶¹ Moreover, the Court stated:

[t]his Court already has recognized the significant safeguard the *Tedder* standard affords a capital defendant in Florida. . . . We are satisfied that the Florida Supreme Court takes the standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role.⁶²

⁴⁹ *Id.* at 248-51.

⁵⁰ 322 So. 2d 908 (1975).

⁵¹ *Id.* at 910.

⁵² *Id.*

⁵³ 428 U.S. 242 (1976).

⁵⁴ *Id.* at 259-60.

⁵⁵ *Id.*

⁵⁶ See, e.g., *Parker v. Dugger*, 498 U.S. 308, 311 (1991); *Harris v. Alabama*, 115 S. Ct. 1031, 1034-35 (1995).

⁵⁷ 498 U.S. 308 (1991).

⁵⁸ *Id.* at 321.

⁵⁹ 468 U.S. 447 (1984).

⁶⁰ *Id.* at 464.

⁶¹ *Id.*

⁶² *Id.* at 465.

In declaring the constitutionality of the Florida sentencing scheme, the Court continually noted that *Tedder* provides the requisite constitutional protections against arbitrary and capricious sentences; the Court never declared that such protections are obtained through the statutory scheme alone.⁶³

Both Delaware⁶⁴ and Indiana⁶⁵ have common law restrictions on judicial powers in sentencing which are similar to Florida's *Tedder* standard. The constitutionality of the Delaware and Indiana capital sentencing schemes and their implementation has not yet been addressed by the Supreme Court.⁶⁶

The majority of the states with capital sentencing schemes vest complete sentencing authority in the jury.⁶⁷ Four states, however, have capital sentencing schemes whereby the judge makes the entire sentencing decision.⁶⁸ The Supreme Court has upheld the constitutionality of these schemes each time the Court addressed them, noting that the schemes provide sufficient guidance to the judges.⁶⁹

III. FACTS AND PROCEDURAL HISTORY

In March 1988,⁷⁰ Louise Harris, an African-American woman,

⁶³ See *id.* at 465-66.

⁶⁴ See *Pennell v. State*, 604 A.2d 1368, 1377-78 (Del. 1992). Here, the defendant was sentenced to death after being convicted on two separate charges of murder. *Id.* at 1369. The defendant waived his right to have a jury recommend a sentence. *Id.* at 1373. The Delaware Supreme Court affirmed the death sentence, stating that the *Tedder* analysis was "didactic . . . for present purposes," *id.* at 1377, and the court, invoking the *Tedder* standard, concluded that the facts in the present case led to the conclusion that no reasonable person could differ that death was the proper sentence to impose on the defendant. *Id.* at 1378.

⁶⁵ See *Martinez-Chavez v. State*, 534 N.E.2d 731, 735 (Ind. 1989). Here, the defendant was found guilty of murder and of felony murder and was sentenced to death. *Id.* at 732. The Indiana Supreme Court upheld the death sentence invoking the *Tedder* standard and stating, "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." *Id.* at 734.

⁶⁶ Russell, *supra* note 28, at 42.

⁶⁷ *Harris v. Alabama*, 115 S. Ct. 1031, 1037-38 (1995) (Stevens, J., dissenting); see also *infra* note 160 and accompanying text.

⁶⁸ Arizona, Idaho, Montana, and Nebraska have capital sentencing schemes which vest complete capital sentencing power in the judge. See ARIZ. REV. STAT. ANN. § 13-703 (Supp. 1993); IDAHO CODE § 19-2515 (1994); MONT. CODE ANN. §§ 46-18-103 - 301 (1993); NEB. REV. STAT. § 29-2522 (1993).

⁶⁹ Addressing the Arizona capital sentencing scheme in a motion denying a rehearing of a motion for certiorari, the Court stated that jury input is not required in sentencing. *Richmond v. Arizona*, 434 U.S. 1323 (1977). The Court upheld the constitutionality of the Idaho capital sentencing scheme on other grounds. *Arave v. Creech*, 113 S. Ct. 1534 (1993). The Court has not addressed the constitutionality of the Montana or the Nebraska capital sentencing schemes.

⁷⁰ Petitioner's Brief at 9, *Harris v. Alabama*, 115 S. Ct. 1031 (1995) (No. 93-7659).

hired someone to kill her husband,⁷¹ Isaiah.⁷² Harris contracted to have him killed with the help of Lorenzo McCarter, the man with whom she was having an affair.⁷³ McCarter enlisted two of his friends, Michael Sockwell and Alex Hood, to commit the crime.⁷⁴ McCarter paid Sockwell and Hood \$100 to kill Isaiah, and he promised to pay them more money upon completion of the crime.⁷⁵ Pursuant to the contract, Sockwell and Hood shot and killed Isaiah.⁷⁶

Shortly after 11:00 p.m. on the night of the murder, Harris paged McCarter on his beeper to alert him that Isaiah had just left their house.⁷⁷ At this time, McCarter was across the street from Harris's home, seated in Hood's car, and Sockwell was hidden behind a bush next to a stop sign near the house.⁷⁸ Isaiah drove down the street, headed for work.⁷⁹ As Isaiah stopped at the intersection, Sockwell jumped out from behind the bush and shot him at point blank range with a shotgun.⁸⁰

When Isaiah failed to arrive at work, a co-worker telephoned Harris to inquire about her husband.⁸¹ Harris offered no assistance to the caller.⁸² Shortly after midnight, two men discovered Isaiah's body and telephoned the police.⁸³ The police went to Harris's house to notify her of her husband's death.⁸⁴ Harris screamed and sobbed upon hearing the news.⁸⁵ The police testified, however, that Harris did not cry and that she immediately grew calm when the police asked her questions.⁸⁶

During police questioning, Harris revealed that she and her husband had been experiencing marital problems and that she was having an affair with McCarter.⁸⁷ When asked if McCarter could have killed her husband, Harris responded that she did not know, but if he had, she had not told him to do so.⁸⁸ Harris also revealed that she was

⁷¹ *Harris v. State*, 632 So. 2d 503, 508 (Ala. Crim. App. 1992).

⁷² Respondent's Brief at 57, *Harris* (No. 93-7659).

⁷³ *Harris*, 632 So. 2d at 508.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Harris v. Alabama*, 115 S. Ct. 1031, 1033 (1995).

⁸¹ *Harris*, 632 So. 2d at 508.

⁸² *Id.*

⁸³ *Id.* at 508-09.

