IN THE
SUPREME COURT OF MISSOURI
No. SC96924

STATE OF MISSOURI,

Respondent,

vs.

CRAIG M. WOOD,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI
31ST JUDICIAL CIRCUIT, GREENE CTY.
NO. 1431-CR00658-01
THE HONORABLE THOMAS E.
MOUNTJOY, PRESIDING

BRIEF OF AMICI AMERICAN CIVIL LIBERTIES UNION OF MISSOURI, AMERICAN CIVIL LIBERTIES UNION FOUNDATION CAPITAL PUNISHMENT PROJECT, AND MISSOURIANS FOR ALTERNATIVES TO THE DEATH PENALTY IN SUPPORT OF APPELLANT

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This brief is filed with consent of the parties.

The American Civil Liberties Union is a nationwide nonprofit, nonpartisan organization with 1.6 million members dedicated to the defense and promotion of the guarantees of individual rights and liberties embodied in the state and federal constitutions. The ACLU of Missouri is the statewide affiliate of the ACLU, with a longstanding interest in preserving the constitutional rights of persons involved in the criminal justice system in Missouri. It has often submitted amicus briefs to this Court in cases raising constitutional issues arising in the criminal justice context. The ACLU, through its Capital Punishment Project in particular, has expertise on the Sixth Amendment jury right and the Eighth Amendment right to be free from cruel and unusual punishment. It has filed amicus briefs in the U.S. Supreme Court in *Hurst* itself, and subsequently, in the supreme courts of Florida, Delaware, Nebraska, and California showing the impact of *Hurst* on state sentencing schemes.

Missourians for Alternatives to the Death Penalty (MADP) is a grassroots, constituent-led organization that uses community organizing and advocacy to educate and inform fellow citizens and policymakers about the systemic costs and consequences of capital punishment. As a nonprofit, with more than 12,473 Missouri members, it raises up the voices of individuals directly impacted by the death penalty, including death row exonerees, murder victim family members, correctional staff, capital jurors, and the families of the executed. MADP seeks to reform practices in the criminal justice system that result in government overreach, racially disproportionate sentences, and broken

institutions. MADP believes that judicially imposed death sentences fly in the face of the constitutional guarantee of the right to trial by jury, in this most compelling setting.

INTRODUCTION

At capital sentencing, the jurors could not agree that Craig Wood should be sentenced to death. The jurors could not unanimously agree that there were "facts and circumstances in mitigation of punishment sufficient to outweigh facts and circumstances in aggravation of punishment." (Tr. 4111–12; D. 867, pp. 18–19.) But, as shown below, the question the trial judge posed to the jury on this issue left open the possibility that up to eleven jurors believed the mitigation sufficient to outweigh the aggravation. Because of the deadlock, at this final step, the trial judge then independently assessed whether the State had proven the alleged aggravating circumstances beyond a reasonable doubt and whether the circumstances in mitigation outweighed the circumstances in aggravation. (Tr. 4166). The judge found that the aggravating circumstances were proven and that the circumstances in mitigation did not outweigh those in aggravation. These are, however, findings of fact that the Sixth Amendment reserves for the jury. Craig Wood's death sentence not only violates the Sixth and Eighth Amendments, as shown below, but is also an anomaly, nationally and in Missouri.

Over the past decade, there has been a dramatic decline nationwide in the use of the death penalty. Executions and death sentences are at a forty-year low, and public opinion has shifted away from the once-widespread belief that capital punishment is either necessary or just. Trends within the state of Missouri have tracked this broader trajectory. While Missouri juries returned an average of more than eight death sentences per year in

the 1990s, over the past five years, not a single jury has determined death is an appropriate sentence for a defendant convicted of first-degree murder.[1] The only two new death sentences during this period, including that challenged in this case, were imposed four months apart by judges, after each jury was unable to agree that the death penalty was warranted.[2] Particularly in light of the recent abandonment of the death penalty by Missouri's citizenry, this Court must fully examine anew whether permitting a judge, acting alone, to make findings of fact and condemn a prisoner to die comports with Missouri precedent and the federal constitution.

ARGUMENT

I. The Sixth Amendment requires Missouri capital sentencing juries to make an affirmative finding that mitigating evidence does not outweigh aggravating evidence.

This Court's holding in *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003), as well as the Supreme Court's Sixth Amendment precedent, clearly illustrates that, for a death sentence to comport with the Sixth Amendment, a Missouri capital sentencing jury must affirmatively and unanimously conclude that evidence in mitigation does not exceed the weight of evidence in aggravation. Because the jury here made no such finding, this Court must vacate Wood's death sentence.

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[1] Death Penalty Information Center (DPIC), *Death Sentences in the United States From 1977 by State and by Year*, https://deathpenaltyinfo.org/death-sentences-united-states-1977-present.

[2] Judges imposed those two death sentences upon Craig Wood and Marvin Rice, SC96737. Both cases are currently on appeal to this Court.

A. Under the Sixth Amendment, all facts supporting an enhanced or increased sentence, including the relative weight of aggravating and mitigating circumstances, are elements of the crime that must be proven to a jury, not a judge.

It is now incontrovertible that, under the Sixth Amendment, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" qualifies as an element that "must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). *Apprendi*'s unbending rule has, therefore, invalidated schemes involving sentencing enhancements, *id*. at 490, mandatory sentencing guidelines, *United States v. Booker*, 543 U.S. 220, 226 (2005), and the death penalty, *Ring v. Arizona*, 536 U.S. 584, 589 (2002).

