IN THE
SUPREME COURT OF MISSOURI
No. 96924

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

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Craig Wood was convicted of one count of first-degree murder, §565.020 (Tr.3621).[1] After a jury could not decide that death was the appropriate punishment (Tr.4110-12;D.867,p.18-19;Appx.A2-A3), the trial court reconsidered the facts, made its own independent findings, and imposed a death sentence (Tr.4166-69;Appx.A8-A9). Notice of appeal was timely filed (D.884). This Court has exclusive jurisdiction. Mo.Const.,Art.V,§3.

[1] All statutory references are to the Missouri Revised Statutes, 2000 edition, unless otherwise noted.

STATEMENT OF FACTS

Until the afternoon of February 18, 2014, Craig Wood seemed like just a regular guy. At age 45, he had no prior criminal history of note, only a misdemeanor possession of marijuana and a drunk driving charge (Tr.3808). He was a loving and devoted son who, most days and in any type of weather, drove to his parents' farm to help them by caring for the animals and doing heavy work (Tr.3825-26,3879,3993-94). He was good with the animals, very calm, and trained the horses (Tr.3994-95).

Wood coached football at a middle school and a high school and supervised in-school suspension at the middle school (Tr.3220-25). He was well-liked; he was thought of as a good coach and a good person (Tr.3249). In the eight years Wood had been at the school, there had never been a complaint about inappropriate behavior (Tr.3229,3248-49).

But depression and substance abuse ran in Wood's family (Tr.3810-11,3814,3981). His father, Jim, had a major depressive disorder and saw signs that Wood suffered from the same severe depression (Tr.3816). Wood had been very popular in high school, but always felt like an outsider (Tr.3789). He had a girlfriend from the eighth or ninth grade into college, but when she broke up with him, he never had another adult relationship (Tr.3790-91,3866,3953-54). He largely had the same circle of friends he had in third grade (Tr.3789,3868).

Wood's depression kept him from fully transitioning into adult life (Tr.3787). He seemed unable to reach his potential (Tr.3817,3788). Wood graduated from Southwest Missouri State, where he had been "a seven year senior" (Tr.3791,3869). He studied for his Masters, but suddenly dropped out even though he was doing well (Tr.3791). Wood

would drive aimlessly for hours (Tr.3818). He lacked stability in his life, felt isolated, and believed his parents were disappointed in him (Tr.3817,3878,3957).

Even in his forties, Wood needed help from his parents for things most adults handle on their own. For example, Wood's parents set him up in a house (Tr.3919,3959). The house was in Jim's name paid for with money Wood received from an inheritance (Tr.3876). The truck Wood drove was registered to Jim (Tr.3876). Jim repeatedly helped Wood find employment at Jim's places of work (Tr.3793-95,3804-05).

Wood had become less outgoing and social, and friends knew he was depressed (Tr.3878,3957). In addition, Wood was a functioning alcoholic who drank at least 8-12 beers on weeknights and even more on the weekends (Tr.3916-17,3955). He could drink a case of beer by himself and did so pretty regularly, and he smoked marijuana almost every day (Tr.3917,3927,3965-66). In the 6-7 months leading up to February 2014, Wood used methamphetamine "quite often" (Tr.3920-21).

The Edwards' Eyewitness Accounts

On the afternoon of February 18, 2014, Carlos and Michelle Edwards chatted in the garage of their home at 3247 W. Lombard Street, in Springfield, Missouri (Tr.2908,2936). Earlier, Mr. Edwards had noticed a tan Ford Ranger drive down the street several times (Tr.2925,2934-35). At about 4:45 p.m., Mr. and Mrs. Edwards saw ten-year-old Hailey Owens walking down the sidewalk as the Ranger reappeared (Tr.2906,2926). The Ranger's driver, later identified as Craig Wood, spoke briefly with Hailey before pulling her into the truck and speeding away (Tr.2917-18,2922,2926,2941-42). The man had worn nothing to mask his appearance (Tr.2948-49,3552). Mrs. Edwards got the Ranger's license

plate number and immediately called 9-1-1 (Tr.2918). She described a man who matched Wood's appearance (Tr.2921,2943-44).

A neighbor found Hailey's cellphone in his yard (Tr.2957,2964). At the guilt phase of trial, over objection, the State presented 32 photographs Hailey took on the cellphone from 11:10 that morning to 4:40 that afternoon (Tr.2996-97,3004-3008). They included 14 "selfies," as well as photographs of her dog, family, friends, stuffed animals and toys, her friend's handwritten lyrics to a Katy Perry song, and others (Ex.14-45).

The Ranger was registered to Jim and Regina Wood (Tr.3025). But the primary driver was the Woods' son Craig, who lived twelve minutes away from where Hailey was taken (Tr.3024-25,3081,3548). Around 8:00 p.m., police officers drove by Wood's home but saw no vehicles or activity, so they waited (Tr.2974,2976-78,3027-29,3082). At about 8:30 p.m., a Ranger matching the description and with the license plate number Mrs. Edwards gave pulled into the driveway (Tr.2978-79,3029,3031-32).

Craig Wood exited the Ranger (Tr.2981-82,2986). Officers pulled in behind and identified themselves (Tr.3032). Appearing startled, Wood said hello and walked toward them (Tr.2981,3032). He tossed a roll of duct tape into the truck bed (Tr.2982,3032-33). On the dashboard, a bag held a pipe and lighter (Tr.3341,3353-54). Beer cans littered the passenger floorboard (Tr.3015).

Wood complied with the officers' requests (Tr.3010,3072). When asked if he knew why they were there, Wood nodded yes (Tr.2982-83,3036). He was nervous, breathing

heavily, and smelled of bleach (Tr.2983,3034). He did not appear under the influence of drugs or alcohol (Tr.2989,3011,3066-67,3200,3202,3550).[2]

Wood willingly accompanied the officers to police headquarters (Tr.2987,3037, 3084). After being advised of his rights, he denied knowing anything about Hailey (Ex.85;Tr.3085-87). Wood told police he had been doing laundry at a laundromat (Ex.85,at 20:51:50).[3]

Wood fully cooperated as he was booked, fingerprinted, and swabbed for a reverse rape kit (Tr.3100,3106-07,3202). He had a small abrasion and dried blood on his lower lip, dried blood on his pinkie finger, redness and a red vertical mark on his neck, and a red vertical mark on his right hip near the groin area (Tr.3104-05). His hat appeared to have bleach stains (Tr.3103,3106).

Search of Wood's House

The back door of Wood's house was unlocked, so officers entered (Tr.3049). The steps to the basement were wet, and a strong odor of bleach emanated from below (Tr.3052). The basement floor itself was completely wet, and two empty bottles of bleach lay about (Tr.3052,3054,3144-47). A fan was running, and a scrap of duct tape was on the floor (Tr.3062,3148). The officers found several plastic tubs but did not open them (Tr.3067). Because they could not find Hailey, they left and secured the house (Tr.3055).

[2] Co-workers who saw Wood before school started and when it let out that day thought he acted normal, not under the influence of drugs or alcohol (Tr.3223-24,3246-47).
[3] Officers later retrieved the laundry, which included bedding (Tr.3252,3258-59,3315-20).

After obtaining a warrant, officers opened a large plastic tub in the basement and found Hailey's naked body (Tr.3057-60,3063-64,3142,3379-80,3412-13). She had died from a gunshot wound to the back of her neck caused by a smaller caliber bullet (Tr.3381,3433-34). Water, blood, and bleach had settled on the bottom of the tub (Tr.3065,3382,3526-27). A .22-caliber shell casing was on the basement floor (Tr.3153). Three bottles of bleach were on the house's main floor (Tr.3050,3136,3155). No linens were on Wood's bed (Tr.3165).

The police located a .22-caliber Ruger 10/22 rifle in a locked gun safe (Tr.3180). A .22-caliber bullet lay on the floor outside the gun safe (Tr.3181;Ex.366-67). Testing revealed that the shell casing found in the basement was ejected from the .22-caliber Ruger (Tr.3463-64). A large bullet fragment recovered from the autopsy shared characteristics with the Ruger (Tr.3460-61).

In addition to introducing evidence of the gun used to kill Hailey, the prosecutor, over objection, presented testimony and 29 photographs relating to ten guns scattered around Wood's house, at least ten more guns in the gun safe, and various gun-related items, such as a speed loader, ammunition, and a reloading station (Tr.3159-69;3177-83;Ex.304-315,330-332,336-37,357-361,363-64,369-73). The prosecutor elicited the purpose of a speed reloader and how it worked (Tr.3179). He had a witness mark on a diagram of Wood's house the location of the guns scattered around the house (Tr.3182;Ex.49). He elicited that these guns were of a larger caliber than the .22-caliber rifle used to kill Hailey and that the .22-caliber Ruger made less noise and mess than the other weapons (Tr.3159-62,3167,3186).