⁸⁴ *Id.* at 509.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

the beneficiary of several insurance policies that had been taken out on her husband's life.⁸⁹ The police arrested Harris after questioning.⁹⁰ McCarter agreed to testify against Harris in exchange for the prosecutor's promise not to seek the death penalty against him.⁹¹

A jury convicted Harris of capital murder.⁹² At the sentencing hearing before the trial court, several witnesses testified about Harris's good character and background.⁹³ They stated that she was raising seven children, held three jobs simultaneously, and participated actively in her church.⁹⁴ As a result, the jury recommended that Harris be sentenced to life imprisonment with no possibility of parole, instead of being sentenced to death.⁹⁵ Of the twelve jurors, seven voted for life without parole and five voted for death by electrocution.⁹⁶

Upon receiving the jury's recommendation, the trial judge considered Harris's sentence and found one aggravating circumstance and two mitigating circumstances.⁹⁷ The judge found the fact that the murder was committed for pecuniary gain to be an aggravating circumstance.⁹⁸ The judge found the fact that Harris did not have a criminal record to be a statutory mitigating factor and determined that her upstanding character as a hardworking churchgoer was a non-statutory mitigating factor.⁹⁹ Determining that the aggravating factor outweighed the mitigating factors, the trial judge rejected the jury's recommendation and sentenced Harris to death.¹⁰⁰

Harris appealed her sentence, contending that the Alabama capital sentencing scheme was unconstitutional since it failed to give proper guidance regarding the amount of weight to accord the jury's recommended sentence to the sentencing judge.¹⁰¹ The Alabama Court of Criminal Appeals affirmed Harris's conviction and sentence, noting that Alabama's death penalty statute is based on Florida's sentencing scheme, a scheme which has been held constitutional by the United States Supreme Court.¹⁰² The Alabama Supreme Court affirmed, rejecting Harris's contention that a judge must give great

⁸⁹ *Id.*

⁹⁰ *Harris v. Alabama*, 115 S. Ct. 1031, 1033 (1995).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Petitioner's Brief at 10, *Harris* (No. 93-7659).

¹⁰² *Harris*, 632 So. 2d at 540.

weight to the jury's recommended sentence.¹⁰³

The United States Supreme Court granted certiorari to determine whether Alabama law, which vests ultimate sentencing power in the trial judge but requires the judge to consider a jury's advisory sentence, violates the Eighth Amendment by failing to specify the weight the judge must accord the jury's recommendation.

IV. SUMMARY OF OPINIONS

A. THE MAJORITY OPINION

Justice O'Connor delivered the majority opinion¹⁰⁴ which affirmed the decisions of the Supreme Court of Alabama, the Court of Criminal Appeals of Alabama, and the trial court.¹⁰⁵ The Supreme Court held that Alabama's sentencing scheme does not violate the Eighth Amendment even though it does not specify how much weight a sentencing judge must accord a jury's advisory sentencing verdict.¹⁰⁶ Although the Court previously upheld the constitutionality of the Florida sentencing scheme, which specifies the weight a judge must accord a jury's advisory sentence, Justice O'Connor stated that such a scheme is not constitutionally mandated.¹⁰⁷ Rather, the Court held that Alabama's scheme, which only requires that a sentencing judge "consider" a jury's advisory sentence without specifying the precise weight the judge must accord it, was constitutional.¹⁰⁸

The Court's opinion began with a comparison of Alabama's and Florida's sentencing procedures.¹⁰⁹ In both Alabama and Florida the reviewing courts must weigh the aggravating and mitigating circumstances in order to determine the appropriateness of the death penalty.¹¹⁰ Additionally, the courts must decide whether, in light of the circumstances, the death penalty is excessive.¹¹¹

The majority recognized, however, that although both states require the jury's participation in the sentencing process, the two schemes differ.¹¹² In Florida, as provided by the Florida Supreme Court, the sentencing judge must accord "great weight"¹¹³ to the

¹⁰³ *Ex Parte Harris*, 632 So. 2d 543, 544 (Ala. 1993).

¹⁰⁴ Chief Justice Rehnquist and Justices Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer joined Justice O'Connor's opinion.

¹⁰⁵ *Harris v. Alabama*, 115 S. Ct. 1031, 1033-34 (1995).

¹⁰⁶ *Id.* at 1036.

¹⁰⁷ *Id.* at 1035.

¹⁰⁸ *Id.* at 1036.

¹⁰⁹ *Id.* at 1034.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ This standard has been referred to as the "*Tedder* standard." *See id.*

jury's advisory sentence and not overrule it unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ."¹¹⁴ This, however, is not the case in Alabama.¹¹⁵ Justice O'Connor noted that the Alabama sentencing statute only requires the sentencing judge to "consider" the jury's recommendation and further observed that the Alabama courts have not read any further requirements into the statute.¹¹⁶

Justice O'Connor proceeded to discuss past Supreme Court cases which reviewed the Florida sentencing scheme.¹¹⁷ She began by noting the Court's decision in *Spaziano v. Florida*,¹¹⁸ which declared Florida's sentencing procedure to be constitutional.¹¹⁹ In *Spaziano*, the Court concluded that a jury could play an advisory role in sentencing.¹²⁰ Justice O'Connor agreed with the proposition set forth in *Spaziano* that it is constitutional for a judge, rather than a jury, to sentence a criminal to death.¹²¹

Next, Justice O'Connor discussed the Court's favorable impressions of the Florida sentencing scheme.¹²² For instance, the Court in *Dobbert v. Florida*¹²³ lauded the "crucial protection" provided by the *Tedder* standard.¹²⁴ However, Justice O'Connor noted, the fact that the Court approved of and appreciated the *Tedder* standard did not mean that the *Tedder* standard was a constitutional imperative.¹²⁵ The amount of weight a judge accords a jury's verdict is less important than "whether the scheme adequately channels the sentencer's discretion so as to prevent arbitrary results."¹²⁶

The Court then determined that the Constitution does not require that any specific weight be accorded to particular factors, including both aggravating and mitigating factors.¹²⁷ Following this line of reasoning, Justice O'Connor concluded that "the Eighth Amendment does not require the State to define the weight the sentencing judge must accord to an advisory jury verdict."¹²⁸

¹¹⁴ *Id.* at 1034 (quoting *Tedder v. State*, 322 So. 2d at 910).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1033-37.

¹¹⁸ 468 U.S. 447 (1984).

¹¹⁹ *Harris*, 115 S. Ct. at 1034.

¹²⁰ *Spaziano*, 468 U.S. at 464.

¹²¹ *Harris*, 115 S. Ct. at 1034 (citing *Spaziano*, 468 U.S. at 465).

¹²² *Id.* at 1035.

¹²³ 432 U.S. 282 (1977).

