Death by Judicial Overkill: The Unconstitutionality of Overriding Jury Recommendations against the Death Penalty

Jason C. Tran

Recommended Citation
Available at: https://digitalcommons.lmu.edu/llr/vol30/iss2/11
DEATH BY JUDICIAL OVERKILL: THE UNCONSTITUTIONALITY OF OVERRIDING JURY RECOMMENDATIONS AGAINST THE DEATH PENALTY

I. INTRODUCTION

On November 30, 1978, a Florida jury convicted Raleigh Porter on two counts of premeditated murder. After a sentencing hearing the jury recommended that Porter be imprisoned for life rather than face the death penalty. The trial judge, however, overrode the jury decision and sentenced Porter to death pursuant to Florida's death penalty statute. On March 28, 1995, one day before the execution date, Porter's attorney received a telephone call from a court clerk claiming that he had some information regarding the case. The clerk said that while Porter's trial was pending, the judge stopped by the clerk's office to have coffee and talk. The judge said that he had changed the venue in Porter's case to another county that "had good, fair minded people... who would listen and consider the evidence and then convict the son-of-a-bitch." The judge then vowed to "send Porter to the chair." Based on these revelations, the Eleventh Circuit Court of Appeals found that the judge had a fixed predisposition to sentence Porter to death and stayed Porter's execution so that an evidentiary hearing could be conducted on the matter.

Although disturbing, such a scenario comes as no surprise when legislatures grant judges the authority to flout a cornerstone of our legal system: jury verdicts. However, what is surprising is

2. See id.
3. See id. at 931-32.
5. See Porter v. Singletary, 49 F.3d 1483, 1487 (11th Cir. 1995).
6. See id.
7. Id.
8. Id.
9. See id. at 1489.
that something so facially unconstitutional as jury override capital statutes could be enacted despite our Constitution's express guarantees of certain unalienable rights, such as the right against the deprivation of life without due process of law.\textsuperscript{10}

Jury override is a sentencing procedure that allows judges to impose the death penalty over jury recommendations of life imprisonment without parole.\textsuperscript{11} It essentially creates a judicial loophole in the criminal justice system through which judges may, at their discretion, nullify jury sentencing verdicts with which they disagree. Perhaps such a scheme would not be so constitutionally egregious if it involved a less significant matter. However, jury overrides as used in capital sentencing can result in a serious and irrevocable deprivation—the deprivation of life. Such a severe penalty, according to Justice John Paul Stevens, demands "unique safeguards to ensure that it is a justified response to a given offense."\textsuperscript{12} It is precisely due to the need for such safeguards that jury override schemes fail to comport with the Constitution.

This Comment argues that life-to-death jury overrides are procedurally and substantively unconstitutional and advocates the repeal of capital statutes that permit them. Part II of this Comment surveys the historical framework of modern jury override schemes and discusses the current law regarding their constitutionality. Part III criticizes the existing law as arbitrary, variable, and ultimately unconstitutional. It analyzes how such discretionary sentencing procedures violate a criminal defendant's Eighth Amendment right against cruel and unusual punishment, Fourteenth Amendment right to due process of law, Fifth Amendment right against double jeopardy, and Sixth Amendment right to a jury trial. Part IV recommends the repeal of statutory jury override provisions but also proposes, in the alternative, narrower override schemes that limit judicial discretion and bolster jury verdicts. Finally, Part V assesses the present and future implications of such an untenable feature of our criminal justice system.

\textsuperscript{10} See U.S. Const. amend. XIV, § 1.
\textsuperscript{11} See Katheryn K. Russell, The Constitutionality of Jury Override in Alabama Death Penalty Cases, 46 Ala. L. Rev. 5, 5 (1994). For purposes of this Comment, the term "jury override" refers specifically and solely to overrides of life imprisonment sentences. This Comment does not argue that overrides of death sentences are unconstitutional.
II. THE EVOLUTION OF STATUTORY JURY OVERRIDE SCHEMES

A. Laying the Groundwork

Jury override jurisprudence in capital cases began in the 1970s with the landmark United States Supreme Court decision in Furman v. Georgia. In Furman the defendant was convicted of rape and murder and sentenced to death on both counts. The Court held in a plurality opinion that death penalty laws as they existed violated the Eighth Amendment's prohibition of cruel and unusual punishment. One rationale for the Court’s ruling was that the discretion given to judges and juries for imposing death sentences was too broad. The Court also expressed concern about the selective application of the death penalty. Justice William Douglass, for example, intimated that the system singled out minorities and the poor. The scathing criticisms of existing death penalty laws in the Furman decision prompted the overhaul of capital statutes across the country. Within a few years more than two-thirds of the states enacted new death penalty legislation.

With new death penalty laws, however, came the new problem of varying capital sentencing schemes. The Supreme Court attempted to remedy this dilemma by specifying in a series of 1976 decisions which type of sentencing schemes would be constitutional under Furman. The most notable was Gregg v. Georgia

13. 408 U.S. 238 (1972) (per curiam).
14. See id. at 239.
15. See id. at 239-40.
16. The Furman Court feared that capital statutes lacked adequate checks and balances, thus giving judges and juries unbridled discretion in deciding the fate of individuals.

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

Id. at 253 (Douglas, J., concurring).
17. See id. at 309-10 (Stewart, J., concurring) (indicating that the petitioners were “among a capriciously selected random handful upon whom the sentence of death has in fact been imposed”).
19. See Russell, supra note 11, at 8.
22. See id. at 8 (citing Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v.
in which the defendant was convicted and sentenced to death for armed robbery and murder.\textsuperscript{24} The Court rejected the defendant's constitutional challenge and identified three constitutional safeguards for avoiding arbitrary death penalty verdicts. First was bifurcation—dividing death penalty cases into two successive phases of conviction and sentencing.\textsuperscript{25} Second was the weighing of both aggravating and mitigating circumstances where at least one aggravating circumstance must be found to justify a death sentence.\textsuperscript{26} And third was direct review of death penalty verdicts by the state's highest court.\textsuperscript{27}

From the Supreme Court's mandate for death penalty reform emerged three distinct types of capital sentencing statutes: those that vest juries with exclusive sentencing authority, those that give such authority to judges, and those that divide sentencing discretion between juries and judges but allow for judges to override jury verdicts in light of mitigating or aggravating circumstances.\textsuperscript{28} Of the thirty-nine states that allow capital punishment, thirty give juries the ultimate sentencing authority unless the defendant has requested sentencing by the court.\textsuperscript{29} Four states—Arizona, Idaho, Montana, and Nebraska—vest such authority in judges.\textsuperscript{30} Combin-
ing the two schemes, Nevada gives juries primary sentencing power but allows for a three-judge panel to make the final decision if the jury cannot reach agreement. Four states, however, have opted for the anomalous scheme of giving juries only an advisory role and allowing judges to accept or reject jury recommendations at their discretion. They are Alabama, Delaware, Florida, and Indiana.

1. Alabama's jury override scheme

Alabama's death penalty statute prompted the most recent United States Supreme Court decision upholding jury overrides in capital cases. Adopted in 1981, the statute prescribes a trifurcated trial and sentencing procedure. In the first phase the court impanels twelve jurors to decide on the defendant's guilt or innocence. A guilty verdict must be unanimous.

