No. _____

IN THE
Supreme Court of the United States

LANCE SHOCKLEY,
Petitioner,
v.

CINDY GRIFFITH, WARDEN,
POTOSI CORRECTIONAL CENTER,
Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of Missouri

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

When a jury drawn from a fair cross-section of the community cannot conclude that the defendant deserves the death penalty, may the trial court proceed as if there had been no jury, make its own independent findings, and impose a death sentence, without violating the core principles underlying the Sixth Amendment right to trial by jury, the Eighth Amendment right to proportionate sentencing, or the Fourteenth Amendment right to due process?

In capital cases, do the Sixth, Eighth, or Fourteenth Amendments require that any death sentence be imposed by the jury, unanimously?

LIST OF PARTIES

The Petitioner, Lance C. Shockley, appears through Rosemary E. Percival, Counsel of Record, Office of the State of Missouri Public Defender, 920 Main Street, Suite 500, Kansas City, Missouri 64105.

The Respondent, Cindy Griffith, Warden of the Potosi Correctional Center, appears by Patrick Logan, Assistant Attorney General, State of Missouri, P.O. Box 899, Jefferson City, MO 65102.

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PETITION FOR WRIT OF CERTIORARI

Lance C. Shockley, the Petitioner, respectfully petitions for a writ of certiorari to the Missouri Supreme Court.

OPINIONS BELOW

The Missouri Supreme Court's November 21, 2017 ruling denying petitioner's Petition for a Writ of Habeas Corpus is attached as Appendix A (Mo. Sup. Ct. #96694). The Missouri Supreme Court's April 4, 2017 ruling denying petitioner's Motion to Recall the Mandate is attached as Appendix B (Mo. Sup. Ct. #90286). The Missouri Supreme Court's August 13, 2013 opinion affirming petitioner's conviction and death sentence is available at 410 S.W.3d 179 (Mo. banc 2013) and is attached as Appendix C.

JURISDICTION

The Missouri Supreme Court entered its order denying petitioner's petition for Writ of Habeas Corpus on November 21, 2017. On February 14, 2018, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including April 20, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a state criminal defendant's constitutional rights under the Sixth, Eighth, and Fourteenth Amendments. The Sixth Amendment provides in relevant part: "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…"

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves Missouri's death penalty sentencing statute, Mo. Rev. St. § 565.030.4 (2000):

> The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:
>
> … (2) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or
>
> (3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or
>
> (4) If the trier decides under all of the circumstances not to assess and declare the punishment at death. If the trier is a jury it shall be so instructed.
>
> If the trier assesses and declares the punishment at death it shall, in its findings or verdict, set out in writing the aggravating circumstance or circumstances listed in subsection 2 of section 565.032 which it found beyond a reasonable doubt. If the trier is a jury it shall be instructed before the case is submitted that if it is unable to decide or agree upon

> the punishment the court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor or death. The court shall follow the same procedure as set out in this section whenever it is required to determine punishment for murder in the first degree.

STATEMENT OF THE CASE

This case presents an important question, over which state courts are resolutely divided, regarding the right to trial by jury in a capital sentencing proceeding. Following *Hurst v. Florida*, 136 S.Ct. 616 (2016), both Florida and Delaware recognized that, under the Sixth Amendment right to trial by jury, every fact necessary for imposition of the death penalty, including the ultimate decision to impose a death sentence, must be found by a jury, unanimously. *Hurst v. State*, 202 So.3d 40, 53-54 (Fla. 2016); *Rauf v. State*, 145 A.3d 430, 435-36, 483 (Del. 2016). Along these same lines, the vast majority of states, as well as the federal government, have passed legislation mandating that any death sentence be imposed by a unanimous jury. In contrast, when a Missouri jury cannot decide whether to impose a death sentence, the trial court takes over, makes its own independent findings, and decides whether to impose a death sentence. Missouri's procedure not only conflicts with other states' procedures, but is contrary to *Hurst* because it violates the Sixth Amendment.

1. In March 2005, Missouri Highway Patrol Sgt. Dewayne Graham was found dead in his driveway (Tr. 1208-09). He had been shot twice (Tr. 1250-52, 1267-68). Although there were no witnesses to the shooting, certain circumstantial

evidence suggested that petitioner may have been involved (Tr. 1051-52, 1160, 1404-05, 1807-10, 1865-66, 1892).

2. Petitioner was charged with first-degree murder (L.F. 145-46). The State gave notice that it would seek the death penalty if petitioner was convicted as charged (L.F. 165-66). Petitioner pursued his right to trial by jury and was found guilty (L.F. 1704; Tr. 2058-60).

At the penalty phase, the jurors returned a "verdict" stating they could not agree upon the punishment to be imposed (L.F. 1723). The jurors listed three statutory aggravating circumstances they found beyond a reasonable doubt (L.F. 1723). They indicated they did not "unanimously find there are facts and circumstances in mitigation of punishment sufficient to outweigh facts and circumstances in aggravation of punishment" (L.F. 1723). However, the jury did not render a verdict of a death sentence.

Under Missouri statute, the court was required to "follow the same procedure as set out in this section whenever it is required to determine punishment for murder in the first degree." Mo. Rev. St. § 565.030.4. Thus, the trial court repeated the steps the jurors had taken, reconsidered the facts, and made its own independent findings (L.F. 1774-75; Tr. 2236). The court recognized that the jurors agreed on three aggravating circumstances, "which the Court has noted and certifies" (Tr. 2236). The court agreed with the jury that the facts and circumstances in mitigation of punishment did not outweigh the facts and circumstances in aggravation (Tr. 2236). The court then imposed a sentence of death (Tr. 2236).