¹²⁴ *Harris*, 115 S. Ct. at 1035 (quoting *Dobbert v. Florida*, 432 U.S. 282 (1977)).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* (citing *Blystone v. Pennsylvania*, 494 U.S. 299 (1990)).

¹²⁸ *Id.* at 1036.

Justice O'Connor next discussed the number of advisory jury verdicts that judges have overruled in Alabama,¹²⁹ noting that judges override recommendations of life imprisonment much more often than recommendations of the death penalty.¹³⁰ Justice O'Connor cautioned that the statistics are not indicative of the statute's constitutionality.¹³¹ Rather, the statistics might reflect the fact that the statute does not achieve the effect that its enactors desired.¹³² That is, perhaps the Alabama sentencing scheme results in more defendants being sentenced to death than the legislature had intended when it enacted the sentencing scheme.¹³³ If that is the case, Justice O'Connor noted, the legislature should amend the sentencing scheme; the Court should not declare it unconstitutional.¹³⁴

The majority rejected the proposition put forth in Justice Stevens's dissent¹³⁵ that the jury's verdict must be accorded great weight because it best reflects community standards.¹³⁶ Justice O'Connor reasoned that it is not the Court's role to determine how a state can best mete out punishments.¹³⁷ The Court has no jurisdiction over those matters to the extent that they involve only policy issues.¹³⁸ The only power the Court does have is to determine whether legislation comports with the Constitution.¹³⁹ Thus, Justice O'Connor concluded, the Court's only role in *Harris* was to determine the constitutionality of the Alabama sentencing scheme, and not to legislate by rewriting the Alabama scheme.¹⁴⁰

The majority also rejected the arguments put forth by Petitioner Harris regarding the roles of the judge and the jury in the Alabama sentencing scheme.¹⁴¹ Harris maintained that the jury's role in Alabama was more than advisory and that the jury, not the judge, held the key sentencing role.¹⁴² Harris reasoned that there would be no need for sentence reversal where the jury was exposed to prejudicial error unless the jury's role in the sentencing was the key one.¹⁴³ She

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 1039 (Stevens, J., dissenting).

¹³⁶ *Id.* at 1035.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1036.

¹⁴² *Id.*

¹⁴³ *Id.*

inferred, from the fact that such reversals have occurred, that the jury must play the key role.¹⁴⁴ Justice O'Connor pointed out the flaw in this reasoning, noting that reversal in such a case is proper regardless of whether the jury's verdict played a key role or a determinative role.¹⁴⁵

Continuing her analysis, Justice O'Connor rejected Harris's argument that judges' differing treatments of juries' recommendations led to arbitrariness and capriciousness.¹⁴⁶ Justice O'Connor reasoned that the differing treatment of the juries' advisory sentences in Alabama merely reflected the different circumstances of the cases.¹⁴⁷ Justice O'Connor maintained that the "sentiments expressed in unrelated cases do not render Petitioner Harris's punishment violative of the Eighth Amendment" and that the cases cited by Harris in which judges accorded different weights to the jury's recommendations were unrelated.¹⁴⁸ Therefore, Justice O'Connor concluded that the Alabama sentencing scheme was constitutional.¹⁴⁹

B. JUSTICE STEVENS'S DISSENT

In his dissenting opinion, Justice Stevens argued that Alabama's sentencing scheme violated both the Eighth and Fourteenth Amendments because it failed to guide sentencing judges in their treatment of jury verdicts.¹⁵⁰ To support his position, Justice Stevens discussed the role of the jury, stating that the jury verdict is supposed to embody the voice of the community.¹⁵¹ He, therefore, concluded that this community voice should guide the ultimate decision of whether the citizen whom the jury has found guilty should be sentenced to death.¹⁵² Justice Stevens reasoned that the death penalty is different than any other punishment because its only goal is retribution—and retribution is something the community should determine.¹⁵³

Justice Stevens cited the potential for the Alabama sentencing scheme to subject criminals to double jeopardy as another indication of the scheme's unconstitutionality.¹⁵⁴ By subjecting the defendant to the jury's advisory sentence and then to the sentencing judge's sen-

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1037.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* (Stevens, J., dissenting).

¹⁵¹ *Id.* at 1038 (Stevens, J., dissenting).

¹⁵² *Id.* (Stevens, J., dissenting).

¹⁵³ *Id.* (Stevens, J., dissenting).

¹⁵⁴ *Id.* at 1040 (Stevens, J., dissenting).

tence, Justice Stevens argued, the Alabama scheme effectively places the criminal's life in jeopardy twice and, therefore, should be declared unconstitutional.¹⁵⁵

Justice Stevens next discussed the problems with vesting too much authority in the sentencing judge. He pointed out that trial judges in Alabama face election every six years and thus might succumb to political pressures in making their decisions.¹⁵⁶ As a result, Justice Stevens argued, there are differences between the ways in which judges and juries impose sentences.¹⁵⁷ Such differences are apparent in the fact that Alabama judges have overridden only five death sentences in favor of sentencing the defendant to life imprisonment, but these same judges have "condemned [forty-seven] defendants whom juries would have spared."¹⁵⁸ As a result, Justice Stevens argued, the proper sentencing scheme is one in which the judge does not have a role.¹⁵⁹ To support this contention, Justice Stevens noted that throughout its history, the Court has recognized the importance of the jury's role in sentencing.¹⁶⁰ The jury, composed of members of the community, should be the body responsible for meting out the ultimate sentencing judgment of one of its members.¹⁶¹ Justice Stevens stated: "Death sentences imposed by judges over contrary jury verdicts do more than countermand the community's judgment: they express contempt for that judgment."¹⁶²

Justice Stevens claimed that Florida's *Tedder* standard is necessary in order to ensure that the sentence imposed upon the defendant

¹⁵⁵ *Id.* (Stevens, J., dissenting).

¹⁵⁶ *Id.* at 1039 (Stevens, J., dissenting).

¹⁵⁷ *Id.* at 1040 (Stevens, J., dissenting).

¹⁵⁸ *Id.* (Stevens, J., dissenting).

¹⁵⁹ *Id.* (Stevens, J., dissenting). Justice Stevens pointed out that 29 of the then 37 states which allowed capital punishment had schemes where the jury made the sentencing decision on its own. *Id.* (Stevens, J., dissenting). At the time this Note was written there were 38 states which had capital punishment statutes because New York recently adopted capital punishment legislation. See Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 73 B.U. L. REV. 759, 835 n.88 (1995). The New York capital sentencing scheme dictates that the jury makes the sentencing decision. N.Y. CRIM. PROC. LAW § 400.27 (McKinney 1995). Thus, 30 of 38 states currently have capital sentencing schemes in which the jury makes the ultimate determination of the sentence. The 38 states which have capital punishment statutes are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. See Bright & Keenan *supra*.