Apprendi applies to *all findings of fact* necessary to the imposition of an increased sentence under state or federal law. This fundamental right is no less protective in death penalty cases. *Ring*, 536 U.S. at 589 ("Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."). In *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016), the Court restated this foundational principle, emphasizing that it applies with equal force to death-penalty sentencing statutes: "The Sixth Amendment requires a jury, not a judge, to find *each fact necessary to impose a sentence of death*." (emphasis added).

In holding that Florida's law violated *Ring*, the Court rejected the State's contention that the jury's advisory death recommendation, which necessarily included a finding that an aggravating factor had been proven, satisfied the Sixth Amendment. *Id*. at 622. The Court noted:

> The State fails to appreciate the central and singular role the judge plays under Florida law. As described above and by the Florida Supreme Court, the Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). The trial court *alone* must find "the facts ... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances."

Id. (emphasis in original). Two of the Court's conclusions in *Hurst* are particularly significant to the question before this Court: (1) Hurst's constitutional right to trial by jury was violated because, pursuant to the Florida statute, his death sentence was premised on findings of fact made by the court, not the jury; and (2) the necessary Sixth Amendment findings establishing Hurst's death-eligibility extended to the determinations "[t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances" — critical questions that had not been answered by the jury at all. *Id*.

In *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003), the Court anticipated *Hurst* by holding that the jury, rather than the court, must make all factual findings necessary for a death sentence, including findings regarding the relative weight of aggravating and mitigating circumstances. In *Whitfield*, this Court read the Missouri death penalty statute to require three different affirmative findings of fact before death is authorized: (1) the presence of at least one aggravating factor, (2) whether all of the aggravating factors, taken together, warrant imposition of the death penalty, and (3) the relative weight of facts in aggravation and mitigation. *Id*. at 258–59, 261, 264. Because a defendant was death-eligible only if all three of these inquiries were answered to his detriment, the Court concluded each was a factual finding that the Sixth Amendment required a jury to make. *Id*. at 259.

In its decision regarding the relative weight of aggravating and mitigating facts, the Court specifically required an affirmative, unanimous, jury finding that mitigation did not outweigh aggravation before a death sentence could be imposed. *Id*. at 264. The Court observed that Whitfield's jury had failed to make the necessary Sixth Amendment finding: "the jury was not told in regard to step 3 that *it had to return a verdict of life imprisonment if it could not unanimously agree whether the mitigating facts outweighed the aggravating facts*." *Id*. (emphasis added).

Although in 2001 the Missouri legislature removed the second finding, regarding whether the aggravating factors warrant death, the other two requirements addressed in *Whitfield* remain in the statute in the same exact form. *Id.* at 259 n.5; 2001 Mo. Legis. Serv. S.B. 267; RSMo. § 565.030.4.

B. Pre-*Hurst*, Missouri courts erroneously interpreted *Whitfield* to require one affirmative factual finding, rather than two.

Following *Whitfield*, but before *Hurst*, trial courts, and this Court, have inconsistently applied *Whitfield*'s requirements to two key factual findings: the determination that a statutory aggravator has been proven, and the determination that mitigating circumstances do not outweigh aggravating circumstances. *See State v. Shockley*, 410 S.W.3d 179, 198 (Mo. banc 2013); *State v. McLaughlin*, 265 S.W.3d 257, 264 (Mo. banc 2008), discussed *infra*. The confusion may arise from the unique wording of Missouri's capital punishment statute.

Unlike the vast majority of death-penalty statutes across the country,[3] section

[3] *See, e.g.*, Ark. Code Ann. § 5-4-603 ("jury shall impose a sentence of death if [it] unanimously returns written findings that: (1) [a]n aggravating circumstance exists beyond a reasonable doubt (2) [a]ggravating circumstances outweigh beyond a

565.030 does not list the factual findings the jury *must make* before a death sentence may be imposed. *See* RSMo. § 565.030.4. Instead, it is written in the negative and specifies what determinations, or lack thereof, mandate a life sentence. *Id*. For example, rather than stating, as most death-penalty statutes do, that, for a death sentence to be permissible, the jury must find that the State has proven one or more aggravating circumstances beyond a reasonable doubt, the Missouri statute addresses the issue in the negative, providing that a life sentence must be imposed "[i]f the trier does *not* find beyond a reasonable doubt at least one of the statutory aggravating circumstances." *Id*. (emphasis added).

Similarly, rather than stating that a death sentence requires a finding that "the existence of . . . aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist," Kan. Stat. Ann. § 21-6617(e), the Missouri statute addresses the opposite scenario, requiring a life sentence "[i]f the trier concludes that there is evidence in mitigation of punishment . . . which is sufficient to outweigh the evidence in aggravation of punishment found by the trier." RSMo. § 565.030.4.

