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## Judges Ignore Juries to Impose Death

*Law: Judicial override in capital trials comes under increased scrutiny. Arizona case is expected to draw a ruling from the U.S. Supreme Court.*

June 16, 2002 | HENRY WEINSTEIN | TIMES STAFF WRITER

MONTGOMERY, Ala. -- After finding Shonelle Jackson guilty of murdering a man while stealing his car stereo, jurors recommended unanimously that the 19-year-old's life be spared.

However, trial Judge William Gordon overruled the 12-member panel. Instead of placing Jackson in prison for life without possibility of parole, Gordon ordered him to the electric chair.

Jackson is one of 83 people who have been sent to death row in Alabama in the last two decades as a result of a judicial override--a procedure that is becoming increasingly controversial in the state and around the nation.

Alabama is one of just four states that has permitted judges to ignore jury recommendations to impose death.

Judges in five other states have the sole power to make capital punishment decisions.

Later this month, the U.S. Supreme Court is expected to rule on a case challenging the procedure in one of the latter states, Arizona, on the grounds that it amounts to a violation of the 6th Amendment right to be tried by a jury of peers.

If Arizona's law is toppled, legal experts say it could have an impact on the Alabama statute under the same reasoning since both laws, in essence, give judges the ultimate power to impose death.

Alabama Atty. Gen. Bill Pryor says the state's law is fair because judges, having viewed capital cases in the past, have some "sense of proportionality."

Critics counter that judges should not be given unbridled authority to ignore jurors' recommendations.

Such a practice "reduces to a sham the role of the jury in sentencing and allows baseless, disparate sentencing of defendants in capital cases," Alabama Supreme Court Justice Douglas Johnstone wrote in May in a dissent in the Jackson case.

Alabama sentences more people to death per capita than any other state, and "judicial override is the single most significant factor" why, said Bryan Stevenson, executive director of the Equal Justice Initiative of Alabama. He is Jackson's appellate lawyer and plans additional appeals.

Five of the 24 people executed in Alabama since capital punishment was reinstated here in 1976 were sentenced to death by judges after juries had recommended life sentences.

The state judge who has imposed the most overrides went so far as to advertise his record on death penalty cases during his 2000 reelection campaign.

In American courts, sentencing for virtually all crimes is the sole prerogative of a judge. But historically, the death penalty has been different. In 1968, the U.S. Supreme Court said that jurors should bear the responsibility "to express the conscience of the community on the ultimate question of life or death."

But seven years ago, in *Harris vs. Alabama*, the Supreme Court upheld the Alabama override law 8 to 1, saying it did not violate the Constitution's prohibition against cruel and unusual punishment.

That did not stop debate over the issue.

In recent years, two men who were sent to Alabama's death row as a result of overrides have had their convictions overturned.

Walter McMilian and Randall Padgett, now free men, often speak publicly against the death penalty.

Alabama also has been criticized more broadly by American Bar Assn. officials for providing insufficient funding for lawyers who represent indigent defendants in capital trials.

And Alabama officials are under attack in a federal lawsuit that contends that the state is violating the Constitution because it does not guarantee legal help to inmates in the final phase of death penalty appeals.

Alabama law permits trial judges to override jury recommendations and impose death, regardless of whether a jury recommends life by a 7-5 majority or a higher margin. A number of defendants, such as Jackson, have been sent to death row even though nine or more jurors recommended life.

To render a death sentence, an Alabama judge must find that aggravating factors, such as the nature of the crime or a defendant's criminal history, outweigh such mitigating factors as a defendant's age or lack of a record.

The judge is required to "consider" the jury's "advisory [sentencing] verdict," but the Alabama statute does not say how much weight it must be given.

The lack of a standard does not invalidate the law, Justice Sandra Day O'Connor wrote in the Harris decision. She said the high court should not engage in "micromanagement" of tasks properly in the state's discretion.

Justice John Paul Stevens issued a strong dissent, saying that "total reliance on judges to pronounce sentences of death is constitutionally unacceptable," in part because it gives prosecutors two chances to win a death sentence.

Some Alabama jurors who have voted for life sentences have expressed frustration and surprise that their recommendation seemed meaningless.

