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Alabama Judicial Override: Is One Greater than Twelve?

A POST-FURMAN LOOK AT POTENTIAL DISPARITIES IN CAPITAL SENTENCING IN ALABAMA

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Adrian Lindekugel
University of Washington Bothell
School of Interdisciplinary Arts and Sciences
First Reader: Camille Walsh
Second Reader: Dan Berger

Table of Contents

Introduction…….…….2

Chapter 1

Historical Context of Override

Furman v. Georgia……..……...…5

Gregg v. Georgia……..……..…8

Chapter 2

Statement of Problem……..……10

Purpose of Study……..…….…...12

Chapter 3

Literature Review……..…….....13

Chapter 4

Methodology & Analysis……..……...16

Chapter 5

Case Study Results and Discussion

Judicial Elections…….....18

Legal Representation…….……...….....23

Override Sentencing Findings…….…….....27

Chapter 6

Conclusion…….……....……...30

Bibliography…….…….……...……...34

Appendices…….…….……..…..36

Introduction

From low level drug offenses to capital murder, arrests and sentencing remain disproportionate in the United States. As a response to the Supreme Court's *Furman v. Georgia* ruling against arbitrary sentencing in capital cases, the state of Alabama implemented the judicial override as a measure to give a defendant a second chance at life after a jury had sentenced him to death.

Judicial override allows a judge to overrule the jury's decision if he or she feels that the jury was not taking all of the mitigating evidence into consideration. Theoretically, the override is in place to deliver an evenhanded ruling and to reduce arbitrary death sentences. Even though blacks and whites are murder victims in nearly equal numbers of crimes in the United States, 80% of executions since *Furman* involved white victims.[1] From low-level offenses to capital murder, arrests and incarceration rates across the U.S. are staggeringly disproportionate based on race. But even if these sentences are handed down within the boundaries of the law, it begs the question of whether the path to the courtroom was one of communal disproportionality, making it arbitrary despite the defendant's unquestionable guilt.

While there is no justification for criminal offenses, social environment is often a strong contributor to one's outcome. Whether or not an individual has access to resources at a young age can often be a predictor of the success or failure of the individual later in life. By their senior year of high school, thirty-eight percent of black children have been suspended or expelled at some point in their school careers compared to twenty percent of Hispanics and fifteen percent of whites.[2] In 2009, the dropout rates of high school students from low-income families were five times greater than that of students from high-income families.[3]

[1] Death Penalty Information Center, "Race and the Death Penalty", accessed Jan. 29, 2015, <http://www.deathpenaltyinfo.org/race-and-death-penalty>
[2] *See* Children's Defense Fund, *Portrait of Inequality 2011 Black Children in America* available at http://www.childrensdefense.org/campaigns/black-community-crusade-for-children-II/bccc-assets/portrait-of-inequality.pdf
[3] United States. U.S. Department of Education. Trends in High School Dropout and Completion Rates in the United States: 1972-2009. Compendium Report (Washington, 2011) 6.

In addition to large disparities in dropout rates between the wealthy and poor, black and white, poorer black communities often tend to lack effective hospitals, access to adequately nutritious food and ample employment opportunities.[4] As a result of these disparities, larceny, drug sales, prostitution, and other crimes often fill the void of a vacant local economy. But while whites have shown to use illegal drugs five times more often than blacks, black communities are targeted the hardest with ten times as many blacks going to prison for drug offenses. Furthermore, once in prison, African Americans serve virtually as much time in prison for a drug offense (58.7 months) as whites do for a violent offense (61.7 months).[5]

Over the last thirty years, the United States prison system has seen an astronomical spike in the number of inmates incarcerated. While the US represents just five percent of the world's population, it houses twenty-five percent of the world's prisoners.[6] Of those incarcerated, the percentage of minority and/or those of low socioeconomic status are significantly disproportionate to the country's general population. One in three African-American males born today will experience prison at some point in their lives. Additionally, African American males are incarcerated six times the rate of whites.[7]

If such great societal disparities can exist at the scholastic level among juveniles and for low level criminal offenders, then there is little faith that the safeguards against such disparities would then exist for capital murder cases. African Americans have accounted for 43% of those executed since 1976 and currently account for 55% percent of those on death row awaiting execution.[8] Furthermore, a 2000 Department of Justice study found that U.S. Attorneys recommended the death penalty in 36 % of the cases involving black defendants and non-black

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[4] Russell W. Rumberger, "Poverty and High School Dropouts." *American Psychological Association*, May 2013 <http://www.apa.org/pi/ses/resources/indicator/2013/05/poverty-dropouts.aspx>

[5] See Supra, note 2

[6] Joshua Holland, "Land of the Free? US Has 25 Percent of the World's Prisoners," December 16, 2013, *Bill Moyers*. <http://billmoyers.com/2013/12/16/land-of-the-free-us-has-5-of-the-worlds-population-and-25-of-its-prisoners/>

[7] "Criminal Justice Fact Sheet," NAACP April 23,2015 <http://www.naacp.org/pages/criminal-justice-fact-sheet>

[8] "Race and the Death Penalty," ACLU April 23, 2015 <https://www.aclu.org/race-and-death-penalty?redirect=capital-punishment/race-and-death-penalty>

victims, but they only recommended the death penalty in 20 % of the cases with black defendants and black victims between 1995 and 2000.[9]

Alabama is the only state that consistently performs judicial overrides. While the judge may reverse the jury's decision in a capital murder trial from either life to death or death to life, it has overwhelmingly been used for the former despite the intent of the override to be used as a second chance at life. In 2000, an Alabama judge overrode a jury's life decision for a white defendant, stating that he had already "sentenced three black people to death and no white people," clearly showing a conscious attempt to balance existing racial disparities at the expense of human life. In a 2014 interview, retired Alabama Supreme Court Justice Douglas Johnstone stated that some judges "want to make sure they put enough white people to death to hang on to the prerogative" of override.[10]

Judicial overrides have often been the subject of contentious debate among civilians and politicians alike. Much effort is put into the process of selecting a potentially unbiased jury of twelve, instructing them to come to an educated decision based on the facts presented, and allowing them to critically assess the arguments at trial, only to have that decision overruled with little need for explanation. United States Supreme Court justice Sonya Sotomayor addressed her distain for such a practice in her seventeen page dissent of *Woodward v. Alabama*.[11]

In the mid-1970's, as a result of several highly controversial capital cases heard by the Supreme Court, there was a strong and deliberate push across the United States to reform capital punishment in an attempt to curtail capricious sentencing. Most notably, *Furman v. Georgia* created a de facto ban to capital punishment nationwide due to questionable state practices. States employing the death penalty responded by enacting measures to show that they could

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[9] United States. U.S. Department of Justice. "The Federal Death Penalty System: A Statistical Survey."(Washington: Sept. 13, 2000) 43

[10] Paige Williams, "Double Jeopardy," New Yorker 17 Nov. 2014, 23 April 2015 <http://www.newyorker.com/magazine/2014/11/17/double-jeopardy-3>

[11] "There is no evidence that criminal activity is more heinous in Alabama than in other states, or that Alabama juries are particularly lenient in weighing aggravating and mitigating circumstances. The only answer that is supported by empirical evidence is one that, in my view, casts a cloud of illegitimacy over the criminal justice system: Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures." *Woodward v. Alabama*, 134 U.S. 405, 408 (2013) (Sotomayor,S., dissenting)

ostensibly eliminate arbitrary sentencing, and in the following years, death sentence rates crept back to pre-*Furman* proportion. In 1976, the U.S. Supreme Court ruled on their first capital case since *Furman* in *Gregg v. Georgia.* This time, the Supreme Court ruled that the state of Georgia had revised their sentencing practices efficiently enough to justify the death penalty.[12]

In 1987, the Supreme Court held in *McCleskey v. Kemp* that while it acknowledged that a defendant was several times more likely to receive the death penalty if the victim was white, it was not unconstitutional, and dealing with the issue was the responsibility of legislators and not the Court. Justice William Brennan dissented from that opinion stating, "at some point in this case Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have had to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that the victim was white…"[13]

Since *Furman*, a handful of states have adopted the judicial override in response to arbitrary sentencing. Of the three that currently employ such a policy, Alabama is the only state that uses it with regularity. While this practice is intended to rely on the judge's training and expertise to ultimately know better than a jury of twelve, it can be argued that the practice is taking the element of the community out of the decision and negating needed checks and balances that the peers amongst the jury are meant to provide.

Chapter 1: Historical Context of Override in Alabama

Furman v. Georgia

Judicial override in Alabama was a result of the Supreme Court ruling of *Furman v. Georgia*. On August 11th, 1967. William Henry Furman, a twenty-six year old African-American male with a 6th grade education, robbed the home of William Joseph Micke Jr. and his

[12] The concerns expressed in Furman that the death penalty not be imposed arbitrarily or capriciously can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance, concerns 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 that information. *Gregg v. Georgia*, 428 U.S. 153, 155 (1976)

[13] Ronald J. Tabak, "Justice Brennan and the Death Penalty," *Pace Law Review*, (June 1991) 473-490

wife and five children. Furman was tried in Georgia for the murder of Micke, convicted and sentenced to death in one day. Prior to the trial, the court committed Furman to the Georgia Central State Hospital at Milledgeville for a mental evaluation. Furman tested in the lowest four percent of the test's intelligence range. The hospital diagnosed Furman as being mentally deficient and subject to psychotic episodes. Nevertheless, the court denied Furman's insanity plea at trial.[14]

Certiorari to the Supreme Court began on January 17th, 1972 and was decided six months later on June 29th, 1972. The decisions was made collectively with *Branch v. Texas* and *Jackson v. Georgia*, similar cases with the exception that they also involved acts of rape. In *Jackson,* no murder was committed, but rather a 21-year-old African American male was sentenced to death for the rape a white doctor's wife during a home invasion robbery.[15] Similarly, Elmer Branch, a twenty-year-old African-American man, was sentenced to death for the rape of a sixty-five-year-old white woman. Branch, like Furman, had also tested low for intelligence with a 67 score which is considered borderline mentally unstable and had the equivalent of a fifth grade education. *Furman* then became the platform for the Supreme Court to decide if the death penalty was generally cruel and unusual as well as capricious in nature under *Furman* and specifically whether rape should be eligible for capital punishment under *Jackson* and *Branch.*[16]