Over objection, the prosecutor also elicited that a purple folder was found in Wood's bedroom (Tr.3167). It contained two fictional stories written by Wood, each describing a sexual encounter with a 13-year-old girl (Tr.3171,3173-74,3216-17,3466,3473). The folder contained schedules for two middle school students at the school where Wood worked and five photographs of four female students (Tr.3170,3224). Each of the four girls was interviewed at the Child Advocacy Center and said that Wood had never done anything to make them feel at all uncomfortable (Tr.3554). Last, the folder held a handwritten, fictional letter dated May 30, 1986, in which a female discussed a consensual sexual encounter (Tr.3171;Ex.343,344).

In the living room, officers found drug residue and drug paraphernalia (Tr.3194-96,3198). Later, marijuana and a tin containing a plastic straw, hollowed-out Bic pen, and baggie of crystalline substance, apparently methamphetamine, were also found (Tr.3555-57).

Other Evidence

Clothing matching Hailey's was found in a dumpster behind a strip mall (Tr. 3277-78,3287). Surveillance video showed Wood raising the dumpster lid around 7:00 p.m. (Tr.3297,3544). A hair found on the dumpster items was microscopically consistent with Wood's hair and dissimilar from Hailey's (Tr.3497). DNA testing could not exclude Wood as being the source of the hair (Tr.3513).

Surveillance video and sales receipts showed that Wood went to Walmart twice that night (Tr.2991). He first arrived at 5:36 p.m., about 50 minutes after Hailey was taken

(Tr.3542). He bought Liquid Plummer and two bottles of bleach (Tr.2992,3265,3271-72). At 8:17 p.m., he bought a laundry bag and duct tape (Tr.2993,3267,3273,3337).

The autopsy revealed possible bruising at the base of Hailey's thumb suggesting her hand had been gripped, and ligature abrasions and contusions on her wrists suggesting she struggled against the restraints (Tr.3381-82, 3415,3416-18,3424-25). She had a bruise on her left cheek and lip, two scrapes on her lower abdomen, and a scrape and bruise beneath her right ear (Tr.3381,3419-20,3422,3425). Hailey had tearing and bruising to her vaginal and anal areas consistent with blunt force trauma from an erect male penis (Tr.3426-29). Her body was tested for the presence of semen but none was found (Tr.3520).

A swab from the passenger side armrest of Wood's truck contained a mixture of DNA; Hailey was the major contributor with a random match probability rarer than one in 6 trillion individuals (Tr.3333,3523).

Wood's t-shirt had two apparent blood stains (Tr.3088,3102,3524). One was identified as blood; DNA testing revealed Hailey as the source (Tr.3525). The other stain was only presumptively blood; no DNA was obtained (Tr.3525).

Procedural Matters

Wood was charged with one count of first-degree murder, one count of armed criminal action, one count of child kidnapping, one count of rape, and one count of sodomy (Doc.649,p.1-2). The State proceeded to trial only on the murder count (Tr.1267). Because of intensive pretrial publicity, a jury was chosen from Platte County (D.659,707).

The prosecutor moved to strike Venireperson 114 for cause even though she stated she could meaningfully consider the death penalty but was generally opposed to it

(App.Ex.1,p.8-10;Tr.2186-90). Venireperson 114 initially stated she did not think she could sign the verdict form if selected as foreperson (Tr.2190). But when defense counsel further explained the process, she stated she could (Tr.2240-41). Over defense objection, the court granted the State's strike for cause (Tr.2258-65,2267,2457-60).

Evidence was presented as set forth above (Tr.2905-3558). The jury convicted Wood of first-degree murder (Tr.3621).

The State's Penalty Phase Evidence

At the penalty phase, the State presented evidence that up until the charged crime, no connection existed between Wood and Hailey or her family (Tr.3699). The State called six victim impact witnesses: the mother of Mackenzie (the friend Hailey had been visiting before she was taken), Hailey's teacher, her great-grandmother, two aunts, and a local pastor (Tr.3705-79). The witnesses testified that Hailey was a happy, enjoyable, fun-loving child who always gave her best effort, encouraged others, and gave gifts (Tr.3717-20,3752). She loved to run, dance, play outdoors, shop, and have her hair and nails done (Tr.3729-31,3734).

Hailey's death left "an unfillable void" in the lives of her family members (Tr.3749). Every day, Hailey's aunt had to explain to Hailey's brother why he cannot see his sister anymore and that not everyone is a bad person who will try to hurt him (Tr.3749). Hailey's brother used to be bubbly and outgoing but now was "very closed off" (Tr.3749,3751). At age 15, he was afraid to go outside by himself at dark (Tr.3751).

After Hailey's death, school was very difficult for her teacher and classmates, and the children's behavior changed (Tr.3720-21,3727-28). They made a memory book for Hailey and built a memorial (Tr.3719,3721).

Hailey's friend Mackenzie distanced herself from her friends and her mother (Tr.3712). Every night, she sleeps with a stuffed animal that reminds her of Hailey (Tr.3712). Mackenzie's mother's own relationships had changed, and she regretted sending Hailey home that afternoon (Tr.3712,3716).

Defense counsel objected that the prosecutor's questioning was intentionally posed to make the witnesses extremely emotional (and thus the jurors too), that two of the witnesses were crying almost as soon as they started testifying, and that Hailey's family members and at least five jurors were crying (Tr.3713,3723,3726). The court did not refute counsel's assertion as to the number of jurors crying but noted there had been no "uncontrollable sobbing" and overruled the objection (Tr.3725-26).

Over objection, the prosecutor presented testimony that a few days after Hailey's death, over 10,000 people attended a vigil for Hailey in downtown Springfield (Tr.3760-61). The prosecutor also elicited, over objection, from a local pastor that "[c]ountless parents" told him they no longer let their children play unsupervised in the front yard, and they "think a lot harder before they let their kids walk to school or just walk down the street to a friend's house" (Tr.3770-71). The crime had changed Springfield from a town into a city (Tr.3770-71).

The Defense's Penalty Phase Evidence

Wood presented testimony from his parents, three friends, a priest, and two guards from the Greene County Jail (Tr.3780-4020). Despite Wood's problems with depression and substance abuse, he was consistently employed (Tr.3792-95,3804-05,3869) and had no criminal history of note (Tr.3808).

When Wood was 18, a fire broke out in his apartment building one night (Tr.3863-64). Wood warned the upstairs neighbors and then ran around to the front of the building, kicked in the door, and carried out the elderly man who lived there, saving him from the fire (Tr.3863-64).

Wood loved football and coached because he wanted to make a positive impact on the lives of young men (Tr.3795-96,3801-02). Parents sent Wood notes expressing their appreciation:

> Thank you so much for helping our son, [J.T.], learn a new sport (for him) and grow under your guidance, attention, and care. We really appreciate all the extra efforts that you personally made to help him feel like he was a part of the team. He grew up under your care, and we think that he grew nicely with your watchful eye and your attention.
>
> I am sure he plans to play next year just because of what you did with and for him in the 3 short months you coached him.
>
> Caring, observant, and generous souls like you should be commented [sic] more often for the hard and dedicated work that you do for our children. We commend you for a job well done, not only for all the boys, but especially for our son.

(Def.Ex.523). Another parent wrote, "Thanks for all you do for our kids, we really appreciate you! [C___] enjoyed the season and thinks the world of you." (Def.Ex.513).

Wood played in bands in high school and throughout his twenties (Tr.3870). For the past ten years, Wood and several other friends have played together in a bluegrass band (Tr.3870-71). The band did not get paid for their gigs but enjoyed entertaining people (Tr.3871-72,3964).

When Wood was arrested, his friends and co-workers were in shock and disbelief because the crime was so far out of character (Tr.3229,3249,3928,3968). Wood was not a violent person; he was much more likely to break up a fight than to start one (Tr.3881). None of Wood's friends or co-workers ever had an inkling that Wood fantasized about young teenage girls (Tr.3225,3228,3929). His friends will continue to visit and write to Wood despite his murder conviction (Tr.3886-87,3931-32,3972).

