

# **HARRIS v. ALABAMA: IS THE DEATH PENALTY IN AMERICA ENTERING A FOURTH PHASE?**

## **I. INTRODUCTION**

### **A. Questions Presented by *Harris v. Alabama***

Petitioner, Louise Harris, was convicted of capital murder by an Alabama jury. The same jury at the sentencing phase recommended life imprisonment by a vote of seven to five. The trial judge disregarded the advisory jury verdict and sentenced the petitioner to death by electrocution.<sup>1</sup> After all appeals at the state level were exhausted,<sup>2</sup> the Supreme Court granted petitioner's motion for leave to proceed *in forma pauperis* and granted *certiorari* limited to the following questions:

Q1. Is [the] death sentence invalid when [the] trial court overrides constitutionally protected jury verdict of life without parole and imposes death, when court relies on no norm or standard for limiting its discretion to override and when it gives no reason as to why jury verdict is improper?

Q2. Does capital sentencing scheme in which trial courts are free to reject jury life-without-parole verdicts without regard to any articulated standard or norm, and in which rejection of those verdicts results in haphazard and inconsistent application of death penalty, violate Eighth Amendment?<sup>3</sup>

### **B. Alabama's Death Penalty Scheme**

Alabama law vests capital sentencing authority in the trial judge, but requires the judge to consider an advisory jury verdict.<sup>4</sup> One convicted of capital murder in Alabama is entitled to a sentencing hearing before a jury,<sup>5</sup> unless waived by both parties with approval of the court.<sup>6</sup> At the sentencing hearing statutory aggravating factors<sup>7</sup>

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1. *Harris v. State*, 632 So. 2d 503 (Ala. Crim. App. 1992).
  2. *Ex parte Harris*, 632 So. 2d 543 (Ala. 1993).
  3. *Harris v. Alabama*, 93-7659, 63 U.S.L.W. 3024 (July 19, 1994).
  4. ALA. CODE § 13A-5-47(a) (1994).
  5. ALA. CODE § 13A-5-46 (1994).
  6. ALA. CODE § 13A-5-44 (1994).
  7. ALA. CODE § 13A-5-49 (1994) states:

Aggravating circumstances shall be the following:

- (1) The capital offense was committed by a person under sentence of imprisonment;
- (2) The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person;
- (3) The defendant knowingly created a great risk of death to many persons;
- (4) The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary, or kidnapping;
- (5) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
- (6) The capital offense was committed for pecuniary gain;

must be proved beyond a reasonable doubt and the state must disprove by a preponderance of the evidence mitigating factors<sup>8</sup> proffered by the defendant.<sup>9</sup> The jury then determines the advisory verdict. If the jury decides that aggravating factors, if any, outweigh mitigating factors, then the jury recommends death; otherwise, the verdict is life without parole.<sup>10</sup> A jury can recommend death only if ten jurors agree, life imprisonment requires only a majority vote.<sup>11</sup> The sentencing judge receives both the verdict and the vote tally. The judge then considers all available evidence and files a written statement detailing the defendant's crime, aggravating and mitigating factors, and the sentence imposed. Alabama law provides as follows:

In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to Section 13A-5-46(a) or 13A-5-46(g). *While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.*<sup>12</sup>

If the death sentence is imposed, the conviction and sentence are automatically reviewed by the appellate court, and if affirmed, an automatic writ of *certiorari* is granted by the Alabama Supreme Court. Additionally, when reviewing the record for errors, the appellate court must independently weigh the aggravating and mitigating factors and also determine if the death sentence is disproportionate to sentences rendered in comparable cases.<sup>13</sup>

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(7) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital offense was especially heinous, atrocious or cruel compared to other capital offenses.

8. ALA. CODE § 13A-5-51 (1994) states:

Mitigating circumstances shall include, but not be limited to, the following:

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

ALA. CODE § 13A-5-52 (1994), further states:

In addition to the mitigating circumstances specified in Section 13A-5-51, mitigating circumstances shall include any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, and any other relevant mitigating circumstance which the defendant offers as a basis for a sentence of life imprisonment without parole instead of death.

9. ALA. CODE § 13A-5-45(g) (1994).

10. ALA. CODE § 13A-5-46(e) (1994).

11. ALA. CODE § 13A-5-46(f) (1994).

12. ALA. CODE § 13A-5-47(e) (1994) (emphasis added).

13. ALA. CODE § 13A-5-53(b) (1994). See also *Harris v. Alabama*, 115 S. Ct. 1031 (1995).

### C. Standards Set by Other States

Only four states, Florida, Indiana, Delaware, and Alabama, use a trifurcated system mandating the involvement of both jury and judge in their death penalty sentencing scheme.<sup>14</sup> The supreme courts of Florida<sup>15</sup> and Indiana<sup>16</sup> have set standards to regulate the roles of judge and jury. When the two (judge and jury) reach different determinations about punishment, the function of the jury's life determination in the final sentencing verdict is clear: the advisory life determination can be set aside only if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ."<sup>17</sup> Delaware has only recently required both jury and judge participation in capital sentencing, but it appears to be adopting the "Tedder standard" for governing disagreements between the two decisionmakers.<sup>18</sup> There have been no death sentences imposed under Delaware's new sentencing scheme after a jury's life recommendation.<sup>19</sup> The Alabama Supreme Court has yet to set forth a distinct standard for judges when overriding a jury's recommendation.<sup>20</sup>

This note will address the question of whether the Alabama death penalty scheme, as presently formulated, violates the Eighth Amendment under the standards set forth by the Supreme Court in *Gregg v. Georgia* and related cases.<sup>21</sup> Part II of this note will discuss the *Furman*<sup>22</sup> and *Gregg*<sup>23</sup> decisions and their effect on state death penalty schemes. Part III will examine the factual history of *Harris*, the Supreme Court's decision, and the dissenting opinion of Justice Stevens. Part IV will offer an analysis of *Harris* and conclude with a brief summary of the major points covered in this note.