3. On appeal, petitioner alleged that Mo. Rev. St. § 565.030.4 was unconstitutional because it allowed the judge to weigh the aggravating and mitigating circumstances and determine the sentence when the jurors cannot agree on the sentence. *State v. Shockley*, 410 S.W.3d 179, 198 (Mo. banc 2013). Rejecting this claim, the Missouri Supreme Court held that the jurors' responses to the interrogatories "showed that the jury deadlocked only on the issue of whether to assess a penalty of death or of life imprisonment." *Id*. at 198-99. The Missouri Supreme Court concluded that, because the jurors made the required findings, the judge could independently find a statutory aggravating circumstance, weigh the aggravating and mitigating evidence, and impose a death sentence. *Id*. The Missouri Supreme Court noted that the statute merely "provide[d] an extra layer of findings that must occur before the court may impose a death sentence." *Id*. at 198-99 (emphasis added).

4. After this Court issued *Hurst v. Florida*, 136 S.Ct. 616 (2016), petitioner filed a motion to recall the mandate in the Missouri Supreme Court on December 9, 2016. Petitioner alleged that Missouri's deadlock procedure mirrored the procedure found unconstitutional in *Hurst*, in that the court imposed a death sentence based on its own independent findings (Recall Mandate, p. 1-2, 27-29, 35, 49-50). Petitioner also alleged that to comply with the Sixth, Eighth, and Fourteenth Amendments, any decision to impose a death sentence must be made by a jury, unanimously (Recall Mandate, p. 3, 15, 36, 41-42, 44, 46-50). The Missouri Supreme Court denied the

motion to recall the mandate on April 4, 2017, but noted its ruling was without prejudice to filing a petition for writ of habeas corpus (Appendix B).

Petitioner filed a petition for writ of habeas corpus in the Missouri Supreme Court on September 26, 2017. It alleged the same grounds as the motion to recall the mandate (Habeas Pet, p. 14, 37-38, 41-46, 73, 85, 92). The Missouri Supreme Court denied the petition without opinion on November 21, 2017 (Appendix A).

The petition for writ of certiorari is due April 20, 2018.

REASONS FOR GRANTING THE WRIT

Following *Hurst v. Florida*, 136 S.Ct. 616 (2016), state courts have come to conflicting conclusions on whether a trial court in a capital penalty phase may replace the jury's factual findings with its own independent "extra layer of findings" and impose a death sentence without violating the Sixth, Eighth, or Fourteenth Amendments. The Supreme Courts of Florida and Delaware hold that, in light of *Hurst*, all factual findings necessary to the imposition of a death sentence, including the decision of whether to impose the death sentence itself, must be made by a unanimous jury. Missouri, on the other hand, has held that as long as the jury initially made the required factual findings, the trial court may make its own independent findings and then impose a death sentence. The Court should use this case to resolve the conflict, as the conflict is fully developed and ripe for review, and the issue will continue to recur unless this Court intervenes. This Court should also grant the petition for writ of certiorari, because Petitioner, as others similarly

situated in Missouri, are inherently prejudiced by being sentenced to death in a state in an unconstitutional fashion.

I. State Courts are Divided over Whether, Following *Hurst*, a Trial Court May Replace the Jury's Findings with its Own Independent Findings and then Impose a Death Sentence

A. The *Hurst* Opinion

In *Hurst v. Florida*, 136 S.Ct. 616, 619 (2016), the Court struck down Florida's capital sentencing procedure because it delegated to the judge, not the jury, the responsibility of finding each fact necessary for imposition of the death penalty. Florida had a "hybrid" procedure by which the jury (1) determined if the State had proven an aggravating circumstance; (2) weighed the aggravating and mitigating circumstances; and (3) recommended whether the defendant should be sentenced to death. *Id*. at 620; 625 (Alito, J., dissenting); *see also State v. Steele*, 921 So. 2d 538, 545 (Fla. 2005). But upon receiving the jury's recommendation, the trial court duplicated the steps taken by the jury. *Id*. at 625 (Alito, J., dissenting). It made its own independent finding of whether the State had proven the aggravating circumstances; it weighed the aggravating and mitigating circumstances; and it decided whether the defendant would live or die. *Id*. at 620; *see also* 625 (Alito, J., dissenting).

In striking down Florida's statute, this Court reiterated that the Sixth Amendment right to trial by jury, together with the Fourteenth Amendment's Due Process Clause, required that "each element of a crime be proved to a jury beyond a reasonable doubt." *Hurst*, 136 S.Ct. at 621 (citing *Alleyne v. United States*, 570 U.S.

99, 104 (2013)). A jury must find the facts "necessary to sentence a defendant to death." *Hurst*, 136 S.Ct. at 621 (citing *Ring v. Arizona*, 536 U.S. 584, 591 (2002)).

The Court concluded that Florida courts had erred in not requiring the jury to find the "critical findings necessary to impose the death penalty." *Hurst*, 136 S.Ct. at 622. Instead, the judge played a "central and singular role." *Id.* Florida impermissibly required the trial court alone to find the facts "'[t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" *Hurst*, 136 S.Ct. at 622. The jury did not make specific factual findings "with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge." *Id.* at 622. Without jury-made findings, the only sentence Hurst could have received was life without parole. *Id.* This Court held that Florida impermissibly increased the authorized punishment by its own findings and thereby violated the Sixth Amendment. *Id.* Moreover, the Court rejected Florida's argument that the judge's finding of an aggravator "only provides the defendant additional protection." *Id.*

B. The Conflict

1. The minority view: as long as a jury made factual findings, the court may replace them with its own factual findings and impose a death sentence

In Missouri, before jurors may consider imposing a death sentence, they must find that the State has proven at least one statutory aggravating circumstance beyond a reasonable doubt, and they must find that they do not agree that the evidence in mitigation outweighs the evidence in aggravation. Mo. Rev. St. §

565.030.4(2), (3); *Shockley*, 410 S.W.3d at 198. Only after the jurors make these two required findings may they decide whether to recommend a death sentence. Mo. Rev. St. § 565.030.4(4); *Shockley*, 410 S.W.3d at 198.