Since his arrest, Wood had a renewal of faith and read the Bible and other books about Christianity (Tr.3831-32). Every Thursday morning, Wood met with a Catholic priest (Tr.4015). Wood spoke about his difficulties coming to terms with what he had done and how he suffered from nightmares and had difficulty sleeping (Tr.4013). Before he started meeting with the priest, Wood considered suicide and had saved up his medication to make an attempt (Tr.4016). He felt terrible about the impact his actions had on Hailey's family, and he condemned himself (Tr.4016,4018). He was genuinely remorseful for his crimes (Tr.4018) and appreciative of the priest's time with him (Tr.4019).

Every week in the 3.5 years from Wood's arrest to the trial, his parents made the half hour drive to visit Wood through glass at the Greene County Jail (Tr.3782-83,3785). It was so important to them that Jim changed his teaching schedule to accommodate the jail visiting hours (Tr.3783). Wood's parents love him and will continue to visit him

(Tr.3785-86,3847,3996). In turn, Wood shows compassion and care for his parents, writing letters and calling them almost every day (Tr.3996-97).

In the 3.5 years at the jail, Wood was reprimanded just once, for hoarding his medication (Tr.3905,3948). Because the jail was concerned that Wood hoarded the medication to attempt suicide, he received weekly therapy sessions (Tr.3905-06). He was calm, obedient and respectful toward the guards (Tr.3906-07,3946,3948). Any issues were caused by Wood's long-term solitary confinement (Tr.3907). He never damaged jail property, was disruptive, got violent, or threatened anyone (Tr.3943-46).

Penalty Phase Verdict

At the penalty phase instructional conference, Wood renewed his pretrial argument that Missouri's deadlock procedure violated his right to trial by jury by allowing the judge to make the critical findings necessary to impose the death penalty and that any death sentence must be rendered by a unanimous jury (D.782).[4] Wood also renewed his motion to bar the State from seeking a death sentence because Missouri's death penalty procedures fail to genuinely narrow the class of persons eligible for the death penalty (D.783;Tr.4050-51).[5] The court denied each of Wood's renewed objections (Tr.4050-51).

Before trial, Wood had moved for permission to elicit that Hailey's mother wanted Wood to receive a sentence of life without parole, and Hailey's mother testified to that effect at a pretrial hearing (D.777;Tr.819-23). But the prosecutor objected (D.780,p.1-3;Tr.823-32,848-49), and the court denied the motion (D.607,p.77). Having kept out

[4] See Arg.IV,V.
[5] See Arg.IX.

evidence that Hailey's mother wanted a sentence of life without parole, the prosecutor argued during penalty phase closing, over defense objection, that by imposing a death sentence, the jury would be speaking for Hailey and her family (Tr.4082-83).

The jurors could not agree that Wood should receive a death sentence (Tr.4110; Appx.A2-A3). They listed six statutory aggravating circumstances they found beyond a reasonable doubt, and they vouched they did not "unanimously find there are facts and circumstances in mitigation of punishment sufficient to outweigh facts and circumstances in aggravation of punishment" (Tr.4111-12;D.867,p.18-19;Appx.A2-A3).

Judge Mountjoy denied Wood's motion for new trial (Tr.4131). He then denied Wood's written motion asking the court to impose a sentence of life without parole because Missouri's death penalty procedures were unconstitutional (D.869). Before the court assessed punishment, defense counsel again argued for a sentence of life without parole because the court could not impose a death sentence without the unanimous vote of the jury (Tr.4161-63).

Judge Mountjoy found that the State had proven each of the six aggravating circumstances beyond a reasonable doubt (Tr.4166;Appx.A8-A9). He also found that the circumstances in mitigation did not outweigh the circumstances in aggravation (Tr.4166; Appx.A8-A9). Judge Mountjoy then imposed a death sentence (Tr.4169;Appx.A4-A9).

APPLICABLE STANDARDS

To avoid unnecessary repetition, the following standards are incorporated by reference in their entirety into the specified Points.

The standard of review applicable to Points I-III, VI, and VIII is as follows:

"A trial court has wide discretion in deciding whether to admit evidence, and its decision will only be overturned for an abuse of discretion." *State v. Hosier*, 454 S.W.3d 883, 895 (Mo.banc2015). An abuse of discretion occurs when the ruling is clearly against the logic of the circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Brown*, 939 S.W.2d 882, 883-84 (Mo.banc1997).

The standard of review applicable to Points IV-V and IX is as follows:

Constitutional challenges to a statute are reviewed *de novo*. *State v. Harris*, 414 S.W.3d 447, 449 (Mo.banc2013). Statutes are presumed to be valid and will not be found unconstitutional unless they clearly contravene a constitutional provision. *Id.* (quoting *State v. Mixon*, 391 S.W.3d 881, 883 (Mo.banc2012)).

POINTS RELIED ON

I.

The trial court abused its discretion in overruling Wood's objections and admitting in guilt phase State's Exhibits 14-45, thirty-two photographs found on Hailey's cell phone, in violation of Wood's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution, because most of the photographs were either irrelevant or cumulative and amounted to victim impact evidence wrongfully admitted during the guilt phase, in that the majority of the photographs were offered to show a five-hour timeline of events before Hailey was kidnapped when such a timeline had no relevance, and while a few of the photographs may have been relevant to show Hailey's clothing or lack of injuries, the State bombarded the jury with fourteen of Hailey's "selfies," plus family photos, photos of Hailey's friends, the family dog, children's toys and a stuffed animal, handwritten song lyrics, and others, the cumulative prejudicial effect of which caused the guilt and penalty phase verdicts to be based on emotion, not the facts and law.

Ragan v. State, 792 S.E.2d 342 (Ga.2016);

State v. Floyd, 360 S.W.2d 630 (Mo.1962);

State v. Robinson, 328 S.W.2d 667 (Mo.1959);

State v. Taylor, 663 S.W.2d 235 (Mo.banc1984);

U.S.Const.,Amends.V,XIV;

Mo.Const.,Art.I,§§10,18(a); and MAI-CR3d 314.44.

II.

The trial court abused its discretion in overruling Wood's objections and allowing the State to present testimony and 29 photographs (State's Exhibits 304-315, 330-332,336-37,357-361,363-64,369-73) of at least twenty firearms, plus ammunition, gun cases, a speed reloader, and reloading equipment and supplies, that were unrelated to the charged murder, because this testimony and evidence violated Wood's right to due process, a fair trial, and a fair and reliable sentencing proceeding, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§10, 18(a), and 21 of the Missouri Constitution, in that the evidence was irrelevant and prejudicial because although these weapons and gun-related items were found in Wood's home, they had no connection to the crime charged and did not make it more likely that Wood committed the charged crime or was more deserving of the death penalty, yet were highly prejudicial, serving only to depict Wood as a gun-crazed, militaristic, unstable, and dangerous person with a propensity for violence.

State v. Holbert, 416 S.W.2d 129 (Mo.1967);

State v. Krebs, 106 S.W.2d 428 (Mo.1937);

State v. Perry, 689 S.W.2d 123 (Mo.App.W.D.1985);

State v. Rupe, 683 P.2d 571 (Wash.1984);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21; and

MAI-CR3d 314.44.

III.

The trial court abused its discretion in overruling Wood's objections and allowing the State to present guilt phase testimony and evidence (State's Exhibits 340-348) regarding the contents of a purple folder containing photographs of four of Wood's female students, a letter, and two fictional stories Wood wrote depicting graphic details of two sexual interludes with thirteen-year-old girls, because this violated Wood's right to due process, a fair trial, and to be tried for the offense with which he was charged, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§10, 17, and 18(a) of the Missouri Constitution, in that the evidence was impermissible evidence of uncharged bad acts because it was intended to show that Wood was a pervert who acted in conformity with that character trait; Wood's motive for the kidnapping, rape, and sodomy was not truly at issue and, at any rate, was obvious from the nature of the crime; and the prejudicial effect of the stories and photographs far exceeded any possible probative value.

State v. Alexander, 875 S.W.2d 924 (Mo.App.S.D.1994);

State v. Barriner, 34 S.W.3d 139 (Mo.banc2000);

State v. Collins, 669 S.W.2d 933 (Mo.banc1984);

State v. Nelson, 501 S.E.2d 716 (S.Car.1998);

U.S.Const.,Amends.V,VI,XIV; and

Mo.Const.,Art.I,§§10,17,18(a),18(c).

IV.

The trial court erred in overruling Wood's motion regarding the unconstitutionality of Missouri's death penalty procedure, his written and oral objections to the judge repeating the steps of the death penalty procedure and determining the sentence, and in imposing a death sentence after the jury deadlocked on punishment, because Missouri's capital sentencing procedure impermissibly allows the imposition of a death sentence that is based on a judge's fact-finding on the critical issues in the sentencing process in violation of Wood's right to trial by jury, due process, and unanimous jury findings at each critical step including the final assessment of sentence, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §22(a) of the Missouri Constitution, in that §565.030 and §565.032 impermissibly allow a judge to make the critical findings necessary for imposition of a death sentence when the jury is not unanimous in weighing aggravating and mitigating circumstances and when the jury cannot unanimously decide that death is the appropriate punishment.

