No. 17-8599

IN THE

Supreme Court of the United States

LANCE SHOCKLEY,

Petitioner,

v.

CINDY GRIFFITH, WARDEN,
POTOSI CORRECTIONAL CENTER,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Missouri

BRIEF OF *AMICI CURIAE* RETIRED MISSOURI JUDGES AND JURISTS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTERESTS OF AMICI CURIAE[1]

The issue before the Court is the constitutionality of Missouri's death penalty procedure under the Sixth, Eighth, and Fourteenth Amendments. Specifically, the Missouri sentencing scheme permits a trial judge to render a death sentence when a jury is deadlocked on that issue, *i.e.*, when the jury has not unanimously and independently made an affirmative determination that a death sentence is warranted. Amici are retired judges and jurists who have served at all levels of the Missouri judicial system. They include trial judges who have presided over capital cases, and a Justice of the Missouri Supreme Court. They have dedicated themselves to public service, devoting time, effort, and in some instances their entire legal careers to the pursuit of justice in Missouri's judicial system. They therefore have particular interest and expertise in the legal and practical ramifications of the Missouri sentencing scheme at issue here.

Former Chief Justice Michael A. Wolff was a justice on the Missouri Supreme Court from 1988-2011 and Chief Justice from 2005-2007.

Former Judge Charles Atwell was a judge on the 16th Judicial Circuit Court of Missouri from 1996-2012.

Former Judge Jon R. Gray was a judge on the 16th Judicial Circuit Court of Missouri from 1987-2007.

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[1] Pursuant to Supreme Court Rules 37.3(a) and 37.6, Amici Curiae certify that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and that the parties have consented to the filing of this brief.

Former Judge John R. O'Malley was a judge on the 16th Judicial Circuit Court of Missouri from 1989-2009.

Former Judge Gary Oxenhandler was a judge on the 13th Judicial Circuit Court of Missouri from 2002-2016.

Former Judge David W. Russell was a judge on the 7th Judicial Circuit Court of Missouri from 1989-2004.

Former Judge Robert Schieber was a judge on the 16th Judicial Circuit Court of Missouri from 2006-2017.

SUMMARY OF ARGUMENT

Petitioner Lance Shockley was sentenced to death in 2009 under Missouri's capital sentencing scheme. Missouri law permits a trial judge to make independent factual findings (both as to aggravating and mitigating factors) and to impose a sentence of death when a jury deadlocks on whether the death penalty is warranted. Missouri's capital sentencing procedure essentially takes a life or death decision out of a jury's purview when the jury is unable to vote unanimously in favor of a death sentence, and places that awesome power in the hands of one individual. That is precisely what happened in Mr. Shockley's case. Such a system promotes disparity in sentencing outcomes, raises the specter of arbitrary results, undermines the Sixth Amendment's jury trial guarantees, and constitutes a form of cruel and unusual punishment under the Eighth Amendment, as applied to the states through the Fourteenth Amendment.

Mr. Shockley has been denied relief by the Missouri Supreme Court, and it now falls to this Court to provide a proper review of the constitutional issues at stake. The Court's review is necessary because the issues presented by the Petition are of substantial importance to the administration of justice. Without immediate review, Mr. Shockley, and those sentenced under Missouri's and other similarly unconstitutional schemes, will be subjected to the possibility of suffering the gravest penalty in our criminal justice system. The risk of significant and irreversible injustices in the administration of those sentences is high, given the inherently problematic nature of a death sentence being imposed by a single person – and particularly after a jury did not unanimously do so.

In short, the Petition's constitutional arguments are compelling and urgent. Amici are concerned that the failure to grant relief now will result in the same irreparable injustices that many of them have lived through during their recent decades on the Missouri bench. Amici urge this Court to prevent such injustices from needlessly recurring.

ARGUMENT

THE COURT SHOULD GRANT REVIEW OF THIS CAPITAL CASE TO ADDRESS THE FEDERAL CONSTITUTIONAL ARGUMENTS PRESENTED BY MISSOURI'S UNJUST AND UNLAWFUL JUDICIAL OVERRIDE SCHEME IN DEATH PENALTY CASES.