Missouri requires that the court "follow the same procedure as set out in this section whenever it is required to determine punishment for murder in the first degree." Mo. Rev. St. § 565.030.4. Thus, when the jury cannot decide whether to impose a death sentence, the court follows the same procedure as if the defendant had waived a jury trial altogether. Once the jury deadlocks, "the jury's findings simply disappear from the case and the court is to make its own independent findings." *State v. Whitfield*, 107 S.W.3d 253, 271 (Mo. banc 2003). Any resulting judgment of death is "based on the court's findings." *Id*. (emphasis added); see also *State v. Deck*, 303 S.W.3d 527, 534 (Mo. banc 2010) ("the judge, not the jury, made the factual findings and sentenced Whitfield to death"). Upon deadlock, "the court must determine punishment independently and without reliance on the results of any deliberations of the jury." *State v. Griffin*, 756 S.W.2d 475, 488 (Mo. banc 1988). The judge must "independently go through" the statutory steps "and make his or her own determination whether the death penalty or life imprisonment should be imposed." *Whitfield*, 107 S.W.3d at 261; see also *State v. Smith*, 944 S.W.2d 901, 920 (Mo. banc 1997) (trial court independently considers each aggravating circumstance). Even though the jury had made findings, "the judge must go through each of the … steps and independently make his or her own factual determination as to each step…."

Whitfield, 107 S.W.3d at 263. The court may reconsider the facts in making its own determinations. *State v. McLaughlin*, 265 S.W.3d 257, 264 (Mo. banc 2008).

In *State v. Shockley*, 410 S.W.3d 179, 198 (Mo. banc 2013), petitioner contended that his death sentence was unconstitutional because it was the product of judicial rather that juror fact-finding. Rejecting this claim, the Missouri Supreme Court held that the jurors' responses to the interrogatories "showed that the jury deadlocked only on the issue of whether to assess a penalty of death or of life imprisonment." *Id.* at 198-99. Because the jurors made the required findings, the judge could independently find a statutory aggravating circumstance, weigh the aggravating and mitigating evidence, and impose a death sentence. *Id.* The Missouri Supreme Court concluded that Missouri's statute merely "provides an extra layer of findings that must occur before the court may impose a death sentence." *Id.*

2. The majority view: a unanimous jury must make all the factual findings, including the final decision of whether to impose a death sentence

Following *Hurst*, both the Supreme Court of Florida and the Supreme Court of Delaware held that the Sixth Amendment required that all factual findings, including the final determination of whether the defendant deserves the death penalty, must be made by a jury, unanimously. In addition, whether or not based on federal constitutional grounds, the vast majority of death penalty states as well as the federal government have enacted legislation mandating that any death sentence be imposed by a jury, unanimously.

a. The Supreme Court of Florida, *Hurst v. State*

Relying on *Hurst*, the Florida Supreme Court held that to satisfy the Sixth Amendment, the jurors, not the judge, must find "each fact necessary to impose a sentence of death." *Hurst v. State*, 202 So.3d at 51 (*quoting Hurst*, 136 S.Ct. at 619). These critical findings were elements, "the sole province of the jury," and had to be found unanimously. *Hurst v. State*, 202 So.3d at 44, 50-51, 57. Thus, a jury must find unanimously (1) that aggravating circumstances exist; (2) that the aggravating circumstances are sufficient; and (3) that the evidence in aggravation outweighs the evidence in mitigation. *Id.* at 53-54, 57.

Moreover, the Florida Supreme Court concluded that the ultimate decision of whether the defendant should live or die had to be made by the jury, unanimously. *Id*. at 54-55. The Sixth Amendment right to trial by jury "required Florida to base [the defendant's] death sentence on a jury's verdict, not a judge's factfinding." *Id.* at 53 (*quoting Hurst*, 136 S.Ct. at 624). "This recommendation is tantamount to the jury's verdict in the sentencing phase of trial; and historically, and under explicit Florida law, jury verdicts are required to be unanimous." *Id*. at 54. In reaching this conclusion, the court relied on Blackstone's writings on the centuries-old right to a unanimous jury in English jurisprudence, the Florida constitution's guarantee of trial by jury, and the common law principle that jury verdicts be unanimous. *Id*. at 54-55.

The Florida Supreme Court stressed that jury unanimity not only enhances the Sixth Amendment right to trial by jury, especially in capital cases, but was required by the Eighth Amendment. *Hurst v. State*, 202 So.3d at 59-60. Death

sentences must be reserved for the worst of the worst, must not be arbitrarily imposed, and must meet the highest standards of reliability. *Id*. at 60.

> If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

Id. Unanimity "furthers the deliberative process by requiring that the minority view be thoroughly examined and then rejected or accepted by the entire jury." *Id*. at 58. Like the "beyond a reasonable doubt" standard, a unanimity requirement impresses on the jury the need to reach "a subjective state of certitude on the facts in issue." *Id*. At the "life or death" step, jury unanimity ensures that the range of murders subject to the death penalty are truly narrowed as the Eighth Amendment demands and that the verdict expresses the conscience of the community. *Id*. at 60. Furthermore, because Florida was an extreme outlier in not requiring a unanimous jury decision for death, any imposition of the death penalty in Florida was cruel and unusual. *Id*. at 61; also 70 (Pariente, J., concurring).

b. The Supreme Court of Delaware, *Rauf v. Delaware*

Delaware also recognized the need for drastic change following this Court's seminal holding in *Hurst*. Under its now-defunct statute, the jury decided whether (1) a statutory aggravating circumstance existed and (2) the evidence in aggravation outweighed the evidence in mitigation. 11 Del.C. §4209(c)(3)(a). The court would consider the jury's recommendation but make its own findings. 11 Del.C. §4209(d).