¹⁶⁰ *Harris v. Alabama*, 115 S. Ct. 1031, 1040 (1995) (Stevens, J., dissenting).

¹⁶¹ *Id.* (Stevens, J., dissenting).

¹⁶² *Id.* at 1041 (Stevens, J., dissenting).

actually reflects the sentiments of the community.¹⁶³ "A penalty that fails to reflect the community's judgment that death is the appropriate sentence constitutes cruel and unusual punishment under our reasoning. . . ." ¹⁶⁴ And, this reasoning applied in the present case suggests that "[t]o permit the state to execute a woman in spite of the community's considered judgment that she should not die is to sever the death penalty from its only legitimate mooring."¹⁶⁵

As a result, Justice Stevens argued, the *Tedder* standard is constitutionally mandated.¹⁶⁶ Justice Stevens cited several cases where the Court had approved the *Tedder* standard, and concluded that the way in which the jury is involved in the Florida sentencing scheme ensures that the community's voice is heard in the sentencing decision.¹⁶⁷ Justice Stevens asserted, "[A] penalty that fails to reflect the community's judgment that death is an appropriate sentence constitutes cruel and unusual punishment."¹⁶⁸ Therefore, Justice Stevens concluded that the *Tedder* standard must be a constitutional imperative.¹⁶⁹

V. ANALYSIS

Despite the Court's correct assertion that the *Tedder* standard is not constitutionally mandated, the Court was incorrect in holding that Alabama's sentencing scheme does not violate the Eighth Amendment. The Eighth Amendment prohibits the imposition of cruel and unusual punishment,¹⁷⁰ and, according to *Furman v. Georgia*, it requires that sentences not be imposed arbitrarily or capriciously.¹⁷¹ Alabama's sentencing scheme violates the *Furman* mandates by giving unbridled discretion to the sentencing judge. This Section begins with a discussion of the constitutional imperatives imposed on legislatures by the Eighth Amendment in enacting their sentencing schemes. Next, the Note examines the effects the Alabama sentencing scheme has on the sentences of convicted defendants in Alabama. The Note then explores judicial bias in sentencing and the political pressures judges face in making sentencing decisions. Finally, the Note examines Justice O'Connor's reasoning and explores its

¹⁶³ *Id.* at 1042 (Stevens, J., dissenting).

¹⁶⁴ *Id.* (Stevens, J., dissenting).

¹⁶⁵ *Id.* at 1042-43 (Stevens, J., dissenting).

¹⁶⁶ *Id.* at 1042 (Stevens, J., dissenting).

¹⁶⁷ *Id.* (Stevens, J., dissenting). See, e.g., *Spaziano v. Florida*, 468 U.S. 447, 465 (1984); *Dobbert v. Florida*, 432 U.S. 282, 294-95 (1977); *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

¹⁶⁸ *Harris*, 115 S. Ct. at 1042 (Stevens, J., dissenting).

¹⁶⁹ *Id.* (Stevens, J., dissenting).

¹⁷⁰ U.S. CONST. amend. VIII.

¹⁷¹ See *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (Stewart, J., concurring).

weaknesses.

A. THE REQUIREMENTS IMPOSED BY THE EIGHTH AMENDMENT

The Constitution protects against the imposition of cruel and unusual punishment.¹⁷² Before *Furman*, the Court had stated, "Punishments are cruel when they involve torture or lingering death. . . . [Cruel] implies there is something inhuman and barbarous—something more than the mere extinguishment of life."¹⁷³ The Supreme Court, in *Furman*, expanded the definition of cruel and unusual punishment to include sentencing schemes which result in the arbitrary and capricious imposition of sentences.¹⁷⁴ That is, the reach of the Eighth Amendment was expanded to cover entire sentencing schemes rather than just individual sentences. Whereas before *Furman*, only a punishment that was deemed "barbaric" or similarly disdainful would be violative of the Eighth Amendment, now "[i]t would seem incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices."¹⁷⁵ In addition, "it is 'cruel and unusual' to apply the death penalty—or any other penalty—selectively to minorities whose numbers are few, who are outcasts, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board."¹⁷⁶ Thus in *Furman*, the Court held that any imposition of a punishment in an arbitrary or capricious manner is unconstitutional.¹⁷⁷ As Justice Stewart stated, "the Eighth . . . Amendmen[t] can-

¹⁷² U.S. CONST. amend VIII.

¹⁷³ *In re Kemmler*, 136 U.S. 436, 447 (1890). For additional historical perspectives on the Eighth Amendment and the definition of "cruel and unusual," see also *Furman*, 408 U.S. at 257 (Brennan, J., concurring); *Furman*, 408 U.S. at 314 (Marshall, J., concurring). A view similar to that expressed in *Kemmler* is held by Justice Scalia. Scalia stated that the Eighth Amendment: (1) only prohibits cruel and unusual punishment; (2) "does not, by its terms, regulate the procedures of sentencing as opposed to the substance of punishment"; and (3) only applies to sentencing schemes when they "are of such a nature as systematically to render the infliction of a cruel punishment 'unusual.'" *Walton v. Arizona*, 497 U.S. 639, 670 (1990) (Scalia, J., concurring).

¹⁷⁴ See *Furman*, 408 U.S. at 313 (Stewart, J., concurring).

¹⁷⁵ *Id.* at 242 (Douglas, J., concurring).

¹⁷⁶ *Id.* at 245 (Douglas, J., concurring).

¹⁷⁷ See *id.* at 310 (Stewart, J., concurring). In fact, two Justices concluded that the death penalty itself was cruel and unusual punishment, and thus any capital punishment scheme was unconstitutional on its face. See *Furman*, 408 U.S. at 257 (Brennan, J., concurring); *Furman*, 408 U.S. at 314 (Marshall, J., concurring). See also *Jones v. Alabama*, *cert. denied*, 470 U.S. 1062, 1063 (1985) (Marshall, J., dissenting). Justice Brennan joined Justice Marshall's dissent in the denial of certiorari, stating: "I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments." *Id.* (Marshall, J., dissenting).

not tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed.”¹⁷⁸

Moreover, the Court has concluded that sentencing schemes that contain improper guidance to the sentencer violate the Eighth Amendment.¹⁷⁹ Specifically, any punishment imposed on a “whim, passion, [or] prejudice” violates the Eighth Amendment.¹⁸⁰ The underlying purpose of the Eighth Amendment is to ensure that the states’ power to inflict punishments is “exercised within the limits of civilized standards.”¹⁸¹ The punishments resulting from such schemes are deemed cruel and unusual because they are by nature arbitrary and discriminatory.¹⁸² Any time extrinsic factors are able to enter a sentencing decision, and any time proper guidance is not given to the sentencer, there is a greater chance that an arbitrary sentence will result by virtue of the fact that the sentencer has too much leeway. This is the case with Alabama’s sentencing scheme.