I. Judicial Capital Sentencing Skews Sentencing Outcomes.

This Court's review is necessary because judicially-imposed death sentences like Mr. Shockley's are unjust and unlawful in several ways. First, judicial sentencing historically has been more likely to result in a death sentence in a capital case than when a jury makes that decision, particularly in jurisdictions where trial judges are elected, as is overwhelmingly the case in Missouri. This is not a new revelation. As Justice Stevens noted over twenty years ago, it "has long been the case" that "[n]ot surprisingly, given the political pressures they face, judges are far more likely than juries to impose the death penalty." *Harris* v. *Alabama*, 513 U.S. 504, 521 (1995) (Stevens, J., dissenting). At the time, there was already significant evidence in support of Justice Stevens' observation. See *ibid.* (noting that "Alabama judges have vetoed only five jury recommendations of death, but they have condemned 47 defendants whom juries would

have spared."); Michael L. Radelet and Michael Mello, *Death–to–Life Overrides: Saving the Resources of the Florida Supreme Court*, 20 Fla. St. U. L. Rev. 195, 196, 210-211 (1992) (demonstrating that, from 1972 to 1992, Florida state judges overrode 134 jury-imposed life sentences to impose a death sentence, while overriding only 51 jury-recommended death sentences to impose a life sentence); see also Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 759, 793-794 (1995) (demonstrating higher likelihood of judicial override of jury-recommended life sentences in jurisdictions in Alabama, Florida and Indiana where judges face elections); *Republican Party of Minnesota* v. *White*, 536 U.S. 765, 789 (2002) (O'Connor, J., concurring) ("Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.").

Over the past twenty years, that trend has continued. For example, a recent study of Delaware's capital sentencing system, relying on statistics gathered before Delaware abolished judicial imposition of death sentences, showed that "whether a case resulted in a death sentence was strongly influenced by whether the punishment was decided" by a judge or jury, and "[j]udges were significantly more likely to give a defendant the death sentence than were juries." Valerie P. Hans, et al., *The Death Penalty: Should the Judge or the Jury Decide Who Dies?*, Cornell Law School Legal Studies Research Paper Series 15 (2014). When Delaware had a solely jury-determined death sentencing scheme, only 11 of 57 capital defendants (less than 20%) received death sentences, while during the judge-determined capital sentencing era, 31 of 58

capital defendants (53%) received death sentences. *Ibid.* Even during the era when Delaware had a hybrid sentencing scheme in which the jury rendered an advisory sentence and the trial judge rendered the final determination as to whether a death sentence was warranted, the frequency of imposition of a death sentence was significantly higher than when the jury had sole responsibility: in the hybrid system, 39% of capital sentences resulted in the death penalty. *Id.* at 8, 15. Data from other states reflect a similar phenomenon. *See, e.g.*, Fred B. Burnside, Comment, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 Wis. L. Rev. 1017, 1039-1044 (1999) (examining frequency of jury override by elected judges in Alabama, Florida, and Indiana).

Statistics drawn from judicial records demonstrate that the same is true in Missouri, where the overwhelming majority of counties elect trial judges. In the Missouri state court system, at the conclusion of cases in which there is a conviction for a capital crime, the trial judge is required to file a report with the Missouri Supreme Court within 10 days after the imposition of sentence. See Missouri Supreme Court Rule 29.08(c). A review of capital cases, relying largely on available trial reports from the past twenty years, indicates that judges are more likely to impose a death sentence than a jury.[2] The statistics are stark: during the relevant period, there were 133 capital crimes prosecuted before a jury in the first instance, where the death penalty was not waived by a prosecutor. See App. at 1a-8a. Of those crimes prosecuted, a jury made

[2] These cases are summarized in the Appendix attached hereto. October 31, 1984, is when Missouri's current scheme permitting judges to break jury deadlock in capital cases took effect. See Mo. Rev. Stat. § 565.030.4.

an affirmative finding as to a life sentence or a death sentence in 121 cases – *i.e.*, there was no jury deadlock. *Id.* at 8a. Of those cases where there was no jury deadlock, the jury imposed a death sentence in 83 of them – *i.e.*, 68.6% percent of cases. *Ibid.* In contrast, judges imposed death sentences at a far higher rate. In cases where there was jury deadlock and the determination as to the sentence was left to the trial judge, the death penalty was imposed for 11 of 12 capital crimes, or 91.6 percent. *Ibid.* A sentencing scheme riddled with such disparity in outcomes cannot pass constitutional muster.

As Justices Breyer and Stevens have warned, "the danger of unwarranted imposition of the penalty cannot be avoided unless 'the decision to impose the death penalty is made by a jury rather than by a single governmental official.'" *Ring* v. *Arizona*, 536 U.S. 584, 618-619 (2002) (Breyer, J., concurring in the judgment) (quoting *Spaziano* v. *Florida*, 468 U.S. 447, 469 (1984) (Stevens, J., concurring in part and dissenting in part)). That is because a sentencing scheme such as Missouri's places the maximal power of the state – the ability to take a human life – in the hands of just one person. No individual, not even a judge, should have that authority.