Hurst v. Florida, 136 S.Ct. 616 (2016);

Hurst v. State, 202 So.3d 40 (Fla.2016);

Rauf v. Delaware, 145 A.3d 430 (Del.2016);

State v. Whitfield, 107 S.W.3d 253 (Mo.banc2003);

U.S.Const.,Amends.VI,XIV;

Mo.Const.,Art.I,§22(a);

§§565.030,565.032,565.040; and MAI-CR3d 314.48, 314.58.

V.

The trial court erred in overruling Wood's motions regarding the unconstitutionality of Missouri's death penalty procedure and in sentencing Wood to death, because Missouri's procedure for dealing with juror deadlock in the penalty phase violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §21 of the Missouri Constitution, in that, by allowing the judge to impose a death sentence after the jury cannot unanimously decide that death is an appropriate punishment, Missouri's procedure violates evolving standards of decency that require that no defendant receive a death sentence but by a unanimous jury decision. A national consensus has emerged mandating that if the jury cannot unanimously decide that death is the appropriate punishment, the defendant must receive, at most, a sentence of life without parole, or a new penalty phase trial must be held; there is a consistent direction of change favoring this requirement; and strong policy considerations support it.

Atkins v. Virginia, 536 U.S. 304 (2002);

Hall v. Florida, 572 U.S. 701 (2014);

Hurst v. State, 202 So.3d 40 (Fla.2016);

Roper v. Simmons, 543 U.S. 551 (2005);

U.S.Const.,Amends.VIII,XIV;

Mo.Const.,Art.I,§21; and

§§565.030,565.040.

VI.

The trial court abused its discretion in allowing the State, over objection, to elicit testimony exceeding the proper scope of victim impact evidence, to pose questions to witnesses that were intended to evoke emotional responses, and to argue the improper victim impact evidence in closing:

(1) evidence that over ten thousand people had attended a vigil for Hailey;

(2) hearsay evidence and argument that "countless parents" now feared for their children's safety and that the crime changed Springfield from a town into a city;

(3) questioning of witnesses intended to elicit strong emotional responses,

because the excessive and improper victim impact evidence and argument and the State's deliberate attempts to create a funereal atmosphere through its questioning violated Wood's right to due process, a fair and reliable sentencing, confrontation, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§10, 18(a), and 21 of the Missouri Constitution, in that the State's actions were so excessive and geared toward encouraging the jury to make its decision based on passion, prejudice, and emotion, as to render the penalty phase fundamentally unfair.

Cargle v. State, 909 P.2d 806 (Okla.Crim.App.1995);

Payne v. Tennessee, 501 U.S. 808 (1991);

State v. Magee, 103 So.3d 285 (La.2012);

United States v. Fields, 516 F.3d 923 (10th Cir.2008);

U.S.Const.,Amends.V,VI,VIII,XIV; and

Mo.Const.,Art.I,§§10,18(a),21.

VII.

The trial court plainly erred in overruling Wood's objection to the prosecutor's argument in penalty phase closing that, with a verdict sentencing Wood to death, the jury spoke for Hailey and her family, because the argument violated Wood's right to due process, a fair trial, and freedom from the capricious and arbitrary infliction of the death penalty, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, §§10, 18(a), and 21 of the Missouri Constitution, in that no evidence was presented regarding the sentence Hailey or her family wanted, the law specifically prohibits family members from commenting upon which verdict they think is appropriate, and the prosecutor sought and obtained the exclusion of testimony by Hailey's mother that she wanted Wood to receive a sentence of life without parole.

Bosse v. Oklahoma, 137 S.Ct. 1 (2016);

State v. Hammonds, 651 S.W.2d 537 (Mo.App.E.D.1983);

State v. Luleff, 729 S.W.2d 530 (Mo.App.E.D.1987);

State v. Weiss, 24 S.W.3d 198 (Mo.App.W.D.2000);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21; and

Rule 30.20.

VIII.

The trial court abused its discretion in overruling Wood's objections and sustaining the State's motion to strike Venireperson 114 for cause, in violation of Wood's rights to due process and a fair and impartial jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution, because Venireperson 114 did not express any views that would substantially impair the performance of her duties as a juror or her ability to follow the instructions or her oath, in that although Venireperson 114 stated she was opposed to the death penalty, she stated that she could listen to the evidence and meaningfully consider both life without parole and the death penalty.

Adams v. Texas, 448 U.S. 38 (1980);

Lockhart v. McCree, 476 U.S. 162 (1986);

Wainwright v. Witt, 469 U.S. 412 (1985);

Witherspoon v. Illinois, 391 U.S. 510 (1968);

U.S.Const.,Amends.VI,XIV; and

Mo.Const.,Art.I,§§10,18(a).

IX.

The trial court erred in overruling Wood's objections that Missouri's death penalty scheme fails to properly narrow the class of persons eligible for the death penalty and in imposing a death sentence upon Wood, because §§565.030 and 565.032 violate Wood's right to be free from cruel and unusual punishment, as guaranteed by the Eighth and Fourteenth Amendments of the United States Constitution and Article I, §21 of the Missouri Constitution, in that the Missouri Legislature adopted so many statutory aggravating circumstances, the aggravating circumstances are so broadly written and interpreted, and the prosecutors have so much individual discretion, that Missouri's death penalty statute does not genuinely narrow the class of persons eligible for the death penalty, does not reasonably justify the imposition of a more severe sentence on any one defendant compared to others found guilty of murder, and allows vast racial, gender, and geographic discrepancies in how the death penalty is imposed, resulting in imposition of the death penalty that is arbitrary and capricious.

Gregg v. Georgia, 428 U.S. 153 (1976);

Lowenfield v. Phelps, 484 U.S. 231 (1988);

Roper v. Simmons, 543 U.S. 551 (2005);

Zant v. Stephens, 462 U.S. 862 (1983);

U.S.Const.,Amends.VIII,XIV;

Mo. Const.,Art.I,§21;

§§565.030,565.032,565.040;

MAI-Cr3d 314.40;

American Bar Association, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Missouri Death Penalty Assessment Report (Feb.2012);

Barnes, Sloss & Thaman, *Place Matters (Most): Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 Ariz. L. Rev. 305 (2009); and

Baumgartner, *Impact of Race, Gender, and Geography on Missouri Executions* (July2015).

ARGUMENTS

I.

The trial court abused its discretion in overruling Wood's objections and admitting in guilt phase State's Exhibits 14-45, thirty-two photographs found on Hailey's cell phone, in violation of Wood's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution, because most of the photographs were either irrelevant or cumulative and amounted to victim impact evidence wrongfully admitted during the guilt phase, in that the majority of the photographs were offered to show a five-hour timeline of events before Hailey was kidnapped when such a timeline had no relevance, and while a few of the photographs may have been relevant to show Hailey's clothing or lack of injuries, the State bombarded the jury with fourteen of Hailey's "selfies," plus family photos, photos of Hailey's friends, the family dog, children's toys and a stuffed animal, handwritten song lyrics, and others, the cumulative prejudicial effect of which caused the guilt and penalty phase verdicts to be based on emotion, not the facts and law.

In guilt phase, the State flooded the jury with no less than 32 photographs (including fourteen "selfies") that could only be considered victim impact evidence. These photographs were basically "a day in the life" of Hailey Owens and a steady reminder – photo after photo after photo displayed on an overhead screen – that Hailey was an innocent ten-year-old girl who loved, and was loved by, family and friends; had a beloved family

dog; and like other children her age, had favorite stuffed animals and toys and loved pop stars like Katy Perry. These 32 photographs could only be intended to amplify the level of emotion and invite the jurors to base their deliberations on emotion rather than the facts and the law.

I. Preservation

The issue is preserved. During guilt phase, the State offered into evidence State Exhibits 14-45, 32 photographs taken from Hailey's cell phone, supposedly to show a timeline of Hailey's day, her clothing, her presence on Lombard Street, and the absence of certain injuries pre-kidnapping (Tr.2997,2999,3001). Defense counsel objected, equating the contents of the cell phone to a family photo album and asserting that the State was introducing victim impact evidence in the guilt phase (Tr.2998). Counsel argued that the photographs were repetitious and irrelevant, appealed to the jurors' emotions, and that the resulting prejudice outweighed any probative value (Tr.2998-3003). Counsel argued that admission of the photographs violated due process, U.S.Const.,Amends.V,XIV;Art.I, §§10,18(a) (Tr.2999).