In Alabama, where the judge is not given any guidance as to how much weight to accord the jury’s recommendation, the exact “arbitrariness and capriciousness” which the Court sought to prevent in *Furman* can come into play.¹⁸³ “[T]he death penalty’s cruel and unusual nature is made all the more arbitrary and freakish when it is imposed by a judge in the face of a jury determination that death is an appropriate punishment.”¹⁸⁴

A system like Florida’s, where the judge is told to give the jury’s recommendation “great weight” and not to reject the jury’s recommendation unless the evidence in favor of a death sentence is “so clear and convincing that no reasonable person could differ”¹⁸⁵ prohibits arbitrariness. A Florida judge is accountable for his decision in a way an Alabama judge is not, thus guaranteeing a less arbitrary sentence in Florida. “It approaches the most literal sense of the word ‘arbitrary’ to put one to death in the face of a contrary jury determination where it is accepted that the jury had indeed responsibly carried out its task.”¹⁸⁶

¹⁷⁸ *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

¹⁷⁹ *See id.* (Stewart, J., concurring).

¹⁸⁰ *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O’Connor, J., concurring).

¹⁸¹ *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion).

¹⁸² *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

¹⁸³ *See infra* part V.C.1 for an in-depth discussion of the effects of racial bias of sentencing; *see infra* part V.C.2 for a discussion of the effects that political pressures placed on judges can have on sentencing.

¹⁸⁴ *Jones v. Alabama*, cert. denied, 470 U.S. 1062 (1985) (Marshall, J., dissenting).

¹⁸⁵ *Tedder v. State*, 322 So. 2d 908, 910 (1975).

¹⁸⁶ *Jones*, cert. denied, 470 U.S. at 1065 (Marshall, J., dissenting).

Although it may be argued that if the Arizona, Idaho, Montana, and Nebraska capital sentencing statutes have not been declared unconstitutional—and therefore are not cruel and unusual—despite the fact that they vest complete sentencing discretion in the judge, then a capital sentencing scheme which involves the jury as one of its components but vests ultimate decision-making power in the judge must be constitutional as well. Such an argument is not persuasive, however.

The Court has not declared that any specific scheme must be adopted, merely that the sentencing ultimately resulting from the scheme must not be arbitrary and capricious. Thus, a scheme whereby the judge has sole authority, provided it gives judges guidance and limits their discretion, may very well be constitutional. There is a big difference between a system where guidance is given and one in which it is not—no matter who makes the final sentencing decision.¹⁸⁷

Therefore, the ultimate question is not who has the power but how that power is controlled.¹⁸⁸ Guidance must be given to the jury even in states where the jury makes the sentencing decision.¹⁸⁹ In the states where complete sentencing power is relegated to the judge, the judge is told which aggravating and mitigating factors to consider and the weight to accord them.¹⁹⁰ Capital sentencing schemes must include the factors to be weighed and the weight they should be given, no matter who is making that decision. Unless each factor is neatly laid out and the weight to be accorded is detailed, the sentences resulting from it will necessarily be arbitrary since any sentencing body can use the factor as it chooses. This is the ultimate problem with Alabama's scheme: it requires a judge to consider the jury's recommendation without providing any guidance as to how much weight to give it. The real issue is not whether the judge or the jury is making

¹⁸⁷ See *Jones, cert. denied*, 470 U.S. 1062 (Marshall, J., dissenting). In his dissent from the Court's denial of certiorari, Justice Marshall, joined by Justice Brennan, stated, "[Alabama's sentencing] system is quite different from a system where there is no jury, for here there has been a life sentence determination by a properly selected and instructed jury which has been witness to all the evidence and arguments. Where such determination has been made, it must at least account for something." *Id.* at 1064 (Marshall, J., dissenting).

¹⁸⁸ In fact, a capital sentencing scheme in which the jury was simply instructed to sentence the defendant without providing any guidance as to the process the jury should use to formulate the sentence might be just as likely to result in arbitrary and capricious sentences as one where the judge was given such power.

¹⁸⁹ For instance, under the sentencing scheme in Texas, where the jury makes the complete sentencing decision, the jury bases its sentencing decision on three determinations: the likelihood that the defendant will be dangerous in the future; whether the defendant intended to kill the victim or the defendant's level of responsibility for the victim's death; and whether there were any mitigating circumstances which would warrant a life sentence. TEX. CRIM. PROC. CODE ANN. § 37.071(2) (West Supp. 1995).

¹⁹⁰ See, e.g., ARIZ. REV. STAT. ANN. § 13-703(F), (G) (Supp. 1993).

the ultimate sentencing decision but rather whether the scheme is so nebulous as to result in arbitrary and capricious sentences.

B. THE EFFECTS OF THE ALABAMA SENTENCING SCHEME

In twenty-nine of the thirty-seven states (seventy-eight percent) which permit capital punishment, the jury makes the final determination of the defendant's sentence.¹⁹¹ The handful of other states which allow capital punishment allow the judge to play a role. As is discussed in more detail in part II.C., four states have capital sentencing procedures wherein the judge makes the sole determination of the defendant's sentence, and the other four states, including Alabama, have schemes which require the judge to consider the jury's recommended sentence.¹⁹² Clearly, in most states the greatest emphasis is placed on the jury's involvement in capital sentencing. The fact that judges may have ulterior motives in imposing sentences on defendants¹⁹³ may be reflected in the statutory sentencing schemes of these states.

In Alabama, the weight which judges accord jury recommendations varies greatly from judge to judge.¹⁹⁴ Some judges treat a life recommendation as a mitigating factor whereas others give great weight to jury recommendations.¹⁹⁵ Not only does the amount of weight accorded the jury's recommendation vary from judge to judge, but the weight that one judge accords it varies from case to case.¹⁹⁶ Moreover, in practice, where no guidance is given to sentencing judges regarding the amount of weight to accord to jury verdicts, the judges need not give the recommendation any weight at all.¹⁹⁷ That is, judges can never be held accountable for not giving enough weight to the jury recommendations.¹⁹⁸ And, there are many cases in Ala-

¹⁹¹ *Harris v. Alabama*, 115 S. Ct. 1031, 1038 (1995) (Stevens, J., dissenting). Now 30 of the 38 states, 77%, have sentencing schemes in which the jury makes the ultimate sentencing decision. See *supra* note 159 for a further discussion of the other states' statutes.