If the jury reaches such a verdict, the advisory phase follows. This second phase involves a jury determination as to whether the defendant should receive a sentence of death or life imprisonment without parole. The sentencing hearing may be conducted before a new jury if the trial jury is unavailable. In arriving at a sentence, the jury considers whether statutory aggravating and

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29-2522 (Michie 1995).
34. See Harris v. Alabama, 115 S. Ct. 1031 (1995). For a complete discussion of the Harris decision, see infra Part II.B.
35. See Russell, supra note 11, at 24.
36. See generally Ala. R. Crim. P. 18.1(a) (Michie 1996) (giving a criminal defendant the right to a jury trial).
37. See id. at 23.1(a).
39. See id. § 13A-5-45(a).
40. See id.
41. The statute identifies the following as aggravating circumstances:
(1) The capital offense was committed by a person under sentence of imprisonment;
(2) The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person;
(3) The defendant knowingly created a great risk of death to many persons;
(4) The capital offense was committed while the defendant was engaged or was 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 pre-
mitigating circumstances or any nonstatutory mitigating circumstances exist. To render a death verdict, a minimum of ten jurors must find at least one aggravating circumstance that outweighs any mitigating circumstances. Thus the vote need not be unanimous. To recommend life imprisonment without parole, only a majority—at least seven out of twelve—of the jurors need to agree. If less than ten jurors vote for death and less than seven vote for life, the trial judge may declare a mistrial and initiate a new sentencing hearing with new jurors. Like Florida’s statute, Alabama’s override statute does not give juries any guidance for finding or weighing aggravating and mitigating factors.

After the jury offers its recommendation, the trial judge independently makes written findings as to the existence of aggravating and mitigating evidence. The judge then determines whether the

venting a lawful arrest or effecting an escape from custody;
(6) The capital offense was committed for pecuniary gain;
(7) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or
(8) The capital offense was especially heinous, atrocious or cruel compared to other capital offenses.

Id. § 13A-5-49.

42. The statute defines mitigating circumstances as including, but not 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 his conduct to the requirements of law was substantially impaired; and
(7) The age of the defendant at the time of the crime.

Id. § 13A-5-51.

43. See id. § 13A-5-45(c).
44. See id. § 13A-5-46(e)-(f).
45. Compare with Florida’s capital statute requiring only a majority jury vote to issue a death sentence. FLA. STAT. ANN. § 921.141(3).
46. See ALA. CODE § 13A-5-46(f).
47. See id. § 13A-5-46(f)-(g).
48. Unlike the Delaware and Indiana capital statutes, which require that the jury find beyond a reasonable doubt that an aggravating circumstance exists before recommending the death penalty, the Alabama and Florida statutes are silent on this matter. See DEL. CODE ANN. tit. 11, § 4209(c)(3)(a)(1); IND. CODE ANN. § 35-50-2-9(k)(1).
49. See ALA. CODE § 13A-5-47(d).
aggravating factors outweigh the mitigating ones and imposes a sentence after considering the jury's advisory verdict. Thus the trial judge is not bound by the jury recommendation or held to any burden of proof in arriving at a sentence. In effect, the decision may be entirely subjective. The statute, however, does require a judicial finding of at least one aggravating circumstance for the death penalty to be imposed.

If the judge rejects the jury's recommendation of life imprisonment and imposes a death sentence, the decision is automatically reviewed by the Alabama Court of Criminal Appeals, which is in turn subject to review by the Alabama Supreme Court. Both courts will consider whether any errors existed in the sentencing proceeding and, if so, whether they violated the defendant's rights. The courts will also determine if the trial judge's findings of aggravating and mitigating factors have evidentiary support. In their review, the courts will look for any prejudice that may have influenced the death sentence as well as consider whether the sentence is disproportionate to the crime.

Despite this process, Alabama remains the only jury override jurisdiction without an articulated standard for reviewing death sentences imposed over jury recommendations for life imprisonment. The United States Supreme Court, nevertheless, has held Alabama's jury override statute constitutional.

50. See id. § 13A-5-47(e).
51. See id.; Russell, supra note 11, at 26-27 (noting that "[i]n Alabama, the standard a trial court should use to determine whether the override is appropriate remains unclear").
52. See, e.g., Harris, 115 S. Ct. at 1037 (Stevens, J., dissenting). Justice Stevens observed that "unlike any other State in the Union, the trial judge [in an Alabama court] has unbridled discretion to sentence the defendant to death—even though a jury has determined that death is an inappropriate penalty." Id. (Stevens, J., dissenting).
55. See id.
56. See id.
57. See id. § 13A-5-53(b)(1), (3).
58. See Russell, supra note 11, at 27.
59. See Harris, 115 S. Ct. at 1036 (holding that Alabama's jury override statute did not violate the Eighth Amendment by failing to specify the weight a trial judge must give to a jury's recommendation).
2. Delaware's jury override scheme

Delaware is the most recent state to adopt a jury override statute. Codified in November 1991 and upheld by the Delaware Supreme Court a few months later, the statute similarly calls for an advisory phase and appellate review for imposing the death penalty after a guilty verdict. Under Delaware law, a trial court may only impose a death sentence "after considering the recommendation of the jury." Thus the trial judge retains the ultimate responsibility of imposing a life or death sentence while the jury merely acts in an advisory capacity.

The statute requires that the sentencing hearing be conducted before the same trial jury if possible. Otherwise, a new jury may be selected for the hearing. The jury must initially decide whether the evidence shows beyond a reasonable doubt that at least one statutory aggravating factor exists. It must then find by a preponderance of the evidence that the aggravating factors outweigh the mitigating ones. This process entails weighing all relevant aggravating and mitigating aspects of the crime as well as considering the character and criminal predisposition of the offender.

The trial judge then considers the jury's sentencing verdict

60. See Del. Code Ann. tit. 11, § 4209.
62. See id. at 848.
64. Id. § 4209(d).
67. See id. (providing for the selection of new jurors and alternates if the trial jury cannot participate in the sentencing hearing).
68. This is the same standard used by Indiana. See Ind. Code Ann. § 35-50-2-9(a).
69. See Del. Code Ann. tit. 11, § 4209(c)(3)(a)(1). Of the four override statutes, Delaware's statute contains the highest number of aggravating circumstances—22 in all. The following is a partial list: the defendant committed murder while escaping from custody or confinement or to avoid or prevent arrest; the defendant paid or was paid by someone else for the murder of the victim; the defendant had a previous murder or manslaughter conviction involving the use of force or violence; the defendant committed murder while attempting to commit unlawful sexual intercourse, arson, kidnapping, robbery, sodomy, or burglary; the victim was pregnant, severely handicapped or disabled, 62 or older, or defenseless. See id. § 4209(c)(1).
70. See id. § 4209(c)(3)(a)(2). Unlike the other jury override statutes, Delaware's statute does not enumerate any statutory mitigating circumstances.
71. See id.
and subsequently makes the same two-step inquiry.\textsuperscript{72} If the judge answers both questions in the affirmative, the judge \textit{must} impose a death sentence.\textsuperscript{73} Otherwise, the defendant must be sentenced to life imprisonment without the possibility of probation or parole.\textsuperscript{74} If a death sentence is imposed, it must be justified in writing\textsuperscript{75} and automatically qualifies for review by the Delaware Supreme Court.\textsuperscript{76} The supreme court must determine whether the trial judge arbitrarily imposed the death penalty, taking into account the totality of the aggravating and mitigating evidence.\textsuperscript{77} The court must also consider whether the evidence supports the trial judge’s finding of a statutory aggravating factor.\textsuperscript{78} If the court finds any errors in the sentencing hearing, it may set aside the death sentence and remand for correction.\textsuperscript{79} Such errors, however, will not prevent the death sentence from being reimposed over the jury’s recommendation if the Delaware Supreme Court ultimately finds it appropriate.\textsuperscript{80}