## II. THE *FURMAN* AND *GREGG* DECISIONS: THEIR MEANING AND EFFECT ON DEATH PENALTY SCHEMES IN AMERICA

### A. Brief History of the Death Penalty in America

The death penalty in America has passed through roughly three broad phases. In phase one, at the time of Independence, most felonies led to the imposition of the death penalty. Most homicides and all murders were automatically punishable by death. Gradually by the nineteenth century most states divided murder into two degrees, first

14. In a vast majority of states that employ the death penalty, juries determine the sentence, unless the defendant requests sentencing by the court. In Arizona, Idaho, Montana, and Nebraska the sentence is determined by the trial judge. Marcia A. Widder, *Hanging Life in the Balance: The Supreme Court and the Metaphor of Weighing in the Penalty Phase of the Capital Trial*, 68 TUL. L. REV. 1341, 1342 n.6 (1994) [hereinafter *Widder*].

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

16. See *Martinez-Chavez v. State*, 534 N.E.2d 731, 735 (Ind. 1989).

17. See *Tedder*, 322 So. 2d at 910; see also *Martinez-Chavez*, 534 N.E.2d at 735 ("In order to sentence a defendant to death after the jury recommended against death, the facts justifying a death sentence should be so clear and convincing that virtually no reasonable person could disagree that death was appropriate . . .").

18. See *Pennell v. State*, 604 A.2d 1368, 1377-78 (Del. 1992).

19. Petitioner's Brief at n.16, *Harris v. Alabama*, (No. 93-7659), cert. granted, 63 U.S.L.W. 3024 (July 19, 1994).

20. See *Martinez-Chavez v. State*, 534 N.E.2d 731, 734 n.2 (Ind. 1989).

21. *Gregg v. Georgia*, 428 U.S. 153 (1976); see also *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality opinion); *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality opinion).

22. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

23. *Gregg v. Georgia*, 428 U.S. 153 (1976).

and second, and the death penalty was usually only implemented for first degree murder.

In phase two, roughly from the mid-nineteenth century to the 1970's, states used the first degree murder definition to decide who was eligible for death, but left the choice of imposing life or death to the unguided discretion of the judge or jury that decided the guilt issue.<sup>24</sup>

Phase three began with the *Furman* decision when the Supreme Court held that in the absence of judicial guidelines the application of the death penalty represents an unconstitutional infringement of the Eighth and Fourteenth Amendments. The five-member majority filed separate concurring opinions, while the four-member minority filed separate dissenting opinions.<sup>25</sup>

The majority opinion held:

[T]he imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.<sup>26</sup>

According to Justice Stewart, current death penalty schemes "allowed [the death sentence] to be 'wantonly' and 'freakishly' imposed, and a death sentence offended the eighth and fourteenth amendments when 'wantonly and freakishly applied.'"<sup>27</sup> Justice White said that current death penalty schemes provided "no meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it was not."<sup>28</sup> The Court's ruling reversed the judgment in *Furman* "insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings."<sup>29</sup>

"The *Furman* decision was splintered, and the fundamental premise that emerged from the various opinions was that the death penalty could not be imposed under sentencing schemes that granted untrammelled discretion to the sentencer and thereby created a risk that the death penalty would be administered in an arbitrary and capricious manner."<sup>30</sup> The Court's decision vacated over 600 death sentences of prisoners awaiting execution, and invalidated all forty death penalty schemes then in existence.<sup>31</sup>

24. See JOHN KAPLAN & ROBERT WEISBERG, *CRIMINAL LAW: CASES AND MATERIAL* 389 (2d ed. 1991).

25. *Furman*, 408 U.S. at 238; (For the Justices' opinions see (Douglas, J., *concurring* at 240-57); (Brennan, J., *concurring* at 257-306); (Stewart, J., *concurring* at 306-10); (White, J., *concurring* at 310-14); (Marshall, J., *concurring* at 314-74); (Burger, C.J., *dissenting* at 375-405); (Blackmun, J., *dissenting* at 405-14); (Powell, J., *dissenting* at 414-65); (Rehnquist, J., *dissenting* at 465-70)). See also *Widder*, *supra* note 14, at 1347 n.31.

26. *Furman*, 408 U.S. at 239-40. See also *Widder*, *supra* note 14, at 1347.

27. *Furman*, 408 U.S. at 310 (Stewart J., *concurring*). See also Daniel Ross Harris, *Capital Sentencing After Walton v. Arizona: A Retreat from the "Death is Different" Doctrine*, 40 AM. U. L. REV. 1389, 1396 & n.35 (1991) [hereinafter *Capital Sentencing*].

28. *Furman*, 408 U.S. at 313 (White, J., *concurring*). See also *Widder*, *supra* note 14, at 1347.

29. See *Furman*, 408 U.S. at 239-40. See also *Widder*, *supra* note 14, at 1347.

30. Daryl Kessler, *Eighth Amendment - Sentencer Discretion in Capital Sentencing Schemes*, 84 J. CRIM. L. & CRIMINOLOGY 827, 828 (1994).

31. See *Capital Sentencing*, *supra* note 27 at 1394.

## B. Post-*Furman* Death Penalty Schemes

After *Furman*, state legislatures scrambled to pass death sentencing schemes that complied with the Court's ruling. At least thirty-five states enacted new death penalty sentencing regulations by the time the Court returned to the issue. These newly adopted schemes generally followed one of two routes: (1) guided discretion schemes "specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence," or (2) mandatory schemes "[making] the death penalty mandatory for specified crimes."<sup>32</sup>

In a group of five cases decided in 1976, the Court determined the constitutionality of these two approaches. The Court struck down statutes that automatically imposed the death penalty on the grounds that defendants were denied individualized determination of their sentences.<sup>33</sup> However, in *Gregg*,<sup>34</sup> the Court upheld death penalty schemes that guided the sentencer's discretion in determining an appropriate sentence, explaining that:

[The] concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.<sup>35</sup>

In *Gregg*, the Georgia legislature's reaction to *Furman* was to mandate a bifurcated death penalty scheme with separate guilt and penalty phases. The "*Gregg* statutes" further narrowed the class of people subject to the death penalty by specifying ten statutory aggravating circumstances, one of which must be found to exist beyond a reasonable doubt before a death sentence could be imposed.<sup>36</sup> Additionally, the jury was authorized to consider any other appropriate aggravating or mitigating circumstances. The jury was not required to find any mitigating factors to make a binding recommendation of mercy, but it had to find at least one statutory aggravating circumstance before it could recommend death.<sup>37</sup> The above procedures required a jury to consider the circumstances of the crime and the criminal, as well as any special facts about the defendant, before it could recommend a sentence of death.