The court overruled the objection, admitted State's Exhibits 14-45 into evidence, and allowed a continuing objection (Tr. 3004). The issue was included in the motion for new trial (D.871,p.16).

II. Standard of Review

"[P]hotographs should not be admitted where their sole purpose is to arouse the emotions of the jury and to prejudice the defendant." *State v. Wood*, 596 S.W.2d 394,403 (Mo.banc1980). See also Applicable Standards, *supra*, p.29.

III. The Trial Court Failed Its Duty to Curb the Prosecution's Excesses

In a trial by jury, the judge must fulfill "the role of an impartial gatekeeper of evidence." *State v. D.W.N.*, 290 S.W.3d 814, 820 (Mo.App.W.D.2009). The trial court had the duty to curb the State's excesses. "Trial judges are clothed with abundant authority to conduct the proceedings of their courts with dignity and to prevent appeals to mere passion and prejudice, and it is their duty on proper occasion to exercise that authority with salutary vigor." *State v. Goodwin*, 217 S.W. 264, 267 (Mo.1919). Instead of curbing the State's excesses, however, the court gave the evidence its stamp of approval. *State v. Williams*, 659 S.W.2d 778, 782 (Mo.banc1983).

Of the 32 cell phone photographs presented by the State, the vast majority were either not relevant to any guilt phase issue or were cumulative:

State's Ex. #	**Description of Photograph**	**Time Taken**	
14	Dog	11:09 a.m.	Tr.3005
15	Dog	11:10 a.m.	Tr.3005
16	Husband and wife portrait	11:19 a.m.	Tr.3006
17	Family portrait	11:20 a.m.	Tr.3006
18	Selfie, Hailey in blue sports bra	1:58 p.m.	Tr.3006
19	Ceiling fan	1:59 p.m.	Tr.3006
20	Photographs on a wall	2:00 p.m.	Tr.3006
21	Selfie, close-up, Hailey's face and left hand	2:01 p.m.	Tr.3006

22	Selfie, blurry, close-up, Hailey's face	2:01 p.m.	Tr.3006
23	Selfie, Hailey's face and part of her arms, blue sports top/bra	2:01 p.m.	Tr.3006
24	Selfie, close-up, Hailey's face (sticking out tongue)	2:01 p.m.	Tr.3006, 3277
25	Selfie, close-up, Hailey's face and left wrist	2:03 p.m.	Tr.3006
26	Selfie, Hailey in red/white striped top	3:32 p.m.	Tr.3006
27	Hailey's friend Mackenzie	3:55 p.m.	Tr.3006, 3707
28	Hailey's friend Brooklyn	4:11 p.m.	Tr.3006, 3707
29	Lyrics to song by Katy Perry handwritten by Mackenzie	4:11 p.m.	Tr.3007, 3708
30	Selfie (features indistinct)	4:12 p.m.	Tr.3007
31	Hailey sticking out tongue, red/white striped top	4:12 p.m.	Tr.3007
32	Teddy bear and sand art	4:12 p.m.	Tr.3007
33	Teddy bear, sand art, furby	4:12 p.m.	Tr.3007
34	Blur	4:13 p.m.	Tr.3007
35	Close-up, Hailey's face, red/white striped top	4:28 p.m.	Tr.3007
36	Close-up, Hailey's face and left hand	4:28 p.m.	Tr.3008

37	Hailey by mailbox, pink top, red/white striped top	4:28 p.m.	Tr.3008
38	Row of mailboxes	4:29 p.m.	Tr.3008
39	Unknown house	4:31 p.m.	Tr.3008
40	Yard of Paddock house	4:32 p.m.	Tr.3002, 3008
41	Selfie, Hailey in pink top, red/white striped top	4:34 p.m.	Tr.3008
42	Selfie, Hailey showing part of red/white striped top and part of pink top	4:35 p.m.	Tr.3008, 3278
43	Red spot on Hailey's torso, blue jean shorts	4:36 p.m.	Tr.3008, 3426, 3538
44	Red spot on Hailey's torso, blue jean shorts	4:36 p.m.	Tr.3008
45	Callus on Hailey's right hand	4:40 p.m.	Tr.3008

To be admissible, evidence must be both logically and legally relevant. *State v. Blurton*, 484 S.W.3d 758, 777 (Mo.banc2016). Evidence is logically relevant "if it tends to make the existence of a material fact more or less probable." *Id.* Evidence is legally relevant if its probative value "outweighs unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness." *Id.* "Photographs are relevant if they depict the crime scene, the victim's identity, the nature and extent of the wounds, the cause of death, the condition and location of the body, or otherwise constitute

proof of an element of the crime or assist the jury in understanding the testimony." *State v. Collings*, 450 S.W.3d 741, 762 (Mo.banc2014).

Although the State's primary argument for admission of the photographs was that they showed the timeline of Hailey's activities, it failed to show why the timeline was relevant. The State "is given latitude to present a complete and coherent picture of the charged offense," but the evidence still must be both logically and legally relevant. *State v. Bullard*, 553 S.W.3d 901, 906 (Mo.App.E.D.2018). Hailey was kidnapped at 4:47 p.m. (Tr.2924). The jury did not need to know that Hailey was with her dog at 11:09 a.m., still there at 11:10 a.m., or that she stuck out her tongue at 2:01 p.m. (Ex.14-15,24). Handwritten lyrics to a Katy Perry song photographed at 4:11 p.m. did nothing to prove the charged crime (Ex.29). The fact that Hailey photographed a teddy bear twice at 4:12 p.m. had no relevance to the charged crime (Ex.32-33). These photographs were intended for one purpose, to heighten the level of emotion felt by the jurors.

The place where Hailey had been in the hours before the crime was of scant importance and did not justify the admission of 32 photographs. Hailey's mother testified that Hailey stayed home from school and later visited her friend Mackenzie (Tr.3275-76). Granted, the State may present photographic evidence that duplicates witness testimony. *State v. Wood*, 596 S.W.2d 394, 403 (Mo.1980). But evidence that only proves undisputed facts has marginal probative value. *People v. McClelland*, 350 P.3d 976, 984 (Colo.App.2015). "Where the topic of the photographs is not really in question or has been relayed by evidence already presented to the jury, evidence may be hard to justify." *State v. Robinson*, 328 S.W.2d 667, 671 (Mo.1959). The details of what Hailey was doing

in the ***five plus hours*** before she was taken had absolutely no relevance to the charged crime and should not have been allowed.

If the State's interest was truly in the jury understanding a timeline – not flooding the jury with emotional images – it would not have presented so many images, some duplicating the same minute. For example, the State presented four selfies Hailey took at 2:01 p.m. (Ex.21-24); two photographs taken at 4:11 p.m. (Ex.28-29), and four taken at 4:12 p.m. (Ex.30-33).

With the timeline rationale exposed as a pretext, the only other basis for admission of the 32 cellphone photographs was to show what Hailey had been wearing and whether she had certain cuts or bruises pre-kidnapping. This goal could have been achieved with just a few photographs. For example, Hailey's mother used two of the 32 photographs to identify what Hailey had been wearing (Tr.3277-78;Ex.24,43), while the medical examiner referred to another photograph in showing what abrasions were new (Tr.3426;Ex.43). Three or four photographs of Hailey would have amply met the State's needs. Instead, the jury was barraged with fourteen "selfies," in addition to two photos of Hailey's torso and one of her callused hand (Ex.18,21-26,30-31,35-37,41-45). The State far exceeded the number of photographs that was needed or reasonable.

The State's true purpose in presenting the cell phone photographs was as victim impact evidence, by presenting particularly sympathetic subject matter, like Hailey's stuffed animal and other toys, her friends, and photo after photo of Hailey smiling into the camera. But victim impact evidence has no place in the guilt phase. "[T]he purpose of having a separate penalty phase … is to permit the presentation of a broad range of evidence

that is relevant to punishment but irrelevant or inflammatory as to guilt." *State v. Ervin*, 979 S.W.2d 149, 158 (Mo.banc1998). "Personal characteristics of the *victim*, in some circumstances, may be relevant to the sentence; and personal characteristics of the *defendant* always are relevant to the sentence. Most of the time, neither is relevant to guilt." *State v. Whitfield*, 837 S.W.2d 503, 511 (Mo.banc1992)(emphasis in original); see also *State v. Earvin*, 743 S.W.2d 125, 128 (Mo.App.E.D.1988)(evidence of victim's fearfulness after crime was irrelevant and prejudicial, requiring new trial); *State v. Graham*, 650 S.E.2d 639, 645 (N.C.2007)(victim impact evidence is usually irrelevant during the guilt-innocence phase of a trial and must be excluded"); *State v. Heiney*,---N.E.3d---, 2018 WL 4055559 (OhioApp.8/24/18)(victim impact evidence "is irrelevant and immaterial to the guilt or innocence of the accused" and "principally serves to inflame the passion of the jury").