Like the other jury override states, Delaware has not codified a standard for reviewing death sentences imposed over jury recommendations of life imprisonment.\textsuperscript{81} It seems, though, to be following Florida’s and Indiana’s lead by adopting the “clear and convincing” standard of review\textsuperscript{82} prescribed by Florida’s supreme court in \textit{Tedder v. State}\textsuperscript{83} and endorsed by the United States Supreme Court in \textit{Proffitt v. Florida}.\textsuperscript{84} The Supreme Court has yet to decide on the constitutionality of Delaware’s statutory override

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{72} See id. § 4209(d)(1)(a)-(b).
\item \textsuperscript{73} See id. § 4209(d)(1).
\item \textsuperscript{74} See id. § 4209(d)(2).
\item \textsuperscript{75} See id. § 4209(d)(3).
\item \textsuperscript{76} See id. § 4209(g).
\item \textsuperscript{77} See id. § 4209(g)(2)(a).
\item \textsuperscript{78} See id. § 4209(g)(2)(b).
\item \textsuperscript{79} See id. § 4209(g)(4)(b).
\item \textsuperscript{80} See id.
\item \textsuperscript{81} As noted above, the statute merely instructs the Delaware Supreme Court to consider “the totality of evidence in aggravation and mitigation” in deciding the appropriateness of a death sentence. \textit{Id}. § 4209(g)(2)(a).
\item \textsuperscript{82} See \textit{Pennell v. State}, 604 A.2d 1368, 1378 (Del. 1992). In \textit{Pennell}, which involved a double murder, the court held that the facts supporting the death sentences imposed on the defendant for the murders were “so clear and convincing that virtually no reasonable person could differ.” \textit{Id}.
\item \textsuperscript{83} 322 So. 2d 908, 910 (Fla. 1975). For a complete discussion of the \textit{Tedder} standard, see \textit{infra} Part II.B.
\item \textsuperscript{84} 428 U.S. 242, 249 (1976). For a complete discussion of the \textit{Proffitt} decision, see \textit{infra} Part II.B.
\end{itemize}
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provision. So far, however, no death sentences have been imposed over a jury recommendation of life imprisonment under Delaware's new capital statute.

3. Florida's jury override scheme

In response to the Furman decision, Florida's legislature revised its death penalty statute in 1972 and became the first state to enact a jury override scheme. Four years later the United States Supreme Court held it constitutional. Under the new Florida law, a defendant found guilty of first degree murder must undergo a separate sentencing hearing. Like Alabama and Delaware, Florida does not require that the same trial jury participate in this hearing. The court may impanel a "special" jury to determine the sentence if necessary. During this penalty phase the jury hears evidence to determine the existence of any of the twelve aggravating or seven mitigating circumstances listed in

85. See Russell, supra note 11, at 17.
87. See FLA. STAT. ANN. § 921.141.
89. See Proffitt, 428 U.S. at 259.
90. See FLA. STAT. ANN. § 921.141(1).
91. See id. (instructing the trial judge to impanel a new jury to determine the sentence if the trial jury cannot reconvene for the sentencing phase due to "impossibility or inability"). Compare FLA. STAT. ANN. § 921.141(1) with ALA. CODE § 13A-5-46(b) (allowing for a new sentencing jury if it is "impossible or impracticable" for the trial jury to decide sentencing) and DEL. CODE ANN. tit. 11, § 4209(b) (allowing for the replacement of the trial jury with a "separate and new jury" during the sentencing phase).
92. FLA. STAT. ANN. § 921.141(1).
93. Florida's statutory list of 12 aggravating circumstance is nearly identical to Alabama's. Circumstances are considered aggravating where the defendant committed a murder while serving a prison sentence; where the defendant had a previous capital felony conviction; where the defendant committed a murder while committing robbery, sexual battery, arson, burglary, kidnapping, aircraft piracy, or an unlawful detonation of an explosive device; where the murder was particularly cruel or atrocious; or where the defendant committed a homicide in a cold and calculated manner without any moral or legal justification. See id. § 921.141(5).
94. The seven mitigating circumstances set forth by the Florida legislature also resemble those codified by Alabama's override statute and include the following: the defendant has no prior criminal activity; the defendant committed a murder under the influence of extreme mental or emotional disturbance; the victim consented to the defendant's act; the defendant was an accomplice to the murder with a minor role; the defendant acted under duress; the defendant lacked the capacity to appreci-
DEATH BY JUDICIAL OVERKILL

It then considers whether the mitigating circumstances outweigh the aggravating ones in deciding on a recommendation for life or death.96

Like Alabama, Florida does not require a unanimous verdict by the jury in the sentencing phase.97 Florida’s statute is similarly silent as to the standard of proof for weighing aggravating and mitigating factors.98 Furthermore, it fails to provide for any inquiry as to the exact breakdown of the votes or the aggravating and mitigating circumstances that shaped them.99 Rather, the judge simply asks each juror whether the majority voted for life or death.100 A tie vote equates to a recommendation for life imprisonment.101 The judge then imposes the final life or death sentence, unconstrained by the jury verdict.102 However, any jury override resulting in a death sentence must “be supported by specific written findings of fact” outlining the mitigating and aggravating circumstances used to make the decision.103

The conclusion of the penalty phase automatically triggers the appellate process.104 Any imposition of death shall be given priority review by the Florida Supreme Court.105 However, Florida does not provide its supreme court with any statutory guidelines for review and simply leaves it to the court to fashion its own rules.106 As a result, in 1975 the court adopted the following test for reviewing jury override cases resulting in a death sentence: whether the facts justifying the imposition of death are “so clear and convincing that virtually no reasonable person could differ.”107 For over twenty years, this standard has governed Florida Supreme Court review of death sentences resulting from jury over-

95. See id. § 921.141(6).
96. See id. § 921.141(2).
97. See id. § 921.141(2)(b), (c).
98. See id. § 921.141(3) (allowing the trial judge to impose death “"[n]otwithstanding the recommendation of a majority of the jury"”) (emphasis added).
100. See Radelet, supra note 88, at 1411.
101. See id.
102. See id.
103. FLA. STAT. ANN. § 921.141(3).
104. See id. § 921.141(4).
105. See id.
106. See id. (allowing for review of jury overrides to “be heard in accordance with rules promulgated by the [Florida] Supreme Court”).
107. Tedder, 322 So. 2d at 910.
rides. 108

In the decade following the enactment of its jury override
death penalty statute, Florida led the country in both the number
of prisoners sentenced to death and executed. 109 As of 1994 its
death row count ranked third behind Texas and California. 110
Florida is also the only state that frequently invokes its jury over-
ride scheme to impose death. 111 In fact, only two decades or so af-
after the Florida legislature added the override provision to the
state's capital statute, twenty percent of those sentenced to die had
originally received jury recommendations of life. 112 By 1992 Flor-
ida trial judges had rejected jury recommendations of life impris-
onment and sentenced the defendants to death in 134 cases. 113
Three of them were executed between 1984 and 1991. 114