II. Judicial Sentencing Contravenes the Concept of Trial By Jury.

From a historic perspective, judicial sentencing in a capital case contravenes both the founding fathers' vision and citizens' expectations of a *jury* trial. As the Delaware Supreme Court found in *Rauf* v. *State*, 145 A.3d 430, 435-436, 460 (Del. 2016) (Strine, C.J., concurring, joined by Holland and Seitz, JJ.), it is illogical to require the jury to make all the necessary factual findings leading up to the imposition of

sentence, including the aggravating and mitigating factors, but then not to require the jury to make the ultimate decision itself. No criminal defendant or member of the community would think that "jury sentencing" means that a jury will decide certain factors but not the actual sentence itself. Jury sentencing is meaningless if it does not include the actual life or death decision.

When the Sixth Amendment was adopted, it was understood that juries were responsible for deciding whether a defendant would be sentenced to death:

> [T]he English jury's role in determining critical facts in homicide cases was entrenched. As fact-finder, the jury had the power to determine not only whether the defendant was guilty of homicide but also the degree of the offense. Moreover, the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established * * * * By the time the Bill of Rights was adopted, the jury's right to make these determinations was unquestioned.

Ring, 536 U.S. at 599; see also *Blakely* v. *Washington*, 542 U.S. 296, 308 (2004) ("[T]he very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury."). Indeed, "[f]rom the beginning of our nation's history, the jury's role as the sentencer in capital cases was unquestioned." *Rauf*, 145 A.3d at 438. That conclusion flowed naturally from the fact that most crimes at the founding were punishable by death. The jury knew this penalty and knew that its determination of guilt, unanimously and beyond a reasonable doubt, was tantamount to

sentencing the defendant to death. See *Woodson* v. *North Carolina*, 428 U.S. 280, 293 (1976); see also *Roberts* v. *Louisiana*, 428 U.S. 325, 360 (1976) (White, J., dissenting joined by Blackmun and Rehnquist, JJ.); *Furman* v. *Georgia*, 408 U.S. 238, 298 (1972) (Brennan, J., concurring).

That is why, as scholars have explained, the framers would have known that capital sentences were a "responsibility traditionally left to juries," Adriaan Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 Yale L.J. 1775, 1800 (1999), because a single person (e.g., the monarch) should not decide the fate of man, but rather the community determines whether a "fellow citizen shall live or die," James Wilson, *Lectures of James Wilson*, in 2 Collected Works Of James Wilson 1008–1009 (Kermit L. Hall & Mark David Hall, eds., 2007). Divesting the jury of its critical role in determining the fate of a defendant and placing that determination in the hands of a single decision maker is little more than allowing a king to pass judgment and wield the sword – a concept that is anathema to the founders and the rights and liberties that form the bedrock of our country.

Yet, Missouri's sentencing scheme does just that. If the jury – the community – cannot come to a unanimous conclusion as to whether a defendant should live or die for his crimes, the judge gets to make the life or death decision. In so doing, the judge makes his or her own findings and is free to reject, as the judge often does, the will of the majority of the jury. That process runs squarely against the fundamental principles of our justice system.

III. Judicial Capital Sentencing Violates the Eighth and Fourteenth Amendments.

A. Missouri's Capital Sentencing Scheme Impermissibly Allows a Judge and Not the Jury to Make Sentencing Determinations.

Although the petition for a writ of certiorari addresses how Missouri does an end-run around *Ring* v. *Arizona*, 536 U.S. 584 (2002), and *Hurst* v. *Florida*, 136 S. Ct. 616 (2016), amici believe that it bears repeating. Once the jury deadlocks in Missouri, the judge takes on the central role. Any death sentence after deadlock is truly based on the judge's fact-finding. No death sentence would be possible without the judge's independent findings. The record does not show that the judge made the same findings as to non-statutory aggravating evidence or statutory and non-statutory mitigating evidence. In addition, the record does not show what the jury actually found at the weighing step, just what it did *not* find. The Sixth Amendment requires that a jury, not a judge, be the final arbiter of the death penalty. This result follows from this Court's decisions, including *Hurst*. Accordingly, Missouri trial judges' role in overriding the jury's determination is constitutionally infirm.