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32. *Gregg v. Georgia*, 428 U.S. 153, 180 & n.23 (1976) (plurality opinion).

33. *See Woodson v. North Carolina*, 428 U.S. 280, 302-05 (1976) (plurality opinion); *see also Roberts v. Louisiana*, 428 U.S. 325, 333-36 (1976) (plurality opinion) (holding mandatory death penalty does not cure *Furman's* concern for jury's unbridled discretion and fails to afford particularized consideration of defendant's record and character). *See also Widder, supra* note 14, at 1348 & n.38.

34. *Gregg*, 428 U.S. at 207; *see also Proffitt v. Florida*, 428 U.S. 242, 260 (1976) (plurality opinion); *Jurek v. Texas*, 428 U.S. 262, 276-77 (1976) (plurality opinion).

35. *Gregg*, 428 U.S. at 195; *See also Jurek*, 428 U.S. at 274 (noting that Texas' procedure "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death"); *Proffitt*, 428 U.S. at 258 (noting that Florida's statute ensures that "the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is imposed"). *See also Widder, supra* note 14, at 1348 & n.41.

36. GA. CODE ANN. § 17-10-30 (1990).

37. *Id.*

An additional safeguard against arbitrary and capricious sentencing was provided by an automatic appeal of all death sentences to the State's Supreme Court. The Georgia Supreme Court was required to review each sentence and determine: (1) whether the sentence was imposed under the influence of passion or prejudice, and (2) if the evidence supports the finding of a statutory aggravating circumstance. Finally, the Court had to determine the disproportionality of the death sentence imposed when compared to other sentences imposed in similar circumstances.<sup>38</sup>

In *Gregg*, the Supreme Court found that limited discretion to impose a death sentence was a valid way to avoid the arbitrariness and capriciousness condemned in the pre-*Furman* sentencing schemes.<sup>39</sup> The Court reasoned that decisions to impose capital punishment should not be made under a system that creates a substantial risk of prejudicial impulse, arbitrariness, or caprice.<sup>40</sup> This doctrine evolved into the principle that "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'"<sup>41</sup>

### C. Mitigating Factors—*Lockett v. Ohio*

A separate doctrine developed alongside the Court's command limiting sentencer's discretion. This separate doctrine required the admission of all relevant mitigating evidence and may be traced to the court's rationale in striking the post-*Furman* mandatory sentencing schemes. The sentencer must be afforded the opportunity to consider mitigating circumstances to allow for "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."<sup>42</sup> However, this doctrine is generally attributed to *Lockett v. Ohio*.<sup>43</sup>

In *Lockett* the Court held that a defendant's minor role in a felony murder was a mitigating factor that the sentencer was required to consider although it did not fall within any enumerated statutory category.<sup>44</sup> The Court commented:

[A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.<sup>45</sup>

The Supreme Court ensured that the entire character and background of the defendant, if relevant, should be considered in the sentencing decision when it decided *Eddings v. Oklahoma*<sup>46</sup> in 1982.

38. *Gregg*, 428 U.S. at 196-98.

39. *Id.* at 198-207.

40. See *Capital Sentencing*, *supra* note 27, at 1401 & n.68.

41. *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)). See also *Widder*, *supra* note 14, at 1348 & n.42.

42. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion).

43. *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion). See also *Widder*, *supra* note 14, at 1348-49.

44. *Lockett v. Ohio*, 438 U.S. 586 (1978).

45. *Id.* at 605.

46. *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

In *Skipper v. South Carolina*,<sup>47</sup> the Court went even further when it reasoned that since a defendant's record of disruptive or dangerous behavior in prison can be considered as aggravating, "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating."<sup>48</sup>

These two complementary doctrines currently inform death penalty jurisprudence. First, the legislature must provide sufficient standards to narrow the class of offenders eligible to receive the death penalty; must "reasonably" justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder, and ensure that the discretion of the sentencing authority is limited and reviewable.<sup>49</sup> Second, the sentencer must be allowed to hear all relevant evidence in mitigation of a sentence of death.<sup>50</sup> It is these two doctrines and the idea that "[t]he State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision,"<sup>51</sup> that will guide the Supreme Court's decision in *Harris v. Alabama*.<sup>52</sup>

### III. HARRIS v. ALABAMA

#### A. Factual History Of *Harris v. Alabama*

The petitioner was convicted of capital murder in the state of Alabama<sup>53</sup>. The victim, a deputy sheriff, was married to the petitioner. The petitioner was having an affair with Lorenzo McCarter, and asked McCarter to find someone to kill her husband. McCarter approached a co-worker, who refused and reported the solicitation to his supervisor. However, McCarter subsequently found willing accomplices in Michael Sockwell and Alex Hood, who were paid \$100 along with a vague promise of more money after performing the deed.

On the designated night, as the petitioner's husband left for work on the nightshift, approximately 11:00 p.m., petitioner called McCarter on his beeper to alert him. McCarter and Hood sat in a parked car across the street from the entrance to the subdivision in which the petitioner and victim lived. Sockwell hid in the bushes next to a stop sign at the entrance to the victims' subdivision. As the victim stopped his car at the stop sign, Sockwell jumped forth and shot him, point blank, with a shotgun.<sup>54</sup>

The petitioner was arrested after questioning, and McCarter agreed to testify to the conspiracy in exchange for a promise not to seek the death penalty.<sup>55</sup> McCarter testified that he was asked to kill the victim so that he and petitioner could share in the victim's death benefits, a total of about \$250,000.

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47. *Skipper v. South Carolina*, 476 U.S. 1 (1986).

48. *Id.* at 5 (referring to the defendant's record of good behavior in prison).

49. *Gregg*, 428 U.S. at 195 (Stewart, J., plurality opinion) ("Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.").