Jackson's defense contended that the death penalty for rape only existed in sixteen states, and all but Nevada – which had not executed for rape since 1930 - were southern or border states, all were states where segregation was a way of life prior to 1954, and since 1930, 453 prisoners had been executed for rape of which 405 were African-American. Jackson's defense also referenced *Furman,* pointing out that all eight African-American males on death row for rape at that time were there for the rape of a white woman.[17] As a result of the 5-4 ruling clearing

[14] David V Baker, "The Role of Profiling in American Society: Purposeful Discrimination in Capital Sentencing" *Journal of Law & Social Change* 189 (2003) Web.
[15] *Jackson v. Georgia* was heard by the U.S. Supreme Court concurrently with Furman v. Georgia. *Furman v. Georgia*, 408 U.S. 238, 252 (1972)
[16] *See supra*, note 12.
[17] *Furman v. Georgia*, 408 U.S. 238, 251

Furman of a death sentence, each justice filed a response to their decision. In the response, Justice Potter Stewart explicitly noted his valuation of arbitrariness of the *Furman* ruling.[18]

The ruling reversed the death penalty citing that the decision was arbitrary in nature and that juries alone should not have sole discretion in death rulings. Justice Douglas' wrote in his response that "*discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority and saving those who by social position may be in a more protected position…*" Additionally, Justice Stewart noted that the jury's decision of death was applied in a "freakish" and "wanton" manner.[19]

Despite the findings by the court that the death penalty was unconstitutional, the various reasoning was mixed and thus left the core issue of its constitutionality unresolved. It can be argued then that this indecision paradoxically provided a justification for the implementation of the death penalty in non-discriminatory cases.[20] While five of the nine justices felt that a ruling of death in *Furman* violated the 8th amendment, only Justices Brennan and Marshall reasoned that the death penalty is generally unconstitutional by means of "cruel and unusual punishment." However, Justice Douglas stated that the punishment itself was not unconstitutional, thus fair sentencing had been disproportionately handed to minorities, which violated equal protection as dictated by the Fourteenth Amendment. It was this ambiguity that left a door open to not abolish the death penalty, but rather to reevaluate the sentencing practices.

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[18] Justice Potter Stewart noted that "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to death, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Ibid* 408 U.S. 238, 309 (P. Stewart) (1972)

[19] *Ibid.* at 310

[20] L. S. Tao, "Beyond Furman v. Georgia: The Need for a Morally Based Decision on Capital Punishment" *Notre Dame Law Review*. 51.4 722-736 (1976). Web.

Of the five justices that voted to overturn, three held that the sentence was cruel and unusual, while the remaining two agreed that the sentence of death is generally capricious in nature and often disproportionately handed to blacks and the poor.

In response to the *Furman* decision, Justice William Brennan argued that there were four principles that determined what was cruel and unusual. Those principles being:

- Degrading to human dignity – torture
- Arbitrary in fashion
- Clearly and totally rejected throughout society
- Patently unnecessary

Because of these inconsistencies, the ruling of *Furman* created a de facto moratorium on the death penalty. States with the death penalty in place reevaluated how it was implemented in order to be consistent and avoid disproportionate sentencing as decided by the Supreme Court.

Gregg v. Georgia

In 1976, Georgia became the first state since *Furman* to reinstate the death penalty, leading to the decision in *Gregg v. Georgia* that ultimately ended the moratorium. The ruling did not reject the *Furman* decision, but rather found that the amended procedures and added criteria specifying the aggravating and mitigating circumstances adequately resolved the issue of arbitrariness. Georgia created a system of "guided discretion," which the court accepted with the belief that this new model would not yield arbitrary results (Nathanson). The U.S. Supreme Court upheld the death sentence in *Gregg* citing that Georgia had determined "guilt" and "sentence" separately. In *Gregg*, the Court compared death sentences in similar cases to ensure that it was not disproportionately handed.[21]

[21] The ruling in Gregg stated, "…that Georgia statutory system under which the punishment and guilt portions of the trial are bifurcated, with the jury hearing additional evidence and argument before determining whether to impose death penalty, under which jury is instructed on statutory factors of aggravation and mitigation, and under which Georgia Supreme Court reviews each sentence of death to determine whether it is disproportionate to the punishment usually imposed in similar cases was constitutional despite contention that it permitted arbitrary and freakish imposition of the death penalty." *Gregg v. Georgia*, 428 U.S. 153

Over the next six years, several cases like *Gregg* were decided in the highest courts of many states. It was because of *Gregg* that some states established the override clause in an attempt to correct arbitrary sentencing that may be imposed by a jury. By 1982, the Supreme Court had completely deviated from telling states how to rule on death penalty cases. In two cases, the Supreme Court allowed states to uphold death sentences even where the penalty trial seemed a clear violation of state or federal law.[22]

Since *Gregg*, most states have used death sentences sparingly, noting the gravity in such a ruling. Additionally, DNA analysis has become increasingly significant in overturning many convictions. Alabama, however, is among a few states that have seen relatively large numbers of death sentences since *Furman*. Furthermore, Alabama is one of only three states that allow a judge to override the decision of a jury in the sentencing of death, and the only one of the three that has used the provision since 1999 (FL).

The debate of capital punishment has been a hot button issue at the state level across the U.S. for decades. Furthermore, the current laws from state to state vary so greatly that the dichotomy itself creates a tear among state leaders and constituents alike. From 1977-2000, 81% of the executions that took place in the United States occurred in the South.[23] Today nineteen states have banned the death penalty (including the District of Columbia) none of which include states from the Southeastern quadrant of the country.[24]

Since 1976, Alabama judges have overridden jury verdicts 111 times. Although judges have authority to override life or death verdicts, in 91% of overrides (n=101) elected judges have overruled jury verdicts of life to impose the death penalty. Of those currently on death row, 20 % were initially sentenced to a life sentence.[25]

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[22] Weisberg cites these two cases as *Zant v. Stephens*, 103 S.Ct 2733 (1983) and *Barklay v. Florida*,103 S.Ct. 3418 (1983). See Robert Weisberg. "Deregulating Death." *The Supreme Court Review*. The University of Chicago Press 1983 (1983): 305-95. Web.

[23] Franklin E. Zimring, The Contradictions of American Capital Punishment, (New York: Oxford University Press) 94

[24] Death Penalty Information Center, "States With and Without the Death Penalty," (March 27, 2015 http://www.deathpenaltyinfo.org/states-and-without-death-penalty

[25] Equal Justice Initiative, *The Death Penalty in Alabama: Judicial Override* (July, 2011) http://www.eji.org/files/OverrideReport.pdf, (last visited Feb. 23, 2015)

With such a polarization between the way that Alabama imposes its death sentence in relation to other states, this study will revisit both the *Furman* and *Gregg* decisions to attempt to determine if Alabama has strayed from these historic rulings and lapsed back into a pattern of capricious and biased nature.

While the Supreme Court did not specifically rule that the death penalty itself was unconstitutional, it set a precedent that caused most states that had the death penalty in place to reevaluate whether they were handing down consistent death sentences. Thirty-five states amended their sentencing practices. The vast majority of states created mandatory death sentences for certain offenses or improved on the standards and guidelines that juries must follow in capital cases. While thirty of the states with the death penalty gave sole discretion to the jury, four states (Indiana, Delaware, Florida and Alabama) allowed for a judge to be the final decision in death sentencing; Indiana has since repealed the override law.

Override complied with *Furman* because it allows for separate trial and sentencing as well as an automatic appellate process. The United States Supreme Court later found the override option to be constitutional in *Dobbert v. Florida* because, as Justice Rehnquist states, it gave the judge the ability to extend a "second chance at life" to the defendant.[26] Of the three remaining states that still have the ability to use judicial override in the United States, Alabama is the only state that uses it with regularity. Since 2000 an Alabama judge has overridden a sentence from life to death twenty-seven times compared to one in Delaware and none in Florida. As stated in *Dobbert*, the measure was ruled as constitutional because it acted as a measure to reduce arbitrary sentencing of death yet it has been used 91 percent of the time since Furman to change a life sentence to death.[27]

Chapter 2: Statement of Problem

The purpose of this study is twofold. First, it looks to answer if the process of judicial override sentencing since *Furman* have improved the arbitrariness in sentencing by comparing the defendants in each case by race and by victim's race to the overall state murder rates.

[26] *Dobbert v. Florida*, 432 U.S. 282, 283
[27] Equal Justice Initiative, *The Death Penalty in Alabama: Judicial Override* (July, 2011) http://www.eji.org/files/OverrideReport.pdf, (last visited Feb. 15, 2015)

Additionally, as a further measure of arbitrariness, this study will look to determine if significant increases in judicial overrides occur as a judge approaches re-election.

Currently, Alabama judges have overruled a jury 111 times. Of those overrides, 101 involved a judge changing a jury's decision from life in prison to execution. This contradicts the policy behind the override as a post-*Furman* measure to curtail capricious death sentencing. Furthermore, as arrests and convictions for general crime in both Alabama and the U.S. continue to increase and disproportionately represent minorities, usually from low income backgrounds, the judicial override potentially threatens to deliver the ultimate sentence to a disproportionate group of people.

By overriding a jury's decision of either life or death, judicial override removes the discretion of twelve individuals, for whom measures were taken to eliminate bias, and puts it in the hands of one individual. This has been argued to be a violation of the Sixth Amendment which states that "*In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed…"*[28] By removing the theoretically impartial jury from the sentencing process in capital cases, justice relies only on the expertise of one judge, with only an assumption that he or she has no conscious or unconscious existing bias. However, in the case of only one judge, there are no checks and balances available that the peers of a juror may otherwise provide. Missing from a single judge, arguably, is the diverse representation of a society that a jury may bring.