Despite the negative or reverse phrasing of the statute, *Whitfield* interpreted it as

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reasonable doubt all mitigating circumstances found to exist; and (3) [a]ggravating circumstances justify a sentence of death beyond a reasonable doubt"); Kan. Stat. Ann. § 21-6617(e) (death penalty imposed if "by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances … exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist"); Tenn. Code Ann. § 39-13-204 (g)(1) ("The sentence shall be death, if the jury unanimously determines that: (A) At least one (1) statutory aggravating circumstance or several statutory aggravating circumstances have been proven by the state beyond a reasonable doubt; and (B) Such circumstance or circumstances have been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt.").

requiring affirmative findings of fact before a death sentence is permitted. 107 S.W.3d at 258-59. The Court thus concluded that the statute did not authorize death in every first-degree murder case unless one of the exceptions requiring life is found by the jury. *Id*. Instead, the Court interpreted the statute as conforming to standard practice across the country: it requires the jury to make affirmative findings of fact before a defendant is eligible for death. *Id*.

The Court's determination in *Whitfield* that a jury must make affirmative factual findings before a death sentence may be imposed requires trial courts to ask the jury more direct, and slightly different, questions than those implied by the language of the death-penalty statute. For example, with respect to statutory aggravating circumstances, the statute requires a life sentence "[i]f the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances . . ." RSMo. § 565.030.4(2). (The converse, which the Court required in *Whitfield*, is that the jury *does* find proven, beyond a reasonable doubt, at least one statutory aggravating circumstance, before a defendant is death-eligible.) Although this question (and its converse) may appear at first glance to mirror a literal reading of the statutory question, the two determinations are actually quite different.

If a trial court followed the literal wording of the statute, it would ask the jury, "Do you unanimously agree that *no* statutory aggravating circumstance was proven beyond a reasonable doubt?" While a "yes" would require a life sentence, a "no" would tell the court very little about the jury's actual findings and could not authorize a sentence of death. The jury would answer this question "no" if it unanimously found one or more

aggravating circumstances. But it would also answer "no" if some jurors found that an aggravator was proven while others concluded it was not.

Despite the statute phrasing these inquiries in the negative, with respect to the inquiry regarding an aggravating circumstance, trial courts have easily transformed the statutory language into a jury question requiring an affirmative, unanimous finding. The trial court in this case did so, asking, "Does the jury unanimously find beyond a reasonable doubt statutory aggravating circumstance or circumstances?" (Tr. 2386; D. 26, p. 1.) The jury's affirmative response reflected an actual finding: that the State had proven an aggravating circumstance, beyond a reasonable doubt.

Whitfield also requires, however, an affirmative finding regarding the relative weight of aggravating and mitigating circumstances. Again, the language of the statute phrases the inquiry in the negative: a life sentence must be imposed, "[i]f the trier concludes that there is evidence in mitigation of punishment . . . which is sufficient to outweigh the evidence in aggravation of punishment found by the trier." RSMo. § 565.030.4(3). But *Whitfield* held that a death sentence requires the jury to make an affirmative finding on this question to the detriment of the defendant. *See Whitfield*, 107 S.W.3d at 264. The Court specified that if the jury did not unanimously find "the mitigating facts outweighed the aggravating facts," a life sentence must result. *Id*.

Therefore, just as trial courts rephrase the question concerning aggravating circumstances to give effect to the statute's design, they must also rephrase the inquiry concerning weighing to ask a question that requires the jury to make an affirmative finding of fact. The revised question, mandated by *Whitfield*, would ask: "Does the jury unanimously find that the facts in aggravation are not outweighed by the facts in

mitigation?" The jury must unanimously answer yes for a death sentence to be authorized. *See id*. at 264.

The trial court here, however, did not modify the statutory language to rephrase the inquiry to a positive one. Instead, it asked the negative question, which fails to require the jury to make any actual findings: "Does the jury unanimously find that there are facts and circumstances in mitigation of punishment sufficient to outweigh facts and circumstances in aggravation of punishment?" (Tr. 4111–12; D.867, pp. 18-19.) As with the negative version of the question regarding aggravating factors, a "no" answer is entirely ambiguous. The jury may have unanimously agreed that mitigation did not outweigh aggravation, or they may have split on the answer to that question. The judge thus should have asked, "Does the jury unanimously find that the facts in aggravation are not outweighed by the facts in mitigation?" If it had done so, and the jury had answered yes, the response would have constituted a factual finding consistent with the constitution's jury trial guarantee. But because the negative question was asked, the jury finding required by *Whitfield* and the Sixth Amendment was not made here. Therefore, the death sentence violated this Court's precedent and the Sixth Amendment.

C. This Court's opinion in *State v. McLaughlin* is inconsistent with *Whitfield.*

In *State v. McLaughlin,* 265 S.W.3d 257 (Mo. banc 2008) and later in *State v. Shockley*, 410 S.W.3d 179 (Mo. banc 2013), this Court addressed the constitutional permissibility of a judicially imposed death sentence following a jury deadlock. In *McLaughlin*, following the penalty-phase evidence, the jury found that the State had proven, beyond a reasonable doubt, one aggravating circumstance. *Id*. at 261. The jury

was then asked whether it unanimously concluded "that the evidence in mitigation outweighed the evidence in aggravation of punishment." *Id*. at 264. The jury responded it did not. *Id*. at 264. After the jury was unable to agree on punishment, the trial court made its own independent factual findings, and imposed a sentence of death. *Id*. at 262.