50. See *Widder*, *supra* note 14, at 1348.

51. See, e.g., *Tuilaepa v. California*, 114 S. Ct. 2630, 2635 (1994). See also John W. Guendelsberger, *Judge Versus Jury: Can a Trial Judge Order Death When the Jury Recommends Life?* PREVIEW OF U.S. SUP. CT. CASES, Nov. 14, 1994 at 113 (A.B.A. Div. for Public Ed.).

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

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

54. *Id.* at 508.

55. *Id.* at 532.

A jury convicted the petitioner of capital murder, and at the sentencing hearing several witnesses testified about the petitioner's good background and strong character. The petitioner was raising seven children, held three simultaneous jobs, and participated actively in church.<sup>56</sup> The jury recommended life without parole by a seven to five vote.

The trial judge then considered the sentence and found the existence of one statutory aggravating circumstance, murder for pecuniary gain, and one mitigating circumstance, no prior criminal record. The trial judge also found as nonstatutory mitigating circumstances that the petitioner was a hardworking, respected member of the community and the church. Noting that the petitioner planned the crime, financed its commission, and stood to the most from the victim's murder, the judge concluded that the one statutory aggravating factor far outweighed the nonstatutory mitigating factors. Hence, the judge sentenced the petitioner to death.

In separate proceedings the other co-conspirators were convicted of capital murder. McCarter and Hood received sentences of life without parole.<sup>57</sup> Sockwell, the triggerman, received a sentence of death after the trial judge rejected a seven to five jury recommendation of life imprisonment.<sup>58</sup>

The Alabama Court of Criminal Appeals affirmed petitioner's sentence,<sup>59</sup> noting that Alabama's death penalty scheme is based on Florida's sentencing scheme which was held constitutional by the Supreme Court.<sup>60</sup> However, jury recommendations receive "great weight" from judges in Florida,<sup>61</sup> while Alabama only requires that judges "consider" the jury's advisory verdict.

The Court of Criminal Appeals rejected the petitioner's contention that Florida's "Tedder standard" is a constitutional requirement.<sup>62</sup> Following the Alabama statute, the Court then reviewed the record for prejudicial errors, and independently weighed the aggravating and mitigating factors.<sup>63</sup> The Alabama Supreme Court affirmed the sentence.<sup>64</sup>

The Supreme Court granted *certiorari* to decide whether Alabama's death sentencing scheme is unconstitutional because it does not specify the weight judges must give a jury's sentencing recommendation, thus allowing arbitrary imposition of a death sentence.<sup>65</sup>

## B. Supreme Court Decision In *Harris*

In *Harris v. Alabama*, the Supreme Court decided in an eight to one majority opinion to affirm the petitioner's death sentence.<sup>66</sup> The Court's opinion was decided along two themes: (1) the fact that the Court has spoken favorably of Florida's "Tedder standard"<sup>67</sup> does not mean that it is a constitutional requirement,<sup>68</sup> and (2)

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

57. *Id.*

58. *Id.* at 1033-34.

59. *Harris v. State*, 632 So. 2d 503, 542-43 (Ala. Crim. App. 1992).

60. *See Spaziano v. Florida*, 468 U.S. 447, 457-67 (1984); *see also Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality opinion).

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

62. *Harris v. State*, 632 So. 2d 503, 538 (Ala. Crim. App. 1992).

63. ALA. CODE § 13A-5-53 (1994).

64. *Ex parte Harris*, 632 So. 2d 543 (Ala. 1993).

65. *Harris v. Alabama*, 115 S. Ct. 1031, 1031-32 (1995).

66. *Id.* at 1031.

67. "[T]he facts suggesting a sentence of death [are] so clear and convincing that virtually no



that the Court has “rejected the notion that ‘a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required.’”<sup>69</sup>

### 1. “*Tedder Standard*” Not a Constitutional Requirement

Alabama’s death sentencing scheme is a trifurcated system similar to that of Florida. Both states have instituted procedural safeguards that are recognized by the Supreme Court. Both states require jury participation in the process, but give ultimate sentencing authority to the trial judge. Furthermore, a death sentence in both states is automatically subject to appellate review.<sup>70</sup> Finally, the reviewing courts must both independently weigh aggravating and mitigating factors to determine the propriety of the sentence,<sup>71</sup> and must also decide if the penalty is excessive or disproportionate when compared to similar cases.<sup>72</sup>

The petitioner’s main contention is that the two states, Florida and Alabama, differ in one very important aspect of constitutional dimension. The Florida Supreme Court requires that a trial judge give “great weight” to a jury’s recommended sentence. In Florida, a judge may not override an advisory verdict of life imprisonment unless “the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.”<sup>73</sup> The same standard applies when overriding a jury recommendation of death.<sup>74</sup> However, Alabama’s sentencing scheme only requires that a judge “consider” the jury’s recommendation,<sup>75</sup> and Alabama courts have refused to read the “*Tedder* standard” into their sentencing scheme.<sup>76</sup>

The different deference accorded the jury’s sentencing determination in the Alabama and Florida death sentencing schemes is the basis for the controversy in *Harris*.<sup>77</sup> The question before the Supreme Court was whether the Eighth Amendment requires a sentencing judge to assign any particular weight to an advisory jury verdict?<sup>78</sup>

The Supreme Court held that Florida’s death sentencing scheme was constitutional in *Proffitt v. Florida*.<sup>79</sup> Later, in *Spaziano v. Florida*, the Court addressed the specific question of whether relegating a jury to an advisory role in a death sentencing scheme and vesting the final sentencing authority in the judge was constitutional.<sup>80</sup> The Court acknowledged that sentencing power resided with the jury in most states.

reasonable person could differ.” *Tedder*, 322 So. 2d at 910; see also *Martinez-Chavez*, 534 N.E.2d at 735 (“In order to sentence a defendant to death after the jury recommended against death, the facts justifying a death sentence should be so clear and convincing that virtually no reasonable person could disagree that death was appropriate . . .”).

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

69. *Id.* at 1035-36. See also *Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988).

