No. 14-7505

In the Supreme Court of the United States

TIMOTHY LEE HURST,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF *AMICI CURIAE* ALABAMA AND MONTANA IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Alabama and Montana prosecute crimes and sentence criminals. Like the Florida capital sentencing system at issue in this case, their systems were designed in response to *Furman v. Georgia*, 408 U.S. 238 (1972). The specific fact-pattern presented here could not have arisen in Alabama or Montana. But we have an interest in seeing the Court reject the petitioner's broadside attack on capital sentencing structures that were designed to make the imposition of capital punishment more consistent and less subjective.

At their heart, the petitioner's arguments are that Florida's system must be unconstitutional because it is unusual. This Court has soundly rejected that argument in the past. *E.g., Blystone v. Pennsylvania*, 494 U.S. 299, 308 (1990) ("The fact that other States have enacted different forms of death penalty statutes which also satisfy constitutional requirements casts no doubt on Pennsylvania's choice."). And it should reject it again here.

SUMMARY OF ARGUMENT

I. The States have relied on this Court's precedent in designing capital sentencing systems. These systems reflect the democratic will of the people and fully comply with the post-*Furman* capital sentencing precedent established by this Court. While *Apprendi* and *Ring* have clarified which findings constitute factual elements of a crime and therefore must be found by a jury, these cases do not require States to abandon their judicial sentencing

regimes. Each State, as before, is free to develop its own capital sentencing regime; and each State has discretion to create its own method of weighing aggravating and mitigating factors, as long as the sentencer – whether court or jury – is properly channeled in its discretion to avoid arbitrary results. Florida's system is constitutional under this Court's precedents.

II. The petitioner and his supporting *amici* obscure the historical analysis of the traditional role of the jury. The jury has always held the role of fact-finder and the responsibility of issuing a verdict. However, nothing compels the jury to play the role of sentencer; in fact, historical analysis points the other way. Judges have always exercised discretion when it comes to sentencing authority. Moreover, historical support for jury unanimity is strongest in the determination of guilt. History does not support a constitutional requirement that a jury vote unanimously to impose a sentence.

III. The roles of judge and jury in sentencing involve policy decisions that have been left to the State legislatures. And contrary to the arguments of Hurst's *amici*, States can reasonably conclude that judicial sentencing is superior to jury sentencing in the capital context. Arguments against the efficacy of jury sentencing apply equally in the capital context, and a State legislature's decision to grant such power to the judge is a legitimate policy decision. Moreover, the death penalty serves a justifiable deterrence function, and judicial sentencing serves this deterrence function to a greater extent than does jury sentencing.

ARGUMENT

I. Florida's sentencing system is constitutional under this Court's established precedent.

The Florida system finds its roots in *Furman*. There, the Court invalidated the death penalty because it was arbitrary. Specifically, the Court held unconstitutional the practice of allowing "juries . . . [to] make the decision whether to impose a death sentence wholly unguided by standards governing that decision." *Furman*, 408 U.S. at 295 (Brennan, J., concurring). After *Furman*, States had to design systems that more consistently applied the death penalty. Many States, in response to *Furman*, removed certain decisions from the jury and gave them to a judge instead.

A. Judicial involvement in sentencing was a response to *Furman*.

In *Furman*, this Court identified serious problems of consistency and arbitrariness in the death penalty as it then existed. But it gave the States "a range of discretion" in formulating a solution. *See Kansas v. Marsh*, 548 U.S. 163, 174 (2006). The States responded with new procedures that eliminated or curtailed the jury discretion that had been capital punishment's defining characteristic up to that point. *See* Nathan A. Forrester, *Judge Versus Jury: The Continuing Validity of Alabama's Capital Sentencing Regime After* Ring v. Arizona, 54 Ala. L. Rev. 1157, 1164-1178 (2003) (summarizing Alabama's response).

Most States responded to *Furman* by severing the question of a defendant's guilt from the question of his penalty. Again, this innovation was at the Court's behest. The Court explained in *Gregg* that "the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious

manner . . . are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

Montana went further and chose to leave the sentencing decision to the judge alone. *See* Mont. Code Ann. §§ 46-18-301, 46-18-305 (current through 2015). And other States gave the defendant the right to choose to be tried or sentenced before a judge. *See, e.g.*, Okla. Stat. § 701.10; Utah Code Ann. § 76-3-207; Va. Code. Ann. § 19.2-264.4. The idea, of course, was that sentences imposed by judges would be more thoughtful and uniform than sentences imposed by juries.