4. Indiana's jury override scheme

Indiana incorporated an override provision 115 into its capital
statute in 1977, 116 and its supreme court upheld the new law four
years later. 117 Like the other jury override schemes, Indiana's
capital statute provides for trifurcated proceedings consisting of a
trial, sentencing hearing, and appellate review. 118 But unlike the
other three states, Indiana requires that the sentencing phase be
conducted before the same jury that tried the case. 119 The jury
may recommend either the death penalty or life imprisonment
without parole 120 if it finds that the government has proven beyond
a reasonable doubt the existence of at least one of the statutory

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108. See Michael Mello, The Jurisdiction to Do Justice: Florida's Jury Override and the State Constitution, 18 FLA. ST. U. L. REV. 923, 936 (1991) [hereinafter Mello, Jurisdiction] (asserting that "Tedder has become the cornerstone of the Florida Supreme Court's override doctrine").
109. See Radelet, supra note 88, at 1409.
110. See Russell, supra note 11, at 11 n.46.
112. See Mello, Jurisdiction, supra note 108, at 926.
115. See IND. CODE ANN. § 35-50-2-9(e).
119. See id. § 35-50-2-9(d).
120. See id. § 35-50-2-9(e)(1)-(2).
DEATH BY JUDICIAL OVERKILL

aggravating circumstances\textsuperscript{121} alleged.\textsuperscript{122} In addition, the aggravating factors must outweigh any mitigating circumstances\textsuperscript{123} found.\textsuperscript{124}

The trial judge, however, is not bound by the jury’s recommendation.\textsuperscript{125} The statute authorizes the judge to make the final determination as to the sentence “after considering the jury’s recommendation . . . based on the same standards that the jury was required to consider.”\textsuperscript{126} If the judge decides to impose a death sentence contrary to the jury’s recommendation, the decision automatically qualifies for review by Indiana’s supreme court.\textsuperscript{127} Although the statute does not specify how soon the review must occur, it gives such hearings priority over all other cases.\textsuperscript{128} In reviewing the death sentence, the Indiana Supreme Court must consider all claims that the sentence violates the state or federal constitution\textsuperscript{129} or, in the alternative, that the sentence is excessive or erroneous.\textsuperscript{130}

Although the statute does not provide any guidance for review, the Indiana Supreme Court in 1989 promulgated a test modeled after the \textit{Tedder} standard.\textsuperscript{131} The court held that “the

\textsuperscript{121} The 15 aggravating circumstances enumerated in the Indiana statute echo those promulgated by the other jury override states. However, the statute includes a few distinctive aggravating factors. For example, a murder is considered more serious if the defendant committed it in connection with drug dealing, while lying in wait, or through a drive-by shooting; if the defendant dismembered the murder victim; or if the victim was less than 12 years old. \textit{See id.} § 35-50-2-9(b).

\textsuperscript{122} \textit{See id.} § 35-50-2-9(k)(1). This is the same standard used by Delaware for determining the existence of aggravating circumstances. \textit{See Del. Code Ann. tit. 11, § 4209(c)(3)(a)(1).} However, Delaware additionally prescribes a preponderance of the evidence standard for weighing aggravating and mitigating circumstances. \textit{See id.} § 4209(c)(3)(a)(2).

\textsuperscript{123} With regard to mitigating circumstances, Indiana’s statute is the most facially liberal among the four jury override statutes because it contains a catch-all provision. The statute provides that in addition to the seven statutory mitigating circumstances listed, “[a]ny other circumstances appropriate for consideration” may be taken into account by the jury in making its sentencing decision. \textit{Ind. Code Ann.} § 35-50-2-9(c)(8).

\textsuperscript{124} \textit{See id.} § 35-50-2-9(k)(2).

\textsuperscript{125} \textit{See id.} § 35-50-2-9(e).

\textsuperscript{126} \textit{Compare Ind. Code Ann.} § 35-50-2-9(e) \textit{with Del. Code Ann. tit. 11, § 4209(d)(1) (requiring a trial judge to make the same inquiry as the jury when deciding the defendant's guilt).}


\textsuperscript{128} \textit{See id.}

\textsuperscript{129} \textit{See id.} § 35-50-2-9(j)(1)(A)-(B).

\textsuperscript{130} \textit{See id.} § 35-50-2-9(j)(3)(A)-(B).

\textsuperscript{131} \textit{See Martinez Chavez v. State, 534 N.E.2d 731, 734-35 (Ind. 1989).}
facts justifying a death sentence should be so clear and convincing that virtually no reasonable person could disagree that death was appropriate in light of the offender and his crime."  The United States Supreme Court has yet to rule on the constitutionality of Indiana's jury override statute, although it has had two opportunities to do so.133

B. The Supreme Court's Justifications for Jury Override Schemes

The first Supreme Court case challenging jury overrides, albeit indirectly, was Proffitt v. Florida.134 The defendant was convicted of first degree murder for a fatal stabbing and sentenced to death.135 He appealed, arguing that Florida's jury override capital statute violated due process guarantees because it allowed for arbitrary sentencing.136 He specifically attacked the statute's lack of guidelines for weighing aggravating and mitigating circumstances.137 The Court rejected these claims, holding that Florida provides criminal defendants with adequate safeguards by prescribing a thorough sentencing procedure that includes a test for meaningful appellate review of death sentences.138

This test, promulgated by the Florida Supreme Court in Tedder v. State,139 allows a judge to impose the death penalty despite a jury recommendation to the contrary only if the facts supporting a death sentence are "so clear and convincing that virtually no reasonable person could differ."140 In other words, the trial judge should give "great weight" to the jury recommendation.141 Only a crime that was "especially heinous, atrocious or cruel" would clearly and convincingly justify the death penalty.142

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132. Id. at 735. The court subsequently overturned the trial judge's override decision, explaining that reasonable people could differ on whether imposing death was appropriate since the defendant's co-conspirator masterminded the murder. See id.


135. See id. at 244-45.

136. See id. at 254.

137. See id.

138. See id. at 251-53.

139. 322 So. 2d 908 (Fla. 1975).

140. Id. at 910.

141. See id.

142. Id. (citing State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), which elaborated on the kinds of crimes considered "especially heinous, atrocious, or cruel"). The Dixon court stated:
Tedder standard, the Proffitt Court concluded that Florida’s jury override scheme adequately guides and channels sentencing discretion by trial judges. The Court also expressed support for broad judicial discretion by adding that judges are more experienced and thus better qualified than juries in deciding whether criminal defendants should live or die.

For the next twenty years, the Tedder standard dominated United States Supreme Court jurisprudence in the area of capital punishment. In Spaziano v. Florida, the first major challenge to jury override since Proffitt, the Court rejected the defendant’s claim that such a scheme runs afoul of the Eighth Amendment prohibition of cruel and unusual punishment, the Fifth Amendment protection against double jeopardy, the Sixth Amendment right to a jury trial, and the Fourteenth Amendment guarantee of due process of law. The defendant had received the death penalty from the trial judge over a jury recommendation of life imprisonment for the torture and murder of two women found in a dumpster.

Addressing the defendant’s argument that the Florida statute violated the Eighth Amendment, the Court held that proving such a violation required more than a showing that the statute was different from other capital statutes. The Court then disposed of

It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Dixon, 283 So. 2d at 9.