In *Rauf v. Delaware*, 145 A.3d 430, 433 (Del. 2016) (per curiam), the Delaware Supreme Court struck down its death penalty procedure as violating "the Sixth

Amendment role of the jury as set forth in *Hurst*." The Delaware court stressed that *Hurst* held that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Id*. (*quoting Hurst*, 136 S.Ct. at 619). Thus, the jury must find, unanimously and beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating circumstances. *Rauf*, 145 A.3d at 434. In addition, both the statutory and non-statutory aggravating circumstances must be found by a jury unanimously and beyond a reasonable doubt. *Id*. at 433-34.

In a concurring opinion, Justice Holland, joined by two other justices,[1] explained *Hurst*'s broader ruling:

> Although the United States Supreme Court's holding in *Hurst* only specifically invalidated a judicial determination of aggravating circumstances, it also stated unequivocally that the jury trial right recognized in *Ring* now applies to *all* factual findings *necessary* to impose a death sentence under a state statute. The logical extension of that broader statement in *Hurst* is that a jury must determine the relative weight of aggravating and mitigating circumstances.

Id. at 487 (Holland, J., concurring, joined by Strine and Seitz) (*citing Hurst*, 136 S.Ct. at 622); *see also id*. at 436, 460-61; *but see Ex Parte Bohannon*, 222 So.3d 525, 532 (Ala. 2016) (holding that *Hurst* only requires a jury finding as to aggravating circumstances).

In another concurring opinion, these justices concluded that, under *Hurst*, the right to trial by jury in a capital trial was not limited to those findings that made the defendant eligible for the death penalty; it also encompassed the determinations "that

[1] The Delaware Supreme Court is made up of five justices. *Id*. at 432.

must be made if the defendant is in fact to receive a death sentence." *Rauf*, 145 A.3d at 435-36, 460 (Strine, J., concurring, joined by Holland and Seitz, JJ.). The Sixth Amendment did not distinguish between "the decision that someone is eligible for death and the decision that he should in fact die." *Id.* Instead, the right to trial by jury extended to all phases of a death penalty case, especially the final decision, which was one "of existential fact." *Id.* at 437, 473.

The opinions of the Supreme Court of Florida and the Supreme Court of Delaware are intractably in conflict with the Missouri Supreme Court's stance. On one side of the conflict, the Supreme Courts of Florida and Delaware hold that the Sixth Amendment requires that every decision necessary for imposition of the death penalty, including the actual decision imposing death, be made by a unanimous jury. The Supreme Court of Missouri, on the other side, holds that as long as the jury made the initial required findings, the trial court can start from scratch, reconsider the facts, make its own independent findings, and impose a death sentence based on those findings.

c. State and Federal Legislation

The vast majority of the thirty-one states with the death penalty, as well as the federal government, have enacted legislation mandating that any death sentence be imposed by a jury, unanimously.[2] All but four states – Montana, Nebraska, Indiana and Missouri – require that any decision to impose a death sentence be made

[2] See Chart of State and Federal Statutes Regarding Penalty Phase Deadlock (Appendix D).

by a jury. See Mont. Code Ann. § 46-18-301; Neb. Rev. St. § 29-2520 - § 29-2522; Ind. Code Ann. § 35-50-2-9(f); and Mo. Rev. St. § 565.030.4. All but five states – the above four plus Alabama – require the jury to make that decision unanimously. See § 2, Act No. 2017–131, Ala. Acts 2017; Ala. Code 1975 § 13A-5-46(f).

Like Missouri, Indiana normally requires a unanimous jury decision to impose a death sentence, but if the jurors cannot agree, the trial court takes over and decides. Ind. Code Ann. § 35-50-2-9(f). In Montana and Nebraska, a judge or a panel of judges makes the ultimate decision. Mont. Code Ann. §46-18-301; Neb. Rev. St. §§29-2520, 29-2521. But Montana essentially has placed a moratorium on the death penalty since no death sentence has been imposed there since 1997.[3] And in Nebraska, if the three-judge panel does not unanimously vote for death, the defendant must be sentenced to life imprisonment. Neb. Rev. St. §§29-2522. Alabama does not require a unanimous verdict, but if not enough jurors vote for the death penalty, a new penalty trial must be held.[4] § 2, Act No. 2017–131, Ala. Acts 2017; Ala. Code 1975 §13A-5-46(f).

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[3] Since 1976, Montana has only imposed the death penalty eight times; the last time was in 1997. It has executed only three people since 1976; the last time was over ten years ago, in August 2006. *See* Death Penalty Information Center website: http://www.deathpenaltyinfo.org/montana-1#sent (last viewed April 19, 2018) and http://www.deathpenaltyinfo.org/news/past/76/2011 (last viewed April 19, 2018).

[4] In Alabama, if seven jurors vote for life without parole, the sentence must be life without parole. If ten jurors vote for death, the sentence must be death. Thus, if six, seven, eight, or nine jurors vote for death, there would not be enough votes for either life without parole or the death penalty, so the jury would be deadlocked. Ala. Code 1975 §13A-5-46(f).