Alabama, along with the Southeast region of the United States, has an overt "tough on crime" stance. Additionally, Alabama also holds partisan elections for judges every six years. Judicial override relies on an assumption that the judge has the ability to deliver justice in a manner that is consistently objective and without favor; however, concern has been expressed that there is a conflict of interest between being consistently objective and fair while selling your "tough on crime" stance to constituents. Furthermore, a judge's campaign finance relies on funding from outside donors, some of whom may have special interests. While transparency is an important quality in any judicial decision, judges run for a seat from campaigns financed by esoteric donors to super PACs.

[28] U.S. Const. am. 6.

Alabama's judges are elected by partisan vote every six years. Because of this, a judge must act as a politician running a campaign that draws from local, individual contributors and Political Action Committees (PACs) to finance a campaign that panders to the popular ideals of their constituency. Seventy percent of Alabamans support the death penalty.[29] Because the general sentiment of the Southeast region of the United States is that in which a "tough on crime" stance is most popular, it could potentially create a situation where a judge rules by popular sentiment rather than equality.

In addition to potential conflicting interests during judicial elections, the representation provided to the defendant may also be a latent problem. The amount of money paid to a public defender, frequently utilized by the indigent, often equates to less than minimum wage when considering the amount of time needed to represent a client in capital cases. Because of this, the representation is often inexperienced with their knowledge of the law, and many times taking on an unreasonable workload from other cases to subsidize their pay. Sometimes, a firm is contracted to do all capital cases in a particular jurisdiction. Attorneys are often one of the largest contributors to judicial elections, who then are often selected by the judge in capital cases. This potentially leads to more quid pro quo incentives, for attorneys and judges alike, to maintain stability in their respective positions.

Purpose of Study

The purpose of the study is to highlight potential existing inequalities and inconsistencies to better determine if death sentences in Alabama violate Fourteenth Amendment rights, specifically equal protection, and show traits of arbitrary sentencing. While Alabama was chosen because of their polarizing political, racial and gender makeup reflected in state government including the judicial branch, it is meant to be a starting point for further research in other states or jurisdictions where similar disparities may exist.

This study will analyze data on all override cases to determine if sentencing has been proportionate to the race of the victim and defendants in the overall murder rates in Alabama or

[29] Clayton Tratt. "Administration of Justice or the Preservation of Political Office: The Unconstitutionality of Judicial Overrides in Alabama Death Penalty Cases," (Faulkner Law Review, Oct. 2009) 151.

if a bias exists among those whose sentence is commuted from life to death. Additionally, this study will explore if it is possible to maintain an unbiased stance consistently, regardless of election year or if fluctuation occurs when there is pressure to hold criminals accountable.

The initial problem of eliminating a jury's decision focuses on the individual's belief system potentially interfering with their ability to preside. The second problem presented focuses on whether the system itself creates an environment for a judge to rule in a way that they may not otherwise rule - consciously or subconsciously - in an effort to pander to constituents or special interest groups for personal and professional gain in furtherance of a quid pro quo relationship.

While the former problem could possibly promote arbitrariness in sentencing, the latter problem may be consistently unbalanced and thus becomes a potential problem of "cruel and unusual punishment" as stated in the Eighth Amendment due to the vast disparity in death sentencing between Alabama as well as the Southeastern US region and the rest of the United States.[30] Judicial elections, however, could also be contributors to inconsistent sentencing if there are patterns of ebbs and flows of harsher sentencing between election years and non-election years.

Chapter 3: Literature Review

In order to understand potential disparities this study will, in part, draw from The American Bar Association's (ABA) 2006 Alabama death penalty report that evaluated the accuracy and objectivity in the state's historical death sentences. While the study was comprehensive in nature, this study focused mainly on the disparities surrounding access to adequate representation during capital cases. This study was particularly important because it was written from a legal perspective as opposed to a non-profit that exists to expose the faults in the death penalty. The ABA study took place from within the Alabama legal system in an

[30] Death Penalty Information Center, "Number of Executions by State and Region Since 1976, updated May 13, 2015, accessed May 18, 2015, <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976>

attempt to assess whether the death penalty was being applied fairly and accurately as defined by state and federal law.[31]

This study will also focus on a July 2011 thirty-two page report from the Equal Justice Initiative. Additionally, EJI's site offered several reports that were analyzed, particularly one using quantitative data analysis surrounding the date, county, judge, race of defendant and race of victim in Alabama since the inception of override laws. It should be mentioned that the EJI is a non-profit organization whose purpose is, in part, to provide legal representation for the indigent as well as "reform[ing] the administration of criminal justice."[32]

Generally, societal perceptions of capital punishment tends to be divided into two groups. There are those who support the death penalty as redress for innocent lives lost; the ultimate punishment for the ultimate crime. Conversely, there are those that feel that the practice is inhumane, primitive and imperfect. With the emergence of DNA testing over the last thirty years, the practice has cleared several individuals of any wrong doing who would have otherwise eventually been put to death. For every 10 people who have been executed since the death penalty was reinstated in 1976, one person has been set free.[33] With such grave inconsistencies, both the *Furman* and *Gregg* rulings will be revisited with attention to the respective justice's support or dissent in each case since such historic decisions represented a fractured then fixed system respectfully, both prior to DNA testing.

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[31] As stated in the ABA study: To assess fairness and accuracy in Alabama's death penalty system, the Alabama Death Penalty Assessment Team researched twelve issues: (1) collection, preservation, and testing of DNA and other types of evidence; (2) law enforcement identifications and interrogations; (3) crime laboratories and medical examiner offices; (4) prosecutorial professionalism; (5) defense services; (6) the direct appeal process; (7) state post-conviction proceedings; (8) clemency; (9) jury instructions; (10) judicial independence; (11) the treatment of racial and ethnic minorities; and (12) mental retardation and mental illness. The Alabama Death Penalty Assessment Report summarizes the research on each issue and analyzes the level of compliance with the relevant ABA Recommendations.
American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report*, Deborah Fleischaker et al, iii (June, 2006).

[32] Equal Justice Initiative, *The Death Penalty in Alabama: Judicial Override* (July, 2011) http://www.eji.org/files/OverrideReport.pdf, (last visited Mar. 11, 2015)

[33] National Coalition to Abolish the Death Penalty, "Exonerations of Innocent Men and Women", accessed February 17th, 2015, http://www.ncadp.org/pages/innocence#_ftn6

Risinger makes the case for what he calls Paleyites and Romillists when analyzing the societal perceptions of conviction and capital punishment. The Paleyites, deriving from Rev. William Paley, reflect a view that the conviction of the innocent is wrong but inevitable and is a necessary social price of providing an appropriate level of security to the public. Romillists, named after Sir Samuel Romilly, see such horror in wrongful convictions that many constant changes to the legal system are in order to constantly improve on an imperfect system. As Risinger points out, both views carry with it their own problems. With Paleyites, the apathy and disregard for the rise or fall of wrongful conviction rates can potentially mean complacency with a broken system which can in turn spiral into further increased rates. Romillists, conversely, can tie up the legal system with so much red tape that the process of conviction to those that are truly guilty can be difficult. These dichotomous stances are important to consider when looking at how a judicial candidate must convey their message when addressing their constituents.

With a current judicial system that is clearly of a Paleyite design, it is still in the collective interest of both archetypes, with common concern for fortuitous conviction of the innocent, to both deliver accurate proof of guilt or innocence. Richardson argues however, that within the Alabama judicial system there is an assumption that death is a greater deterrent than life in prison despite no evidence to support such a claim. Thus, regard for such cautious sentencing can wane as a judge is tempted by political reward and finds herself in two "inconsistent positions" (as a politician and as a judge); there "necessarily involves a lack of due process of law in the trial of defendants charged before [her].[34]

In my analysis of judicial election I look, in part, from a symposium conducted by former New York Law School Dean Norman Redlich sponsored, again, by the American Bar Association and transcribed into a journal entry for *Fordham Urban Law Journal*. While a large portion of Redlich's career focus was around capital punishment it should be noted that the cited

[34] Richardson cites Justice Stevens in *Alabama v Harris* stating*: the assumption that death provides a greater deterrent than other penalties is unsupported by persuasive evidence. Instead, the interest that we have identified as the principle justification for the death penalty is retribution.* John M. Richardson "Reforming the Jury Override: Protecting Capital Defendants' Rights by Returning to the System's Original Purpose" *Journal of Criminal Law and Criminology* 94.2 2004 Winter 455-480. Web

work is from 1993 and precedes the use of political action committees that have had a profound impact on local and federal politics over the last decade.

Finally, this study will also compare other influential cases during that time that were both used to justify ending the moratorium in the respective states citing that they had corrected such egregious faults in sentencing and cases that were used as examples against capital punishment.

Chapter 4: Methodology and Analysis

The following Theory Building Case Study is qualitative and primarily relies on document analysis to gain a holistic understanding of the override process. The temporal scope of the entire study was from 1976, after the *Gregg* decision, to the present. In order to analyze data regarding the racial make-up of both victims and defendants, statistics were obtained, in part, from the Equal Justice Initiative (EJI), a non-profit organization providing legal representation to indigent defendants and prisoners, containing a list of the one hundred eleven inmates who were sentenced to life in prison by a jury and was then overridden to a sentence of death by a judge. The EJI data categorizes each override by year of override, judge, name of defendant, race of defendant and race of victim. This information was then graphed to determine trends in sentencing over time and by race.

Data was also used that was compiled from the U.S. Census Bureau analyzing national statistics of murder victims by race between 1978 and 2007. This was then plotted next to murder victims by race in Alabama gathered from the Bureau of Justice Statistics (BJS) for comparison.