143. See Proffitt, 428 U.S. at 258.
144. See id. at 252.
147. See Russell, supra note 11, at 12.
149. See id. at 450-52.
150. See id. at 464. The six-member majority stated that “[t]he 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.” Id.
the defendant's Sixth Amendment argument by asserting that the constitutional right to a jury trial does not necessarily require jury sentencing.\textsuperscript{151} The Court also held that the defendant was never subjected to double jeopardy since "there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed."\textsuperscript{152} Finally, the Court rejected the defendant's Fourteenth Amendment claim by holding that the \textit{Tedder} test afforded a capital defendant adequate due process.\textsuperscript{153}

Despite the Supreme Court's faith in the \textit{Tedder} standard, the test poses several problems. First, the phrase "so clear and convincing that virtually no reasonable person could differ"\textsuperscript{154} requires a judicial finding that the sentencing jurors were unreasonable in order to justify an override.\textsuperscript{155} This task presents a paradox because our legal system necessarily assumes that, as triers of fact, jurors are reasonable people.\textsuperscript{156} Second, dispensing with this assumption, how should the trial judge determine whether or not jurors are reasonable?\textsuperscript{157} Third, the phrase "no reasonable person could differ" has broad implications, conceivably allowing the judge to meet the standard by simply disagreeing with the jury.\textsuperscript{158} Finally, the \textit{Tedder} test does not provide the trial judge with specific instructions for determining the sentence in light of the jury recommendation.\textsuperscript{159} Despite these problems, however, the \textit{Tedder} standard became the constitutional benchmark of modern jury override jurisprudence.\textsuperscript{160} That is, until \textit{Harris v. Alabama}.\textsuperscript{161}

\begin{itemize}
\item \textsuperscript{151} See id. The Court also added that "the demands of fairness and reliability in capital cases do not require [jury sentencing]." \textit{Id.}
\item \textsuperscript{152} \textit{Id.} at 465.
\item \textsuperscript{153} See id. (asserting that "the Florida Supreme Court takes [the \textit{Tedder}] standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role").
\item \textsuperscript{154} \textit{Tedder}, 322 So. 2d at 910.
\item \textsuperscript{155} See Radelet, supra note 88, at 1425.
\item \textsuperscript{156} See Amy D. Ronner, \textit{When Judges Impose the Death Penalty After the Jury Recommends Life: Harris v. Alabama as the Excision of the Tympanic Membrane in an Augmentedly Death-Biased Procedure}, 23 HASTINGS CONST. L.Q. 217, 248 (1995). In her article Professor Ronner noted the linguistic paradox of the "reasonable person" standard promulgated by \textit{Tedder}. "Because the 'reasonable person' is the juror . . . literal compliance with the \textit{Tedder} standard should elicit judicial adherence to the advisory jury verdict." \textit{Id.} (second emphasis added).
\item \textsuperscript{157} See Russell, supra note 11, at 17.
\item \textsuperscript{158} See id.
\item \textsuperscript{159} See id. at 16. Professor Russell observed that "[i]n the absence of legislative or appellate court directives . . . trial court judges are left to decide cases without guidance from an established rule." \textit{Id.} at 16-17.
\item \textsuperscript{160} The \textit{Tedder} standard remains the constitutional basis for Florida's override
In *Harris* the Supreme Court held that the *Tedder* standard for reviewing jury overrides is not a constitutional requirement. The jury in that case convicted the defendant of first degree murder for plotting the murder of her husband to collect on his death benefits. At the sentencing hearing the jurors heard testimony that the defendant had a good background and strong character, and that she was raising seven children while working three jobs and actively participating in her church. Based on this testimony, the jury returned a seven-to-five verdict recommending life imprisonment without parole. The trial judge, however, overrode the verdict and imposed death, holding that the one aggravating circumstance—murder for pecuniary gain—outweighed all the mitigating circumstances. The defendant appealed, claiming that Alabama’s capital statute was unconstitutional because it failed to specify the weight that trial judges must give to advisory jury verdicts.

The Supreme Court affirmed the death sentence, claiming that requiring “great weight” be given to jury recommendations would “place within constitutional ambit micromanagement tasks that properly rest within the State’s discretion to administer its criminal justice system.” Although acknowledging the “crucial protection” provided by the *Tedder* standard, the Court refused to recognize it as a constitutional mandate. The appropriate analysis, the Court pointed out, is whether Alabama’s override scheme “adequately channels the sentencer’s discretion so as to prevent arbitrary results.” The Court held that the Alabama statute did just that by requiring the weighing of aggravating and mitigating circumstances, even though it did not specify a standard.

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162. See id. at 1035.
163. See id. at 1033.
164. See id.
165. See id.
166. See id.
167. See id. at 1034.
168. Id. at 1036.
169. Id. at 1035 (quoting *Dobbert*, 432 U.S. at 295).
170. See id. (asserting that the Court’s “statements of approbation [of the *Tedder* standard], however, do not mean that the *Tedder* standard is constitutionally required”).
171. Id.
for this process.\textsuperscript{172} Thus in one broad sweep, the Supreme Court brushed aside the constitutional defects of Alabama's amorphous capital sentencing scheme and bolstered its legitimacy.

III. THE UNCONSTITUTIONALITY OF LIFE-TO-DEATH JURY OVERRIDES

A. Eighth Amendment Violation

The Eighth Amendment of the Constitution prohibits the imposition of "cruel and unusual punishments,"\textsuperscript{173} which the Supreme Court has defined as those that are "excessive" or "disproportionate" to the crime.\textsuperscript{174} Arguably, a sentence may be excessive or disproportionate if it contradicts what the community deems is appropriate retribution for a particular offense. Furthermore, since juries represent the community\textsuperscript{175} and reflect its views in their decisions,\textsuperscript{176} it follows that rejecting jury recommendations against the death penalty amounts to ignoring what the community considers proportionate punishment. Severing this crucial ""link between contemporary community values and the penal system""\textsuperscript{177} inevitably raises the potential for arbitrary decisions based on the personal whims and prejudices of judges—a result that the Supreme Court has expressly condemned.\textsuperscript{178} In short, a death sentence should be justified by public sentiment to avoid running afoul of the Eighth Amendment's protection against ex-

\textsuperscript{172} See id. (declaring that the Constitution does not compel a specific method for balancing aggravating and mitigating factors).

\textsuperscript{173} U.S. CONST. amend. VIII.


\textsuperscript{175} See id. at 486-87 (Stevens, J., concurring in part and dissenting in part). According to Justice Stevens:

\textit{Juries—comprised as they are of a fair cross section of the community—are more representative institutions than is the judiciary; they reflect more accurately the composition and experiences of the community as a whole, and inevitably make decisions based on community values more reliably, than can that segment of the community that is selected for service on the bench.}

\textit{Id.} (Stevens, J., concurring in part and dissenting in part) (footnote omitted).

\textsuperscript{176} See Harris, 115 S. Ct. at 1039 (Stevens, J., dissenting). Justice Stevens noted that "[a] jury verdict expresses a collective judgment that we may fairly presume to reflect the considered view of the community." \textit{Id.} (Stevens, J., dissenting).

\textsuperscript{177} Id. at 1040 (Stevens, J., dissenting) (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968)).