Finally, States like Florida and Alabama responded to *Furman* by creating hybrid systems under which the jury recommends an advisory sentence, but the judge makes the final sentencing decision. *See* Ala. Code § 13A-5-47; Fla. Stat. § 921.141. Under Alabama law, for example, an intentional murder is capital when the jury finds one of several aggravating factors in either the guilt or penalty phase. *See* Ala. Code § 13A-5-40. The jury recommends a sentence, but the judge determines how to sentence the defendant by weighing the statutory aggravating factors and any mitigating factors. *See* Ala. Code § 13A-5-47, 49, & 51. The judge must enter a written sentencing order that identifies the aggravating and mitigating factors and explains the weight given each. *See id.* § 13A-5-47(d). The appellate courts then review the trial judge's decision, performing their own weighing of the aggravating and mitigating circumstances. *See generally Ex parte Carroll*, 852 So. 2d 833, 836 (Ala. 2002).

These systems are all legitimate responses to the problems identified in *Furman*. A state capital sentencing system (1) must "establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold" and (2) "cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty." *McCleskey v. Kemp*, 481 U.S. 279, 305-06 (1987). But, within these "constitutional limits," "the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." *Blystone*, 494 U.S. at 308.

B. Florida's sentencing structure is a constitutional response to *Furman*.

The petitioner and supporting *amici* erroneously argue that Florida's system is inconsistent with the Eighth and Sixth Amendments because it confers sentencing discretion on the judge. Florida's brief rightly questions whether the petitioner even preserved broader questions about the constitutionality of judicial sentencing. *See* Brief of Respondent at 27-29. And the Court has recently denied certiorari in cases that squarely presented these arguments.[1]

Regardless, the petitioner's argument also finds no purchase in this Court's precedent. Instead, the Court has expressly upheld the constitutionality of systems like Florida's and Alabama's, even though they confer sentencing discretion on a judge. *See*

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[1] *See, e.g.*; *Woodward v. State*, 123 So. 3d 989 (Ala. Crim. App. 2011), *cert. denied,* 134 S. Ct. 405 (2013); *Lockhart v. State*, 2013 WL 4710485 (Ala. Crim. App. 2013), *cert. denied,* 135 S. Ct. 1844 (2015); *Scott v. State*, 2012 WL 4757901 (Ala. Crim. App. 2012), *cert. denied,* 135 S. Ct. 1844 (2015).

Spaziano v. Florida, 468 U.S. 447 (1984); *Harris v. Alabama*, 513 U.S. 504 (1995). Neither the Eighth Amendment nor the Sixth Amendment call into question the constitutionality of judicial sentencing.

This Court's Eighth Amendment jurisprudence invalidates only the imposition of certain sentences based on "the nature of the offense" or "the characteristics of the offender." *Graham v. Florida*, 560 U.S. 48, 60 (2010). The Eighth Amendment "is not concerned with the process by which a State determines that a particular punishment is to be imposed in a particular case" but rather "forbids the imposition of punishments that are so cruel and inhumane as to violate society's standards of civilized conduct." *Furman*, 408 U.S. at 397 (1972) (Burger, J., dissenting). There is no third category that focuses on societal consensus *about procedure*. As a result, the Eighth Amendment provides a uniquely poor vehicle for determining whether there is a constitutional right to jury sentencing in capital cases.

But even if the societal consensus were relevant to this question, there has been no "evolution" in any particular direction. In 1953, three states placed final sentencing authority with a judge in capital cases. "In Utah, New York and Delaware a judge [could] not impose a penalty other than death unless the jury recommends life imprisonment, although he [could] impose the death sentence in spite of such a recommendation if he so desire[d]." Robert E. Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. Penn. L. Rev. 1099, 1133 (1953). In 1984, the number remained at three, with Florida, Alabama, and Indiana granting judges the final sentencing decision after juries provided advisory recommendations. *Spaziano*, 468 U.S. at 464 n.9. By 1995, the year *Harris* was decided, the list of judicial sentencing states had grown to four with the return

of Delaware. *Harris*, 513 U.S. at 516. At present, Montana gives sole sentencing authority to a judge, to weigh aggravating factors found by the trier of fact. *See* Mont. Code Ann. §§ 46-18-301, 46-18-305 (current through 2015). Three states – Delaware, Florida, and Alabama – allow a judge to impose a sentence regardless of a jury's recommendation. *See* Ala. Code § 13A-5-47; Fla. Stat. § 921.141; Del. Code tit. 11, § 4209(d).