The Sixth Amendment to the U.S. Constitution guarantees a criminal defendant the right to a jury trial. See U.S. Const. Amend. VI. The Sixth Amendment also requires that a jury unanimously determine beyond a reasonable doubt every factual finding necessary to increase the maximum sentence imposed on a defendant. In *Apprendi* v. *New Jersey*, 530 U.S. 466, 469 (2000), this Court held that "a factual determination authorizing an increase in the maximum prison sentence * * * [must] be made by a

jury on the basis of proof beyond a reasonable doubt." And it is "unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." *Id*. at 490 (quoting *Jones* v. *United States*, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring)). The Court explained that the constitutional right to a jury trial is rooted in the historical requirement that all factual determinations in a criminal case must be made by a jury because "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours." *Id.* at 477 (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769)); see also *Blakely*, 542 U.S. at 305-06 ("[The jury trial right] is * * * a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."). "Equally well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt." *Apprendi*, 530 U.S. at 478.

In *Ring*, 536 U.S. 584 (2002), this Court specifically addressed *Apprendi*'s application to the death penalty. The Court noted that "the Sixth Amendment does not permit a defendant to be 'expose[d] to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" *Id.* at 588-589 (quoting *Apprendi*, 530 U.S. at 483). In that case, under Arizona law, the defendant "could not be sentenced to death * * * unless further findings were made." *Id.* at 591. As the Court

explained, Arizona's law permitted the judge alone to determine whether to "sentence the defendant to death." *Id.* at 593. "At the conclusion of the sentencing hearing, the judge is to determine the presence or absence of the enumerated 'aggravating circumstances' and any 'mitigating circumstances.'" *Id.* at 591. Following *Apprendi*'s reasoning, the Court ruled that the Arizona death penalty statute was unconstitutional because the judge (not the jury) was responsible for increasing the punishment from life in prison to the death penalty. The Court held that, under the Sixth Amendment, "[c]apital defendants * * * are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589.

In *Hurst*, this Court reaffirmed the importance of the jury's decisionmaking in capital sentencing. In that case, the Court concluded that the Sixth Amendment requires "a jury to find every fact necessary to render [a defendant] eligible for the death penalty." *Hurst*, 136 S. Ct. at 622. The Court reaffirmed that "[t]he Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding." *Id.* at 624. And "[a]s with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding." *Id.* at 622. The Court accordingly struck down the Florida sentencing scheme. The same result is required here.

There is simply no meaningful distinction between *Hurst* and Florida's sentencing scheme thereunder,

and the one employed by Missouri. Both the unconstitutional Florida statute and the Missouri statute permit judges, not juries, to be the final arbiter of capital punishment, regardless of the jury's final determination of the issue. Mo. Rev. St. § 565.030.4 (2000). The Court has long recognized the seemingly obvious distinction between sentences to death and sentences to imprisonment. See *Woodson*, 428 U.S. at 305 (opinion of Stewart, Powell, and Stevens, JJ.) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."); see also *Beck* v. *Alabama*, 447 U.S. 625, 637-638 (1980) ("[D]eath is a different kind of punishment from any other which may be imposed in this country[.] * * * From the point of view of the defendant, it is different in both its severity and its finality."). Because of this obvious difference, the process of the ultimate punishment requires there be "reliability in the determination that death is the appropriate punishment." *Woodson*, 428 U.S. at 305.

That is why, in a series of cases culminating with *Hurst*, the Court has explained the jury's role in capital sentencing is demonstrably different than the jury's role in non-capital sentencing schemes. The jury's role is not only to find facts that make the defendant eligible for the death penalty; it must also determine the aggravating and mitigating factors, and weigh those aggravating and mitigating factors. The jury then takes another step and determines whether, in its view, the defendant should die for his crime. Under the Missouri scheme, however, the judge is free to disregard the jury's determinations if it cannot come

to a unanimous conclusion. It makes little sense to require a jury to engage in such detailed fact-finding and balancing of the aggravating and mitigating factors only to have a judge summarily usurp the jury's determination. Such a scheme permits a complete end-run around the carefully articulated capital sentencing protections required by the Sixth and Eighth Amendments and it cannot stand constitutional scrutiny.