Courts have recognized the need to limit "in-life" photographs of homicide victims because of their potential to inflame the emotions of the jury. In *Ragan v. State*, 792 S.E.2d 342, 345-46 (Ga.2016), the Georgia Supreme Court held that it was error for the trial court to allow the State to present five photographs of the victim:

> [C]ertain steps must be taken to ensure that the tenuous probative value of a victim-while-in-life photograph is not subsumed by the substantial prejudicial impact…. With no serious question as to the victim's existence or identity, any probative value of the photographs was outweighed by the cumulative prejudicial effect therefrom, and the trial court erred when it admitted the photographs.

Id. (citing *Hood v. State*, 786 S.E.2d 648, 656 (Ga.2016)(evidence was inadmissible when it had virtually no probative value "and something not insubstantial on the prejudice side");

Wilks v. State, 49 P.3d 975, 983 (Wyo.2002)("Admission of homicide victims' 'in life' photographs is discouraged and should be permitted under only very limited circumstances where their relevancy outweighs the potential to inflame the jury"); *McClelland*, 350 P.3d at 985 (defendant prejudiced by erroneous admission of three "in-life" photographs with almost no probative value); *Carty v. People*, 56 V.I. 345, 359 (V.I.2012)(victim's in-life photograph deemed irrelevant and prejudicial, "only served to appeal to the sympathy of the jurors").

The court's failure to curb the prosecution's excesses violated due process; it caused fundamental unfairness and denied Wood a fair trial. *State v. Burnfin*, 771 S.W.2d 908, 914 (Mo.App.W.D.1989); U.S.Const.,Amends.V,XIV;Mo.Const.,Art.I,§§10,18(a). Wood was prejudiced by the admission of the 32 cell phone photographs. Prejudice occurs when the improperly admitted evidence is outcome-determinative, *i.e.*, when "the evidence had an effect on the jury's deliberations to the point that it contributed to the result reached." *State v. Barriner*, 34 S.W.3d 139, 150-51 (Mo.banc2000).

This Court has recognized that "cases involving child victims can stir up powerful emotions and sympathy." *State v. Clark*, 981 S.W.2d 143, 147 (Mo.banc1998). These 32 photographs were unfairly prejudicial because they had no true purpose other than to amplify the jurors' emotions, eliciting sympathy for Hailey and her friends and family and hatred for Wood. "[P]hotographs should not be admitted where their sole purpose is to arouse the emotions of the jury and to prejudice the defendant." *State v. Floyd*, 360 S.W.2d 630 (Mo.1962). Evidence that tends to unnecessarily divert the jury's attention from the

questions before it is more prejudicial than probative and should be excluded. *State v. Taylor*, 663 S.W.2d 235, 239 (Mo.banc1984).

Here, it cannot be said with confidence that the 32 cellphone photographs did not contribute to the guilty verdict. The only issue in guilt phase was whether Wood deliberated in killing Hailey.[6] Deliberation is difficult to prove through direct evidence, and thus it is typically established "by indirect evidence and inferences reasonably drawn from the circumstances surrounding the offense." *State v. Smith*, 966 S.W.2d 1, 5 (Mo.App.W.D.1997), *opinion adopted and reinstated after retransfer* (6/2/98). These heart-wrenching photographs, presented one after the other early in the case, were precisely the type of improper evidence that could sway the jury when it determined the inferences to be drawn regarding the critical issue in the case.

Moreover, in the penalty phase, the jurors were told to consider the evidence presented at both the guilt and penalty stages of trial in determining whether Wood should receive the death penalty. See MAI-CR3d 314.44 (D.867,p.10). The State cannot show that this improper evidence had no impact in the jurors' weighing of the aggravating and mitigating evidence and their deadlock verdict, especially in light of Wood's strong mitigating evidence.

For 45 years, until this crime, Wood had led a productive, law-abiding life (D.609,p.1;Tr.3792-94,3869,3795,3804-05,3808). He had a steady work history and was well-liked at his school; he was thought of as a good coach and a good person

[6] Defense counsel admitted in opening statement that Wood committed the acts; the only issue was whether he acted with deliberation (Tr.2899).

(Tr.3249;3792-94,3869,3795,3804-05). As a coach, Wood had made a positive impact on his athletes and was thanked for his extra efforts to make players feel like they belonged and for being a "[c]aring, observant, and generous soul" (Tr.3873-74,3925;D.Ex.513,523). Friends and colleagues were shocked that Wood was involved in this crime since it was so far out of character (Tr.3229,3249,3928,3968-69).

Wood was a devoted son who came to his elderly parents' farm in all types of weather to help them and care for the animals (Tr.3824-26,3879,3993-94). His family and friends supported him despite his murder conviction (Tr.3785-86;3847,3886-87,3931-32,3972). Wood struggled with depression and substance abuse, and but for those factors, this crime may not have happened (Tr.3916-17,3955). He had once saved an elderly man's life by carrying him out of a burning apartment building (Tr.3863-64).

Wood was a calm, respectful, and obedient inmate (Tr.3906-07,3946,3948). Since his arrest, Wood had a renewal of faith, read the Bible and other books about Christianity, and met weekly with a priest (Tr.3831-32). He struggled to come to terms with what he had done and had nightmares and difficulty sleeping (Tr.4013). He felt terrible about how his actions affected Hailey's family, and he condemned himself (Tr.4016,4018). He had considered suicide and saved up his medication to make an attempt (Tr.3905,3948,4016). Wood was genuinely remorseful (Tr.4018).

This Court has made clear that "juries are to decide cases on the evidence presented – not appeals to unreasoned emotion…" *State v. Banks*, 215 S.W.3d 118, 123 (Mo.banc 2007). "[W]hen the State insists on walking the precipice of reversible error, it must be prepared to suffer the consequences of stepping over the edge—reversal and remand for a

new trial." *State v. Rogers*, 529 S.W.3d 906, 916 (Mo.App.E.D.2017). Because the State deliberately encouraged the jurors to base Wood's conviction and sentence on emotion rather than reasoned judgment, this Court must reverse.

II.

The trial court abused its discretion in overruling Wood's objections and allowing the State to present testimony and 29 photographs (State's Exhibits 304-315, 330-332,336-37,357-361,363-64,369-73) of at least twenty firearms, plus ammunition, gun cases, a speed reloader, and reloading equipment and supplies, that were unrelated to the charged murder, because this testimony and evidence violated Wood's right to due process, a fair trial, and a fair and reliable sentencing proceeding, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§10, 18(a), and 21 of the Missouri Constitution, in that the evidence was irrelevant and prejudicial because although these weapons and gun-related items were found in Wood's home, they had no connection to the crime charged and did not make it more likely that Wood committed the charged crime or was more deserving of the death penalty, yet were highly prejudicial, serving only to depict Wood as a gun-crazed, militaristic, unstable, and dangerous person with a propensity for violence.

One bullet from one gun, a .22-caliber Ruger rifle, killed Hailey (Tr.3381,3434). Yet the State was allowed, over defense counsel's repeated objections (Tr.3124-25,3157, 3163,3177-78), to present guilt phase testimony, along with 29 photographs, that Wood had at least twenty guns of various shapes, sizes, and potency scattered throughout his house and in his locked gun safe, as well as boxes of ammunition, gun cases, a speed reloader, and a reloading station with supplies and equipment (Tr.3159-69;3177-83;Ex.

304-315,330-332,336-37,357-361,363-64,369-73). This testimony and evidence was so excessive and had such minimal probative value that it should have been excluded. The evidence violated Wood's right to due process, a fair trial, and a fair and reliable sentencing proceeding. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21. It caused outcome-determinative prejudice as to both the guilt and penalty phases of the trial, warranting reversal.