The Sixth Amendment and *Ring/Apprendi* also do not call into question the constitutionality of judicial sentencing. As Justice Scalia explained in *Ring v. Arizona*, "States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase." 536 U.S. 584, 612-13 (2002) (Scalia, J., concurring). Although *Ring* overruled *Walton v. Arizona*, 497 U.S. 639 (1990), in part, it left untouched *Walton*'s holding that judicial sentencing is consistent with the Sixth Amendment. The lower courts have unanimously held that a judge may determine a capital defendant's sentence consistent with *Ring*.[2]

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[2] *See, e.g., Lee v. Commissioner, Alabama Dep't of Corr.*, 726 F.3d 1172, 1198 (11th Cir. 2013) ("*Ring* does not foreclose the ability of the trial judge to find the aggravating circumstances outweigh the mitigating circumstances."); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); *United States v. Purkey*, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); *Higgs v. United States*, 711 F. Supp. 2d 479, 540 (D. Md. 2010) ("Whether the aggravating factors presented by the prosecution outweigh the mitigating factors presented by the defense is a normative

C. *Harris* and *Spaziano* should not be reconsidered.

Ultimately, the petitioner and his supporting *amici* recognize that their broader arguments are barred by this Court's long-settled precedent. *See* Brief for Petitioner 26–31 (attacking the validity of *Spaziano*, *Harris*, and *Proffit v. Florida*, 428 U.S. 242 (1976)). But they have not provided any reason to overrule these cases. There have been no intervening doctrinal developments that undermine these precedents. *See Alleyne v. United States*, 133 S. Ct. 2151, 2166 (2013) (Sotomayor, J., concurring). And the number of States that rely on these precedents has remained constant, demonstrating no

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question rather than a factual one."); *State v. Fry*, 138 N.M. 700, 126 P.3d 516, 534 (2005) ("[T]he weighing of aggravating and mitigating circumstances is thus not a 'fact that increases the penalty for a crime beyond the prescribed statutory maximum.'"); *Commonwealth v. Roney*, 581 Pa. 587, 866 A.2d 351, 360 (2005) ("[B]ecause the weighing of the evidence is a function distinct from fact-finding, *Apprendi* does not apply here."); *Ritchie v. State*, 809 N.E.2d 258, 266 (Ind. 2004) ("In *Bivins v. State*, 642 N.E.2d 928, 946 (Ind. 1994), we concluded, as a matter of state law, that '[t]he determination of the weight to be accorded the aggravating and mitigating circumstances is not a 'fact' which must be proved beyond a reasonable doubt but is a balancing process.' *Apprendi* and its progeny do not change this conclusion."); *Brice v. State*, 815 A.2d 314, 322 (Del. 2003) (*Ring* does not apply to the weighing phase because weighing "does not increase the punishment."); *Nebraska v. Gales*, 265 Neb. 598, 658 N.W.2d 604, 627–29 (2003) ("[W]e do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review be undertaken by a jury"); *Oken v. State*, 378 Md. 179, 835 A.2d 1105, 1158 (2003) ("The weighing process never was intended to be a component of a 'fact finding' process.").

change in the "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

Moreover, Florida and Alabama have relied on this Court's decisions in *Spaziano* and *Harris* to sentence hundreds of murderers in the intervening decades. Some of those murderers have likely already been executed. Others are presently on death row. "[T]he States' settled expectations deserve our respect." *Ring*, 536 U.S. at 613 (Kennedy, J., concurring). The Court should hesitate before questioning the constitutionality of "reforms designed to reduce unfairness in sentencing." *Id.* (Kennedy, J., concurring). And it should decline to consider overruling precedents where "significant reliance interests are at stake that might justify adhering to their result." *Alleyne*, 133 S. Ct. at 2166 (Sotomayor, J., concurring). Although the petitioner and his supporting *amici* attack these precedents, they have given the Court no reason to doubt their continued viability as good law.

* * *

The States reasonably responded to *Furman* in different ways. Even if some of these responses were unique, the Constitution "is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws." *Spaziano*, 468 U.S. at 464. This Court's precedents recognize the constitutionality of Florida's system. And they should not be overruled.