Thus, in the vast majority of death penalty states, when a capital jury cannot agree on the sentence to be imposed, the resulting sentence must be life imprisonment without parole (or a lesser sentence), or at the very least, the defendant must receive a new sentencing trial. The federal government also requires that the defendant be sentenced to life without parole or less in the event of jury deadlock at a capital sentencing phase. 18 U.S.C. § 3594 (2014).

Courts have an obligation "to re-examine capital-sentencing procedures against evolving standards of procedural fairness in a civilized society." *Gardner v. Florida*, 430 U.S. 349, 357 (1977); *Woodson* v. North Carolina, 428 U.S. 280, 288 (1976); *see also Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002). These standards are most clearly and reliably seen through the legislation of the various states. *Id.* at 312 (*quoting Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)) (overturned on other ground).

Missouri is an extreme outlier. It has failed to keep pace with evolving standards of decency as expressed through the legislation of the death penalty states. Missouri must conform its procedures to the current standards of decency which demand that no defendant proceed to his death at the hands of the State except by the unanimous decision of a jury. Judicial determination of sentence in a capital case is now so unusual as to violate the Eighth Amendment. As the Delaware Supreme Court held, "the practice of executing a defendant without the prior unanimous vote of a jury is so out of keeping with our history as to render the resulting punishment cruel and unusual." *Rauf*, *supra*, 145 A.3d at 437, 465.

II. This Case Involves the Immediate and Ongoing Violation of Core Principles Underlying the Sixth, Eighth, and Fourteenth Amendments

Missouri's violation of petitioner's fundamental constitutional right to trial by jury is not an isolated incident. In 2017, three capital cases went to trial in Missouri. In one, the jury imposed a sentence of life without parole.[5] But in the second and third cases, neither jury could agree on the sentence to be imposed.[6] In both cases, the trial court then took over, made its own factual findings, and imposed a death sentence.[7] The only way Missouri could obtain a death sentence for cases tried in 2017 was by judicial fiat. Unless this Court intervenes, Missouri will continue to sentence defendants to death under this unconstitutional deadlock procedure, and thereby, without the benefit of a jury finding or verdict that death was appropriate.

Allowing the court to replace the jury in a capital sentencing trial contravenes the core principles underlying the right to trial by jury, a right deemed "fundamental to the American scheme of justice." *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) (*quoting Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)). Denial of the right to trial

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[5] Mark Bliss, *Convicted murderer Mark Gill receives life sentence in retrial of penalty phase,* Southeastern Missourian, May 23, 2017; available at https://www.semissourian.com/story/2414258.html (last accessed April 17, 2018).

[6] Robert Patrick, *Judge in St. Charles County sentences former Dent County deputy to death for murder*, St. Louis Post-Dispatch, Oct. 6, 2017; available at http://www.stltoday.com/news/local/crime-and-courts/judge-in-st-charles-county-sentences-former-dent-county-deputy/article_2c1dbb19-0bc6-5022-8dc7-2d6540e61951.html (last accessed April 17, 2018); Collin Lingo, *Judge Sentences Craig Wood to Death*, Ozarks First.com, Jan. 11, 2018; available at http://www.ozarksfirst.com/news/judge-sentences-craig-wood-to-death/911152416 (last accessed April 17, 2018).

[7] *Id.*

by jury in turn threatens a capital defendant's right to be free from cruel and unusual punishment under the Eighth Amendment and due process under the Fourteenth.

To the writers of the Constitution and Bill of Rights, the right to trial by jury was of paramount importance. Although the founders disagreed on many things, they were united in support of the right to trial by jury in criminal cases. As Alexander Hamilton noted, any disagreement centered on whether the jury trial right was "a valuable safeguard to liberty" or instead, "the very palladium of free government."[8] Trial by jury in criminal cases was so important that the founders explicitly guaranteed the right in both Article III, Section 2, of the Constitution and the Sixth Amendment.

The founders insisted upon trial by jury so the jury would serve as a buffer between the criminal defendant and the State and thus be an essential protection against governmental oppression. *Baldwin v. New York*, 399 U.S. 66, 72 (1970). Its inclusion in the federal constitution and all state constitutions "reflect[s] a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan*, 391 U.S. at 156. Trial by jury serves as a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Burch v. Louisiana*, 441 U.S. 130, 134 (1979).

Moreover, trial by jury gives voice to "the commonsense judgment of the community" and allows "community participation and shared responsibility" in the

[8] Jenny E. Carroll, *Nullification as Law*, 102 Geo. L.J. 579, 590 (2014).

administration of justice. *Williams v. Florida*, 399 U.S. 78, 100 (1970); *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975). Broad community participation is "critical to public confidence in the fairness of the criminal justice system." *Taylor*, 419 U.S. at 531-32. It allows different perspectives to be considered and ensures a "diffused impartiality." *Id.*

Trial by jury ensures that a death sentence reflects contemporary standards of morality and the conscience of the community. *Thompson v. Oklahoma*, 487 U.S. 815, 822-23, 832 (1988). Jurors provide "a link between contemporary community values and the penal system," and thus ensure that death penalty decisions comply with the Eighth Amendment by reflecting "the evolving standards of decency that mark the progress of a maturing society." *Witherspoon v. Illinois,* 391 U.S. 510, 519, n.15 (1968); *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). When a judge rather than the jury assesses punishment in a capital case, the resulting decision does not reflect the moral conscience of the community.

> [Jurors] are more likely [than a trial judge] to express the conscience of the community on the ultimate question of life or death, and better able to determine in the particular case the need for retribution, namely, an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.