\textsuperscript{178} See Spaziano, 468 U.S. at 465 (noting that the result of a sentencing process must not be arbitrary or discriminatory).
cessive punishment.\textsuperscript{179}

A death sentence may also be considered excessive if it is inaccurate. Accordingly, jury override schemes create the potential for such inaccuracy by dividing sentencing responsibility between jurors and judges, as Justice Thurgood Marshall pointed out in \textit{Caldwell v. Mississippi}.\textsuperscript{180} Such bifurcated sentencing may lead to the unconstitutional result of jurors rendering hasty sentences under the misguided belief that their decisions are reversible and thus insignificant.\textsuperscript{181} They may simply shirk their duties and recommend death with the misunderstanding that the appellate process will take care of the matter.\textsuperscript{182} Thus, "the jury may impose a more severe penalty (\textit{i.e.}, death subject to judicial review) than it otherwise would."\textsuperscript{183}

\textbf{B. Fourteenth Amendment Violation}

The Fourteenth Amendment states "nor shall any State deprive any person of life, liberty, or property, without due process of law."\textsuperscript{184} The deprivation of life, in particular, raises special concern because it is the ultimate punishment that our society can impose upon a citizen. As such, it deserves heightened due process

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{179}] See \textit{Harris}, 115 S. Ct. at 1042-43 (Stevens, J., dissenting). Justice Stevens concluded that "[t]he most credible justification for the death penalty is its expression of the community's outrage. To permit the state to execute [the defendant] in spite of the community's considered judgment that [the defendant] should not die is to sever the death penalty from its only legitimate mooring." \textit{Id.} (Stevens, J., dissenting).
\item[\textsuperscript{180}] 472 U.S. 320, 328-29 (1985).
\item[\textsuperscript{181}] See \textit{id.} Justice Marshall, in delivering the opinion of the Court, wrote:

\begin{quote}
[W]e conclude that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. This Court has repeatedly said that under the Eighth Amendment "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."
\end{quote}

\item[\textsuperscript{182}] See Michael Mello, \textit{Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Statutes that Divide Sentencing Responsibility Between Judge and Jury}, 30 B.C. L. Rev. 283, 330-31 (1989) [hereinafter Mello, \textit{Taking Caldwell}]. Professor Mello observed that "[i]nstead of an irrevocable choice between life and death," jury override schemes offer juries "an intermediate choice; impose death, but with the understanding that the decision is not final. Rather than being forced to make the hard decision, the jury has a fall-back option. The defendant is left with a chance to show the reviewing court that it was all a mistake." \textit{Id.}
\item[\textsuperscript{183}] \textit{Id.} at 331.
\item[\textsuperscript{184}] U.S. CONST. amend. XIV, \S 1.
\end{itemize}
\end{footnotesize}
Applying this scrutiny to jury override schemes reveals that they impair criminal due process in several respects.

First, judges may reject jury verdicts for improper reasons. Jury override statutes, in effect, credit judges with the wisdom to recognize and rectify what they deem to be erroneous jury decisions. But such schemes fail to take into account the possibility that judges may override jury recommendations against the death penalty based on political motives. This is not inconceivable given that judges in most death penalty states are subject to election or retention. These states include Alabama, Florida, and Indiana. Therefore, how these judges rule in capital cases can have a significant impact on their career prospects. Indeed, the political repercussions of unpopular decisions or opinions can be devastating. For example, in 1986 the governor of California waged a successful campaign to oust three California Supreme Court justices who opposed the death penalty. And in 1992 the attorney general and prosecutors in Mississippi instigated the removal of a supreme court justice because of his votes against the death penalty on the bench.

The threat of such political reprisal may motivate a judge to override a jury recommendation against the death penalty, especially in a high-profile case. Indeed, the risk of trial judges imposing prejudicial sentences is very real because "the fact that more persons identify with victims of crime than with capital defendants inevitably encourages judges who must face election to reject a recommendation of leniency." Juries, in contrast, are not as

185. See Spaziano v. Florida, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part and dissenting in part). Justice Stevens remarked that "the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense." Id. (Stevens, J., concurring in part and dissenting in part).


187. See id. at 777 n.85, 779 n.87.

188. See id. at 776.


190. See id. at 283-84 (citing David W. Case, In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi, 13 MISS. C. L. REV. 1, 15-20 (1992)).

191. Spaziano, 468 U.S. at 475 n.14 (Stevens, J., concurring in part and dissenting
vulnerable or sensitive to political pressures and hence can be better trusted to render just verdicts.192

Second, judicial sentencing contrary to jury determinations skews the criminal justice process by failing to conform to community values. As discussed above, jury decisions tend to reflect the values of the communities in which the jurors live and thus provide a more accurate assessment of what the public considers appropriate punishment for a particular crime.193 For this reason, juries should be responsible for "express[ing] the conscience of the community on the ultimate question of life or death."194 A capital sentencing scheme that deprives them of this responsibility subsequently creates the risk of death sentences being imposed in disregard of community values.

Jury override schemes also impair the justice process by producing unreliable jury death sentences.195 As previously discussed, jurors may feel less compelled to render accurate and hence reliable verdicts if they think their decisions will have no legal force.196 Such attitudes clearly diminish their sense of responsibility and inevitably result in their increased willingness to render death sentences—even those they believe erroneous—based on the misconception that their harsh verdicts would be duly cor-

192. See Harris v. Alabama, 115 S. Ct. 1031, 1039 (1995) (Stevens, J., dissenting). According to Justice Stevens, jury decisions are more reliable because they harbor no political motives:
   I am convinced that our 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. Jurors' responsibilities terminate when their case ends; they answer only to their own consciences; they rarely have any concern about possible reprisals after their work is done.
Id. (Stevens, J., dissenting).

193. See Spaziano, 468 U.S. at 487 n.33 (Stevens, J., concurring in part and dissenting in part) (citing Stephen Gillers, Deciding Who Dies, 129 U. PA. L. REV. 1, 63-65 (1980)). Professor Gillers pointed out that "twelve people are more likely than one person to reflect public sentiment, because jurors are selected in a manner enhancing that likelihood, and because trial judges collectively do not represent—by race, sex, or economic or social class—the communities from which they come." Gillers, supra, at 63.

194. Harris, 115 S. Ct. at 1039 (Stevens, J., dissenting) (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)).


196. See id. (noting that "[i]n the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court").
rected at the appellate level.\textsuperscript{197} As Justice Marshall wrote in \textit{Caldwell}:

\begin{quote}
Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to "send a message" of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely "err because the error may be corrected on appeal."\textsuperscript{198}
\end{quote}

Simply put, jury override schemes tell jurors that they do not have to take a death sentence seriously—that they can risk rendering an erroneous or unsubstantiated death verdict without any fear or qualms because, ultimately, the appellate process will ensure that the defendant gets the proper punishment. Such misguided reliance on appellate review, as Justice Marshall correctly pointed out, "will generate a bias toward returning a death sentence,"\textsuperscript{199} thereby contaminating the entire criminal justice process with unreliable results.

In sum, due process is not due when those entrusted to carry it out fail to appreciate the significance of their duty. The gravity of a death sentence deserves serious deliberation—an essential element of the capital sentencing process which jury override statutes effectively vitiate.