And, if the jury must make a determination of whether a defendant lives or dies, it must do so unanimously. The requirement of jury unanimity is one that, again, was a core principle at the time of the country's founding. See 4 W. Blackstone, *Commentaries on the Laws of England*, 349-350 (Rees Welch & Co. ed. 1898) (explaining under English law that "no man should be called to answer to the king for any capital crime unless "the truth of every accusation * * * be confirmed by the unanimous suffrage of twelve of his equals and neighbours"). The Court has explained that in "criminal cases" the unanimity requirement "extends to all issues – character or degree of the crime, guilt and punishment – which are left to the jury." *Andres* v. *United States*, 333 U.S. 740, 748 (1948). Accordingly, the reasoning undergirding *Hurst*, its plain language, and the historical role of juries in capital sentencing all demonstrate that it is the jury, not the court, that must determine whether a defendant lives or dies, and it must do so unanimously.

This reading of *Hurst* and the Sixth Amendment is not unprecedented. To the contrary, it has been invoked to strike down capital sentencing statutes in Florida and Delaware that provide the judge authority to conclude that the defendant should die, even though

the jury has not reached that conclusion. See *Hurst* v. *State*, 202 So. 3d 40 (Fla. 2016); *Rauf*, 145 A.3d 430 (Del. 2016). Indeed, as Chief Justice Strine of the Delaware Supreme Court wrote, "I embrace the notion that the Sixth Amendment right to a jury extends to all phases of a death penalty case, and specifically to the ultimate sentencing determination of whether a defendant should live or die. Although states may give judges a role in tempering the harshness of a jury or in ensuring proportionality, they may not execute a defendant unless a jury has unanimously recommended that the defendant should suffer that fate." *Rauf*, 145 A.3d at 437 (Strine, C.J., concurring, joined by Holland and Seitz, JJ.). More to the point: "If *Hurst* means what it says, then the finding required to be made for the imposition of a death sentence must not only be made by a jury, it must be made by a unanimous jury." *Id.* at 480.

Missouri's capital sentencing scheme, which usurps the jury's constitutional role in determining whether a defendant lives or dies, violates the Sixth Amendment.

B. Judicial Imposition of the Death Penalty Is Rare and It Constitutes Cruel and Unusual Punishment.

Finally, this Court's review is necessary because judicially-imposed capital punishment is so exceedingly and increasingly rare as to constitute cruel and unusual punishment under the Eighth Amendment. This Court has repeatedly recognized capital sentencing *procedures* receive particular constitutional scrutiny because "death is a different kind of punishment from any other which may be imposed in this country." *Gardner* v. *Florida*, 430 U.S. 349, 357 (1977). Consequently, as Justice Sotomayor recently observed, states are required to "apply special

procedural safeguards to 'minimize the risk of wholly arbitrary and capricious action' in imposing the death penalty." *Woodward* v. *Alabama*, 571 U.S. 1045 (2013) (Sotomayor, J., dissenting from denial of certiorari) (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 189, 195 (1976)). Were that not the case, as Justice Breyer has explained, "the constitutional prohibition against 'cruel and unusual punishments' would forbid" use of the death penalty. *Ring*, 536 U.S. at 614 (Breyer, J., concurring in judgment) (citing *Furman* v. *Georgia*, 408 U.S. 238 (1972)).

One of the core procedural safeguards required by the Eighth Amendment is that juries, not judges, should be responsible for the decision to impose the death penalty. Put differently, requiring a jury to render a capital verdict exclusively and collectively reduces the possibility of arbitrary verdicts. As this Court has previously held, "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner* v. *Florida*, 430 U.S. 349, 357-358 (1977); see also *Gregg* v. *Georgia*, 428 U.S. 153, 188 (1976) (noting that the death penalty cannot "be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner"). For precisely that reason, Justice Breyer recognized that "the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death." *Ring*, 536 U.S. at 619 (Breyer, J., concurring in the judgment); see also *Harris*, 513 U.S. at 525 (Stevens, J., dissenting) ("A penalty that fails to reflect the community's judgment that death is the appropriate sentence constitutes cruel and unusual punishment[.]").

A ruling that requires a jury to have *sole and exclusive* responsibility for the underlying fact-finding, as well as the ultimate decision to impose a death sentence, is consistent with this Court's previous Eighth Amendment jurisprudence. As this Court has held, in determining whether a particular punishment is "cruel and unusual," "courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society." *Graham* v. *Florida*, 560 U.S. 48, 58 (2010) (quoting *Estelle* v. *Gamble*, 429 U.S. 97, 102 (1976)) (internal quotation marks omitted). In cases evaluating whether punishment should be categorically barred as cruel and unusual in particular circumstances – as should be the case here for judicially-imposed capital punishment – this Court "first considers 'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue." *Graham*, 560 U.S. at 61 (quoting *Roper* v. *Simmons*, 543 U.S. 551, 572 (2005)). This Court then "must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution." *Ibid.* (citing *Roper*, 543 U.S. at 572).