70. ALA. CODE §§ 13A-5-47(e), 13A-5-55 (1994); FLA. STAT. ch. 921.141 (3), (4) (1994).

71. ALA. CODE § 13A-5-53(b) (2) (1994); *Harvard v. State*, 375 So. 2d 833, 834 (Fla. 1977).

72. ALA. CODE § 13A-5-53(b)(3) (1994); *Williams v. State*, 437 So. 2d 133, 136 (Fla. 1983).

73. *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975); see also *Harris*, 115 S. Ct. at 1034 (quoting *Tedder*, 322 So. 2d at 910).

74. See *Grossman v. State*, 525 So. 2d 833, 839 n.1 (Fla. 1988).

75. ALA. CODE § 13A-5-47(e) (1994).

76. *Ex parte Jones*, 456 So. 2d 380, 382-83 (Ala. 1984); see also *Harris*, 115 S. Ct. at 1034.

77. *Harris*, 115 S. Ct. at 1031.

78. *Id.* at 1034.

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

80. *Spaziano v. Florida*, 468 U.S. 447, 459-64 (1984).

However, the Court also made it clear 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."<sup>81</sup> The Court spoke favorably about the deference a judge in Florida must accord the jury's advisory verdict.<sup>82</sup> The Court was also satisfied that the Florida Supreme Court takes the "*Tedder* standard" seriously; the Florida Supreme Court does not hesitate to reverse a trial court if the jury's role is diminished.<sup>83</sup>

These favorable comments by the Court did not mean that the "*Tedder* standard" is a constitutional requirement. The Court stated in *Spaziano*: "Our responsibility, however, is not to second-guess the deference accorded the jury's recommendation in a particular case, but to ensure that the result of the process is not arbitrary or discriminatory."<sup>84</sup> The Supreme Court has made it clear that there is "not" just one correct way for a state to set up its death penalty scheme.<sup>85</sup> Despite the Court's praise for the "*Tedder* standard," the key to analysis in cases in which the judge overrides a jury advisory verdict is not the particular weight given a jury's advice, "but whether the [sentencing] scheme adequately channels the sentencer's discretion so as to prevent arbitrary results."<sup>86</sup>

In *Harris*,<sup>87</sup> the petitioner did not challenge Alabama's legislative choice to guide the sentencing decision by requiring both jury and judge to weigh aggravating and mitigating factors. Petitioner also did not object to the vesting of sentencing authority in the judge, or the requirement that the jury's advisory verdict be considered in the process. What petitioner sought from the Supreme Court was a "constitutional mandate" on what weight a judge should accord a jury's sentencing recommendation. Referring to the "*Tedder* standard," petitioner in *Harris* contended that the judge must give "great weight" to a jury's advisory verdict.<sup>88</sup>

## 2. *Specific Method for Weighing Sentencing Factors Not a Constitutional Requirement*

In *Harris*, the Supreme Court rejected petitioner's argument that a specific method for balancing aggravating and mitigating factors in a death penalty scheme is a constitutional requirement.<sup>89</sup> The Court also rejected the idea that any specific weight should be given to particular factors, either in aggravation or mitigation, when considering a death sentence.<sup>90</sup> Petitioner in *Harris* argued that in Alabama, a jury's verdict is really much more than an advisory verdict and, in fact, actually commands the key sentencing role, subject only to review by the judge. To support the argument, petition-

81. *Id.* at 464. See also *Harris*, 115 S. Ct. at 1035.

82. *Proffitt*, 428 U.S. at 249; see also *Spaziano*, 468 U.S. at 465-66 (quoting *Dobbert v. Florida*, 432 U.S. 282, 294-95 (1977)).

83. *Spaziano*, 428 U.S. at 465. See also *Harris*, 115 S. Ct. at 1034-35.

84. *Spaziano*, 468 U.S. at 465.

85. *Id.* at 464. See also *Pulley v. Harris*, 465 U.S. 37 (1984); *Zant*, 462 U.S. at 884; *Gregg*, 428 U.S. at 195; *Harris*, 115 S. Ct. at 1035.

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

87. *Id.* at 1031.

88. *Id.* at 1035-36.

89. *Id.* See also *Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988); *Zant v. Stephens*, 462 U.S. 862, 875 n.13 (1983).

90. *Harris*, 115 S. Ct. at 1036. See also *Blystone v. Pennsylvania*, 494 U.S. 299, 306-07 (1990); *Eddings v. Oklahoma*, 455 U.S. 104, 113-15 (1982); *Proffitt*, 428 U.S. at 267-68.

er pointed to several Alabama cases that reversed death sentences when prejudicial errors were committed before an advisory jury.<sup>91</sup>

In reply the Supreme Court stated: "If the judge must consider the jury verdict in sentencing a capital defendant, as the statute plainly requires, then it follows that a sentence is invalid if the recommendation upon which it partially rests was rendered erroneously."<sup>92</sup>

Error is committed if the jury considers an invalid factor and its verdict is considered in turn by the judge: "This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor,"<sup>93</sup> and the result, therefore, was error."<sup>94</sup>

The Court held that such consequential error attaches whenever a jury recommendation is considered in a death penalty scheme, not only when it is given "great weight" by a judge.<sup>95</sup>

The petitioner in *Harris* also pointed out that "inconsistent weight" was accorded jury recommendations by trial court judges in numerous Alabama death sentencing cases.<sup>96</sup> For example, the trial judge in this case did not specify his reason for rejecting the jury's advice, but in another case stated that he gave "great weight" to the jury's recommendation.<sup>97</sup> Other judges, when rejecting jury recommendations of life imprisonment have commented that there was a "reasonable basis" to do so;<sup>98</sup> that the verdict was "unquestionably a bizarre result;"<sup>99</sup> and that "if this were not a proper case for the death penalty to be imposed, a proper case could scarcely be imagined."<sup>100</sup>

Using the above examples, the petitioner in *Harris* argued that the Alabama statute allowed arbitrary rejection of the jury's advisory verdict by judges. Petitioner maintained that this arbitrary rejection by the judges goes directly against the Court's mandate in *Furman*.<sup>101</sup> In *Furman*,<sup>102</sup> the Court stated that the death penalty could not be imposed under sentencing schemes that granted untrammelled discretion to the sentencer and thereby create a risk that the death penalty could be administered in an arbitrary and capricious manner.<sup>103</sup>

The Supreme Court, in affirming the judgment of the Alabama Supreme Court in *Harris*, replied that these divergent statements do not show any differing understanding of the statutory requirement that jury verdicts be considered in death penalty cases. They merely illustrate how different judges have considered the jury's advisory verdict.