\textbf{C. Fifth Amendment Violation}

The Fifth Amendment provides, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."\textsuperscript{200} Jury override schemes violate this constitutional prohibition of double jeopardy by subjecting the defendant to two different sentences. Receiving a life sentence from the jury simply clears the way for a death sentence from the judge. In addition, whereas the defense gets only one opportunity to prove its case to the jury, the prosecution is allowed to prove its case twice—first before the jury and then again before the trial judge.\textsuperscript{201} Giving

\begin{footnotes}
\item[197] \textit{See supra} notes 181-83 and accompanying text.
\item[198] \textit{Caldwell}, 472 U.S. at 331 (quoting Maggio v. Williams, 464 U.S. 46, 54-55 (1983) (Stevens, J., dissenting)).
\item[199] \textit{Id.} at 333.
\item[200] U.S. CONST. amend. V.
\end{footnotes}
prosecutors two chances to argue their case can produce lopsided results in their favor. For instance, under Alabama’s capital statute there have only been five instances where the judge rejected a jury recommendation of death as compared to forty-seven rejections of jury recommendations for life imprisonment.202

Ironically, the Supreme Court itself has conceded that subjecting a defendant to two capital sentencing hearings inherently poses a double jeopardy problem due to the torturousness of such proceedings.203 According to the Court, the Double Jeopardy Clause bars a state from making repeated attempts to convince a sentencer to impose the death penalty since the “‘embarrassment, expense and ordeal’ and the ‘anxiety and insecurity’ faced by a defendant at the penalty phase of a ... capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial.”204 With its vast resources, a state can easily wear down a criminal defendant and ultimately obtain an unjust death sentence if allowed to overprosecute.205

D. Sixth Amendment Violation

The Sixth Amendment guarantees a criminal defendant “the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”206 In short, defendants have a right to be judged by their peers in their community when they are charged with a crime. Although such a right does not necessarily entitle a defendant to jury sentencing, it seems more appropriate that jurors, as representatives of the community’s conscience, should have the last say on whether a fellow citizen should live or die for committing a certain offense.

This issue, however, becomes irrelevant when a state specifically allows for jury sentencing as a procedural right, which is what
jury override schemes in effect do. By entitling defendants to two
jury verdicts through the process of law—one in the trial phase and
the other in the penalty phase—a state effectively imputes legal
validity to both. Both verdicts should thus be binding on the trial
court. It makes no sense, from either a logical or constitutional
standpoint, that a jury decision on the degree of punishment
should be accorded less weight than one concerning a defendant’s
guilt or innocence. When a state grants a criminal defendant the
right to jury sentencing following a jury trial, it should recognize
the legitimacy of both.207

Jury sentencing verdicts should also be given the same legal
force as jury trial verdicts because the primary justification for the
latter equally applies to the former. The purpose of jury trials is to
prevent government oppression resulting from abuse of authority
by judges or prosecutors who may harbor political or personal
motives for securing convictions at the expense of criminal defen-
dants.208 The jury essentially serves as a buffer between the gov-
ernment and the accused, a role that dates back to colonial

207. See Schiro v. State, 451 N.E.2d 1047, 1065 (Ind. 1983) (DeBruler, J., concur-
ing in part and dissenting in part). Judge DeBruler argued that a jury sentencing
hearing closely resembles a jury trial and should thus be given equal effect:

[The jury reconvenes in court for the sentencing hearing. It is presided
over by the judge. The defendant is present with his counsel and the state
by its trial prosecutor. Evidence is presented in an adversarial setting. The
jury receives the instruction from the court regarding... whether an aggra-
vating circumstance exists and whether it is... not... outweighed by miti-
gating circumstances. The burden is upon the state to prove the aggravat-
ing circumstance beyond a reasonable doubt. The lawyers make final
arguments to the jury. The jury retires to deliberate and returns into open
court with its verdict in the form of a recommendation. This is a full scale
jury trial in every sense .... The jury recommendation against death is so
much like a binding decision, that constitutional protection against a second
hearing before the judge on the propriety of death should be afforded.

Id. (DeBruler, J., concurring in part and dissenting in part).

ing in part and dissenting in part). As Justice Stevens observed:

"Those who wrote our constitutions knew from history and experience that
it was necessary to protect against unfounded criminal charges brought to
eliminate enemies and against judges too responsive to the voice of higher
authority .... Providing an accused with the right to be tried by a jury of
his peers gave him an inestimable safeguard against the corrupt or
overzealous prosecutor and against the compliant, biased, or eccentric
judge .... [T]he jury trial provisions in the Federal and State Constitutions
reflect a fundamental decision about the exercise of official power—a reluc-
tance to entrust plenary powers over the life and liberty of the citizen to
one judge or to a group of judges,"

Id. (Stevens, J., concurring in part and dissenting in part) (quoting Duncan v. Louisi-
am, 391 U.S. 145, 156 (1968)).
times. Inviting jurors to participate in the criminal justice process as representatives of the community not only checks arbitrary government power but also ensures legitimate verdicts that reflect public sentiment. The need for such checks becomes apparent when one considers empirical research indicating that judges and juries generally render significantly different verdicts in capital cases. This discrepancy, as Justice Stevens observed, supports "the conclusion that entrusting the capital decision to a single judge creates an unacceptable risk that the decision will not be consistent with community values." The right to be judged by peers from one's own community is a deeply-rooted constitutional hallmark of our criminal justice system. Therefore, statutory schemes that deny individuals this fundamental right cannot be allowed to stand.

IV. REPEALING OR LIMITING LIFE-TO-DEATH JURY OVERRIDE SCHEMES

Due to the grave constitutional concerns posed by jury override statutes, it appears that the only feasible solution is to repeal such schemes. Alabama, Delaware, Florida, and Indiana should follow the lead of their sister states and adopt sentencing procedures that better protect the rights of criminal defendants. In other words, to better ensure defendants a more efficient, reliable, and just sentencing process, these states should adopt schemes that assign sentencing responsibility exclusively to either the trial judge or the jury—preferably the latter—rather than dividing it be-


In assigning the jury this role, the framers of course drew from the English as well as the colonial experience. The right to jury trial that the framers viewed as an indispensable safeguard against government oppression... had evolved in England over the course of several centuries. Thus, the historic concerns that led to the adoption of the sixth amendment right to jury trial are rooted to some extent in the historical evolution of the English jury.

Id.

210. See Spaziano, 468 U.S. at 482, 490 (Stevens, J., concurring in part and dissenting in part).

211. See id. at 488 (Stevens, J., concurring in part and dissenting in part) (citing HANS ZEISEL, CENTER FOR STUDIES IN CRIMINAL JUSTICE, SOME DATA ON JUROR ATTITUDES TOWARDS CAPITAL PUNISHMENT 37-50 (1968)).

212. Id. at 489-89.

213. See supra notes 29-31 and accompanying text.

214. See supra Parts III.A-B, D.
tween the two.

However, since the Supreme Court has repeatedly asserted and affirmed the constitutionality of jury override provisions over the last decade, repeal does not seem to be a viable or acceptable alternative. Therefore, the necessary constitutional step to take is to narrow jury override capital statutes by limiting judicial discretion and bolstering jury sentencing verdicts.

One approach is to modify the Tedder standard by requiring that trial judges have a “reasonable basis” for rejecting a jury recommendation of life imprisonment. This test may be less cumbersome to apply than one calling for an examination of whether the facts so clearly and convincingly justify a death sentence that “no reasonable person could differ.” Also, by focusing the inquiry on the reasonableness of the trial judge’s action, an override decision would be subject to more objective appellate scrutiny. However, the problem with this approach is that it allows trial judges to present only a minimal level of proof for overriding jury recommendations.

A more effective remedy is to apply the reasonable basis test to the jury instead of the trial judge. Under this scheme, the inquiry would be whether the jury has legitimate reasons for recommending life imprisonment—with the term “legitimate” given broad interpretation. Thus, for instance, a jury may be deemed to have a legitimate reason for not imposing a death sentence if it finds the existence of any mitigating factor. Holding juries to such a low threshold of proof ensures that their decisions will be accorded due weight and provides the added benefit of safeguarding the constitutional rights of criminal defendants.