With regard to "objective indicia of national consensus," this Court reaffirmed in *Graham* that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Graham*, 560 U.S. at 62 (quoting *Atkins* v. *Virginia*, 536 U.S. 304, 312 (2002)). Courts also may look to "[a]ctual sentencing practices," which "are an important part of the Court's inquiry into consensus." *Ibid.* These objective indicia demonstrate that the overwhelming majority of states which still allow for the death penalty prohibit the

participation of judges in fact-finding or ultimate determinations of whether the death penalty is warranted in a given case. As set forth in the petition, 31 states and the federal government still allow for imposition of the death penalty in their criminal sentencing schemes. See Pet. App. at 47a-50a. Of those 32 jurisdictions, 28 do not permit any role by the trial judge in the underlying fact-finding or the ultimate determination as to whether the death penalty shall be imposed in a given case.[3] In other words, in these 28 jurisdictions, the death penalty may only be imposed if there is an *affirmative verdict from the jury* to that effect. Indeed, of these 28 jurisdictions, three – Alabama, Delaware, and Florida – have recently changed their sentencing schemes to prohibit judge-imposed death sentences.

Accordingly, jurisdictions that permit judges to be the final death sentence arbiters are extreme outliers with regard to criminal sentencing procedures. And of those four, two are readily distinguishable from Missouri's sentencing scheme. In Nebraska, a panel

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[3] Twenty-three of these jurisdictions require a sentence of life imprisonment and/or life without parole to be imposed unless the jury empaneled for the trial unanimously makes the required factual findings and the determination that the death penalty is warranted. Those jurisdictions are Arkansas, Colorado, Florida, Georgia, Idaho, Kansas, Louisiana, Mississippi, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming, and the federal government. Pet. App. at 47a-50a. An additional five jurisdictions (Alabama, Arizona, California, Kentucky, and Nevada) contemplate the possibility of a subsequent jury or juries being empaneled to address the issue of the death penalty if the initial jury cannot arrive at a unanimous decision on the same. *Ibid.* Only one of these 28 jurisdictions (Alabama) permits a jury to impose a death sentence without unanimous consent. Pet. App. at 47a.

of three judges must unanimously decide to impose the death penalty, thus partially mitigating the possibility of an arbitrary imposition of a capital sentence by a single judge. See Neb. Rev. Stat. §§ 29-2520 – 29-2522. Further, although Montana still permits a death sentence to be rendered by a single judge, an effective moratorium on the death penalty has been in place in Montana for over 20 years. See Pet. 15. Therefore, Missouri and Indiana are the only two remaining jurisdictions where both current law and practice permit the death penalty decision to rest in a single judge's hands. In short, as Justice Sotomayor has previously observed, "the national consensus has moved towards a capital sentencing scheme in which the jury is responsible for imposing capital punishment."[4] *Woodward* v. *Alabama*, 571 U.S. 1045 (2013) (Sotomayor, J., dissenting from denial of certiorari). In light of this overwhelming national consensus, review is needed to determine whether the Eighth Amendment's prohibition of cruel and unusual punishment should bar the Missouri sentencing scheme at issue here.

[4] The American Bar Association also has recently recognized this trend. See ABA Resolution 108A (2015) (urging federal, state, and territorial governments that impose capital punishment to require that "(1) Before a court can impose a sentence of death, a jury must unanimously recommend or vote to impose that sentence; and (2) The jury in such cases must also unanimously agree on the existence of any fact that is a prerequisite for eligibility for the death penalty and on the specific aggravating factors that have each been proven beyond a reasonable doubt").