Even though the trial court had asked the ambiguous, negative question rather than the affirmative one which would have produced a factual finding, this Court affirmed, finding no Sixth Amendment violation had occurred. The Court noted,

> [t]he jury in this case followed its instructions and answered that it did find the statutory aggravator that the crime was committed with depravity of mind in that Mr. McLaughlin committed repeated and excessive acts of physical abuse. It also specifically found that it *could not unanimously conclude that the evidence in mitigation outweighed the evidence in aggravation of punishment*. Its answers thus show that it became deadlocked only after making the necessary factual findings.

Id. at 264 (emphasis added).

This Court also rejected McLaughlin's claim that the judge's fact-finding violated the Constitution. *Id*. at 264. Without acknowledging that the plain statutory text of section 565.030.4 required a trial court to make the sentencing determinations *de novo* by conducting its own, independent factfinding when the jury is unable to agree on penalty, the Court found that the jury's previous, nonbinding factfinding was sufficient to meet Sixth Amendment muster. *Id*.

Because the *McLaughlin* jury findings were inadequate under the Sixth Amendment, as interpreted in *Whitfield*, *McLaughlin* runs contrary to *Whitfield*. As discussed in detail *supra*, *Whitfield* required an affirmative jury determination that mitigating evidence does not outweigh aggravating evidence, 107 S.W.3d at 258–59, 264,

a holding entirely consistent with the United States Supreme Court's decision in *Hurst*.

This determination, like the finding of an aggravating circumstance, must be unanimous for a death sentence to be authorized. *Whitfield*, 107 S.W.3d at 264. The question the trial court must ask, then, is the affirmative one: "Does the jury unanimously find that the facts in aggravation are not outweighed by the facts in mitigation?" The jury must unanimously answer "yes" before a death sentence may be imposed. The Court in *Whitfield* made this requirement abundantly clear by noting that, if a sentencing jury is *not unanimous* that aggravating evidence is not outweighed by mitigating evidence, a life sentence must result. *Id*.

As *Hurst* has now made clear, this Court's conclusion in *McLaughlin*, later repeated in *Shockley*, 410 S.W.3d at 185–86 and 198–99, that the "jury had found the facts necessary to make a defendant eligible for a death sentence," 265 S.W.3d at 264, proves inconsistent with both *Whitfield* and with the Sixth Amendment. The inherent contradiction in the Court's own description of these determinations is immediately evident. Without the benefit of *Hurst*, the Court contended in *McLaughlin* that the jury had made the "finding" that "that it could not unanimously conclude that the evidence in mitigation outweighed the evidence in aggravation of punishment." *Id*. But a report of what the jury *did not* find is simply not the same as an actual finding of its converse. That is what is required by *Whitfield*, and now in light of *Hurst*, by the Sixth Amendment itself. *See also State v. Clark*, 197 S.W.3d 598, 601 (Mo. banc 2006) (citing *United States v. Watts*, 519 U.S. 148, 155 (1997)) ("An acquittal is not a finding of any fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt.").

D. The United States Supreme Court's decision in *Kansas v. Marsh*, which resolved an Eighth Amendment challenge to a death penalty statute and did not present a Sixth Amendment question, is not relevant to the issue presented here.

Contributing to the inconsistencies between *Whitfield*, *McLaughlin* and *Shockley* is the Court's improper reliance on *Kansas v. Marsh*, 548 U.S. 163 (2006), to resolve Sixth Amendment questions. *See Shockley*, 410 S.W.3d at 197 n.9 (citing *Marsh* to reject a Sixth Amendment challenge to the jury instruction regarding weighing); *State v. Anderson*, 306 S.W.3d 529, 539-40 (Mo. banc 2010) (same); *State v. Johnson*, 284 S.W.3d 561, 587-89 (Mo. banc 2009) (same).

A proper understanding of *Ring*, *Hurst, Whitfield,* and *Marsh* must begin with the observation that *Ring*, *Hurst* and *Whitfield* applied the Sixth Amendment to a particular death penalty statute, while *Marsh* addresses what the Eighth Amendment requires in every death penalty case. Though the requirements of the Sixth and Eighth Amendments sometimes interact, they are distinct.

The Eighth Amendment, which mandates that the death penalty is only imposed on "those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution,'" *Roper v. Simmons*, 543 U.S. 551, 558-59 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)), governs the *substance* of what all death penalty statutes must include.

The Sixth Amendment's scope, on the other hand, is wholly determined by the terms of the statute being analyzed. Whenever a legislature chooses to make a factual finding necessary to an enhanced sentence, the Sixth Amendment requires that the

finding be made by the jury. *Apprendi*, 530 U.S. at 475 (*Apprendi*'s Sixth Amendment claim concerned the "adequacy of New Jersey's procedure," not the "substantive basis" for the statute or "[t]he strength of the state interests that are served.").

In *Marsh*, the defendant had argued that the Kansas statute violated the Eighth Amendment because it required a death sentence to be imposed when mitigating and aggravating circumstances held equal weight. 548 U.S. at 166-67. The defendant contended that the Eighth Amendment always required a life sentence to result in these circumstances, and that any statute providing to the contrary violated its protections. *Id*. The United States Supreme Court rejected that contention, finding that the Eighth Amendment imposed no such requirement. *Id*. at 175. Although the Eighth Amendment mandated the narrowing of death-eligible offenses and a consideration of mitigating evidence, *id*. at 173-75, the Court noted, "'[w]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required,'" *id*. at 175 (quoting *Franklin v. Lynaugh,* 487 U.S. 164, 179 (1988) (plurality opinion). The Court's opinion broke no new ground. It was apparent, long before *Marsh*, that the Eighth Amendment did not require a capital sentencing statute to include a formal weighing of aggravating and mitigating facts at all, much less a particular method of balancing the two. *See*, *e.g.*, *Zant v. Stephens,* 462 U.S. 862, 873-74 (1983) (approving the constitutionality of Georgia's death penalty statute in which "the jury is not instructed to give any special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any

special standard"). But the limits of the Eighth Amendment in this area do not determine the bounds of the Sixth.