This study will attempt to determine if disproportionate sentencing of death has occurred in Alabama since *Furman v. Georgia* in 1973. This study will analyze the convictions and deaths in Alabama since the *Gregg* decision in 1976 to determine if the state has made strides to convict in a fair, equal and calculated manner or if the practice has digressed to the ways of the pre-*Furman* style of disproportional and arbitrary sentencing. In order to do so, this case study will focus heavily on:

- Race of defendant sentenced to death
- Race of victim

- Convictions by election year v. non-election year

Because judicial elections raise concerns regarding the intentions of the justice, Electoral Incentives Theory will be the focus when analyzing historical judicial voting records. This theory states that, as politicians, getting and staying in office becomes the principal motivator for judicial candidates. Given the support in the region for the death penalty, this creates such a motivator for a judge running for a seat. In the following study I will further analyze the areas of executions as related to election years and money spend on judicial elections to determine if a pattern of inconsistent sentencing exists. Because southern states tend to carry a "tough on crime" stance, it is then hypothesized that death sentencing will be higher during campaigns.

This inconsistency may therefore demonstrate that the system creates an environment where capital punishment convictions are capricious and thus arguably unconstitutional as both cruel and unusual, contradicting the guaranty of due process and equal protection under the 8th and 14th Amendments. In analyzing judicial electoral cycles and sentencing patterns, I referenced a Wisconsin Law Review study by Fred Burnside, *Dying to Get Elected: A Challenge to the Jury Override*. Finally, this study will look at other United States Supreme Court cases to attempt to recognize if any inconsistencies exist in Alabama sentencing in comparison to federal rulings.

This study seeks to address two questions. First, given the gravity of such cases as *Furman* and *Gregg,* along with Supreme Court Cases since, has there been an improvement with disproportionate sentencing in death penalty cases since? Second, is there a direct conflict of interest with judicial elections and consistent sentencing when a judicial sentencing record is a selling point in an electoral campaign? While several studies exist with regard to general disproportionality in the prison and death row populations, this study will focus on the override population specifically to determine if stark disproportion exists in the 101 defendants sentenced to death. While ample there is ample existing literature that addresses judicial override, it is often from the stance of an organization with an existing bias and agenda to end it. Additionally, few studies have sought to determine if disproportionality exists among override defendants and their victims *and* its relation to the election of the judge simultaneously. While the intention of the study is meant to be a holistic and unbiased look at a common judicial practice, it is noted that this study has drawn in part from such aforementioned studies such as that of the Equal Justice

Initiative whose mission states that they are "committed to confronting injustice." It should also be noted that the purpose of a case study in general is to analyze information that is guided by theory and thus leaves the door open to seek biased support of such a theory.

The intent of the study is to determine if a pattern of arbitrary or intentionally biased sentencing occurs during a judicial override in order to spur further future research to quantitatively and specifically focus on the areas of disproportionality to invoke change in a potentially flawed system.

Chapter 5: Case Study Results and Discussion

Judicial Elections

The three states that have the ability for a judge to override a jury in capital cases (Alabama, Delaware and Florida) justify the jury override primarily on the grounds that it insulates defendants from prejudiced juries by "providing capital defendants with more, rather than less, judicial protection."[35] While Delaware, a state that has never used their ability to override life to death, states that the primary effect of their jury override statute is because it gives the defendant a second chance at life, Alabama has used its ability to override life to death in 91% of all of its 111 override decisions.[36]

While the case can be made that the reason Delaware has yet to override a life sentence to death is because of its unpopularity amongst a relatively liberal constituency, a case can also be made that judges in Alabama over-sentence to promote a position of being "tough on crime." In both cases, these are states with judicial elections and judges have sentenced based on the popularity of the local constituency.[37]

The practice of electing judicial representatives has long been a divided topic. On one hand, the elections of judicial representatives promote federalism and the people's voice.

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[35] Fred B Burnside. "Dying to Get Elected: A Challenge to the Jury Override." *Wisconsin Law Review* 1999(1999):1017, 1018

[36] Hillard Hamm, *Alabama Once Again Has Highest Death Sentencing Rate in the Country*, Southeast Alabama Gazette, January 8, 2014.

[37] Delaware performed 62 executions prior to *Gregg* but 16 since the 1976 ruling. Death Penalty Information Center, State by State Database http://www.deathpenaltyinfo.org/state_by_state

Without elections, supporters fear possible aristocratic rule and government further involved in citizen's lives without any democratic say. Conversely, naysayers argue that electing judicial representatives creates a situation where the judge must make decisions, consciously or unconsciously, based on the popularity of the constituency and not necessarily based entirely on what was presented at trial.

In Alabama, the general stance of the constituency is one that is unforgiving to criminals; it values punishment over rehabilitation. The United States Supreme court has openly denounced judicial campaign promises to be "tough on crime" when enforcing the death penalty, yet 38 states conduct elections for their Supreme Courts by partisan or non-partisan elections, often running on such a platform. In Alabama, justices are elected by partisan election. To fund such elections, judges receive contributions to fund their campaign in large part by big business and by trial lawyers, mainly through political action committees (PACs) in which donors remain anonymous to the public. In 2012 alone, more than $29.7 million was spent on effective TV ads painting their opponent in a negative light, often describing them as sympathizers to rapists, volunteering to help free terrorists, and protecting sex offenders (Bannon). In one particular 1996 ad promoting the election of Judge Kenneth Ingram, the ad states: "Without blinking an eye, Judge Kenneth Ingram sentenced the killer to die."[38] In Alabama alone in 2006, Justices Sue Bell Cobb and Chief Justice Drayton Nabers spent $2.6 million and $4.9 million respectively (in addition to another $600,000 raised by Justice Tom Parker) on their campaigns; the second most in US history.[39] The efficacy of such campaigns can be seen in the election results in this largely conservative state. As of 2012, all nine of the elected Alabama State Supreme Court justices ran on a Republican platform. It is forecasted that because of this, spending for future campaigns will decrease because of control of popular opinion. Because of the party's general "tough on crime" stance, Alabama's judicial selection process then pressures justices to conform to popular opinion rather than an evenhanded interpretation of the law.

[38] David R. Dow, and Mark Dow. *Machinery of Death: The Reality of America's Death Penalty Regime*. New York: Routledge, 2002. 84-85. Print.

[39] *Alabama Judge Says Raising Money To Be Elected Is 'Tawdry'*, NPR (March 31, 2015), http://www.npr.org/2015/03/31/396595322/alabama-judge-says-raising-money-to-be-elected-is-tawdry

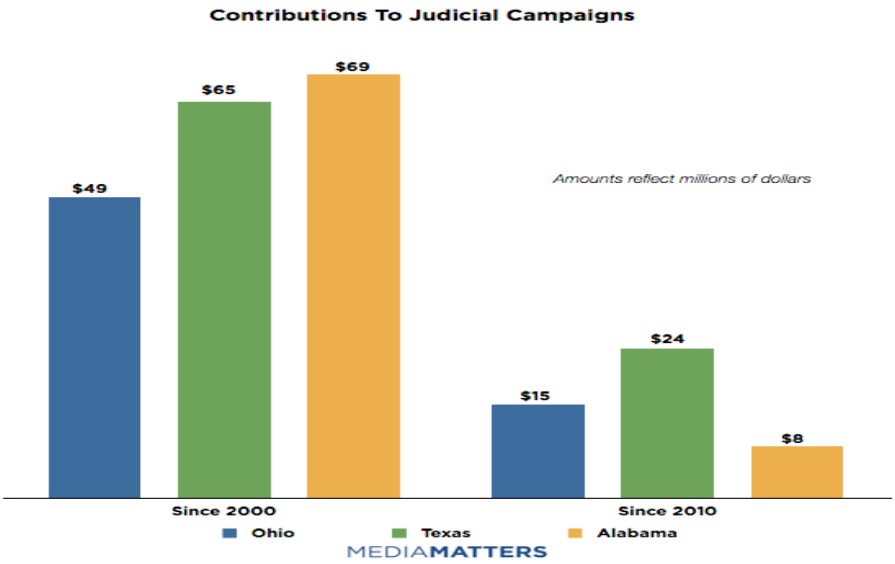


Table 1 (Source: Media Matters for America)

In *Tumey v. Ohio*, the defendant contended before the U.S. Supreme court that he was denied due process in his 1926 prohibition conviction citing that the mayor that convicted him had an invested personal interest in his conviction. The mayor could only be paid for his services as a judge if he convicted those who were brought before him, and the mayor had an interest in generating revenue for his village by convicting and fining those before him. In the *Tumey* ruling, the Supreme Court stated:

> *Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law.*[40]

Alabama holds staggered judicial elections every six years. Donations contributed to the Alabama Supreme Court candidates since 2000 have totaled over $69 million, more than any other state including Texas.[41] Since 2010 there has been a significant drop, in part because the

[40] *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927)
[41] Daniel Angster, *5 Years After Citizens United, Newspapers Fail To Cover Its Impact on Judicial Elections*, Media Matters for America, January 21, 2015. http://mediamatters.org/research/2015/01/21/5-years-after-citizens-united-newspapers-fail-t/202212

Republican Party currently control all nine seats in the State Supreme Court and the task of taking on the status quo ideals of said party can prove to be a costly yet futile election.

Since 1976, forty percent of all death sentences in Alabama have come from just four counties: Jefferson, Mobile, Montgomery, and Houston. Of the sixty-seven counties within the state, the vast majority has imposed fewer than five death sentences in the last thirty years, and eight counties have never sentenced anyone to death. At the same time, the Brennan Center for Justice recently singled out the state, reporting that it leads the nation in expenditures by judicial candidates during elections. (Adger) Sixteen override cases have been decided by three justices in two counties.[42]

In 2008, 30% of new death sentences were imposed by judge override, compared to 7% in 1997, a non-election year. In some years, half of all death sentences imposed in Alabama have been the result of override.[43] A mini-multiple regression analysis showed that there is a statistical correlation between judicial override and election years in most Alabama counties where override decisions have taken place. As Redlich states, this is "one of the clearest examples of the precise dynamic of politics in the administration of the death penalty".[44] Perhaps the greatest example of this in Alabama came after voters in California voted out Chief Justice Rose Bird.

