



FACT SHEET

Juries matter: Why Alabama must end judicial override

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The right to a trial by jury is one of the most sacred elements of the American criminal justice system. The basic principle of being judged by a jury of peers is a cornerstone of a nation built on a populist spirit and suspicion of elites and autocrats. But in Alabama, members of a jury in a capital murder trial are not empowered to set the sentence. Rather, it is a single judge, and not the jury, who makes the ultimate decision about whether the defendant should be executed. Two bills in the Alabama Legislature's 2017 regular session – HB 32, sponsored by Rep. Chris England, D-Tuscaloosa, and SB 16, sponsored by Sen. Dick Brewbaker, R-Pike Road – would end these “judicial overrides” and respect the jury’s decision in weighty matters of life or death.

History lessons

Alabama has a long and tangled history with the death penalty. A Tuskegee University archive preserves the grim evidence of the “lynch law” that long terrorized African Americans. That same fear of “mob justice” lies at the root of Alabama’s unusual judicial override statute in capital cases.

Judicial override is a classic case of a potentially good idea gone horribly wrong. When Alabama revised its death penalty statute in the 1970s, lawmakers chose to constrain juries’ sentencing power, fearing jurors may have been subject to emotion and inflamed by the details of murder trials. As a result, the law vests final sentencing power in capital cases with the judge. Sadly, instead of insulating the defendant from a bloodthirsty jury, the well-intentioned practice of leaving the sentencing up to elected judges actually has led to far more death sentences than anyone could have anticipated.

Today, Alabama is the only state that still allows judicial overrides. Alabama is one of 31 states to permit capital punishment, and about 190 people are on Alabama’s death row. Alabama sentences more people to death per capita than any other state. This reliance on the death penalty is out of sync with national trends. Several states recently have abolished capital punishment, and executions overall have been declining since 2009.

Even in Alabama, executions are less frequent than in previous decades, in part because of litigation across the nation challenging various states’ secretive lethal injection protocols. Still, the Attorney General’s Office is actively seeking execution dates for many prisoners on Alabama’s death row.

Only a ‘recommendation’

To understand Alabama’s judicial override policy, it is useful to examine the way that someone is sentenced after being found guilty of a capital crime. Once a jury finds a person guilty beyond a reasonable doubt of committing a capital offense, the jury subsequently will decide whether to recommend a sentence of death by lethal injection, or life in prison without the possibility of parole. However, this decision is not binding as to the fate of the defendant.

The jury in a capital cases only issues a recommendation to the judge about which sentence is appropriate. Judges are then free to decide whether to accept the jury’s recommended sentence or disregard it in a “judicial override.” Of the handful of states allowing juries to make recommendations to the judge regarding the sentence, only in Alabama can the judge disregard

the recommendation without any binding standards or even a requirement to explain the reasons for doing so.

Judicial override is largely a one-way street.

When judges disregard a jury's recommendation, it is almost always in favor of imposing a death sentence over the jury's recommendation of life without parole. From 1978 to early 2016, Alabama judges used judicial override 112 times, according to the Equal Justice Initiative (EJI). Of those instances, 101 were to impose death despite a jury's recommendation of life without parole. Alabama has executed 11 people whose death sentences were imposed as a result of judicial override. In total, nearly 20 percent of Alabama's death row inmates face execution because of judicial override.

Judicial overrides tend to spike in election years, according to EJI research. Alabama's trial judges are chosen every six years in politicized elections, often with expensive television ads, and some candidates may fear being labeled as "soft on crime." Placing decisions about life and death back in the hands of juries would eliminate even the possibility of political pressures playing a role.

Alabama's prospects for reform

The tide is turning against ambiguities in the capital punishment process, at least in the judiciary. Though the U.S. Supreme Court has not yet considered a direct challenge to the override portion of Alabama's capital punishment sentencing scheme, there is a good chance that the current court would not view it favorably. In January 2016, the court held 8-1 in *Hurst v. Florida* that Florida's capital punishment system violated the Sixth Amendment because of the relationship at sentencing between judge and jury.

Florida judges had not used overrides since the late 1990s, but the U.S. Supreme Court was critical of provisions allowing juries to be less than unanimous in issuing death sentences. (Alabama, one of four states not to require unanimity, allows juries to recommend death even if two jurors dissent.) In *Hurst*, the court held that the Sixth Amendment required a jury, not a judge, to be the finder of fact in each element of a capital crime.

***Hurst* may not be fatal for judicial override in Alabama**, but some state jurists seem increasingly skeptical of the practice. In March 2016, a Jefferson County circuit judge considering four death cases held that Alabama's override provisions were unconstitutional, though the state Supreme Court later overruled her opinion.

Legislators have an opportunity to act before the courts do. Repealing judicial override would bring Alabama's capital punishment system more in line with the rest of the country – and could spare the state from costly litigation to defend this unusual practice. With growing bipartisan support for prison reform and a "smart on crime" approach to law-and-order policies, we may be entering a new era of possibility for improving Alabama's criminal law statutes.

Bottom line

Whether a person supports or opposes the death penalty, there is potential common ground on the idea that a jury of a defendant's peers is the appropriate group to decide the sentence in a capital case. Jurors have the ability to struggle with the complex moral decision about whether someone should be executed or instead spend the remainder of his or her life in a prison cell without the possibility of parole. Though juries in capital cases are screened to remove people who are incapable of sentencing a defendant to death, as "peers" of the accused who already have struggled with the matter of guilt or innocence in the case, jurors are uniquely suited to reach a collective decision about an appropriate ultimate sentence.

Alabama likely will not end the death penalty any time soon, and the state may not even be willing yet to place a temporary moratorium on executions. But the practice of allowing a judge to ignore a jury's recommended sentence places Alabama far out of step with other death penalty states, and invites the risk that a federal court may step in and strike down the practice of override on constitutional grounds. It would demonstrate moral leadership – and save the state considerable money on legal bills – if the Alabama Legislature would abolish the outdated, ineffective and immoral practice of judicial override in death penalty cases.