Marsh concluded that the Eighth Amendment permits legislatures, if they so choose, to draft death-penalty statutes requiring a death sentence when mitigating evidence does not outweigh aggravating evidence, or to decline to include formal weighing in their statutes at all. But *Marsh* says nothing about what the Sixth Amendment requires when legislatures *do* choose to identify factual findings that are necessary for a death sentence. In other words, the legislature is free to decide if a death sentence requires no more than the consideration of mitigation, *see* Ga. Code Ann. §§ 17-10-30 and 17-10-31 (after considering mitigation, jury may recommend death if it finds proven one aggravating circumstance), or requires a finding that aggravating circumstances equal mitigating circumstances, *see* Kan. Stat. Ann. § 21-6617(e) (death sentence requires "the existence of . . . aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist"), or a finding that aggravating circumstances exceed mitigating circumstances, *see* Fla. Stat. § 921.141 (death sentence may not be imposed if "sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist"), or a finding that "sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances." *See* Neb. Rev. Stat. § 29-2522. But once the legislature has decided to require formal weighing, the Sixth Amendment requires that factual finding included in the statute to be made by a jury.

Marsh certainly does not stand for the proposition, as the Court has suggested, that, even where the State's highest Court has determined that the weighing of evidence is a necessary factual finding for the increased punishment of death, Sixth Amendment rights do not attach to the determination. *See Shockley*, 410 S.W.3d at 197 n.9; *Anderson*, 306 S.W.3d at 539–40; *Johnson*, 284 S.W.3d at 587–89. As Justice Scalia's concurrence in *Ring* acknowledged, it is irrelevant to the Sixth Amendment analysis *why* a particular factual finding appears in statutory text or whether that finding is required by the Eighth Amendment. 536 U.S. at 610–611 (Scalia, J., concurring). As long as the elements are in the statute, they are subject to the Sixth Amendment's requirements. *Id*. at 612 ("[W]hether or not the States have been erroneously coerced into the adoption of 'aggravating factors,' wherever those factors exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt.").

Therefore, although *Marsh* makes clear that the Eighth Amendment does not mandate how aggravating and mitigating circumstances must be weighed within a death penalty statute, both the legislature and this Court have *required a finding that evidence in mitigation does not outweigh evidence in aggravation* before a death sentence can be imposed. Therefore, as the *Whitfield* and *Hurst* Courts have held, these determinations are factual findings that must be made by the jury, beyond a reasonable doubt. 107 S.W.3d at 258–59; 136 S. Ct. at 622.

II. The Missouri capital sentencing statute, which requires a judge to make independent factual findings supporting a death sentence when a jury is deadlocked on punishment, violates the Sixth Amendment.

Even if this Court concludes the jury verdict here encompassed the necessary factual findings set forth in the statute, Missouri's sentencing scheme nevertheless violates the Sixth Amendment because it requires the trial court, independent of any determinations made by the jury, to find facts necessary for a sentence of death when the jury is deadlocked on punishment.

The Missouri statute requires the jury to make factual determinations regarding the presence of an aggravating circumstance, as well as the relative weight of aggravating and mitigating evidence, before it may consider whether a death sentence is warranted. RSMo. § 565.030.4; *Whitfield*, 107 S.W.3d at 258-59. Where the jury is unable to agree on the ultimate punishment, however, the statute mandates that the court alone examine the evidence presented and make independent factual findings necessary for a sentence of death. *Id*. Even assuming the jury did return a verdict encompassing the necessary factual determinations (which *Amici* contend it did not here):

> if [the jury] 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.

Id. The legislature did not instruct trial courts to only consider the aggravating circumstances found by a jury. Nor, under the statute, are trial courts bound by the determination of the jury regarding the relative weight of the aggravating and mitigating evidence. *Id*. Instead, the statute provides that the court shall follow the same procedure as

the jury, *i.e.*, conduct independent factfinding regarding the presence of aggravating circumstances and the relative weight of evidence in mitigation and aggravation, whenever it determines punishment. *Id*. *See also State v. Griffin*, 756 S.W.2d 475, 488 (Mo. banc 1988) ("[T]he court must determine punishment independently and without reliance on the results of any deliberations of the jury."); *State v. Smith*, 944 S.W.2d 901, 920 (Mo. banc 1997) (trial court independently considers each aggravating circumstance).