Ring, 536 U.S. at 615-16 (Breyer, J., concurring) (internal quotations and citations omitted) (*quoting Gregg v. Georgia*, 428 U.S. 153, 184 (1976); *Witherspoon*, 391 U.S. at 519). Without a link to community values, a death sentence loses its moral and constitutional legitimacy. *Spaziano v. Florida*, 468 U.S. 447, 482 (1984) (Stevens, J, dissenting) (majority opinion overturned in relevant part by *Hurst*, 136 S.Ct. at 623).

The State itself has a strong interest "in having the jury express the conscience of the community on the ultimate question of life or death." *Jones v. United States*, 527 U.S. 373, 382 (1999).

Trial by jury also enhances the fairness and reliability of the sentencing determination and thus ensures due process under the Fourteenth Amendment. Nowhere is the need for trial by jury stronger than at a capital penalty phase trial. Because the stakes are so high, the Court has recognized "an acute need for reliability in capital sentencing proceedings." *Monge v. California*, 524 U.S. 721, 732 (1998); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion of Burger, C.J.).

With its multiple perspectives and the give and take of group discussion, trial by jury achieves a more reliable "verdict" on the sentence than a judge acting alone. *Ballew v. Georgia*, 435 U.S. 223, 239 (1978) ("substantial doubt" exists "about the reliability and appropriate representation of panels smaller than six"). The jury's collective judgment "tends to compensate for individual short-comings and furnishes some assurance of a reliable decision." *Herring v. New York*, 422 U.S. 853, 863 n. 15 (1975). Exclusion of any one group of people "deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." *Hobby v. United States*, 468 U.S. 339, 343 (1984). Yet with judicial setencing, multiple groups are excluded.

Judicial sentencing also risks the introduction of arbitrary factors into the sentencing determination. Studies have shown that judicial sentencing is all too often affected by the judge's fear that "going easy" on a defendant by sentencing him

to life without parole instead of death will jeopardize the judge's chance of re-election. *See Woodward v. Alabama*, 134 S.Ct. 405, 408 (2013) (Sotomayor, J., dissenting from denial of cert.) (citing studies). This extraneous factor has been shown to sway judges' decision-making in capital cases, resulting in arbitrary and unreliable death sentences. *Harris v. Alabama*, 513 U.S. 504, 519 (1995) (Stevens, J., dissenting); *Beck v. Alabama*, 447 U.S. 625, 642 (1980) (extraneous factors "introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case").

Each of the above core constitutional principles is significantly jeopardized, if not outright defeated, when a trial court replaces the jury in a capital sentencing trial. Allowing a trial court to reconsider the facts, make its own independent findings, and impose a death sentence based on those findings, contravenes the founders' insistence that one judge not have "plenary powers over the life and liberty of the citizen." *Duncan*, 391 U.S. at 156. Because the State failed to present sufficient evidence to convince the jury that death was appropriate, petitioner was stripped of his right to trial by jury and faced judgment by a potentially biased or politically-motivated judge.[9] The death sentence was not the product of community participation or shared responsibility and did not express the conscience of the

[9] The decision that petitioner must die was made by an elected judge. See *County, circuit judicial races see new faces*, Howell County News, May 14, 2018; available at https://www.howellcountynews.com/news/local/county-circuit-judicial-races-see-new-faces/article_6b7ede30-27f0-11e8-8674-574fcdd22c94.html (last accessed April 18, 2018).

community. Without a link to community values, petitioner's death sentence has no moral or constitutional legitimacy. *Spaziano*, 468 U.S. at 482 (Stevens, J, dissenting).

Because of the importance of the right to trial by jury and its correlation to other constitutional rights, this Court has been vigilant to curb any encroachment. See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (jury, not judge, must find defendant acted with biased purpose in order for hate crime sentencing enhancement to apply); *Ring v. Arizona*, 536 U.S. 584 (2002) (jury, not judge, must find existence of aggravating circumstances beyond a reasonable doubt); *Hurst v. Florida*, 136 S.Ct. 616 (2016) (jury, not judge, must find any fact necessary for imposition of death penalty); *Alleyne v. United States*, 570 U.S. 99 (2013) (jury, not judge, must find fact of whether defendant brandished firearm before sentence could be enhanced); and *Mathis v. United States*, 136 S.Ct. 2243, 2252 (2016) (trial court cannot make disputed determination about factual basis of prior guilty plea for burglary). The Court's vigilance is needed now to ensure that the most important findings made in an American courtroom, those decisions leading up to and including the decision to impose a death sentence, are made by a jury, not a judge.[10]

[10] It would be a perversion of justice to hold that a trial court cannot make a disputed determination about the factual basis of a prior guilty plea for burglary, *Mathis v. United States*, 136 S.Ct. 2243, 2252 (2016), yet allow a trial court to replace the factual findings of the jury with its own and then impose a death sentence that the jury itself was unwilling to return. See *id.* at 2258 (Thomas, J., concurring) (praising Court for avoiding further extension of "precedents that limit a criminal defendant's right to a public trial before a jury of his peers").

III. This Case Presents an Ideal Vehicle for Resolution of these Issues

The conflict presented here is fully developed and ripe for resolution. Petitioner properly presented his constitutional claims in the state-court system, and each of the states involved has set forth its views clearly. There is no need for the issue to "percolate" further. Moreover, the fact that Missouri has flouted this Court's holding in *Hurst* by itself provides a sufficient basis for granting certiorari.