¹⁹² *Harris*, 115 S. Ct. at 1038 (Stevens, J., dissenting).

¹⁹³ For instance, in Alabama, the trial judges who make the sentencing decisions face partisan elections every six years. ALA. CODE § 17-2-7 (1987).

¹⁹⁴ See Petitioner's Brief at 19-20, *Harris* (No. 93-7659).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 20. Judge Randall Thomas, who sentenced Harris and one of her co-defendants, stated that he "considered" the jury's life recommendation in Harris's case. *Id.* He made a similar statement in Sockwell's sentencing order. *State v. Sockwell*, No. CC-88-1244-HR (Montgomery County 1991). However, in another case where he overrode the jury's life recommendation, he said he accorded the jury's advisory sentence "great weight" and was treating it as a mitigating factor. *State v. Coral*, No. CC-88-741 (Montgomery County 1992).

¹⁹⁷ *Harris v. Alabama*, 115 S. Ct. 1031, 1038 (1995) (Stevens, J., dissenting).

¹⁹⁸ Of course, judges are held accountable for their sentencing decisions at election time, but voters typically do not pore over judges' decisions and opinions when deciding.

bama in which it appears the judges gave little or no weight to the jury recommendation.¹⁹⁹ Of thirty-three cases where the judge overrode the jury's life sentence recommendation and sentenced the defendant to death, nineteen (fifty-eight percent) involved jury vote tallies where more than two-thirds of the jurors had voted for life imprisonment.²⁰⁰ In fact, in four of the cases, the juries had unanimously voted for life imprisonment.²⁰¹

Alabama sentencing judges not only failed to give consistent weight to jury recommendations, they often failed to specify the reasoning behind their decisions in cases where they overrode the jury recommendations.²⁰² There were thirty-six jury overrides in Alabama between 1981 and 1991, and in nineteen of those cases "the trial court stated little more than that its independent examination found aggravating circumstances to exceed mitigating ones."²⁰³

The trial judge in *Harris* seemingly gave little or no regard to the jury's recommendation of life imprisonment,²⁰⁴ making only a cursory mention of the jury's recommendation and then rejecting it.²⁰⁵ The judge sentenced Harris to death without any explanation as to why or as to what role he allowed the jury recommendation to play in his sentencing decision other than to say that he "considered" it.²⁰⁶

The manner in which judges have treated jury sentence recommendations provides no discernible pattern.²⁰⁷ The amount of weight accorded to the advisory sentences varies from one judge to another as well as from one case to another.²⁰⁸ This type of random, arbitrary sentencing mechanism is exactly the type of sentencing scheme which *Furman* and the Eighth Amendment seek to prevent.

C. THE REALITIES OF SENTENCING

Who makes the ultimate sentencing decision—the judge or the jury—and how much weight that decision-maker gives to the other's recommendation is something that can be controlled both statutorily and through common law mandates like the *Tedder* standard. Unfortunately, there are many other factors affecting sentencing over which

how to cast their votes.

¹⁹⁹ Russell, *supra* note 28, at 33-34.

²⁰⁰ Russell, *supra* note 28, at 33-34.

²⁰¹ Russell, *supra* note 28, at 33-34.

²⁰² Russell, *supra* note 28, at 29.

²⁰³ Russell, *supra* note 28, at 29.

²⁰⁴ Petitioner's Brief at 20, *Harris v. Alabama*, 115 S. Ct. 1031 (1995) (No. 93-7659).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

judges and the legislature have little control. These factors include judicial bias based on race²⁰⁹ and the political pressures that are placed on judges to be tough on crime.²¹⁰ Given the fact that there is no easy way to control these factors and the fact that the Court wants to prevent arbitrary and capricious sentences, the Court should require sentencing schemes to provide greater guidance to the ultimate sentence-imposer. Such guidance will limit the potential effects of extrinsic factors by channeling the sentencer's decision.

1. *Judicial Bias in Sentencing*

Studies have shown that judicial bias has an effect on sentencing decisions.²¹¹ However, the Court has rejected the use of statistical methods for proving constitutional violations in individual sentencing decisions when the statistics address broader discriminatory practices.²¹² The Court was confronted with the issue of judicial bias in sentencing in *McCleskey v. Kemp*.²¹³ In *McCleskey*, the petitioner, an African-American man, sought to prove racial bias in his own sentencing by offering a study which showed racial bias in sentencing in general.²¹⁴ The Court allowed the evidence to be admitted but upheld the death sentence, in a five to four decision, reasoning that the petitioner failed to prove that there had been racial animus in his specific case.²¹⁵ The Court declared that the statistics were insufficient to demonstrate that there was an "unacceptable risk of racial prejudice influencing [the] capital sentencing decisio[n]."²¹⁶ The four dissenters,²¹⁷ considering the statistics regarding racial bias in sentencing in Georgia, disagreed and concluded that, in fact, there was an imper-

²⁰⁹ See, e.g., Samuel R. Cross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984).

²¹⁰ See, e.g., *Politics and the Death Penalty*, 21 HUM. RTS. 24, 29 (1994).

²¹¹ See, e.g., DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY, 80-139, 198-228, 306-425 (1990); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4-5 (1988); Cross & Mauro, *supra* note 209. The Baldus study was based on over 2,000 Georgia murder cases, and it examined data relating to the defendant's race, the victim's race, and the various combinations resulting therefrom. The study indicated that black defendants who killed white victims were the most likely to receive the death penalty. For a critique of the Baldus study see Howe, *supra* note 24 (describing the importance of the Baldus study and questioning the authors' contention that equality in capital punishment on a statistically significant level is the goal of the Constitution).

²¹² *McCleskey v. Kemp*, 481 U.S. 279, 290 (1987).

²¹³ 481 U.S. 279 (1987).

²¹⁴ *Id.* at 287.

²¹⁵ *Id.* at 292 (where the Court declared that in order to prevail, the defendant would have had to provide specific concrete evidence in his own case, not just cite to statistics).

²¹⁶ *Id.* at 309.