CONCLUSION

Amici therefore ask this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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May 24, 2018

APPENDIX

APPENDIX

Missouri Capital Cases Involving Potential Death Sentence, 1998 - Present

Year Sentenced	Defendant	Case No. / Source	Sentence
1998	Charles Armentrout	22971-01754	Death (Jury)
1998	Walter Barton	998 S.W.2d 19, 24 (Mo. banc 1999)	Death (Jury)
1998	Winston Bell	2194R-03409-02	LWOP (Jury)
1998	Jerry Brandon	22971-00382-01	LWOP (Jury)
1998	Carman Deck	23CR196-1084	Death (Jury) Death (Jury)
1998	John Middleton	995 S.W.2d 443, 451 (Mo. banc 1999)	Death (Jury)
1998	Malik Nettles	22961-01479-01	LWOP (Jury)
1998	Kenneth Thompson	985 S.W.2d 779 (Mo. banc 1999)	Death (Jury) Death (Jury)
1998	Deshun Washington	2196R-06443-01	LWOP (Jury)
1998	John Winfield	2196R-04909-01	Death (Jury) Death (Jury)

Year Sentenced	**Defendant**	**Case No. / Source**	**Sentence**
1999	Cecil Barriner	34 S.W.3d 139, 144 (Mo. banc 2000)	Death (Judge after jury deadlock) Death (Judge after jury deadlock)
1999	Mark Christeson	50 S.W.3d 251, 259-60 (Mo. banc 2001)	Death (Jury) Death (Jury) Death (Jury)
1999	Louis Clark	2195R-05234-02	LWOP (Jury)
1999	Martiez Davis	22991-00101	LWOP (Jury)
1999	Robert Driscoll	55 S.W.3d 350, 351 (Mo. banc 2001)	Death (Jury)
1999	Paul Goodwin	2198R-01227-01	Death (Jury)
1999	Cleveland Jackson	22971-02699A-01	LWOP (Jury) LWOP (Jury)
1999	Alis Johns	25R05961379 F	Death (Jury)
1999	Ernest Johnson	13R019441538-01	Death (Jury) Death (Jury) Death (Jury)
1999	Antoine King	41 S.W.3d 528 (Mo. App. E.D. 2001)	LWOP (Jury) LWOP (Jury)
1999	Earl Ringo	13R019860152-01	Death (Jury) Death (Jury)

Year Sentenced	**Defendant**	**Case No. / Source**	**Sentence**
1999	John Smith	32 S.W.3d 532 (Mo. banc 2000)	Death (Jury) Death (Jury)
1999	Walter Storey	40 S.W.3d 898, 902 (Mo. banc 2001)	Death (Jury)
1999	Leon Taylor	18 S.W.3d 366, 368 (Mo. banc 2000)	Death (Jury)
1999	Danny Wolfe	13 S.W.3d 248, 255 (Mo. banc 2000)	Death (Jury) Death (Jury)
2000	Charles Anglin	13R01986244 2-01	LWOP (Jury)
2000	Gary Black	CR598-2792FX	Death (Jury)
2000	Bobby Mayes	63 S.W.3d 615, 624 (Mo. banc 2001)	Death (Jury) Death (Jury)
2000	Derrick Roper	25R03970239 F-01	LWOP (Jury)
2001	Terrance Anderson	32R03970003 1	LWOP (Jury) Death (Jury)
2001	Kenneth Baumruk	0511-CR00094	Death (Jury)
2001	Andre Cole	71 S.W.3d 163, 177 (Mo. banc 2002)	Death (Jury)
2001	Kim Davis	107 S.W.3d 410, 416 (Mo. App. W.D. 2003)	LWOP (Jury)

Year Sentenced	**Defendant**	**Case No. / Source**	**Sentence**
2001	Richard DeLong	31199CF0001	LWOP (Jury) LWOP (Jury) LWOP (Jury) LWOP (Jury) LWOP (Jury)
2001	Kenneth Thompson	85 S.W.3d 635, 637-38 (Mo. banc 2002)	Death (Judge after jury deadlock) Death (Judge after jury deadlock)
2001	Michael Tisius	01CR164629	Death (Jury) Death (Jury)
2001	Marcellus Williams	97 S.W.3d 462, 475 (Mo. banc 2003)	Death (Jury)
2002	Cecil Barriner	111 S.W.3d 396, 397 (Mo. banc 2003)	Death (Jury) Death (Jury)
2002	Deandre Buchanan	00CR165704-01	Death (Judge after jury deadlock) Death (Judge after jury deadlock) Death (Judge after jury deadlock)
2002	Kimber Edwards	2100R-03704-01	Death (Jury)
2002	Michael Farris	16CR990049 06-01	LWOP (Jury)