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91. *Harris*, 115 S. Ct. at 1036; See also *Ex parte Williams*, 556 So. 2d 744, 745 (Ala. 1987).

92. *Harris*, 115 S. Ct. at 1036.

93. Cf. *Baldwin v. Alabama*, 472 U.S. 372, 382 (1985).

94. *Harris*, 115 S. Ct. at 1036 (quoting *Espinosa v. Florida*, 505 U.S. 1079, 1082 (1992)).

95. *Harris*, 115 S. Ct. at 1036.

96. *Id.* at 1036-37.

97. *Id.* See also *Coral v. State*, 628 So. 2d 988 (Ala. Crim. App. 1992) (see Appendix at end of the case for sentencing order of the trial court judge).

98. *Parker v. State*, 610 So. 2d 1171 (Ala. Crim. App. 1992) (see Appendix I at the end of the case for the sentencing order of the trial court judge).

99. *Ex parte Hays*, 518 So. 2d 768, 777 (Ala. 1986).

100. *State v. Frazier*, No. CC-85-3291 (Mobile Cty., July 31, 1990) (Ala. sentencing order, p. 139).

101. *Harris*, 115 S. Ct. at 1036-37.

102. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

103. *Id.* at 309-10 (Stewart, J., concurring). See also Daryl Kessler, Note, *Eighth Amendment - Sentencer Discretion in Capital Sentencing Schemes*, 84 J. CRIM. L. & CRIMINOLOGY 827, 828 (1994).

The Court stated that uniform treatment of jury advisory verdicts is not constitutionally mandated.<sup>104</sup>

The Alabama statute provides that “[t]he process of weighing the aggravating and mitigating circumstances to determine the sentence shall not be defined to mean a mere tallying of aggravating and mitigating circumstances for the purpose of numerical comparison.”<sup>105</sup> According to the *Harris* court, this is no less than what the Constitution requires.<sup>106</sup> “[D]isparate treatment of jury [advisory] verdicts simply reflects the fact that . . . emphasis given to decisional criterion must, of necessity, vary in order to account for the particular circumstances of each case.”<sup>107</sup> As stated in *Eddings v. Oklahoma*,<sup>108</sup> “[A] consistency produced by ignoring individual differences is a false consistency.”<sup>109</sup> The Court further pointed out that “[i]n any event, [petitioner] [did] not show how the various disparate statements affected her [particular] case. [Petitioner] did not bring an equal protection claim, [nor did petitioner] contest the lower court’s conclusion that her sentence [was] proportionate to [those] imposed in similar cases.”<sup>110</sup> The Court decided that sentiments expressed in unrelated cases do not render petitioner’s punishment violative of the Eighth Amendment.

The Supreme Court reasoned in support of its holding:

The Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury’s recommendation and trusts the judge to give it the proper weight.<sup>111</sup>

### C. Dissenting Opinion of Justice Stevens

#### 1. *Death Is Different*

Justice Stevens, in his dissent, pointed out that a death penalty is fundamentally different from any other penalty that society may impose. This difference is manifested by state legislatures’ assignments of sentencing authority. In every state except Oklahoma, the trial judge and not the jury is responsible for sentencing in noncapital cases.<sup>112</sup> In 33 of the 37 states that authorize the death penalty, the jury participates in the sentencing decision. In 29 of these states the jury’s decision is final. In the other four states: Alabama,<sup>113</sup> Delaware,<sup>114</sup> Florida,<sup>115</sup> and Indiana,<sup>116</sup> the judge has the power to override the jury.<sup>117</sup> Florida, Indiana, and Delaware use the “*Tedder* standard” for jury overrides.<sup>118</sup> However, Alabama has no standard for a judge’s over-

104. *Harris*, 115 S. Ct. at 1037.

105. ALA. CODE § 13A-5-48 (1994).

106. *Harris*, 115 S. Ct. at 1037. See also *Proffitt v. Florida*, 428 U.S. 242, 258 (1976).

107. *Harris*, 115 S. Ct. at 1037.

108. *Eddings v. Oklahoma*, 455 U.S. 104 (1982). See also *Harris*, 115 S. Ct. at 1037.

109. *Eddings*, 455 U.S. at 112.

110. *Harris*, 115 S. Ct. at 1037.

111. *Id.*

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

113. ALA. CODE § 13A-5-47 (1994).

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

115. FLA. STAT. ANN. ch. 921.141 (West 1985 & Supp. 1995).

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

117. See Kathryn K. Russell, *The Constitutionality of Jury Override in Alabama Death Penalty Cases*, 46 ALA. L. REV. 5, 6, 9-10 (1994) (hereinafter *Russell*). See also *Harris*, 115 S.Ct. at 1037-38.

118. “[T]he facts suggesting a sentence of death [are] so clear and convincing that virtually no

ride, which leaves open the possibility of an arbitrary and capricious judgement by the judge.

## 2. Political Pressures Can Influence Sentencing Decisions

Justice Stevens believes that total reliance on judges to pronounce sentences of death is constitutionally unacceptable.<sup>119</sup> An advisory jury recommendation may ameliorate concerns about judicial sentencing in some cases; more often than not, however, that addition makes the scheme much worse, especially in Alabama, where the jury's verdict carries no weight.<sup>120</sup> Because of political pressures, Alabama judges who face partisan election every six years, are more likely to impose a death sentence.<sup>121</sup>

Justice Stevens in a quote from *Duncan v. Louisiana*<sup>122</sup> wrote:

The Framers of our Constitution "knew from history and experience that it was necessary to protect . . . against judges too responsive to the voice of higher authority."<sup>123</sup>

Justice Stevens added:

[T]he 'higher authority' to whom present-day capital judges may be 'too responsive' is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty.<sup>124</sup>