I. Preservation

This issue is preserved. The court overruled Wood's objections that testimony and evidence of guns and gun-related items found in his home that were unrelated to the charged crime was irrelevant and the prejudice it engendered far exceeded any probative value (D.607,p.86,D.817,p.1,5-6;Tr.1189-91,2886-87,3124-27,3157, 3163,3177-78). The issue is included in the motion for new trial (D.871,p.14-15).[7]

II. Evidence of the Twenty Plus Guns Unrelated to the Charged Crime

At trial, the State presented evidence that the gunshot that killed Hailey was a lower caliber bullet (Tr.3381,3433-34,3442). A .22-caliber shell casing was found in the basement (Tr.3153), and a .22-caliber rifle was found in Wood's locked gun safe amidst multiple other firearms (Tr.3180;Ex.373). A .22-caliber bullet lay on the floor outside the gun safe (Tr.3181;Ex.365,366,367). Testing revealed that the .22-caliber shell casing found in the basement was ejected from the .22-caliber rifle (Tr.3463-64).

[7] The standard of review is set forth, *supra*, p.29.

In addition to presenting evidence about the gun used to kill Hailey (Tr.3183-86), the prosecutor, over Wood's objection (Tr.2886-87,3124-27,3157,3163,3177-78), presented lengthy testimony and evidence about twenty other guns, plus ammunition, gun cases, a speed reloader, a reloading station, and reloading supplies, that had no connection to the charged crime (Tr.3159-82). Through the testimony of F.B.I. Special Agent Jonathan Tucker, the prosecutor elicited that Wood had a holstered Ruger .44 pistol on his dining room table (Tr.3159). Tucker then identified State's Exhibit 304 as a photograph of the gun on the table, State's Exhibit 305 as a close-up of the gun, and State's Exhibit 306 as a close-up of the gun, now un-holstered (Tr.3159;Ex.304-306).

At the prosecutor's request, Tucker testified that Wood had a Model 1911 .45-caliber pistol on a nearby bookshelf (Tr.3160). He identified State's Exhibit 308 as a photograph of the pistol, State's Exhibit 309 as a close-up photograph of the pistol, and State's Exhibit 310 as a further close-up photograph of the pistol on a different surface (Tr.3160;Ex.308-310).

Tucker next testified that Wood also had a .38-caliber revolver on the bookshelf (Tr.3160-61). He identified State's Exhibit 311 as a photograph of the revolver, State's Exhibit 312 as a close-up of the revolver, and State's Exhibit 313 as a further close-up of the revolver on a different surface (Tr.3160-61;Ex.311-313). Using State's Exhibit 312, Tucker showed the jury that the cylinder was loaded with live rounds (Tr.3160-61).

Next, Tucker testified that between the bookcase and the table, Wood had a gun case containing two guns (Tr.3159-61). He used State's Exhibit 307 to show where the gun case was located (Tr.3159-61). He testified that two semiautomatic handguns were

found in the case; one was a .40-caliber, and the other was either a .40-caliber or a .9-millimeter (Tr.3161-62). He identified State's Exhibits 314 and 315 as photographs of the two guns in their case (Tr.3161-62;Ex.314,315). Exhibit 315 was a close-up photograph of Exhibit 314 (Ex.314,315).

Tucker testified about two guns found in the bedroom (Tr.3165-67; Ex.330,331,336,337). Wood had a pump action shotgun just inside his bedroom door (Tr.3165). Tucker identified State's Exhibit 330 as a photograph of the shotgun and State's Exhibit 331 as a "better picture" of the shotgun (Tr.3165;Ex.330-331).

Tucker also testified that Wood had a gun in a camouflage gun case on the nightstand next to his bed (Tr.3165-66). Using State's Exhibit 336, he pointed out where the butt of the handgun stuck out of the case (Tr.3166;Ex.336). He identified State's Exhibit 337 as a photograph of the handgun (Tr.3166;Ex.337). Tucker noted that the handgun was a .40-caliber Springfield semiautomatic (Tr.3166-67).

Tucker noted that in a desk drawer in Wood's storage room, Wood had a revolver (Tr.3178-79). The prosecutor elicited that a speed reloader was also in the drawer (Tr.3179). Tucker identified State's Exhibit 359 as a photograph of the revolver (Tr.3179;Ex.359). On State's Exhibit 360, a close-up of the revolver, he noted the speed reloader next to the revolver (Tr.3179;Ex.360). Tucker offered that the speed reloader was "for fast reloading of a revolver-type handgun" (Tr.3179). Upon the prosecutor's request, Tucker explained to the jury how the speed reloader worked: "So what it allows you to do is you can open up the cylinder, dump your spent rounds out, and drop all six new rounds into the cylinder simultaneously with one push of a button" (Tr.3179). Using State's

Exhibit 361, a close-up of the revolver on a different surface, Tucker identified the revolver as a .44 Smith & Wesson (Tr.3179-80;Ex.361).

The prosecutor elicited that in the hallway outside the storage room was a gun safe (Tr.3180). Tucker testified that Wood had a pump action shotgun to the right of the gun safe (Tr.3182). He identified State's Exhibits 369 and 370 as photographs of the shotgun (Tr.3182;Ex.369, 370). He identified State's Exhibit 371 as a photograph of a side-by-side double barrel shotgun, and State's Exhibit 372 as a close-up photograph of that shotgun (Tr.3182). State's Exhibit 371 shows that shotgun standing to the left of the gun safe (Ex.371). The gun case itself held at least ten more guns, including the one used to kill Hailey (Tr.3183;Ex.373).

The prosecutor asked Tucker about various gun-related items in Wood's home. Tucker identified State's Exhibit 357 as a photograph of a bookcase in the storage room (Tr.3178). The photograph showed the side view of the bookcase, with a table to its left side upon which a box of bullets sat (Ex.357). State's Exhibit 363 showed a frontal view of the bookcase (Ex.363). Special Agent Tucker testified that the bookcase held "ammunition and what appears to be reloading supplies," while the table to the right of the bookshelf "appears to be reloading equipment and a reloading station" (Tr.3178). At the request of the prosecutor, he explained that "an individual can shoot his firearms, and then he can reload the empty shell casings with new powder in it, and bullets, or rounds to fire and make a new round" (Tr.3178-79). State's Exhibit 358, a close-up view of the bookcase with ammunition and reloading supplies, was admitted into evidence but not further discussed (Tr.3177;Ex.358). Tucker identified State's Exhibit 364 as a photograph of the

top half of the gun safe; this photograph was offered for no apparent purpose than to show several boxes of ammunition on top of the safe (Tr.3181;Ex.364).

On a large diagram of Wood's home, Special Agent Tucker marked an "X" where each of these weapons not related to the charged crime was located (Tr.3182;Ex.49). He testified that each of these guns was of a larger caliber than the .22-caliber rifle used to kill Hailey (Tr.3159-62,3167). He also testified that the .22-caliber rifle would make less noise and mess than the other weapons (Tr.3186).

IV. Evidence of the Unrelated Guns and Gun-Miscellany Was Irrelevant and Prejudicial

Craig Wood had the right, under the Second Amendment to the United States Constitution and Article I, §23 of the Missouri Constitution, to possess the guns, ammunition, and other gun-related items found in his home. But the State used Wood's possession of multiple firearms as evidence against him. Although many citizens are comfortable with guns and may own more than one firearm, many others are afraid of such weapons and take a dim view of those they perceive as "gun–crazy," militaristic, dangerous, or unstable.

To be admissible, evidence must be both logically and legally relevant to the charged crime. *State v. Anderson*, 76 S.W.3d 275, 276 (Mo.banc2002). "Evidence is logically relevant if it tends to make the existence of a material fact more or less probable." *Id*. But logically relevant evidence is admissible only if legally relevant. *Id*. "Legal relevance weighs the probative value of the evidence against its costs – unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or

cumulativeness." *Id*. Logically relevant evidence is excluded if its costs outweigh its benefits. *Id*.

A. The Evidence Was Not Logically Relevant

Evidence that Wood had multiple guns and gun-related items in his home did not tend to prove or disprove a fact in issue or corroborate other relevant evidence. *State v. Rousan*, 961 S.W.2d 831, 848 (Mo.banc1998). The State argued that evidence of the other weapons was relevant to prove deliberation, in that Wood allegedly chose a small caliber weapon over any of his other firearms to minimize noise and mess (Tr.1191-92). This argument is not supported by evidence, only speculation and inference stacked upon inference. For this argument to succeed, one must infer that Wood made a choice in firearms; that he made a choice based on wanting to make less noise and less mess; that he knew that the smaller caliber weapon would make less noise and less mess; and that he did in fact make a choice on that basis. No evidence supports any of these inferences. Moreover, if Wood truly had been motivated to make less noise and mess, he would not have used a firearm at all; he would have ended Hailey's life in another manner altogether. This rationale should not be used as a basis to introduce lengthy, detailed evidence that would only serve to make the jurors view Wood in a very negative light.