In 1986, Chief Justice Rose Bird became the only Chief Justice in California to be removed from office by state voters by a margin of 67 to 33 percent.[45] This was a monumental decision on a national level because of Justice Bird's polarizing stance on capital cases. Bird had reviewed a total of sixty-four capital cases in appellate court in her career overturning all of them. Bird also struck down several other cases traditionally supported by conservatives such as the "use a gun go to jail" law which made prison mandatory if a gun is used in a crime, and other "tough on crime" cases. Opponents of Bird aired harsh campaigns painting her soft on crime and

[42] F. McRae (Mobile), B. Kittrell (Mobile), R. Thomas (Montgomery).
Equal Justice Initiative, *The Death Penalty in Alabama: Judicial Override* (July, 2011) http://www.eji.org/files/OverrideReport.pdf, (last visited Mar. 11, 2015)
[43] Equal Justice Initiative, *The Death Penalty in Alabama: Judicial Override* (July, 2011) http://www.eji.org/files/OverrideReport.pdf, (last visited Mar. 13, 2015)
[44] Norman Redlich, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Political Pressure?*, 21 Fordham Urban Law Journal (1993), http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1387&context=ulj
[45] Edwin Chen, "California Court Fight; Bird runs for her life." The Nation, Jan. 18, 1986 p43-46

a judge that will free killers. Mayor Tom Bradley overtly supported the death penalty largely as a counter-response to Bird. This decision put lenient judges on notice across the country that they are not immune to political pressure[46]

In Alabama, an overwhelmingly conservative, "tough on crime" state, the Bird loss reinforced the state's paradigm. This is supported by Fred Burnside's statistical study - charting override history, the sentencing judge, when that judge was up for reelection or actively campaigning for a judicial position and how many judges reside in that circuit - in order to see if there is a statistically significant relationship between the use of override and the proximity to election.[47] The study looked at the six-year span of a judge's term and at the amount of overrides each of the six years. If there were no relationship between overrides and election years then one could expect to see a relatively consistent amount of overrides in each of the six years of the judicial term, expecting some random but not large deviations from the average. Burnside used Chi-Squared at a .05 threshold for significance meaning that if the actual results were greater than 95% then some factor other than chance has been operating to cause the difference. Burnside found that the distribution of overrides were: 18, 9, 6, 12, 12 and 6 with the first number representing the last year of the judicial term; the closest to reelection. While this shows that there is a spike in overrides during reelection it does not meet the Chi-Squared measure of statistical significance at only 92.6%.[48]

Burnside then conducted the same study before and after the Rose Bird election loss and found that the pre-Bird data appears to be very random at: 3, 3, 4, 3, 4, 2. The post-Bird override data, however, shows: 15, 6, 2, 9, 8, 4. The probability that the post-Bird data could be random process is only .015 meaning that if by rolling the dice, 98.5% of the time a less extreme sequence would occur.[49]

As of 2009, no minorities sat in any judgeship in Alabama with the exception of twelve African Americans of a possible 140 in circuit court despite an African American population of

[46] *CBS Nightly News* (CBS television broadcast May 21st, 1986).
[47] Fred B Burnside. "Dying to Get Elected: A Challenge to the Jury Override." *Wisconsin Law Review* 1999(1999):1040
[48] Burnside's findings show that 92.6% of the time less extreme override results would occur from a roll of the dice. *Ibid*, pp. 1040-1041
[49] *Ibid*, pp. 1041

26.6%; more than twice the national average.[50] Additionally, only two African-Americans have won statewide contested elections since the end of reconstruction in 1877.[51]

Diversity of the Bench: Alabama

	Supreme Court	Court of Criminal Appeals	Court of Civil Appeals	Circuit Court
Judgeships	9	5	5	140
Women Judges	3	3	1	21
African American/Black Judges	0	0	0	12
Latino/Hispanic Judges	0	0	0	0
Native American Judges	0	0	0	0
Asian/Pacific Island Judges	0	0	0	0

Figures were updated by AJS staff in September 2009. Gender figures for trial courts were derived from The American Bench's "Judges of the Nation Gender Ratio Summary," 20th ed (2010).

Table 2 (Source: National Center for State Courts)

Hays v Alabama was one of only two life-to-death override cases where the defendant was white and the victim was black. *Hays* was presented before the Alabama Supreme Court. Judge Braxton Kittrell – who is responsible for the most override cases from life to death (n=6) – made mention of this disparity. This was argued in Hays' appeal, and later overruled, that the 1984 lynching of Michael Donald by three Ku Klux Klan members, which was an atypical crime for its time, was a "token" case and that the death sentence was a clear and conscious effort by the court to "balance the books" with regard to racial disparity.

Legal Representation

Like many states, Alabama faces many of its legal challenges from the beginning of the trial process when a trial lawyer is chosen. Lawyers are chosen to take capital cases by being picked from a list by a trial judge. Being on this list carries very little requirements regarding training specifically on capital cases (Smith). Given this, the American Bar Association report on capital punishment in Alabama concluded that Alabama's "failure to adopt a statewide public

[50] *Methods of Judicial Selection*, National Center for State Courts, (Feb 22, 2015), http://judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=A
[51] *Equal Justice Initiative,* Judicial Selection in Alabama, (February 23, 2015) eji.org/files/judicialselection.pdf

defender office, a series of local public defenders, or to implement close oversight of indigent legal services at the circuit level has resulted in the State being incapable of delivering quality counsel in all capital cases."[52] The 2006 review goes on to point out seven areas most in need of reform. Those areas include the following:

- Inadequate indigent defense services at trial and on direct appeal
- Lack of defense counsel for state post-conviction proceedings
- Lack of statute protecting people with mental retardation from execution
- Lack of a post-conviction DNA testing statute
- Inadequate proportionality review (state looks only at cases where the death penalty was imposed under similar circumstances rather than also looking at cases where the death penalty was sought but not imposed
- Lack of effective limitations on the "heinous, atrocious and cruel" aggravating circumstances
- Capital juror confusion (jurors not sure of their roles in deciding to impose death)

As Cornell University Associate Law Professor John Blume notes, a racial hierarchy in sentencing to death clearly exists. Black defendants who murder white victims are most likely to receive death while white defendants that murder white victims are the second highest. Least likely to get sentenced to death are black defendants who murder black victims. While blacks on death row are relatively low, this imbalance saves room for sentencing to death without seeming disproportionate.[53]

Alabama has no statewide public defender system and instead they are one of only two states that does not guaranty legal representation during the post-conviction portion of the death penalty process, even if the inmate may have new evidence of innocence.[54] Furthermore, a judge can appoint post-conviction counsel to the defendant, but not until the defendant has filed a

[52]American Bar Association, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report, Deborah Fleischaker et al. iv (June, 2006).
[53] John Blume, Theodore Eisenberg, Martin T. Wells. "Explaining Death Row's Population and Racial Composition". Journal of Empirical Legal Studies. Vol. 1.1, 165-207 (167) Mar 2004
[54]American Bar Association, online fact sheet, Alabama's Death Penalty System Identification of Problems and Recommendations for Reform.
http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/alabama/factsheet.authcheckdam.pdf

petition to do so with the court which would require some knowledge of state law. As a result, if the defendant receives inadequate counsel, the inmate may not be afforded representation to appeal on the grounds of misrepresentation. While the bar continues to provide *pro bono* representation, it is entirely limited to post-conviction trial. Statewide, each of the forty-one judicial circuits is responsible for providing counsel for indigent defendants. Of the total circuits, many have not set such indigent counsel despite a state statute requiring such a measure be put in place.[55] Per that statute, each circuit must include an indigent defense commission, which:

> (1) Shall advise the presiding circuit judge on the indigent defense system to be utilized in each county of the circuit.
>
> (2) It shall advise the presiding circuit judge on the operation and administration of indigent defense systems within the circuit.
>
> (3) It shall select the public defender by majority vote, if a public defender system is established within the circuit, determine the budget for the public defender and supervise the operation of the public defender office. It may remove the public defender for cause after notice and a hearing.
>
> (4) It shall select, in accordance with procedures promulgated by the Administrative Director of Courts, one or more contract counsel by majority vote, if a contract counsel system is established within the circuit; contract with such entities, subject to the approval of the presiding circuit judge; and determine the compensation to be paid to contract counsel under each contract, subject to the review of the Administrative Director of Courts and the approval of the State Comptroller. Notwithstanding this section or any other law to the contrary, no presiding judge or indigent defense commission shall by rule, regulation, or otherwise prohibit a circuit court judge or a district court judge from appointing any attorney licensed in Alabama to represent an indigent defendant.

Additionally, of the forty-one judicial circuits, twenty-seven use a court-appointed system where the judge selects a private defense attorney that is paid at an hourly rate. An additional ten

[55] ALA. CODE § 15-12-4(a) (2006).