Justice Stevens writes that the jury system provides reliable insulation against the passions of the polity. "Voting for a political candidate who vows to be 'tough on crime' differs vastly from voting at the conclusion of an actual trial to condemn a specific individual to death."<sup>125</sup> A jury focuses its attention on a particular case that involves the fate of a fellow citizen. This process is totally different than focusing on a general remedy for a global category of faceless violent criminals who may appear unworthy of life in the abstract. Justice Stevens stated that a jury's verdict is the expression of a collective judgement that "we may fairly presume to reflect the considered view of the community."<sup>126</sup>

According to Justice Stevens, community participation in life or death sentencing decisions is just as critical as in those decisions that are expressly guaranteed a jury trial by the constitution.<sup>127</sup> As explained in *Duncan*:

The jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary

reasonable person could differ." *Tedder*, 322 So. 2d 908, 910 (Fla. 1975); see also *Martinez-Chavez v. State*, 534 N.E.2d 731, 735 (Ind. 1989) ("In order to sentence a defendant to death after the jury recommended against death, the facts justifying a death sentence should be so clear and convincing that virtually no reasonable person could disagree that death was appropriate . . .").

119. *Walton v. Arizona*, 497 U.S. 639, 708 (1990) (Stevens, J., dissenting). See also *Harris*, 115 S. Ct. at 1039.

120. *Harris*, 115 S. Ct. at 1036, 1039-40.

121. *Id.* at 1039-40, n.8.

122. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

123. *Duncan*, 391 U.S. at 156. See also *Harris*, 115 S. Ct. at 1039.

124. *Harris*, 115 S. Ct. at 1039.

125. *Id.* at 1038-39.

126. *Id.* at 1039.

127. See U.S. CONST. amends. VI & VII.

powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.<sup>128</sup>

Death sentences imposed against a jury recommendation of life imprisonment “sever the critical ‘link between contemporary community values and the penal system . . . .’ [and] [t]hey result in execution of individuals whom the community would spare.”<sup>129</sup> Judicial override of a jury’s death sentence recommendation not only countermands the community’s judgment; it expresses “contempt” for that judgment.<sup>130</sup>

#### IV. ANALYSIS AND CONCLUSION

At first glance it seems that the Supreme Court in reaching its decision in *Harris*,<sup>131</sup> overwhelmingly approves of the Alabama sentencing scheme. However, a closer reading of the decision leads one to reach the opposite conclusion.

##### A. Statistical Anomaly in Results of Alabama’s Death Penalty Scheme

The Court observed that, in the Florida context, permitting a trial judge to reject a jury’s recommendation may afford capital defendants “a second chance for life with the trial judge.”<sup>132</sup> However, in Alabama the sentencing scheme yielded some surprising statistics; there have been only five cases where a judge in Alabama rejected a jury’s death recommendation, compared to 47 cases where a judge imposed a death sentence over a jury’s recommendation of life imprisonment.<sup>133</sup> The Court brushed over this anomaly by saying that the numbers do not tell the whole story:

We do not know for instance, how many cases in which a jury recommendation of life imprisonment is adopted would have ended differently had the judge not been required to consider the jury’s advice. Without such a subjective look into the minds of the decisionmakers, the deceptively objective numbers afford at best an incomplete picture. Even assuming that these statistics reflect a true view of capital sentencing in Alabama, they say little about whether the scheme is constitutional. That question turns not solely on a numerical tabulation of actual death sentences as compared to a hypothetical alternative, but rather on whether the penalties imposed are the product of properly guided discretion and not of arbitrary whim.<sup>134</sup>

##### B. The Problem With Alabama’s Death Penalty Scheme

The fact that Alabama trial judges have overridden nine jury’s life recommendations for every vetoed death recommendation is disturbing.<sup>135</sup> If the statistics are correct, there is a problem with Alabama’s death penalty scheme.<sup>136</sup> While the problem

128. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

129. *Harris*, 115 S. Ct. at 1040-41 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519, n.15 (1968)).

130. *Harris*, 115 S. Ct. at 1041.

131. *Id.* at 1031.

132. *Dobbert v. Florida*, 432 U.S. 282, 296 (1977). *See also Harris*, 115 S. Ct. at 1036.

133. *Harris*, 115 S. Ct. at 1036 (statistics compiled by the Alabama Prison Project (Nov. 29, 1994) filed with the Clerk of the Supreme Court).

134. *Harris*, 115 S. Ct. at 1036.

135. *Id.* at 1040-41.

136. *Id.* at 1032.

is not major, it can still be viewed as a crack in the protection afforded by *Furman*, *Gregg* and their progeny. The people of Alabama, who face the death penalty, are entitled to the full protection afforded by the Eighth Amendment.

As pointed out in *Gregg*:

[T]he Eighth Amendment has not been regarded as a static concept. As Mr. Chief Justice Warren said, in an often quoted phrase, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment . . . . [T]his assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction.<sup>137</sup>

The evolving standards of decency that mark the progress of a maturing society, is the fact that every state with a death penalty scheme in place requires a norm or standard for limiting the sentencer's discretion when imposing a death penalty. Only in Alabama, does a trial judge when rejecting a jury advisory verdict not rely on any standard or norm, and is not required to articulate any reason for that override. This raises a question as to the propriety of Alabama's death penalty scheme in light of the objective criteria that reflect that standard.<sup>138</sup>

Because Alabama's death sentencing scheme does not call for an articulable standard when overriding a jury recommendation we have no way of knowing why the statistical anomaly occurred: (1) is it because the Alabama death penalty scheme so narrows the class of people eligible for death that the majority of defendants truly deserve death more than they deserve life imprisonment or (2) is it because of prejudice, arbitrariness, or caprice on the part of the judge? The list of suppositions is almost endless, and the only way to resolve these disturbing questions is by the "simple expedient" of requiring the judge to articulate a standard when overriding a jury recommendation.<sup>139</sup>

This "simple expedient" not only resolves any questions of impropriety on the part of the trial judge, but also facilitates appellate review of the sentence. The appellate court will have concrete determinations by the judge which will allow easier analysis of the propriety of the sentence imposed.