This statutory scheme cannot survive *Hurst*. Similar to Missouri's jury deadlock scheme, Florida employed a "hybrid" system that involved the jury, to some degree, in the determination of punishment. *Hurst*, 136 S. Ct. at 620. Merely involving the jury in a non-binding role, however, is insufficient to comply with the Sixth Amendment. *Id*. at 622. The Missouri deadlock provision is even more problematic than the statute addressed in *Hurst* because, where the Florida scheme required the court to consider the jury's conclusions and give them great weight, *id.* at 620, the Missouri statute requires an entirely new factfinding endeavor, in which the judge considers the evidence in aggravating and mitigation *de novo. See* § RSMo. 565.030.4. Sentencing schemes that "allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty" are impermissible under the Sixth Amendment. *Hurst*, 136 S. Ct. at 624; *see also Rauf v. Delaware*, 145 A.3d 430, 433 (Del. 2016) (finding Delaware capital sentencing statute violates the Sixth Amendment, in part, because it permits a "sentencing judge in a capital jury proceeding, independent of the jury, [to] find the existence of 'any aggravating circumstance,'

statutory or non-statutory, that has been alleged by the State for weighing in the selection phase of a capital sentencing proceeding").

III. Because the Missouri capital sentencing statute permits the trial court to impose a death sentence, even where the jury has failed to unanimously conclude that it is warranted, it violates the Eighth Amendment to the United States Constitution.

The states and federal government demonstrate a near uniform rejection of death sentences imposed by judges or unsupported by the unanimous agreement of the jury. In addition, unanimous jury agreement is necessary to ensure death sentences are imposed reliably, on only the most culpable defendants, and that the sentence reflects the judgment of the community. As a result, a death sentence resulting from Missouri's jury deadlock procedure violates the Eighth Amendment to the United States Constitution. *See also Hurst v. State*, 202 So. 3d 40, 59 (Fla. 2016) ("In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida's right to trial by jury, we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment.").

The Eighth Amendment prohibits "cruel and unusual punishments," U.S. Const. amend. VIII. The "standard of extreme cruelty" remains stable over time; yet, "its applicability must change as the basic mores of society change." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C. J., dissenting)). To gauge whether a punishment practice has fallen outside these evolving standards, the Supreme Court looks to objective indicia of societal consensus. *See Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

In this analysis, the Court first examines objective indicators, such as state legislation and death sentences, to determine whether the punishment or practice is consistent with contemporary standards of decency. *See Atkins*, 536 U.S. at 312. In doing so, the Court gives particular weight to legislation, "'the clearest and most reliable objective evidence of contemporary values.'" *Id.* (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

This review of societal consensus, though significant, does not "wholly determine" the constitutional permissibility of capital punishment. *Coker v. Georgia*, 433 U.S. 584, 597 (1977). Rather, "the Constitution contemplates that in the end [the Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Id*.

The Court has utilized this two-part analysis to evaluate the constitutionality of a category of sentences, *see*, *e.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005) (prohibiting the execution of juveniles); *Atkins*, *supra* (barring execution of the intellectually disabled); *Coker*, *supra* (prohibiting the death penalty as a punishment for the rape of an adult woman), as well as the adequacy of the procedures used to implement the Eighth Amendment principles contained in its precedent. *See Hall v. Florida*, 134 S. Ct. 1986, 1996-2000 (2014).

In *Hall*, the Court examined Florida's procedure for determining whether a capital defendant is intellectually disabled. In Florida, a defendant was first required to show that he had an IQ score of 70 or below. *Id*. at 1992. Only if IQ testing produced such a score would he be entitled to present additional evidence of intellectual disability. *Id*. This IQ

score cutoff was strict, and prohibited defendants whose IQ score was above 70, but still within the test's standard error of measurement, from pursuing a claim of intellectual disability. *Id*. Because Hall's lowest admissible IQ score was a 71, the Florida Supreme Court affirmed his death sentence, finding that the testing had conclusively established Hall was not intellectually disabled. *Id*.

The United States Supreme Court reversed, holding that Florida's bright-line IQ cutoff posed a procedural hurdle to establishing intellectual disability that violated the Eighth Amendment. *Id*. at 2001. As with its substantive Eighth Amendment jurisprudence, the Court looked to the national consensus by examining the means through which most states implemented the protections of *Atkins*. *Id*. at 1996. Because only two other states, in addition to Florida, had adopted a fixed-score cutoff that failed to incorporate the standard error of measurement in IQ testing, the Court found that there was "strong evidence of consensus that our society does not regard this strict cutoff as proper or humane." *Id*. at 1998; *see also Moore v. Texas*, 137 S. Ct. 1039, 1052 (2017) (finding Texas' use of "*Briseno* factors" to determine whether a capital defendant is intellectually disabled violates the Eighth Amendment, in part because "[n]o state legislature has approved the use of *Briseno* factors or anything similar"). The Court's independent judgment supported the same conclusion, finding that Florida's law "created an unacceptable risk that persons with intellectual disability will be executed." *Id*. at 1990. The reasoning in *Hall* demonstrates that, where a state has adopted an outlier procedure that fails to adequately protect a defendant's substantive Eighth Amendment

rights, that "rule is invalid under the Constitution's Cruel and Unusual Punishments Clause." *Id*. at 2001.

Application of *Hall*'s analysis to a judge-imposed death sentence following a jury deadlock on penalty demonstrates that it does not withstand constitutional scrutiny. There is a strong national consensus against judge-imposed death sentences, as well as death sentences premised on non-unanimous jury verdicts. In addition, such a procedure fails to provide the heightened reliability in capital sentencing that the Eighth Amendment requires.