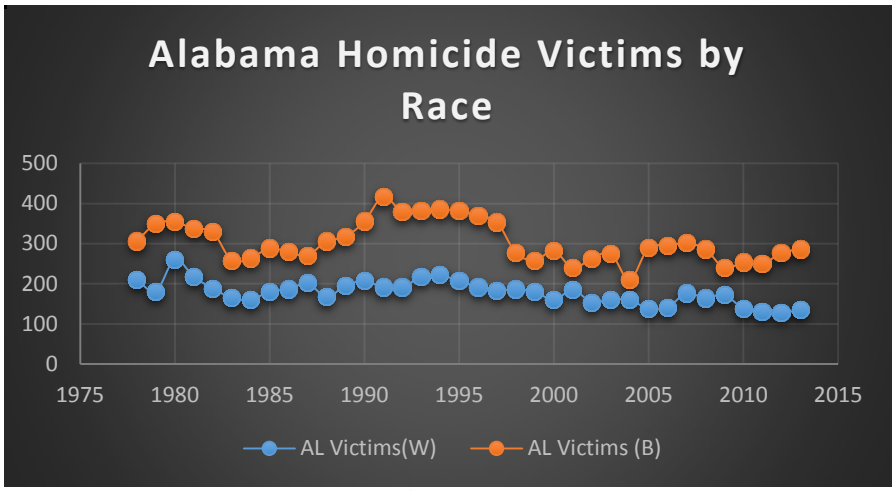
circuits contract individuals or firms where they are paid a monthly contract rate to handle cases.[56] Often the defense attorney is new and provides poor representation. During the appellate process in *White v. Alabama*, Leroy White's unseasoned attorney misunderstood the law and convinced his client to pass on a plea bargain that would have given him a life sentence thinking that he could not be convicted of capital murder and given death. One of White's appellate attorneys later withdrew from the case without telling White, and admitted that he allowed his client to miss a critical appeal deadline, shortening the appeals process and expediting his execution. Despite the Equal Justice Initiative taking on the case White was put to death in 2011.[57]

While measures have been put in place to afford due process to all, 95% of those on death row in Alabama were considered indigent.[58] Deficient instruction to the jury can also pose a problem. The Death Penalty Information Center points out that a jury naturally grapples with a death sentence but is not allowed explanation on details with regard to a life-sentence, thus creating a misconception that if a murderer convicted of a capital crime is not sentenced to death they will be released back into society within seven years. This fear derives from older high profile murder cases such as Charles Manson or Sirhan Sirhan, in which neither was sentenced under a "life without parole" scheme and thus the topic of their release would surface in news stories. This is a grave inaccuracy, as thirty-three states and the District of Columbia now impose life-without parole and the rest carry a minimum of twenty years.[59]

Override Sentencing Findings

[56] American Bar Association, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report, Deborah Fleischaker et al, 98 (June, 2006).
[57] Death Penalty Representation, Death Penalty Information Center, (March 2, 2015), http://www.deathpenaltyinfo.org/dea
[58] American Civil Liberties Union, Slamming the Courthouse Doors: Denial of Access to Justice and Remedy in America, 8 (December, 2010) https://www.aclu.org/files/assets/HRP_UPRsubmission_annex.pdf
[59] Richard C. Dieter Esq, *Sentencing for Life: Americans Embrace Alternatives to the Death Penalty* (April, 1993) (March 25, 2015). http://www.deathpenaltyinfo.org/sentencing-life-americans-embrace-alternatives-death-penalty

Before analysis can be done on the microcosm of Alabama's homicide defendants that represent override cases, we must first look at the racial statistics among homicide cases in Alabama as a whole. Since 2001, the South as a region has consistently had a higher murder rate per capita every year than any of the three other regions.[60] All states in the southern region have the death penalty statute and since 1976 have represented over 81% of the nation's executions (n=1143).[61] While the African-American population in Alabama is considerably higher than the national average, at approximately 27% and 12% respectively, they are still outnumbered by the white population, which makes up 72% of the state. Despite this disparity in race, African-Americans have made up between 51 and 226 more homicides per year than whites, every year since 1978 (Table 3).

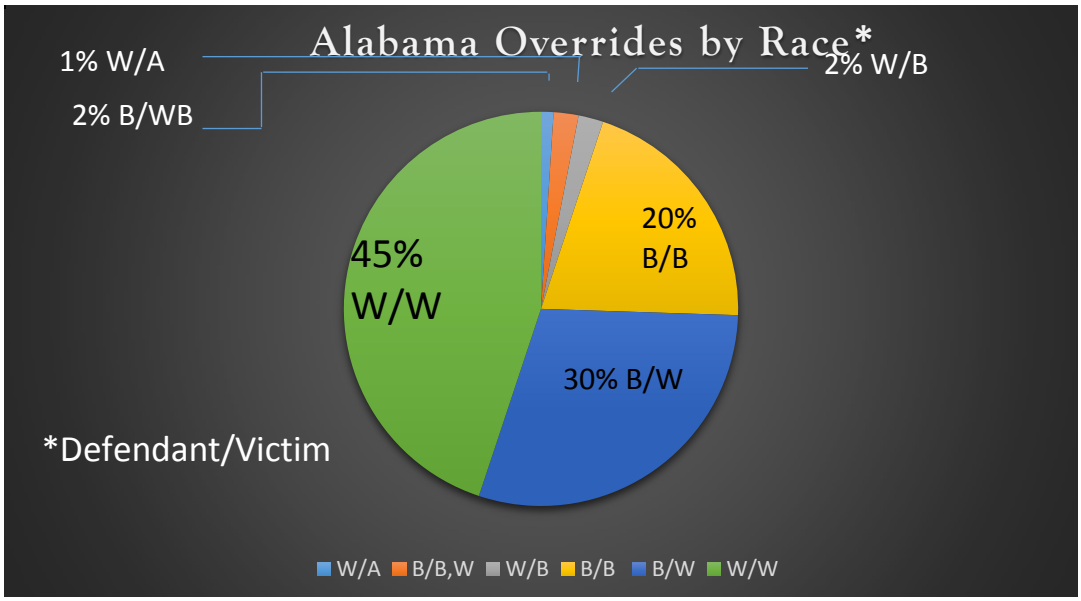


[1]Table 3: Homicide by race; 1978-2013, rates of homicide are per 100,000 population
[2]Appendix C

Over the last 30 years, Alabama has shown murder rates between two and four times that of the national average. Higher capital crimes, in turn, create more opportunities for death-eligible cases. It is in part because of this statistic that Alabama sentences defendants to death eight times more often than Texas per capita (Alger). While less than thirty-five percent of murder victims in Alabama are white, seventy-five percent of overrides to a death sentence

[60] *Murder Rates Nationally and by State*, Death Penalty Information Center, (April 10, 2015) http://deathpenaltyinfo.org/murder-rates-nationally-and-state#MRalpha
[61] *Ibid*

involved white victims including thirty percent involving a black defendant and white victim while twenty-five percent involved a black victim of which just two percent involved a white defendant and black victim (Table 4).



[1]Table 4: Alabama Overrides from Life to Death Sentence by Race
[2]Appendix A

Of the 111 overrides since 1978, 101 have been the judge overriding the jury's life sentence to death. Of those, three judges have been responsible for sixteen of those overrides (16%). Over this same period of time, five justices in Alabama over the last thirty-seven years account for twenty-two of those life-to-death overrides (22%). Unlike most states, which require a unanimous vote from the jury to sentence a defendant to death, Alabama only requires ten votes from a jury. Of all overrides from life to death, sixteen sentences were handed after the jury had ruled a unanimous 12-0 decision of life. Alabama Supreme court has recognized that trial judges would see a life verdict by a jury as a mitigating factor and furthermore would see a unanimous life verdict as holding more weight.[62] Despite this, 57% (n=57) of the time judges did not consider the jury's life verdict when overriding to death. Of these unanimous overrides, one defendant was retried three times, all three were a unanimous jury decision of life. Of these fourteen "unanimous life" override cases, eleven were regarding a white victim (79%). 55% of

[62] Ex Parte Carroll 852 So, 2d 833 (Ala. 2002)

overrides (n=55) were by a judge who had ruled in more than one override case and of those fifty-five cases, sixty-seven percent (n=37) of the victims were white.

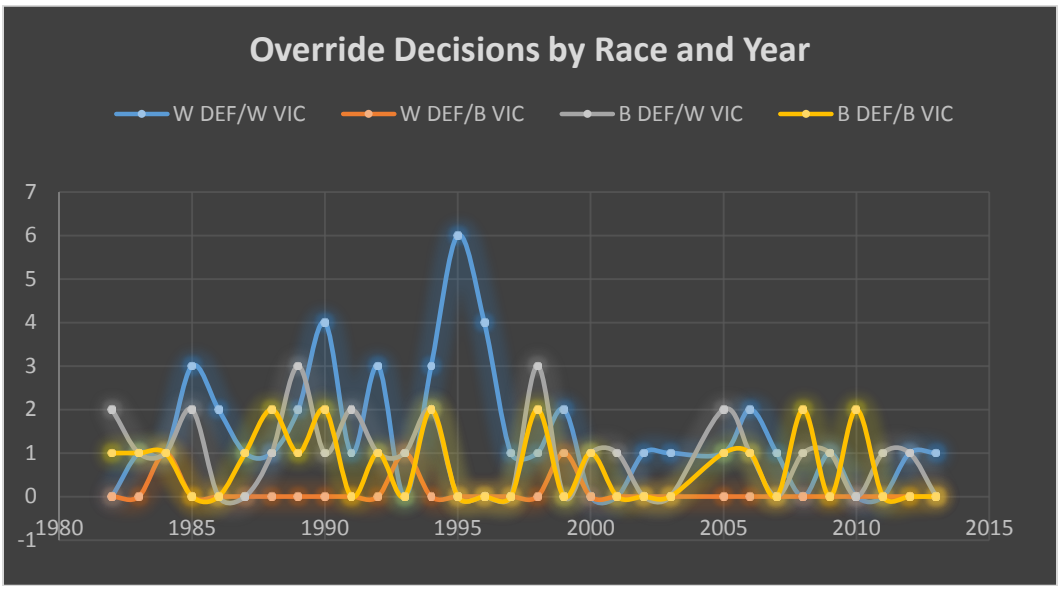
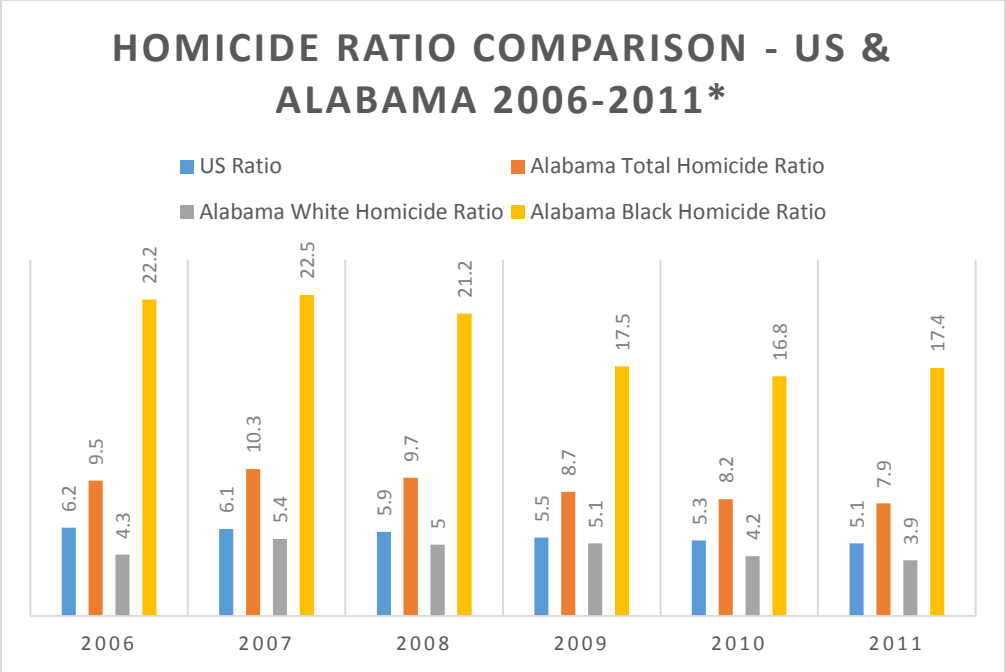