²¹⁷ Justices Marshall, Blackmun, and Stevens joined in Justice Brennan's dissent.

missible risk that racial considerations had motivated the petitioner's sentencing.²¹⁸

Judicial bias based on race exists in sentencing.²¹⁹ Justices Douglas,²²⁰ Brennan,²²¹ and Marshall²²² recognized this in their concurrences in the landmark *Furman* decision. As Justice Douglas stated,

[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.²²³

Although the Court has acted to prevent racial bias in other aspects of the trial process,²²⁴ controlling judicial bias in sentencing is difficult. Since judges do not express racial bias when issuing their sentencing orders, the only way a defendant can prove such bias is through statistical methods, like those rejected in *McCleskey*.²²⁵

The seriousness of the problem of racial bias has been recognized both by the Court and by Congress.²²⁶ In addition to noting the fact that racial bias pervades sentencing, Justice Brennan noted the reasons why such bias is so egregious:

Considering the race of a defendant or victim in deciding if the death penalty should be imposed is completely at odds with this concern that an individual be evaluated as a unique human being. Decisions influenced by race rest in part on a categorical assessment of the worth of human beings according to color, insensitive to whatever qualities the individuals in question may possess. Enhanced willingness to impose the death sentence on black defendants, or diminished willingness to render such a sentence when blacks are victims, reflects a devaluation of the lives of black persons. When confronted with evidence that race more likely than not plays such a role in a capital-sentencing system, it is

²¹⁸ *McCleskey*, 481 U.S. at 325-28 (Brennan, J., dissenting).

²¹⁹ See Bryan K. Fair, *Using Parrots to Kill Mockingbirds: Yet Another Racial Prosecution and Wrongful Conviction in Maycomb*, 45 ALA. L. REV. 403 (Winter 1994) for an in-depth look at and specific examples of racial animus in sentencing.

²²⁰ *Furman v. Georgia*, 408 U.S. 238, 253 (1972) (Douglas, J., concurring).

²²¹ *Id.* at 293-95 (Brennan, J., concurring).

²²² *Id.* at 364-66, 368 (Marshall, J., concurring).

²²³ *Id.* at 255 (Douglas, J., concurring). Justice Douglas further concluded that the "discretionary [capital sentencing] 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 256-57 (Douglas, J., concurring).

²²⁴ See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1880), where the Court declared that it was unconstitutional to exclude African-Americans from juries. *Id.* at 304. See also *Swain v. Alabama*, 380 U.S. 302 (1965), where the Court reiterated the principles from *Strauder*. *Id.* at 204.

²²⁵ *McCleskey v. Kemp*, 481 U.S. 279, 291 (1987).

²²⁶ *Id.* at 334-35 (Brennan, J., dissenting).

plainly insufficient to say that the importance of discretion demands that the risk be higher before we will act—for in such a case the very end that discretion is designed to serve is being undermined.²²⁷

Congress also recognized the problems with racial disparities in sentencing.²²⁸ Congress established the United States Sentencing Commission which promulgated the Federal Sentencing Guidelines, in part to eliminate racial disparities in sentencing.²²⁹ The Guidelines attempt to do this by eliminating much of the federal judges' discretion in sentencing and replacing it with minimum sentences for certain offenses.²³⁰

The influence of racial bias in sentencing should be closely monitored. Since the Court has rejected statistics as a method for proving discrimination in specific cases, the only other recourse is to control the power of the final sentencing body, whether it is the judge or the jury, by placing strict limits on its discretion, just like the sentencing guidelines attempt to do. In this way, personal feelings will be hampered from entering into sentencing decisions. Thus, in order to prevent racial bias in Alabama sentencing, the Court should have struck down the Alabama sentencing scheme as unconstitutional because it fails to give enough guidance to the judge. This, in turn, would have forced Alabama to revise its sentencing scheme so as to comply with the Court's decision.

2. *Political Pressures on Judges*

Alabama judges are elected every six years.²³¹ Thus, judges are subject to the same political pressures other elected officials face, and the electorate will analyze judges' judgments and sentences in the same way in which they analyze politicians' decisions in the legislature. The judges' decisions, therefore, greatly impact whether they are re-elected, and the public is strongly in favor of meting out the maximum punishments to defendants.²³²

According to Bryan Stevenson, the Executive Director of the Alabama Capital Representation Resource Center, "When you do a statistical study—a minimultiple regression analysis of how the death penalty is applied and how override is applied—there is a statistically

²²⁷ *Id.* at 336 (Brennan, J., dissenting).

²²⁸ Floyd D. Weatherspoon, *The Devastating Impact of the Jury System on the Status of African-American Males: An Overview Perspective*, 23 CAP. U. L. REV. 23, 39 (1994).

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ ALA. CODE § 17-2-7 (1987). In fact, in nine states, including Alabama and Texas, judges actually run under party affiliations, furthering the chance that politics will influence their sentencing decisions. Bright & Keenan, *supra* note 159, at 779.

²³² For a more in-depth discussion of this subject, see Bright & Keenan, *supra* note 159.

significant correlation between judicial override and election years."²³³

Further evidence indicating that political pressures do affect judges was provided by a North Carolina judge. During a recent American Bar Association panel discussion, Chief Justice Exum, of the Supreme Court of North Carolina, discussed his campaign for Chief Justice, demonstrating the pressures he felt to support and impose the death penalty.²³⁴

Sometimes the campaign debate got really grizzly. My opponents would bring up all the times I had dissented in cases involving the imposition of the death penalty, and I had to come back and demonstrate all the times I had concurred in cases sustaining the death penalty. So, it emerged into a battle of statistics.²³⁵

Chief Justice Exum continued, "So, I guess on the question of whether elected state judges can survive if they sometimes overturn death sentences, the answer is yes, they can, but I believe that it is becoming more and more difficult."²³⁶

Another example of the political influences judges face arose in Alabama. There, a Court of Criminal Appeals judge who was running for a position on the Alabama Supreme Court accused the Alabama Supreme Court of being "'too left and too liberal' in capital cases and challenged the court to set execution dates in twenty-seven cases that were pending in the federal courts on habeas corpus review."²³⁷ Other judges actually have scheduled capital cases so that they occur right before elections,²³⁸ and still other judges have refused to continue a case until after an election just so they can get the publicity which surrounds such trials.²³⁹

These examples provide concrete evidence that the amount of political pressure on judges is enormous. These pressures inevitably

²³³ *Politics and the Death Penalty*, 21 HUM. RTS. 24, 25 (1994). This article is a collection of statements made at a panel discussion at a 1993 meeting of the American Bar Association. See Stevenson's discussion in *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure*, 21 FORDHAM URB. L.J. 239 (1994) for a complete discussion.

²³⁴ *Politics and the Death Penalty*, *supra* note 233, at 270.

²³⁵ *Id.* at 271.

²³⁶ *Id.* at 272.

²³⁷ Bright & Keenan, *supra* note 159, at 786.

²³⁸ *Id.* at 795-96.