II. History supports the constitutionality of Florida's capital sentencing regime.

The history of the jury's role in capital sentencing also supports the constitutionality of Florida's system. The petitioner and his supporting *amici* erroneously argue that history supports an

expansive role for the jury in capital sentencing. *See* Brief of the ACLU, et al., as *Amici Curiae* in Support of Petitioner. But, as we have explained, Florida's capital sentencing structure was a direct response to *Furman*'s concern about the arbitrariness of unfettered jury discretion. And, far from providing an argument against judicial sentencing in the capital context, the historical analysis shows only that juries were – and remain – integral to the adjudication of guilt or innocence. At sentencing, however, a judge has long played *the* crucial role.

A. Historically, the judge has had the predominant role in sentencing.

The petitioner and *amici* make a hash of sentencing under the common law and during the American colonial period. They confuse the jury's preeminent role in the determination of guilt with its lesser role in determining the sentence. And they draw an unwarranted comparison between single-punishment sentencing structures—where the guilty verdict automatically controls the punishment—and the kind of scaled system employed by Florida here.

Briefly, the jury and judge in Renaissance-era England shared sentencing authority: the judge through direct exertion and the jury indirectly through their power to convict. Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings about* Apprendi, 82 N.C.L. Rev. 621, 630-636 (2004) (hereafter Lillquist, *Puzzling Return of Jury Sentencing*). During this time, the jury's adjudication of guilt and indirect role in sentencing "was constrained and channeled in a number of ways." *Id.* at 630. Judges used their discretion to confer the benefit of the clergy – which made the defendant ineligible for the death sentence – in capital cases; "the jury would have to first decide upon guilt, after which the justice would decide upon the applicability

of the benefit to the case." *Id.* at 631. For less serious, non-capital crimes, "the punishment (and in some cases, the matter of guilt as well) was left solely in the hands of the justices." *Id.* at 636. By the Eighteenth century, "[o]nce a jury convicted a defendant of a nonclergyable offense, the jury could recommend a pardon, but reprieve was left wholly to the justice's discretion." *Id.* at 639.

Unlike in England, juries were *de facto* sentencers in the American colonial period, but that quickly changed for two very good reasons.

First, in the colonial period, most verdicts had only a single associated punishment. There was no need for anyone to exercise sentencing discretion in the early American criminal system "because there was, for the most part, a single punishment" for any given offense. Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right,* 100 J. Crim. L. & Criminology 691, 694 (2010) (hereafter Gertner, *A Short History*). The jury had an indirect role in sentencing "through application of its factfinding power," since "[t]he crime under which a defendant was convicted, and therefore the sanction, depended on the particular facts found by the jury in the case." Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 Hofstra L. Rev. 377, 419 (1996) (hereafter Smith, *Jury Reform*). But, by the turn of the nineteenth century, scalable punishments created a "more complex set of sentencing outcomes" for which "the jury could no longer link conviction to a particular sentence." Gertner, *A Short History* at 694. Judges, not juries, have historically exercised sentencing discretion when a range of punishments are linked to an offense.

Second, in the colonial period, juries were just as expert in the law as the judges. "[F]ew trained

lawyers and little law were to be found in the colonies." Albert Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 903 (1994) (hereafter Alschuler & Deiss, *A Brief History*). Moreover, the same group of landowners would serve on multiple juries, providing professionalism and consistency. *See* Gertner, *A Short History* at 692. This balance between juries and judges changed in part because judges became more expert on the law. *See* Lillquist, *Puzzling Return of Jury Sentencing* at 651. "[A]s the judiciary improved, there was less and less reason to leave this power in the hands of juries, and so jury sentencing atrophied." *Id*.

In short, the jury quickly returned to the way it had functioned in England. The conviction stage and the sentencing stage developed "different standards of proof and of evidence," allowing the judge to set the sentence without the limitations of the rules of evidence. Gertner, *A Short History* at 695. Judges developed broad power over sentencing; although "[t]he legislature set the outside limits within which sentencing discretion could be exercised," there were no "specific, detailed criteria to guide judicial sentencing." Alan M. Dershowitz, *Criminal Sentencing in the United States: An Historical and Conceptual Overview*, 423 Annals Am. Acad. Pol. & Soc. Sci. 117, 126 (1976).