### C. The Opportunity for Self-Correction

The Court in *Harris* seems to be giving the state of Alabama an opportunity to correct the problem discovered while reviewing the statistical data concerning the application of its death penalty scheme.<sup>140</sup> The Court stated:

If the Alabama statute indeed has not had the effect that we or its drafters had anticipated, such unintended results would be of little constitutional consequence.

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137. *Gregg*, 428 U.S. at 172-73 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

138. The objective criteria is the reality of what is being done to limit discretion in similar death penalty schemes by Alabama's sister states.

139. There are other alternatives to this one and they will be discussed *infra*.

140. *Harris*, 115 S. Ct. at 1036.

An ineffectual law is for the State legislature to amend, not for us to annul.<sup>141</sup>

Although not of constitutional magnitude, the problem is still a distinct chink in the armor of the *Furman* and *Gregg* decisions. I believe that if the Alabama legislature does not take the opportunity given by the Court to correct the apparent flaw in its death penalty scheme; the Court might not hesitate to mandate a solution to the problem in the future, if given another opportunity.

This is not the first time that the Court has given the states an opportunity to self-correct a problem involving death penalty schemes before acting on its own. In *McGautha v. California*,<sup>142</sup> the Court seemed to hint that if the states did not move to correct the problems with their death penalty schemes, the Court would step in and mandate a solution. One year later, the Court decided *Furman*<sup>143</sup> and invalidated all death penalty schemes then in existence as violative of the Eighth Amendment.

#### D. Alternative Solutions

Adopting the *Tedder* standard<sup>144</sup> is not the only solution to Alabama's problem. The Alabama legislature could amend the *Tedder* standard to require only a reasonable basis for a judge's override. The legislature could mandate a two-part *Tedder* standard: (1) accord the jury's advisory verdict a presumptive weight, and (2) where the facts suggesting a death sentence are so clear and convincing so that no reasonable person could differ, the trial judge could override the jury's verdict.<sup>145</sup>

Beyond *Tedder*, an Alabama sentencing jury could make written findings of aggravating and mitigating factors, which along with its votes would provide the trial judge with a definite starting point to evaluate the jury's verdict. With this information the judge, in light of his or her experience, along with information that might not have been made available to the jury (i.e., a defendant's pre-sentencing investigation report), could more fairly decide if an override is proper.<sup>146</sup> Furthermore, the judge's written findings, along with the jury's, would provide greater guidance to the appellate court's review of whether the trial court's override was fair, consistent, and in accord with the mandates of the *Furman* and *Gregg* decisions.

The Alabama legislature has many options open to it to revise the now standardless procedure for jury override in its death penalty scheme.<sup>147</sup> Surely Alabama will heed the clarion call and amend the procedure.

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141. *Id.*

142. *McGautha v. California*, 402 U.S. 183 (1971).

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

144. "[T]he facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder*, 322 So. 2d at 910; see also *Martinez-Chavez*, 534 N.E. 2d at 735 ("In order to sentence a defendant to death after the jury recommended against death, the facts justifying a death sentence should be so clear and convincing that virtually no reasonable person could disagree that death was appropriate . . .").

145. Russell, *supra* note 117, at 41.

146. *Id.*

147. *Id.* at 41-42.



## E. Conclusion

The Supreme Court in upholding the Alabama death penalty scheme in *Harris* posited:

The Constitution permits the trial judge, acting alone, to impose a capital sentence. It [the Constitution] is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight.<sup>148</sup>

By this ruling the Court affirmed its prior commitment to, and concerns about, federalism, state autonomy, and the growing power of the federal government. The Court made the following very clear: (1) there is "not" only one correct way for a state to set up its death penalty scheme;<sup>149</sup> (2) a specific method for balancing mitigating and aggravating factors in a death penalty scheme is "not" a constitutional requirement.<sup>150</sup> Finally, the idea that any specific weight should be given to particular factors, either in aggravation or mitigation, when considering a death sentence, was rejected.<sup>151</sup>

In the final analysis the Court found that in today's society the overriding concern of the Eighth Amendment is that a state's death penalty scheme adequately channels the sentencer's discretion so as to prevent arbitrary results.<sup>152</sup> Although the Court found some disturbing statistics concerning the application of Alabama's death penalty scheme, the Court left open the opportunity for the Alabama legislature to correct the problem by itself.<sup>153</sup>

It might seem that the Court's decision in *Harris*<sup>154</sup> flies in the face of the mandates of *Furman*<sup>155</sup> and *Gregg*.<sup>156</sup> However, this "crack in the armor" of *Furman* and *Gregg* can be easily corrected by the Alabama legislature. The Supreme Court seems to be giving Alabama an opportunity for self-correction. If the Alabama legislature fails to correct the problem in the near future, and the Supreme Court does not correct the problem, if given another opportunity to do so; the *Harris* decision could mark the beginning of a "fourth phase" concerning the death penalty in America.<sup>157</sup> This "fourth phase" could manifest itself as a "loosening up" of the mandates of the *Furman* and *Gregg* decisions as a result of the recent public demand for tougher attitudes toward crime.

*Abe Muallem\**

148. *Harris*, 115 S. Ct. at 1037.

149. *Id.* at 1034-35. See also *Spaziano*, 468 U.S. at 464; *Pulley v. Harris*, 465 U.S. 37 (1984); *Zant*, 462 U.S. at 884; *Gregg*, 428 U.S. at 195.

150. *Id.* at 1035-36. See also *Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988); *Zant*, 462 U.S. at 875 n.13.

151. *Id.* See also *Blystone v. Pennsylvania*, 494 U.S. 299, 306-07 (1990); *Eddings v. Oklahoma*, 455 U.S. 104, 113-15 (1982); *Proffitt v. Florida*, 428 U.S. 242, 267-68 (1976).

152. *Harris*, 115 S. Ct. at 1032. See also *Spaziano*, 468 U.S. at 465.

153. *Harris*, 115 S. Ct. at 1036.

154. *Id.* at 1031.

155. *Furman*, 408 U.S. at 238.

156. *Gregg*, 428 U.S. at 153. See also *Proffitt*, 428 U.S. at 242 (plurality opinion); *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality opinion).

157. See *supra* section II A of this note.

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