Year Sentenced	**Defendant**	**Case No. / Source**	**Sentence**
2002	Lewis Gilbert	13R069401054 -01	Death (Jury) Death (Jury)
2002	Douglas Maupin	01CR168223	LWOP (Jury)
2002	Dorian Perry	2100R-01772-01	LWOP (Jury)
2003	Carman Deck	23CR196-1084	Death (Jury) Death (Jury)
2003	Travis Glass	136 S.W.3d 496, 502 (Mo. banc 2004)	Death (Jury)
2003	Richard Strong	2100R-04590-01	Death (Jury) Death (Jury)
2003	Michael Taylor	134 S.W.3d 21, 24 (Mo. banc 2004)	Death (Jury)
2003	Eldon Tinsley	01CR680916-01	LWOP (Jury)
2004	Cecil Barriner	03CR170457	LWOP (Jury) LWOP (Jury)
2004	Earl Forrest	03CR83190	Death (Jury) Death (Jury) Death (Jury)
2004	Mark Gill	02CR754906	Death (Jury)
2004	David Zink	27R050100219	Death (Jury)
2005	Johnny Johnson	02CR-003834 / 207 S.W.3d 24, 30 (Mo. banc 2006)	Death (Jury)
2005	Vincent McFadden	2103R-00005-01	Death (Jury)

Year Sentenced	**Defendant**	**Case No. / Source**	**Sentence**
2005	Kenneth Sisak	2102R-01458-01	LWOP (Jury)
2006	Gary Black	29R059802792-01	Death (Jury)
2006	Justin Brown	246 S.W.3d 519, 522 (Mo. App. S.D. 2008)	LWOP (Jury)
2006	Ernest Johnson	13R019441538-01	Death (Jury) Death (Jury) Death (Jury)
2006	Luther Martin	25R05020745F-01	LWOP (Jury) LWOP (Jury)
2006	Vincent McFadden	2103R-02642-01	Death (Jury)
2006	Scott McLaughlin	2103R-05745-01	Death (Judge after jury deadlock)
2006	Danny Wolfe	26R029700785-01	LWOP (Jury) LWOP
2006	Walter Barton	240 S.W.3d 693, 700 (Mo. banc 2007)	Death (Jury)
2007	Kenneth Baumruk	0511-CR00094	Death (Jury)
2007	Vincent McFadden	2103R-00005-02	Death (Jury)
2008	Terrance Anderson	32R039700031	Death (Jury)
2008	Richard Davis	0616-CR03195-01	Death (Jury)
2008	Carman Deck	23CR196-1084	Death (Jury) Death (Jury)

Year Sentenced	**Defendant**	**Case No. / Source**	**Sentence**
2008	Brian Dorsey	07BA-CR01875	Death (Jury) Death (Jury)
2008	Larry Flenoid	2100R-01979-01	LWOP (Jury)
2008	Kevin Johnson	2105R-02833-01	Death (Jury)
2008	Vincent McFadden	2103R-02642-02	Death (Jury)
2008	Leonard Taylor	2104R-05338-01	Death (Jury) Death (Jury) Death (Jury) Death (Jury)
2009	Gregory Bowman	337 S.W.3d 679, 683 (Mo. banc 2011)	Death (Jury)
2009	Stanley Johnson	2106R-04034-01	LWOP (Jury)
2009	Lance Shockley	05C2-CR00080-01	Death (Judge after jury deadlock)
2010	Michael Tisius	01CR164629	Death (Jury) Death (Jury)
2011	Fredrick Barnes	0722-CR09122-01	LWOP (Judge after jury deadlock)
2011	Ryan Patterson	09G9-CR02082-01	LWOP (Jury) LWOP (Jury) LWOP (Jury)
2011	Todd Shepard	08SL-CR08802-01	LWOP (Jury)
2012	Christopher Collings	08PH-CR01205	Death (Jury)

Year Sentenced	Defendant	Case No. / Source	Sentence
2013	Robert Blurton	10CY-CR01475	Death (Jury) Death (Jury) Death (Jury)
2013	Jesse Driskill	10LA-CR00872-01	Death (Jury) Death (Jury)
2013	David Hosier	09AC-CR02972-01	Death (Jury)
2017	Mark Gill	12BA-CR03801	LWOP (Jury)
2017	Marvin Rice	1611-CR00967-01	Death (Judge after jury deadlock)
2018	Craig Wood	1431-CR00658-01	Death (Judge after jury deadlock)

SUMMARY:

- 133 capital crimes for which the death penalty was an option
- 121 capital crimes for which the jury gave an affirmative sentence. Of those cases, 83 resulted in a death sentence and 38 resulted in a life sentence.
- 12 capital crimes for which a judge rendered sentence after the jury deadlocked. Of those cases, 11 resulted in a death sentence and one resulted in a life sentence.