A third and more stringent alternative is to eliminate the Tedder standard altogether and accord jury sentencing verdicts a rebuttable presumption of validity. Under this approach, jury sentencing verdicts would be presumed correct and subject to reversal only upon the finding of unfair prejudice against the prosecution. The emphasis here is on the word “unfair.” It would not be enough that the jury prejudicially sympathized with the defendant

215. See supra Part II.B.
217. Id. at 328 (quoting Tedder v. State, 322 So. 2d 908, 910 (1975)).
218. See id.
219. See, e.g., Russell, supra note 11, at 41. Professor Russell proposed a similar solution in the form of a hybrid “two part ‘Tedder plus’” test. Id.
or morally refused to impose a death sentence. The prejudice must have been to such a degree as to clearly invalidate the verdict. This scenario could arise, for example, as a result of gross jury misconduct. Only in light of such circumstances and others of comparable severity could the presumption of validity be rebutted.

A fourth option is to require the jury to put in writing its findings and votes as to the existence of each statutory aggravating and mitigating circumstance as well as any nonstatutory mitigating circumstance. This scheme would give the trial judge a more concrete and tangible basis for deciding whether to accept the jury's advisory verdict. In short, written findings would eliminate the need for a judge to speculate on why the jury decided for life instead of death. Written findings would also have the added effect of legitimizing jury sentencing recommendations. By recording their findings, juries could show that their decisions were not based on whim or prejudice but on substantive and meticulous deliberations. Judges would then be more inclined to respect jury decisions and not be too hasty to reverse.

A corollary solution is to also require trial judges to put in writing their reasons for reversing jury recommendations against

220. By "misconduct" I mean any undue influence on jury deliberations such as duress, bribery, blackmail, and the like perpetrated by extrinsic forces sympathetic to or in collusion with the defendant. Proponents of jury override may argue that giving jury sentencing verdicts presumptive force would substantially reduce, if not virtually eliminate, the prospects for jury overrides since instances of jury contamination are rare. However, such deference is consistent with our legal tradition of according respect to jury decisions.

221. See Russell, supra note 11, at 41. Professor Russell noted that the Supreme Court has rejected this proposition, holding that "the Sixth Amendment does not require that the specific findings [of aggravating circumstances] authorizing the imposition of the sentence of death be made by the jury." See Russell, supra note 11, at 41 n.246 (citing Hildwin v. Florida, 490 U.S. 638, 640 (1989)). This policy, however, unsoundly overlooks the necessity of written records for determining how the jury weighed and compared aggravating circumstances with mitigating ones to arrive at a recommendation against death.

222. See Russell, supra note 11, at 41.

223. See id. at 41 n.247. Professor Russell offered the following justifications for requiring juries to submit written findings to the trial judge:

Knowledge of the jury's findings as to aggravation and mitigation would allow the judge to scrutinize the jury's decision. Based upon this information, the judge could more fairly determine—in light of his or her experience as well as in light of information he or she has which was not made available to the jury (i.e., the defendant's pre-sentence investigation report)—whether the jury's recommendation should be followed.

Id. at 41.
the death penalty. Although three of the four jury override capital statutes already provide for this, they do not require juries to make written findings, so there is no basis for comparing the sentencing rationales of judges with those of juries.

Requiring judges to record their findings for comparison purposes would yield two benefits. First, it would limit judicial discretion. Judges would no longer be able to simply reverse for subjective reasons; rather, they would have to justify their rejection of an advisory jury verdict by identifying the flaws of the jury’s written findings and showing that their override decision was necessary in the interest of justice. In other words, they must prove that death is the most appropriate penalty in light of the totality of the circumstances. Second, written records of both judicial and jury findings ensure a more thorough appellate review process. Currently in all four jury override jurisdictions, appellate judges are limited to reviewing only the trial judge’s reasons for reversing a jury sentencing verdict. They have no record of the jury’s findings and hence no basis for comparison. Consequently, the appellate review process is skewed in favor of trial judges who can defend their decisions while the jury remains silent.

A fifth alternative for limiting the effect of jury override statutes is to provide trial judges with numerical weights for each aggravating and mitigating circumstance. Giving judges a clearer idea of the specific value of each of the statutory circumstances would enable them to determine if the jury had compared and balanced such factors properly to arrive at an appropriate sentence. This, too, limits judicial discretion because it prevents judges from assigning their own subjective values to the various statutory ag-

225. See Russell, supra note 11, at 41 (noting that “a judge’s written findings, as well as the jury’s, would provide greater guidance to the appellate court in its review of whether the trial court’s override decision was fair and consistent in accord with Furman”).
226. Under all four jury override statutes, the state supreme court reviews the sentencing authority’s reasons for imposing a death sentence. So, in effect, only the trial court’s overriding death sentence is considered, not the jury’s life recommendation. See Ala. Code § 13A-5-53(a); Del. Code Ann. tit. 11, § 4209(g); Fla. Stat. Ann. § 921.141(4); Ind. Code Ann. § 35-50-2-9(j) (Michie Supp. 1996).
Finally, a more far-reaching solution is to give appellate judges, rather than trial judges, the power to override advisory jury sentences. Rather than allowing the trial judge to reverse a jury and then submitting the reversal to a reviewing court, this entire procedure could be eliminated by permitting prosecutors to appeal directly to an appellate panel for jury reversals. The appellate judges could then review the jury’s findings with regard to the aggravating and mitigating circumstances and determine whether the jury erred in not recommending death.

This scheme has two benefits. First, judicial power to reverse jury verdicts would be vested in a multi-judge panel rather than placed in the hands of a single judge. This would prevent any one judge from injecting personal biases into the sentencing decision. Requiring a common verdict from a slate of judges subsequently ensures a more objective sentencing process. Second, appellate override promotes judicial economy and sentencing efficiency. Rather than clogging up trial court dockets by having trial judges review advisory verdicts, this task would be relegated to the appellate courts where it rightfully belongs. This eliminates the potential for needless duplication of review. Instead of giving trial courts a say and appellate courts the last say, it obviously makes more sense to give the latter the only say.

V. CONCLUSION

In light of our legal tradition of according respect to jury decisions, it is rather unsettling that our highest court could sanction something as legally unsound as jury override schemes for imposing the death penalty. And judging by recent Supreme Court decisions, it does not seem likely that the Court will change its course any time soon. Thus the constitutional dilemmas remain. Limiting jury override schemes can only minimize these dilemmas rather than offer a complete solution. What is at stake are the lives of individuals that may be denied protection because the Supreme Court has sanctioned anomalous capital statutes from four states that flagrantly violate an accused’s most fundamental rights: the right against cruel and unusual punishment, the right to due process of law, the right against double jeopardy, and the

228. See U.S. Const. amend. VIII.
229. See id. amend. XIV, § 1.
right to a jury trial. By permitting trial judges to override jury recommendations against the death penalty, the Supreme Court has, in effect, overridden the very constitutional guarantees that define and protect our democracy.

Jason C. Tran*

230. See id. amend. V.
231. See id. amend. VI.

* This Comment is dedicated to my family and friends who have always stood by me. In addition, I would like to thank George Carney for being a friend and a mentor. Special thanks also to the staff and editors of the Loyola of Los Angeles Law Review for their extraordinary effort and invaluable input. Finally, I wish to express my heartfelt gratitude to Stephanie Miyoshi who has inspired me with her loving devotion and friendship.