A. The nationwide consensus rejects death sentences that are unsupported by a unanimous jury verdict.

Because requiring a unanimous jury to determine whether a defendant deserves the ultimate punishment produces more reliable results that are reflective of the community's judgment, the vast majority of death-penalty jurisdictions require the unanimous agreement of twelve jurors before a death sentence may be imposed. Missouri, which permits a judge alone to impose a death sentence where the jury cannot agree, is a clear outlier.

There is a nationwide consensus against death sentences imposed by judges and pursuant to non-unanimous jury verdicts. In twenty jurisdictions, capital punishment is prohibited and can never be imposed.[4] The practices of these jurisdictions, which have

[4] These jurisdictions are Alaska, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. *See States with and without the death penalty*, Death Penalty Information Center ("DPIC") (Nov. 9, 2016), https://deathpenaltyinfo.org/states-and-without-death-penalty.

entirely rejected the death penalty, are relevant to the consensus analysis. *See Roper*, 543 U.S. at 564 (counting thirty states that prohibit the death penalty for juveniles, including 12 that have abolished the death penalty entirely and 18 that permit it, but not as applied to children).

In the vast majority of jurisdictions that do authorize the death penalty,[5] a death sentence may be imposed only if a unanimous jury determines the sentence is warranted. If there is no unanimous agreement, either the penalty phase must be retried, or a life sentence must follow.

Only five jurisdictions nationwide permit a death sentence to be imposed where a sentencing jury has not unanimously concluded the sentence is warranted. Those states are Alabama, Indiana, Nebraska, Missouri, and Montana. *See*, *e.g.*, *Hurst*, 202 So. 3d at

[5] These jurisdictions are Arizona, Ariz. Rev. Stat. Ann. § 13-752 (retrial, but life after second deadlock), Arkansas, Ark. Code Ann. § 5-4-603 (life sentence), California, Cal. Penal Code § 190.4(b) (retrial, but life after second deadlock), Colorado, Colo. Rev. Stat. § 18-1.3-1201 (life sentence), Florida, Fla. Stat. § 941.141(life sentence), Georgia, Ga. Code Ann. § 17-10-31(c) (life sentence), Idaho, Idaho Code Ann. § 19-2515 (life sentence), Kansas, Kan. Stat. Ann. § 21-6617(e)(life sentence), Kentucky, Ky. Rev. Stat. § 532.025 (retrial), Louisiana, La. Code Crim. Proc. Ann. art. 905.8 (life sentence), Mississippi, Miss. Code Ann. § 99-19-101(3); 99-19-103 (life sentence), Nevada, Nev. Rev. Stat. § 175.556 (life sentence or retrial), New Hampshire, N.H. Rev. Stat. Ann. § 630:5(IX)(life sentence), North Carolina, N.C. Gen. Stat. Ann. § 15A-2000(b)(life sentence), Ohio, Ohio Rev. Code Ann. § 2929.03(D)(2)(a)(life sentence), Oklahoma, Okla. Stat. tit. 21, § 701.11 (life sentence), Oregon, Or. Rev. Stat. Ann. § 163.150 (life sentence), Pennsylvania, 42 Pa. Stat. and Cons. Stat. Ann. § 9711 (life sentence), South Carolina, S.C. Code Ann. § 16-3-20 (life sentence), South Dakota, S.D. Codified Laws § 23A-27A-4 (life sentence), Tennessee, Tenn. Code. Ann. § 39-13-204 (life sentence), Texas, Tex. Code Crim. Proc. Ann. art. 37.071 (life sentence), Utah, Utah Code Ann. § 76-3-207(4) (life sentence), Virginia, Va. Code Ann. § 19.2-264.4 (life sentence), Washington, Wash. Rev. Code Ann. § 10.95.080 (life sentence), Wyoming, Wyo. Stat. Ann. § 6-2-102 (life sentence), and the federal government, 18 U.S.C. § 3593 (life sentence).

61 (noting, as of the time of the opinion, "Florida [was] one of only three [states] that [did] not require a unanimous recommendation for death"). One of these states—Montana—is functionally abolitionist because no defendant has been sentenced to death there in more than 20 years.[6] *See Hall*, 134 S. Ct. at 1997 (counting Oregon as abolitionist because it has suspended the death penalty and executed only two individuals in fifty years). Nebraska's law places the death-sentence determination exclusively in the hands of a three-judge panel. Neb. Rev. St. § 29-2522. Alabama permits a death sentence on a jury's vote of 10-2, but now prohibits the judge from imposing a death sentence if ten jurors cannot agree death is warranted. Ala. Stat. Ann. 13A-5-46.[7] Only Missouri and Indiana legislatively authorize a judge to impose a death sentence when a jury has deadlocked during its penalty deliberations. RSMo. § 565.030(4); Ind. Code Ann. § 35-50-2-9(f).

That only four active death-penalty jurisdictions permit a death sentence to be imposed in the absence of a jury's unanimous agreement on punishment weighs heavily against its constitutionality. As in *Hall*, which addressed procedures adopted by only three death-penalty states, the scarcity of state laws permitting capital sentencing without a unanimous jury penalty verdict is "strong evidence of consensus that our society does not regard this [procedure] as proper or humane." 134 S. Ct. at 1998; *see also Coker*, 433

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[6] *Death Sentences in the United States From 1977 By State and By Year*, DPIC, https://deathpenaltyinfo.org/death-sentences-united-states-1977-present (showing no death sentences imposed in Montana since 1996).