"I was very shocked to know that the judge had changed our decision," said Allene Evans, one of nine jurors who recommended life for Herbert Williams Jr., after finding him guilty of murdering a Mobile businessman. "We were supposed to make the decision."

Alabama judges can override a capital jury's decision in either direction; there have been 83 overrides from life to death, and just seven from death to life.

That disparity presents a marked contrast with the other three states that have had override laws.

In Delaware, where judges are appointed, there have been seven overrides, all from death to life.

In Indiana, there have been nine overrides to death and nine to life. Earlier this year, Indiana's legislature abolished the practice of overrides for future cases.

Florida had 173 overrides for death and 51 for life from 1972 to 1992. But under a Florida Supreme Court decision, judges now can override a jury's life verdict only if "the facts justifying a sentence of death are so clear and convincing that virtually no reasonable person could disagree that a death sentence was appropriate." In recent years the number of overrides in Florida has dropped markedly.

A review of Alabama cases shows that some courts treat the jury's life recommendation as a mitigating factor. But other judges give no weight to the jury's opinion.

In Jackson's 1998 trial, Judge Gordon did not say the jury had done anything wrong. Rather, Gordon said he thought a death sentence was appropriate, even though he acknowledged that there was conflicting evidence on whether Jackson or another person involved in the car stereo robbery had fired the shot that killed Lefrick Moore.

The judge said there were two aggravating factors: The murder was committed in the course of a robbery, and Jackson was on probation for burglary and theft.

Gordon said the fact that Jackson was 18 when he committed the crime was a mitigating factor, but was due only "slight weight" because Jackson had an extensive juvenile court record starting at age 12.

Under the Alabama death penalty law enacted in 1976, the first judge to override a life recommendation and impose a death sentence was Braxton L. Kittrell of Mobile in 1982. Kittrell's first override drew little attention outside Alabama, but the second came in a case frequently cited by override supporters as an example of the virtue of the law.

Two members of the Ku Klux Klan, angry about a hung jury in the trial of a black man accused of killing a white policeman, went looking for revenge. Klansmen Henry F. Hays and James Knowles abducted Michael Donald, a 19-year-old black man, from a Mobile street at gunpoint, slashed his throat and hanged him from a tree. Two years later, a Mobile jury convicted Hays of murder but recommended life without parole. (Knowles got a life sentence in return for his testimony.)

Citing the brutality of the lynching, Kittrell overrode the jury and sent Hays to death row in 1984. Hays was electrocuted in 1997, the first white man in 84 years executed in Alabama for killing a black person.

Overall, about 55% of defendants sent to death row as a result of overrides have been black, and 75% of the victims in override cases were white.

The trial judge who has imposed the most overrides is Ferrill D. McRae of Mobile, who has sent at least six men to death row after rejecting jurors' recommendations for life.

McRae, a crusty, white-haired jurist appointed to the bench by Gov. George Wallace in 1965, said that in every instance the murder had been "heinous, atrocious and cruel."

For example, he noted, George Martin murdered his wife by burning her in a family car to collect insurance money. "If burning a human being alive is not an example of what is heinous, atrocious or cruel, those words lack meaning," McRae said in July 2000 when he overrode the jury's 8-4 life sentence recommendation.

During his reelection campaign in 2000, McRae ran advertisements listing some of the men he had ordered to death row. Among them was Martin.

In a sign that attitudes may be shifting, the Mobile Press Register, though saying Martin's crime was "obviously heinous," denounced McRae, a marked contrast to the praise it gave Kittrell for his override 16 years earlier: "For one judge to overrule the jury's considered judgment, so as not to favor life but to order execution, is for the judge to assume god-like powers."

At least 45 Alabama judges have sent defendants to death row via override. Only a few have overridden death sentences, and one of them, who has since died, was chastised by the Legislature for making "a mockery of the judgment of the jury."

Another is 17-year judge Denny Louis Holloway of Dothan. Saying he is sometimes accused of being "soft on crime," Holloway, 55, said he has used care in twice overruling jury recommendations of death.

He said he "would have a hard time overruling a jury to give death" and has never done it. "I feel that if the jurors made their decision not to take a life; why would I want to go the other way?"

Besides, Holloway emphasized, "When you give someone life without parole you are not doing them a favor."