B. Historically, jury unanimity is important to the adjudication of guilt, not the imposition of a sentence.

This Court has already held that jury unanimity is not a constitutional requirement. The Court in *Apodaca v. Oregon*, 406 U.S. 404 (1972), held that jury unanimity is not required in the guilt phase. Although *Apodaca* does not address jury unanimity

in a sentencing stage, this Court's historical analysis applies *a fortiorari* to jury sentencing. The Court explained that, "[a]fter a proposal had been made to specify precisely which of the common-law requisites of the jury were to be preserved by the Constitution, the Framers explicitly rejected the proposal and instead left such specification to the future." *Id.* at 410 (plurality opinion). Because unanimity is not constitutionally required in the verdict stage, it makes no sense to require unanimity at the sentencing stage. The petitioner's arguments on that front are barred by this on-point precedent.

Moreover, there is no historically rooted requirement for jury unanimity when the jury has been entrusted with sentencing. Instead, the importance of jury unanimity has always been tied to fact-finding at the conviction stage. *See* Joseph Story, *Commentaries on the Constitution of the United States* 559 n.2 (5th ed. 1891) (noting that the jury "must unanimously concur in the guilt of the accused before a legal *conviction* can be had") (emphasis altered). *See also* John Proffatt, *A Treatise on Trial By Jury* § 77 at 112 (1876) (commenting that "to accept a *verdict* of any number less than the whole" is a foreign concept) (emphasis added). In fact, former members of this Court have suggested that States "replac[e] the requirement of unanimous jury verdicts with majority decisions about sentence[s]" in order to secure greater uniformity in capital sentencing. *See Witherspoon v. State of Ill.*, 391 U.S. 510, 542 n.2 (1968) (White, J., dissenting). The historical developments that underscore the presumption of unanimity at the guilt phase do not demand the same procedural design in sentencing.

III. Important policy considerations support the role of judges in capital sentencing.

States can reasonably conclude that judicial involvement in capital sentencing supports the objectives of consistency, deterrence, and other important public policies. Jury sentencing may have countervailing benefits. But it is also criticized as inconsistent and arbitrary when compared with judicial sentencing. Ultimately, Florida and every other State should have the right to weigh these policy considerations and make a determination for itself.

A. Judicial sentencing is less arbitrary and more consistent than jury sentencing.

In the non-capital context, it is generally accepted that judicial involvement in sentencing makes sentences more consistent. In 1967, the President's Commission on Law Enforcement and Equal Justice recommended that each State be able to decide whether capital punishment was an appropriate sanction. *See* President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 143 (1967). But the Commission concluded that juries should have no sentencing role in the *non*capital context. "Jurors do not and cannot have the expertise to assess rationally the correctional needs of offenders; and juries, because of their size and their position of being half in and half out of the court system, are inappropriate recipients of sentencing information." *Id.* at 145. Similarly, the American Bar Association, an *amicus* for the petitioner, urges in its literature that "[u]niformity in sentencing is crucial." American

Bar Association, *Handbook of International Standards on Sentencing Procedure* 3 (2010). The ABA argues that "disparity in sentencing may erode the public's confidence in the integrity of the criminal justice system." *Id.* We agree with these goals.

But these insights apply equally to capital sentencing. In the capital context, juries "appear to make decisions in a more prejudiced and biased manner than do judges." Radha Iyengar, *Who's the Fairest in the Land? Analysis of Judge and Jury Death Penalty Decisions*, 54 J.L. & Econ. 693, 716 (2011). Additionally, jury decisions may "more strongly correlated with demographic factors related to the victim, the defendant, and the interaction between these characteristics." *Id.* at 694. But "judges appear to be more likely to be influenced by the choice of weapon, the circumstances of the murder, and the relationship between the victim and the defendant." *Id.* This may make juries "more susceptible to racial bias while being less concerned with the details surrounding the circumstances of the crime." *Id.* at 716. Although "the jury is a vital procedural safeguard in representing society in the determination of guilt or innocence, by its very nature a jury . . . is completely unprepared to determine a complex question such as sentencing." Charles W. Webster, *Jury Sentencing—Grab-Bag Justice*, 14 Sw. L.J. 221, 228 (1960). *See also* Randall R. Jackson, *Missouri's Jury Sentencing Law: A Relic the Legislature Should Lay to Rest*, 55 J. Mo. B. 14, 16 (1999) ("[J]ury sentencing inherently results in unjustly disparate sentences.").

The petitioner and his supporting *amici* cannot explain why the same concerns that support judicial sentencing in other contexts do not apply with equal or greater force in the capital context. In its *amicus* brief, the ABA posits that jury capital sentencing is a better guide to the conscience of the community. Brief of the American Bar Association as *Amicus Curiae* in Support of Petitioner at 21–22. But this factor does not distinguish capital cases from other criminal cases, in which retributive goals are also important. Ultimately, if States can reasonably choose to trust judges with imposing life-without-parole sentences and sentences for terms of years, there is no reason that judges cannot also be trusted to impose capital sentences.