IV. Missouri's Sentencing Procedure Violates the Constitution as Held by *Hurst* and Conflicts with the Holdings of the Florida and Delaware Supreme Courts

The resolution of this conflict is dictated by *Hurst*. Missouri's procedure for dealing with penalty phase deadlock mirrors the hybrid procedure struck down in *Hurst*. After the jurors indicated they could not agree on the sentence, Missouri effectively became a hybrid state. As the Missouri Supreme Court has acknowledged, the jury's factual findings "simply disappeared." *State v. Whitfield*, 107 S.W.3d 253, 271 (Mo. banc 2003). The trial court then started from scratch as if petitioner had never asserted his right to trial by jury (L.F. 1774-75; Tr. 2236). The court repeated the steps set forth in Mo. Rev. St. § 565.030.4, reconsidered the facts, and made its own independent findings on the statutory aggravating circumstances and the relative weight of the mitigating and aggravating evidence (Tr. 2236; L.F. 1774-75). The court then made the decision that a jury of petitioner's peers could not – he decided that petitioner deserved to die.

The similarities between *Hurst* and petitioner's case are striking. In both, the jurors found that the State had proven one or more statutory aggravators. *Hurst*,

136 S.Ct. at 625 (Alito, J., dissenting); *Shockley*, 410 S.W.3d at 198. In both, the jurors made a finding as to the relative weight of the statutory and mitigating evidence. *Hurst*, 136 S.Ct. at 620, also 625 (Alito, J., dissenting); *Shockley*, 410 S.W.3d at 198.

In both, after the jury made its findings, the judge repeated the steps followed by the jurors, reconsidered the facts, and made his or her own independent findings. *Hurst*, 136 S.Ct. at 620; *Shockley*, 410 S.W.3d at 198. As in *Hurst*, once the Missouri jury deadlocks, the judge assumes the "central and singular" role of fact-finder. *Hurst*, 136 S.Ct. at 622. As mentioned above, the jury's findings were gone, and the court was free to make its own independent findings. *Whitfield*, 107 S.W.3d at 271; *Griffin*, 756 S.W.2d at 488 ("the court must determine punishment independently and without reliance on the results of any deliberations of the jury"); *State v. McLaughlin*, 265 S.W.3d 257, 264 (Mo. banc 2008) (trial court may reconsider the facts in making its own determinations). As in *Hurst*, since the decision was death, the judge set forth his own independent factual findings. *Hurst*, 136 S.Ct. at 620; *Shockley*, 410 S.W.3d at 186. In both petitioner's case and *Hurst*, the resulting death sentence was the product of the judge's independent factual findings, in violation of the Sixth Amendment. *Hurst*, 136 S.Ct. at 622; *Shockley*, 410 S.W.3d at 186.

In petitioner's case, the Missouri Supreme Court reasoned that no Sixth Amendment violation occurred because the jury already had made the required findings; the statute merely "provides an extra layer of findings that must occur before the court may impose a death sentence." *Shockley*, 410 S.W.3d at 198-99. In

Hurst, Florida tried to do the same, urging that "the additional requirement that a judge *also* find an aggravator only provides the defendant additional protection." *Hurst*, 136 S.Ct. at 622 (emphasis in original). This Court rejected the argument because Florida failed to acknowledge the "the central and singular role" the judge played. *Id.* The defendant was not eligible for the death penalty until the court made findings that the defendant receive the death penalty. *Id.* The jury's role was only advisory; the court alone found the facts. *Id.*

When petitioner's jury was unable to impose a sentence of death, Missouri's sentencing procedure became an unconstitutional hybrid procedure. The jury's findings, however, were not even advisory; they simply disappeared. *Whitfield*, 107 S.W.3d at 271. The trial court started from scratch, reconsidered the facts, and made its own independent findings. *Id.* It was the trial court's findings upon which petitioner's death sentence was based. *Id.* As in *Hurst*, without the judge's independent – and unconstitutional – factual findings, there would be no death sentence. *Hurst*, 136 S.Ct. at 622.

V. The Jurors' Interrogatories Do Not Render the Constitutional Violations Harmless

Following its *Whitfield* decision, the Missouri Supreme Court attempted to render the constitutional error harmless by changing the jury instructions to require deadlocked juries to answer several interrogatories to show they made the required factual findings. *McLaughlin*, 265 S.W.3d at 264. The jurors must list the statutory aggravators they found beyond a reasonable doubt and must state they did not "unanimously find that there are facts and circumstances in mitigation of

punishment sufficient to outweigh facts and circumstances in aggravation of punishment." See Missouri Approved Instruction MAI-CR3d 314.58. These interrogatories, however, fail to mitigate the harm suffered by petitioner by the denial of his Sixth Amendment right to trial by jury.

A. The jurors' response to the second interrogatory did not reveal what the jurors actually found at the weighing step, so we cannot conclude that the trial court made the same finding.

The jurors' response to the second interrogatory failed to show what the jury found (L.F. 1723); it only showed what the jury did not find. The jurors stated that they did not unanimously find that the evidence in mitigation outweighed the evidence in aggravation (L.F. 1723). As many as eleven jurors could have found that the evidence in mitigation did outweigh the evidence in aggravation. Or perhaps all the jurors found that the evidence in mitigation did not outweigh the evidence in aggravation. There simply is no way of knowing. Because the record does not show what the jurors actually found, it does not show that the judge and jury made the same finding as to the weight of the aggravating and mitigating evidence. By the nature of the interrogatory, the jurors necessarily made a different finding than the trial court.

In *Mills v. Maryland*, 486 U.S. 367, 370 (1988), the Court struck down Maryland's capital sentencing procedure because the jurors may have believed they could not consider a mitigating circumstance unless all twelve jurors agreed that the mitigating circumstance existed. Hypothetically, eleven jurors could believe that six mitigating circumstances existed, but the jurors might not find any one mitigating

circumstance unanimously. *Id.* at 374. In such an instance, the jurors would be prevented from weighing any of the mitigating circumstances. *Id.* A defendant could receive the death penalty even though eleven of the jurors thought the death penalty was inappropriate. *Id.* "[I]t would certainly be the height of arbitrariness to allow or require the imposition of the death penalty under the circumstances so postulated." *Id.*

A criminal conviction cannot stand if the jury's verdict "could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict." *Id.* at 376. Capital cases require "even greater certainty that the [verdict] rested on proper grounds." *Id.* As this Court stressed in *Mills*, "[u]nless we can rule out the substantial possibility" that the verdict is based "on the 'improper' ground,' the sentence cannot stand." *Id.* at 377.