²³⁹ *Id.* at 787-89. For instance, in Alabama, the defense in a capital case requested a continuance because the defense attorney was suffering from a serious infection that was a complication of polio. Bob Austin, who was a candidate in the election for the circuit court of Alabama, was the judge in the case. He refused a motion by the defense to continue the case. The case was tried, and the defendant was sentenced to death. Full press coverage was given to the case. This case occurred just two weeks before the election, which Austin proceeded to win. *Id.*

impact judges' sentencing decisions. The Alabama sentencing scheme does nothing to temper these pressures, it simply increases the arbitrariness of the sentences imposed by Alabama judges. Therefore, in order to comply with the *Furman* mandate of non-arbitrary, non-capricious sentences, without eliminating the procedure of electing state court judges, guidelines should be given to sentencers. As more limitations are placed on judges' discretion so that they cannot act on whims or prejudices, it becomes more likely that the sentences will not be arbitrary.

D. JUSTICE O'CONNOR'S "NO COURT LEGISLATION" ARGUMENT

Since the *Furman* decision in 1972, the Court has consistently stated that the death penalty is an extreme form of punishment that should only be used in dire circumstances.²⁴⁰ Thus, the states are required to "regularize, and make rationally reviewable the process for imposing a sentence of death,"²⁴¹ and they must rectify the "procedural rules that tended to diminish the reliability of the sentencing determination."²⁴² The most significant and fundamental point of all of these pronouncements was that "death penalty statutes must be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion."²⁴³

The majority acknowledged such pronouncements in *Harris* but failed to give much credence to them. Instead, Justice O'Connor, by citing various political and judicial tenets about the balance of power and the role of precedent, avoided fully delving into the issue presented in *Harris*: namely, whether the Alabama capital sentencing scheme resulted in the arbitrary and capricious imposition of sentences.²⁴⁴ Justice O'Connor never explained why the sentences resulting from Alabama's capital sentencing scheme are not arbitrary. She simply dismissed the statistics about the number of judicial overrides in favor of the death penalty, stating that they do not demonstrate anything about constitutionality.²⁴⁵ Thus, Justice O'Connor concluded, the Court did not have the power to force Alabama to adopt Florida's *Tedder* standard.²⁴⁶

Justice O'Connor made several statements regarding the limited role that precedent plays in terms of the substance of the sentencing

²⁴⁰ Cf. *Harris v. Alabama*, 115 S. Ct. 1031, 1037-39 (1995) (Stevens, J., dissenting).

²⁴¹ *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (plurality opinion).

²⁴² *Beck v. Alabama*, 447 U.S. 625, 638 (1980).

²⁴³ *California v. Brown*, 479 U.S. 538 (1987).

²⁴⁴ *Harris*, 115 S. Ct. at 1032.

²⁴⁵ See *id.* at 1036.

²⁴⁶ *Id.* at 1035.

schemes. For example, she wrote:

These statements of approbation [about the *Tedder* standard], do not mean that the *Tedder* standard is constitutionally required. . . . [O]ur praise for *Tedder* notwithstanding, the hallmark of the analysis is not the particular weight a State chooses to place upon the jury's advice, but whether the scheme adequately channels the sentencer's discretion so as to prevent arbitrary results.²⁴⁷

Justice O'Connor also quoted *Franklin v. Lynaugh*²⁴⁸ where the Court stated that no "specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required."²⁴⁹

As support for the proposition that the Florida precedents should play a very limited role, the Court discussed the fact that it is not the role of the Court to legislate.²⁵⁰ Although these statements may be accurate interpretations of the role of the judiciary, they do not lead to the conclusion that the Alabama capital sentencing scheme is constitutional.

The Court's reasoning is flawed. In effect, the Court is saying that because it is not within its power to determine what the Alabama scheme must say, it is also not within its power to simply declare the scheme unconstitutional. Such a statement overlooks the basic fact that the Court does not have to design replacement statutes for those statutes it declares unconstitutional.²⁵¹ Instead, the Court should have declared Alabama's capital sentencing scheme unconstitutional under *Furman* and let the Alabama legislature adopt a new scheme—one which would not result in arbitrary sentences.

The majority opinion, therefore, managed to avoid an in-depth analysis of the realities of sentencing and the arbitrariness that actually does pervade the sentencing process both in Alabama and elsewhere.

VI. CONCLUSION

The Eighth Amendment protects against arbitrary and capricious sentencing schemes. In order to protect against the whims and prejudices which can affect sentencing, the Constitution requires that sentencing schemes give proper guidance to sentencers. Such restric-

²⁴⁷ *Id.*

²⁴⁸ 487 U.S. 164 (1988).

²⁴⁹ *Id.* at 179.

²⁵⁰ *Harris v. Alabama*, 115 S. Ct. 1031, 1035 (1995).

²⁵¹ This reality can be seen in innumerable cases, including *United States v. Furman*, discussed *supra* note 29, where the Court declared all then-existing death penalty statutes unconstitutional. *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972). As a result, each state had to revamp its current statute or create a new one.

tions on sentencers' discretion prevents arbitrary sentences.

Factors like judicial bias and the political pressures faced by judges inevitably have an impact on judges and the sentences they impose.²⁵² These factors introduce an inevitable arbitrariness into sentencing. Because such factors are not easily monitored or controlled, sentencing schemes must do their best to ensure that such factors have little impact on sentencing decisions. That is, they must incorporate restrictions on the judge's discretion so as to eliminate as much arbitrariness as possible.

The Alabama sentencing scheme at issue in *Harris v. Alabama* fails to incorporate the proper guidelines and channeling devices which prevent arbitrary sentencing. Although the scheme does contain some specifications to the judge on how to formulate a sentence, it does not instruct the judge on how to treat the jury's recommended sentence. Thus, the resulting sentences contain the exact arbitrariness that *Furman* sought to prevent, and the scheme violates the Eighth Amendment and its protection against cruel and unusual punishment.

The *Tedder* standard employed in Florida acts as a safeguard against judicial whims and prejudices. The Florida scheme instructs the judge on how to factor in each aspect of the scheme—including how much weight to accord the jury's recommended sentence. Although the *Tedder* standard, as noted by Justice O'Connor, was never declared a constitutional mandate, the Court could have declared Alabama's sentencing scheme unconstitutional without requiring Alabama to adopt the *Tedder* standard. Such a decision is clearly within the bounds of the Court's powers. If the Court declared the sentencing scheme unconstitutional, the Alabama legislature would have to revise it, and the legislature would be forced to enact a new scheme which comports with the mandates set forth in *Furman*: namely, a sentencing scheme which restricts the judge's discretion to such an extent that arbitrary and capricious sentences are avoided.

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²⁵² See *Politics and the Death Penalty*, *supra* note 233. James A. Coleman, Jr., a professor at Duke University stated, "you [have] to accept the risk that some arbitrary factor [will] determine impositions of the death penalty." *Id.* at 24.