B. Judicial sentencing improves the general deterrent effect of capital punishment.

The only meaningful argument that capital sentencing procedures should, as a policy matter, be different from other kinds of sentencing procedures is that the *only* purpose of the death penalty is retribution. But this conclusion is contrary to numerous studies and the theory of deterrence itself.

As an initial matter, questioning the deterrent effect of the death penalty "is ultimately to question the foundation of general deterrence theory, the idea that the harsher a penalty, the greater the deterrence value." Chad Flanders, *The Case Against the Case Against the Death Penalty*, 16 New Crim. L. Rev. 595, 601 (2013). Because "we by and large [accept general deterrence theory], there is no reason

to suddenly reject it in the death penalty context." *Id.*

Moreover, many statistical analyses have shown a powerful deterrent effect to the death penalty.[3] According to Judge Richard Posner, these empirical analyses demonstrate "a substantial incremental deterrent effect of capital punishment" that "coincides with the common-sense of the situation," as "it is exceedingly rare for a defendant who has a choice to prefer being executed to being imprisoned for life." Richard A. Posner, *The Economics of Capital Punishment*, 3 The Economists' Voice, Issue 3 (2006). Indeed, "on certain empirical assumptions, capital punishment may be morally required, not for retributive reasons, but rather to prevent the taking of innocent lives." Cass R. Sunstein & Adrian Vermuele, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 Stan. L. Rev. 703, 705 (2005).

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[3] *See*, *e.g.*, Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 Am. L. & Econ. Rev. 344 (2003); H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & Econ. 453 (2003); Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 Mich. L. Rev. 203 (2005); Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. Legal Stud. 283 (2004); Paul R. Zimmerman, *Estimates of the Deterrent Effect of Alternative Execution Methods in the United States: 1979-2000*, 65 Am. J. Econ. & Soc. 909 (2006); Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. Applied Econ. 163 (2004).

Anecdotal evidence also provides support for this conclusion. Senator Diane Feinstein, who served on a parole board in the 1960s, recounted an experience involving a woman who had carried an unloaded gun into a store robbery. The woman testified that she kept the weapon unloaded to make sure she did not panic, accidentally kill someone, and thus become eligible for the death penalty. 141 Cong. Rec. S7662 (June 5, 1995) *see also* S. Rep. 107-315, at 62-63 (2002) (recounting anecdotal testimony about the deterrent effect of capital punishment). And, in 2011, a man conducted research to ensure that Illinois did not have the death penalty before he killed his ex-girlfriend. Art Barnum and Ted Gregory, *Woman slain in Oak Brook parking lot*, Chi. Trib., Apr. 14, 2011.[4] This murder may not have happened if the murderer knew he could be eligible for the death penalty.

In short, judicial involvement in sentencing increases the consistency in the application of the death penalty. It recognizes "the legal potential for a judge to rationally update beliefs based on evidence relevant to an estimate of the offender's deterrability by prison." Charles N. W. Keckler, *Life v. Death: Who Should Capital Punishment Marginally Deter?*, 2 J.L. Econ. & Pol'y 51, 101 (2006). And, unlike a jury, a judge's sentencing decision can account for "localized deterrence in communities or upon certain type of murders." Iyengar, *Who's the Fairest in the Land? Analysis of Judge and Jury Death Penalty*

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[4] Available at http://articles.chicagotribune.com/2011-04-14/news/ct-met-oak-brook-murder-0415-20110414_1_state-s-attorney-robert-berlin-death-penalty-oak-brook. (last visited on August 3, 2015).

Decisions at 717. Florida's choice to involve the judge in the sentencing decision is amply supported by public policy.

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The Court should reject the petitioner's broadside attack on Florida's capital sentencing structure. Accepting the arguments of the petitioner and his supporting *amici* would upset established precedent. It would undermine state attempts to infuse their capital systems with structure and consistency. And it would require accepting the historical fiction that rules about the adjudication of guilt necessarily apply to the imposition of a sentence. There are good reasons for entrusting judges with a role in imposing sentences. Florida's decision to do so should be respected.

CONCLUSION

This Court should affirm the decision of the Supreme Court of Florida.

Respectfully submitted,

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