[7] Thus, even in the leading death-penalty state of Alabama, Wood could not be sentenced to death based on the jury vote in this case.

U.S. at 596 (death penalty for rape of an adult woman held unconstitutional, in part, because Georgia was the only state in the country that authorized such a punishment and therefore the nation's collective judgment on the penalty "obviously weigh[ed] very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman").

B. Death sentences imposed in the absence of unanimous jury agreement fail to reflect the community consensus and are not sufficiently reliable to comply with the Eighth Amendment.

In addition to evaluating consensus, the Court must also exercise its "own judgment . . . on the question of the acceptability of the death penalty under the Eighth Amendment." *Hall*, 134 S. Ct. at 2000 (quoting *Coker*, 433 U.S. at 597). Judge-imposed death sentences, in the absence of unanimous jury agreement, fail in this respect as well.

Because of the severity and finality of the punishment, the Eighth Amendment demands heightened "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). The Supreme Court has required multiple procedures and protections in capital cases to ensure that the death penalty is only imposed on "offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319). *See*, *e.g.*, *Woodson*, *supra* (prohibiting a mandatory death penalty); *Lockett v. Ohio*, 438 U.S. 586 (1978) (requiring full consideration of mitigation); *Godfrey v. Georgia*, 446 U.S. 420 (1980) (requiring aggravating circumstances to meaningfully narrow the number of death-eligible offenses).

"[C]apital punishment is an expression of society's moral outrage at particularly offensive conduct," *Gregg v. Georgia*, 428 U.S. 153, 183 (1976), and a sentence of death thus "expresses the community's judgment that no lesser sanction will provide an adequate response to the defendant's outrageous affront to humanity." *Harris v. Alabama*, 513 U.S. 504, 518 (1995) (Stevens, J., dissenting and citing *Gregg*, 428 U.S. at 184). Jurors "possess an important comparative advantage over judges . . . [because] they are more likely to 'express the conscience of the community' on the ultimate question of life or death." *Ring*, 536 U.S. at 615-16 (Breyer, J., concurring in judgment) (citation omitted); *see also Woodward v. Alabama*, 134 S. Ct. 405, 409 (2013) (Sotomayor, J., dissenting from denial of certiorari) (commenting that "[b]y permitting a single trial judge's view to displace that of a jury representing a cross-section of the community, Alabama's sentencing scheme has led to curious and potentially arbitrary outcomes").

The use of the death penalty has declined precipitously in recent years, and polling shows that the nation's citizens are increasingly opposed to the punishment.[8] Further, many people, even those generally in favor of capital punishment, are concerned about the risk of executing an innocent person, the low likelihood that the death penalty deters murder, and the likely impact of race and ethnicity in death penalty determinations.[9] Perhaps as a result of these widespread concerns, new death sentences and executions are

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[8] Baxter Oliphant, *Support for death penalty lowest in more than four decades*, Pew Research Center (Sept. 29, 2016), http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/.

[9] Pew Research Center, *Less Support for Death Penalty, Especially Among Democrats* (April 16, 2015), http://www.people-press.org/2015/04/16/less-support-for-death-penalty-especially-among-democrats/.

at near-record lows.[10] The number of active death-penalty jurisdictions is small and getting smaller, with only a handful of counties imposing any death sentences at all in 2017.[11]

This dramatic geographic diversity in the use of the death penalty "argues strongly for procedures that will help assure that, in a particular case, the community indeed believes application of the death penalty is appropriate, not 'cruel,' 'unusual,' or otherwise unwarranted." *Ring*, 536 U.S. at 618 (Breyer, J., concurring). Because the jury is "uniquely capable of determining whether, given the community's views, capital punishment is appropriate in the particular case at hand," *id*. at 616, concerns about reliability demand that "the decision to impose the death penalty is made by a jury rather than by a single governmental official." *Spaziano v. Florida*, 468 U.S. 447, 469 (1984) (Stevens, J., concurring in part and dissenting in part), majority opinion *overruled by Hurst v. Florida*, 136 S. Ct. 616 (2016).

C. Because it runs contrary to the national consensus and fails to guarantee the necessary heightened reliability, a death sentence imposed following a jury deadlock on punishment violates the Eighth Amendment.

Where, as here, the death penalty is imposed in a manner contrary to the national consensus, fails to adequately implement Supreme Court precedent, and undermines rather than promotes the reliability of capital sentencing proceedings, the practice is necessarily invalid under the Eighth Amendment. *See Hall*, 134 S. Ct. at 2001; *Hurst*,

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[10] Death Penalty Information Center, *The Death Penalty in 2017: Year End Report* (Dec. 14, 2017), https://deathpenaltyinfo.org/YearEnd2017.

[11] *Id.*

202 So. 3d at 61-63. Because the jury failed to unanimously agree that death was the appropriate punishment, this Court must vacate the death sentence and remand for a life sentence to be imposed.

Respectfully submitted,

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Certificate of Service and Compliance

The undersigned hereby certifies that on December 5, 2018, the foregoing amicus brief was filed electronically and served automatically on the counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 8,590 words (excluding the cover, signature block, and this certificate of service and compliance), as determined using the word-count feature of Microsoft Office Word. Finally, the undersigned certifies that the electronically filed brief was scanned and found to be virus-free.

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