Table 5: Overrides by Race and Year in Alabama
Appendix D

Large disparities have consistently existed between black and white murder victims. In 1991, homicide rates between black and white males saw their largest disparity with black male homicide victims twice as high as white males. During this period of unusually high homicide rates, thirteen overrides took place between 1990 and 1992. While the black to white murder rate at this time was approximately 2:1, ten of the thirteen override cases were for white victims, three for "black on black" homicide, and none where the victim was black and the defendant was white.

Table 6 shows comparative homicide ratios between the national average and Alabama separated by race per 100,000 people. Between 2006 and 2011, the state of Alabama consistently exceeded the national average in murder rate. During this time period, the black population saw homicide rates from 3.17 to 3.69 times that of the national average and 3.43 to 5.16 times higher than whites in Alabama. During the same period of time, white homicide victims were consistently 11.5% to 23.5% below the national average.



[1]Table 6: Homicide by race; 2006-2011, rates of homicide are per 100,000 population
[2]Appendix B

In Alabama, the age of the defendant has also been a focal point. In 1988 the United States Supreme Court ruled in *Thompson v. Oklahoma* that it is unconstitutional to impose capital punishment to crimes committed to those under the age of 16 citing "evolving standards of decency that mark the progress of a maturing society".[63] Despite this ruling, Alabama Justice James Reid overrode an 11-1 jury to sentenced Clayton Flowers, a fifteen year old boy, to death just two years after *Thompson*. Alabama has sentenced seven children to death despite a life sentence by a jury.

Conclusion

Based on the existing statistics regarding the aggregate of all of Alabama's override cases, it is difficult to dispute the glaring inconsistencies. While it is not clear still if the sentencing is arbitrary it is clear that it is consistently disproportionate. With generally high murder rates in Alabama it is expected that high rates of death sentencing would follow. This in itself would not constitute arbitrary sentencing. However, when considering the white victim

[63] *Thompson v. Oklahoma*, 487 U.S. 815, 815 (1988)

murder rate, which is lower than national average and the black victim murder rate which is considerably higher, one cannot overlook the imbalance in sentencing for the retribution of victims by race with 75% of overrides to death being decided in white victim cases.

Justices are elected on a partisan basis and thirty-seven of forty-one judicial circuits directly choose who represents the defendant, either by contract or hand-picked by the presiding judge. Because judicial campaigns are primarily funded by contributions through political action committees or the attorneys themselves, it is the opinion of this study that there is a direct conflict of interest when and if representation is chosen in capital murder trials.

Deborah Stone's Rational vs. Polis models see a divide in "legal mobilization". The status quo stays in place because people rely on official statements of rights found in constituents, statutes, administrative rules or court opinion and judges merely apply normal rules to the facts of the case using logic and reason. Simultaneously the Polis Model exists where people get their beliefs and ideas about their rights from moral philosophy, media and other people. This dangerous dynamic exposes a vulnerable and naïve constituent who both assumes a flawless judicial system while having their view of justice and rights shaped in a similar manner as a consumer may be sold on a particular product the Rationality Model says that judges are not influenced by power of disputants, or anything except reason or fact while the Polis Model says that Judges are influenced by their own experiences, beliefs about justice and understandings to society; the same model that sees the constituents developing their ideals around the media and their peers.

Compounding further on top of the Polis Model theory, electoral incentives theory plays a large part in conscious sentencing that contribute to exaggerated override numbers. As Douglas Johnstone stated, some judges "want to make sure they put enough white people to death to hang on to the prerogative" of override. Between these two theories it is difficult to not think that there is an arbitrariness to override decisions.

Finally, with a statistically disproportionate override sentencing record with regard to both race and socioeconomic status and a potential conflict of interest with judicial elections and

an extensive and convincing American Bar Association study showing the poor representation afforded to the indigent, it is this study's objective to create a platform for dialog to change.

Given the grave inconsistencies with override sentencing it is the hope that this study may open doors for comprehensive and quantitative studies in the near future to begin the process of reforming judicial override in Alabama. This study makes the following suggestions to further influence change in judicial override policy and death sentence regulations in general:

1. Limit both, the amount that a judicial candidate can receive during a campaign, and disallow Political Action Committees in judicial elections while making it mandatory that all donors and amounts be transparent. With a judicial system that operates on the idea that every defendant receives a fair trial, then special interests should be completely removed from the equation. Candidates receive large campaign donations from businesses and firms with no reason other than a quid pro quo expectation from the legal system. This is a direct contradiction to the intent of the judicial system itself.

2. While a case can be made to repeal judicial override, a realistic starting point would be to only allow override where a jury is overturning a jury's death sentence to that of a life sentence. This was the stated purpose after the *Gregg* ruling to protect from the arbitrary sentencing as ruled in *Furman* and the reason that the U.S. Supreme Court allowed the practice to exist when Florida challenged it in *Spaziano v. Florida*. *Spaziano,* which was decided in 1984, did not have an adequate sample size to show the arbitrariness of the override at the time but has been challenged minimally since. If such change is too far-reaching in scope then it is recommended that there be "checks and balances" at a gubernatorial level to sign off on each override thus curbing potential bias that may exist because of the judicial election.

3. A higher set of standards must be met in order to represent a defendant in capital cases. Making such grave decisions of life and death should not be left to public defenders that are often looking to gain job experience to further their careers. These individuals are often underprepared, underpaid and thus over worked by taking on higher workloads.

Each of these suggestions should require their own separate and independent study. First, a detailed and analytical look at money spent during election years and the sentencing practices on

crime in general in a similar format as the Burnside study using a chi square test for significance. This could potentially show that the judicial election itself creates a statistically relevant change in how a judge rules depending on proximity to upcoming elections and thus point out the arbitrariness that the election process creates. Additionally, it is recommended that further focus be done as a clinical case study compounding on the ABA study with regard to the quality of defense that indigent defendants receive. It is recommended that this be done with state and federal representatives in order to influence policy change.

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Appendices

Year	Race Def/Vic	Name	County	Judge	Year	Race Def/Vic	Race Def/Vic
1998	B/B	Lindsey, Michael	Mobile	B. Kittrell	1982	3	B/W
1995	W/W	Jones, Arthur	Baldwin	H. Wilters	1982	3	B/W
2006	W/W	Murry, Paul	Montgomery	W. Gordon	1982	4	B/B
1991	B/W	Neelley, Judy	De Kalb	R. Cole	1983	1	W/W
1994	W/W	Acres, Gregory	Mongomery	R. Thomas	1983	3	B/W
1984	W/W	Harrell, Ed	Jefferson	D. Reynolds	1983	4	B/B
2013	W/W	Crowe, Coy	Jefferson	B. Burney	1984	1	W/W
1996	W/W	Hays, Henry	Mobile	B. Kittrell	1984	2	W/B
1995	W/W	Turner, Calvin	Etowah	J. Swann	1984	3	B/W
1986	W/W	Freeman, Darryl	Madison	D. Banks	1984	4	B/B
1990	W/W	Johnson, Anthony	Morgan	D. Hundley	1985	1	W/W
1984	W/B	Musgrove, Phillip	Madison	L. Smith	1985	1	W/W
1982	B/W	Thompson, Steven	Madison	W. Page	1985	1	W/W
1994	B/W	Owens, Charles	Russell	W. Johnson	1985	3	B/W
1994	B/B	Tarver, Robert	Russell	W. Johnson	1985	3	B/W
2010	B/B	Frazier, Richard	Mobile	B. Kittrell	1986	1	W/W
2010	B/B	Hooks, Joseph	Montgomery	R. Thomas	1986	1	W/W
1989	W/W	Boyd, William	Calhoun	H. Quattlebaum	1987	1	W/W
1990	W/W	Tarver, Bobby	Mobile	F. McRae	1987	4	B/B
1993	W/B	Duncan, Joe	Dallas	J.C. Norton	1988	1	W/W
1989	B/W,B	McMillian, Walter	Monroe	R. Key	1988	3	B/W
1984	B/B	Wesley, Ronald	Mobile	F. McRae	1988	4	B/B
1989	B/B	Murry, Paul	Montgomery	W. Gordon	1988	4	B/B
2012	B/W	Hadley, J.C.	Baldwin	C. Partin	1989	1	W/W