We cannot rule out that same possibility in petitioner's case. It is impossible to dismiss the possibility that, at the weighing step, just one juror propelled the case forward to a death verdict when eleven others believed a lesser punishment was warranted. Allowing the death penalty to stand in such circumstances "would certainly be the height of arbitrariness." *Mills*, 486 U.S. at 374. The jurors' response to the second interrogatory did not render the *Hurst* violation harmless.

B. The record does not show that the trial judge made the same findings on statutory and non-statutory aggravating circumstances as the jurors.

At oral pronouncement of the sentence, the trial court noted that the jurors agreed on three aggravating circumstances, "which the Court has noted and certifies"

(Tr. 2236). The court was silent as to the aggravating circumstance that the jury rejected. In its written judgment, the trial court stated it agreed "with the jury's findings on the statutory aggravating circumstances, and the jury's findings are certified by the court" (L.F. 1775). The record is not clear whether the aggravating circumstance the jury rejected played a role in the court's individual weighing and his conclusion that death was warranted.

Under Missouri's statute, the defendant should receive a sentence of life without parole if the evidence in mitigation "is sufficient to outweigh the evidence in aggravation of punishment found by the trier[.]" Mo. Rev. St. § 565.030.4(3) (emphasis added). While the jury must consider any statutory and non-statutory mitigating evidence, it may consider only that aggravating evidence found by the jury.

Because only that aggravating evidence that was found by the jury may be considered in the weighing process, the judge may only consider those non-statutory aggravating facts and circumstances that the jury found unanimously and beyond a reasonable doubt. *Hurst*, 136 S.Ct. at 621 (*citing Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000) (any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty 'verdict' is an 'element' that must be submitted to the jury"); *see also Washington v. Recuenco*, 548 U.S. 212, 220 (2006) ("sentencing factors, like elements, [are treated] as facts that have to be tried to the jury and proved beyond a reasonable doubt"); *McLaughlin*, 265 S.W.3d at 267 (findings by jury required by Mo. Rev. St. § 565.030.4, must be unanimous); *but see State v. Johnson*,

284 S.W.3d 561, 585 (Mo. banc 2009) (non-statutory aggravators need not be found beyond a reasonable doubt).

Here, the record does not show what non-statutory aggravating evidence, if any, the jury found. The State urged the jury to find petitioner's alleged future dangerousness as non-statutory aggravating evidence (Tr. 2215). It urged the jurors to take the "statutory aggravating circumstances and all the bad evidence" and weigh it against the evidence in mitigation (Tr. 2215). The non-statutory aggravating evidence could have been rejected by the jury yet be the bit of evidence that tipped the weighing in favor of death for the trial court.

The prosecutor's urging the jury to consider "all the bad evidence," a term that could be interpreted in multiple ways and have different meanings for a judge and a jury, injected arbitrariness and confusion into the proceedings. Because of the term, it is harder to discern what the jurors considered as non-statutory aggravating evidence and makes it more likely that the judge employed a different standard of non-statutory aggravating evidence than the jurors.

In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Court reversed the defendant's death sentence and remanded for a new penalty trial because the trial and appellate courts might not have considered certain mitigating evidence. *Id.* at 113-17; also 124-25 (Burger, CJ, dissenting) (record was "at best ambiguous" that court failed to consider the evidence). Reversal was warranted because "we may not speculate as to whether [the state courts] actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances. …

Woodson and *Lockett* require us to remove any legitimate basis for finding ambiguity concerning the factors usually considered by the trial court." *Eddings*, 455 U.S. at 119 (O'Connor, J., concurring).

The trial court had no jury findings as to non-statutory aggravating evidence upon which to rely, nor would he have been bound by any such findings. In the absence of express jury findings, the record does not show that the death sentence was based on the jury's findings rather than the judge's. Because the State cannot show that the jury and the court made the same factual findings, it cannot show that the constitutional violation – *i.e.*, a judge independently making all the required factual findings and imposing death – was harmless.

This precise issue formed a basis for the Delaware Supreme Court's decision declaring the Delaware death penalty statute unconstitutional. *Rauf*, *supra*, 145 A.3d at 484 (Holland, J., concurring, joined by Strine and Seizt, JJ). The trial judge independently found the existence of non-statutory aggravating factors without knowing which, if any, the jury found. *Id*. The Delaware Supreme Court concluded, "[i]n light of *Hurst*'s application of *Ring*, this violates the Sixth Amendment." *Id*.

CONCLUSION

The framers of the Constitution saw the wisdom of protecting life and liberty by ensuring that a jury stood as a barrier between a criminal defendant and the whims of a possibly biased or politically-motivated government official. They understood that our justice system depended upon the involvement of a broad cross-section of the community, jurors who shared the responsibility of the administration

of justice and, through group discussion and the interchange of ideas, would reach a fair and reliable decision. When a jury drawn from a fair cross-section of the community cannot agree that a death sentence is appropriate, the trial court cannot take over, proceed as if there had never been a jury. Such a sentence violates the Sixth, Eighth, and Fourteenth Amendments. Our democratic principles mandate that only a jury, expressing the conscience of the community, can make the ultimate decision of whether the defendant should live or die. No defendant should receive a death sentence but by the unanimous vote of his or her peers.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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