1985	W/W	Parker, John	Colbert	I. Johnson	1989	1	W/W
1998	B/W	Jackson, Willie	Coffee	G. McAliley	1989	3	B/W
1992	B/W	Russaw, Henry	Pike	R. Green	1989	3	B/W
1983	B/B	Coral, Robert	Montgomery	R. Thomas	1989	3	B/W
1996	W/W	White, Leroy	Madison	D. Banks	1989	4	B/B
1999	W/W	Stephens, Victor	Hale	C. Thigpen	1989	6	B/W,B
1993	B/W	Frazier, Richard	Mobile	B. Kittrell	1990	1	W/W
1994	W/W	Neal, John	Baldwin	C. Partin	1990	1	W/W
2005	B/B	Tomlin, Phillip	Mobile	F. McRae	1990	1	W/W
1995	W/W	Flowers, Clayton	Baldwin	J. Reid	1990	1	W/W
1994	B/W	Williams, Herbert	Mobile	F. McRae	1990	3	B/W
2000	B/B	Harris, Louise	Montgomery	R. Thomas	1990	4	B/B
1987	B/B	Sockwell, Michael	Montgomery	R. Thomas	1990	4	B/B
1990	W/W	Beard, David	Marshall	W. Gullahorn	1991	1	W/W
1988	B/B	Giles, Arthur	Morgan	B. Aderholt	1991	3	B/W
1990	B/W	Bush, William	Montgomery	J. Phelps	1991	3	B/W
2008	B/B	Reiber, Jeffrey	Madison	J. Blankenship	1992	1	W/W
2005	W/W	Gentry, Ward	Jefferson	J. Garrett	1992	1	W/W
1989	B/W	Padgett, Larry	Marshall	W. Jetton	1992	1	W/W
2003	W/W	Carr, Patrick	Jefferson	D. Reynolds	1992	3	B/W
2007	W/W	McGahee, Earl	Dallas	J. Meigs	1992	4	B/B
1987	W/W	Knotts, William	Montgomery	C. Price	1993	2	W/B
1999	W/W	McNair, Willie	Montgomery	E. Jackson	1993	3	B/W
1982	B/W	Roberts, David	Marion	B. Aderholt	1994	1	W/W
1994	B/B	Tomlin, Phillip	Mobile	E. McDermott	1994	1	W/W
1989	W/W	Scott, William	Geneva	P.B. McLauchlin	1994	1	W/W
1992	W/W	Burgess, Roy	Morgan	B. McRae	1994	3	B/W
2009	B/W	Madison, Vernon	Mobile	F. McRae	1994	3	B/W

1997	W/W	Myers, Robin	Morgan	B. McRae	1994	4	B/B
1992	W/W	Burgess, Alonzo	Jefferson	I. Johnson	1994	4	B/B
2006	W/A	Norris, Michael	Jefferson	A. Bahakel	1995	1	W/W
2000	B/W	Barnes, Michael	Mobile	B. Kittrell	1995	1	W/W
1992	B/B	Ponder, Terry	Cullman	F. Brunner	1995	1	W/W
1991	B/W	Smith, Ronald	Madison	L. Smith	1995	1	W/W
1990	W/W	Gregory, William	Baldwin	P. Baschab	1995	1	W/W
1984	B/W	Clark, Andrew	Henry	S.E. Jackson	1995	1	W/W
2011	B/W	Hyde, James Matthew	Marshall	B. Jetton	1996	1	W/W
2012	W/W	Evans, Edward	Macon	D. Segrest	1996	1	W/W
1988	W/W	Smith, Kenneth	Jefferson	N.P. Thompkins	1996	1	W/W
2007	B/W,B	McGowan, James	Conecuh	S. Welch	1996	1	W/W
1985	W/W	Apicella, Andrew	Jefferson	J. Garrett	1997	1	W/W
1995	W/W	Ferguson, Thomas	Mobile	N.P. Thompkins	1998	1	W/W
1998	W/W	Taylor, Jarrod	Mobile	D. Johnstone	1998	3	B/W
1996	W/W	Wimberly, Shaber	Dale	P.B. McLauchlin	1998	3	B/W
1995	W/W	Dorsey, Ethan	Conecuh	S. Welch	1998	3	B/W
1994	W/W	Carroll, Taurus	Jefferson	A. Bahakel	1998	4	B/B
1998	B/W	Jackson, Shonelle	Montgomery	W. Gordon	1998	4	B/B
2001	B/W	Waldrop, Bobby	Randolph	D. Segrest	1999	1	W/W
1983	W/W	Tomlin, Phillip	Mobile	H. Thomas	1999	1	W/W
1989	B/W	Hodges, Melvin	Lee	R. Harper	1999	3	B/W
1999	B/W	Lee, Jeffrey	Dallas	J. Meigs	2000	3	B/W
1988	B/W	Martin, George	Mobile	F. McRae	2000	4	B/B

1983	B/W	Wimberly, Shaber	Dale	P.B. McLauchlin	2001	3	B/W
1989	B/W	Morrow, John	Baldwin	R. Wilters	2002	1	W/W
1990	B/B	Moore, Daniel	Morgan	G. Thompson	2003	1	W/W
1986	W/W	Yancey, Vernon	Russell	G. Green	2005	1	W/W
1990	B/B	Spencer, Kerry	Jefferson	T. Nail	2005	3	B/W
2002	W/W	Eatmon, Dionne	Jefferson	T. Petelos	2005	3	B/W
2006	B/W	Harris, Westley	Crenshaw	E. McFerrin	2005	4	B/B
1998	B/W	Doster, Oscar	Covington	A. McKathan	2006	1	W/W
1996	W/W	Killingsworth, Jimmy	Bibb	T. Jones	2006	1	W/W
1995	W/W	Sneed, Ulysses	Morgan	S. Paler	2006	3	B/W
2009	W/W	Billups, Kenneth	Jefferson	W. Cole	2006	4	B/B
2008	B/W	Lane, Thomas	Mobile	J. Johnston	2006	5	W/A
2006	W/W	Stanley, Anthony	Colbert	H. Hughston	2007	1	W/W
2005	B/W	Mitchell, Brandon	Jefferson	J.W. Cole	2007	6	B/W,B
2005	B/W	Woodward, Mario	Montgomery	T. Hobbs	2008	3	B/W
2008	B/B	Spradley, Montez	Jefferson	G. Bahakel	2008	4	B/B
2006	B/B	Jackson, Demetrius	Jefferson	T. Petelos	2008	4	B/B
1998	B/B	Scott, Christie	Franklin	T. Dempsey	2009	1	W/W
1982	B/B	McMillan, Calvin	Elmore	J. Bush	2009	3	B/W
1988	B/B	Riggs, Jeffrey	Jefferson	C. Jones	2010	4	B/B
1991	W/W	White, Justin	Jefferson	C. Jones	2010	4	B/B
1992	W/W	Lockhart, Courtney	Lee	J. Walker III	2011	3	B/W
1985	B/W	Henderson, Gregory	Lee	J. Walker III	2012	1	W/W
1985	B/W	Shanklin, Clayton	Walker	D. Farris	2012	3	B/W
1985	W/W	Russell,	Lee	B. Howell	2013	1	W/W

		Joshua					

Appendix A

Year	US Ratio	AL - Tot	AL - Tot - Rat	AL W Tot	AL W - Rat	AL B - Tot	AL B - Rat
2006	6.2	435	9.5	141	4.3	294	22.2
2007	6.1	477	10.3	176	5.4	301	22.5
2008	5.9	450	9.7	164	5	286	21.2
2009	5.5	411	8.7	172	5.1	239	17.5
2010	5.3	391	8.2	138	4.2	253	16.8
2011	5.1	379	7.9	130	3.9	249	17.4

Appendix B

Year	**AL Victims(W)**	**AL Ratio (W)**	**AL Victims (B)**	**AL Ratio (B)**
1978	210	7.5	306	32.4
1979	181	6.4	350	36.5
1980	260	9	354	34.6
1981	217	7.5	337	32.6
1982	188	6.4	329	31.4
1983	165	5.4	258	24.3
1984	160	5.2	264	24.7
1985	180	5.8	288	26.8
1986	186	6.2	279	35.8
1987	201	6.6	270	24.7
1988	167	5.4	306	27.7
1989	195	6.2	317	28.3
1990	207	7	355	33.3
1991	191	6.4	417	38.5
1992	191	6.4	379	35.4
1993	217	7.2	382	35.6
1994	221	7.3	386	35.8
1995	207	6.8	381	35.1
1996	191	6.3	370	33.9
1997	182	6	353	32.2
1998	186	6.1	277	25.1
1999	180	5.9	258	23.3
2000	159	5	282	22

2001	185	5.8	239	18.3
2002	153	4.8	263	19.7
2003	161	5	275	21.3
2004	159	4.9	210	16.2
2005	138	4.2	290	22.2
2006	141	4.3	294	22.2
2007	176	5.4	301	22.5
2008	164	5	286	21.2
2009	172	5.1	239	17.5
2010	138	4.2	253	16.8
2011	130	3.9	249	17.4
2012	127	3.8	276	19.1
2013	134	4	286	19.6

Appendix C

Year	W DEF/W VIC	W DEF/B VIC	B DEF/W VIC	B DEF/B VIC
1982	0	0	2	1
1983	1	0	1	1
1984	1	1	1	1
1985	3	0	2	0
1986	2	0	0	0
1987	1	0	0	1
1988	1	0	1	2
1989	2	0	3	1
1990	4	0	1	2
1991	1	0	2	0
1992	3	0	1	1
1993	0	1	1	0
1994	3	0	2	2
1995	6	0	0	0
1996	4	0	0	0
1997	1	0	0	0
1998	1	0	3	2
1999	2	1	0	0
2000	0	0	1	1
2001	0	0	1	0
2002	1	0	0	0
2003	1	0	0	0
2005	1	0	2	1
2006	2	0	1	1

2007	1	0	0	0
2008	0	0	1	2
2009	1	0	1	0
2010	0	0	0	2
2011	0	0	1	0
2012	1	0	1	0
2013	1	0	0	0

Appendix D