The State did not even attempt to justify its evidence of gun-related items. Wood's ownership of a speed reloader, reloading supplies, and multiple boxes of ammunition had no relevance in a case where just one bullet was fired. The jury had no need to know how a speed reloader worked and why someone would have reloading supplies and equipment. This evidence should have been excluded.

B. The Evidence Was Not Legally Relevant

Nor was evidence that Wood owned multiple guns and gun-miscellany legally relevant; its scant probative value did not outweigh the unfair prejudice it caused. This Court "has long identified the unfair prejudice of introducing weapons not connected to the defendant or the crime." *Anderson*, 76 S.W.3d at 277 (evidence that defendant had a brochure for a Baretta was impermissible). "The objection to the introduction of weapons or other demonstrative evidence, especially when not connected with the…crime, on the ground of unfair prejudice is based on sound psychological and philosophical principles." *State v. Wynne*, 182 S.W.2d 294, 300 (Mo.1944). "The sight of deadly weapons … tends to overwhelm reason…" *Id.* "A conviction may be reversed when a weapon admitted into evidence is unconnected to the crime and not similar to the weapon involved in the crime." *State v. Black*, 50 S.W.3d 778, 786 (Mo.banc2001)(*citing Wynne*, 182 S.W.2d at 299-300; *State v. Perry*, 689 S.W.2d 123, 125 (Mo.App.W.D.1985); *State v. Grant*, 810 S.W.2d 591, 592 (Mo.App.S.D.1991)).

"Rightly or wrongly, many people view weapons, especially guns, with fear and distrust…. [P]hotographs of firearms often have a visceral impact that far exceeds their probative value. The prejudice is even greater when the picture is not of one gun but of many." *United States v. Hitt*, 981 F.2d 422, 424 (9thCir.1992); *Smith v. State*, 98 A.3d 444, 454 (Md.Ct.Spec.App.2014)(evidence of defendant's ownership of unrelated guns and ammunition "was minimally relevant, at best, and highly prejudicial, and should have been excluded from the trial").

Additionally, the evidence caused undue delay and waste of time. *Id*. In addition to evidence of the ten plus guns in the gun safe, the prosecution elicited detailed gun-by-gun testimony and excessive photographic documentation of each, as well as testimony and photographs of the gun-miscellany:

- three photographs of the Ruger .44 pistol (Tr. 3159;Ex.304,305,306);
- three photographs of the Model 1911 .45-caliber pistol (Tr.3160;Ex.308, 309,310);
- three photographs of the .38-caliber revolver (Tr.3160-61;Ex.311,312,313);
- two photographs of the two semiautomatic guns found in a case (Tr.3161-62;Ex.314,315), and another photograph showing the case's location (Tr.3159-60;Ex.307);
- two photographs of the shotgun in the bedroom (Tr.3165;Ex. 330,331);
- three photographs identifying a gun case and a .40-caliber Springfield semiautomatic (Tr.3165-67; Ex.332,336,337);
- three photographs of a .44-caliber Smith & Wesson revolver and a speed reloader (Tr.3179-80;Ex.359,360,361);
- three photographs of a table, bookcase, and reloading station in the storage room with boxes of ammunition, reloading supplies, and reloading equipment (Tr.3177-78;Ex.357,358,363);
- one photograph of the top of the safe with several boxes of ammunition (Tr. 3181;Ex.364).

- two photographs of the shotgun found on the right side of the gun safe (Tr.3182;Ex.369,370);
- two photographs of the shotgun found on the left side of the gun safe (Tr.3182;Ex.371,372);
- one photograph of the open gun safe, revealing at least ten firearms (Tr.3183; Ex.373).

Missouri courts have reversed convictions on far less firearm evidence. See, e.g., *State v. Holbert*, 416 S.W.2d 129, 132-33 (Mo.1967)(reversible error to introduce two guns found in defendant's possession when arrested for carrying third gun as concealed weapon); *State v. Krebs*, 106 S.W.2d 428 (Mo.1937)(reversible error to present evidence that when defendant was arrested, two guns unrelated to charged robbery were found on or near defendant); *Perry*, 689 S.W.2d at 124-25 (reversible error to present evidence of shotgun when charged crime was committed with handgun).

V. The Resulting Prejudice was Outcome-Determinative

Reversal is warranted when prejudice is outcome-determinative, *i.e.*, when it "had an effect on the jury's deliberations to the point that it contributed to the result reached." *State v. Barriner*, 34 S.W.3d 139, 150-51 (Mo.banc2000).

Here, the prosecutor inundated the jury with testimony and photo after photo of the unrelated guns, ammunition, and gun accessories (Tr.3159-63,3165-67;3177-83;Ex.304-315,330-332,336-37,357-361,363-64,369-73). The State presented 29 photographs of guns and gun-related items that had ***no*** role in the charged crime. This meant that the jury saw two or three photographs, some close-up, for each of the ten guns that were scattered

around Wood's home yet were unrelated to the crime (Ex.304-315,330-332,336-37,357-361,363-64,369-72). The jury also saw a photograph of the gun safe containing at least ten additional guns, only one of which was involved in the charged crime (Tr.3183-85;Ex. 373). The prosecutor mentioned the guns in his opening statement and closing argument (Tr.2897,3596,3604-05).

The prosecutor's intentional presentation of detailed testimony and numerous photographs about ammunition, the speed reloader, and reloading supplies shows that his true intention was to prejudice Wood. This evidence had zero probative value since only one bullet was fired. Yet the prosecutor had Special Agent Tucker identify the "ammunition and what appears to be reloading supplies" in the storage room and also what "appears to be reloading equipment and a reloading station" (Tr.3178-79;Ex.363). The jurors would have seen multiple boxes of ammunition in addition to the items discussed (Ex.357-358,363-364,369). The prosecutor deliberately had Tucker explain reloading and identify a speed reloader (Tr.3179;Ex.360). After Tucker offered that the speed reloader "was for fast reloading of a revolver-type handgun," the prosecutor asked him to further describe how the reloader worked and Tucker did so (Tr.3179).

The only possible purpose for this evidence was to show that Wood as a gun-crazed, dangerous person with a propensity for violence. The Las Vegas shooting had recently occurred (Tr.1193) and would have reminded the jurors of another person who had multiple guns, plentiful ammunition, and the ability to reload quickly. The evidence invited the jurors to view Wood as the same type of person as the Las Vegas shooter and thus base his conviction on fear and innuendo rather than evidence.

Nor can the State show that the evidence had no effect on the jury's deliberations in penalty phase. *Id.* In the penalty phase, the jurors were told to consider the evidence presented in both guilt and penalty stages in determining whether Wood should get the death penalty. See MAI-CR3d 314.44 (D.867,p.10). Yet this evidence would have been ***inadmissible*** in penalty phase as a reason for the jury to give death. See *State v. Rupe*, 683 P.2d 571, 594-97 (Wash.1984)(State's introduction of defendant's gun collection warranted a new penalty phase because the evidence was irrelevant, prejudicial, and violated due process; constitutionally protected behavior, such as the constitutional right to possess firearms, cannot be the basis of criminal punishment including a sentence of death); *Zant v. Stephens*, 462 U.S. 862, 883-85 (1983)(jury cannot treat constitutionally protected conduct as aggravating circumstance, nor can it draw adverse inferences from constitutionally protected conduct).

Although the court ended up assessing Wood's sentence, the State cannot show that this evidence played no role in the jurors' deliberations leading up to their deadlock, especially in light of Wood's strong mitigating evidence, *supra*, p.25-27,50-51. But for this impermissible evidence, the jury may have assessed the punishment at life imprisonment without parole. See *State v. Taylor*, 944 S.W.2d 925, 937-38 (Mo.banc1997)(reversing even though judge imposed sentence after deadlock; reasonable probability exists that jury would have reached different result without prosecutor's improper argument); *State v. Richardson*, 923 S.W.2d 301, 319 (Mo.banc1996). The State cannot show that no juror considered this impermissible evidence in determining the

weight of the mitigating and aggravating evidence. It cannot show that, for that juror or those jurors who voted for the death penalty, this evidence did not make a difference.

"Given the special need for reliability and fairness in death penalty cases, the Eighth Amendment does, and must, apply to the death penalty 'with special force.'" *Glossip v. Gross*, 135 S. Ct. 2726, 2764 (2015)(Breyer, J., dissenting)(quoting *Roper v. Simmons*, 543 U.S. 551, 568 (2005)). "It is of vital importance that the decisions made in that context be, and appear to be, based on reason rather than caprice or emotion." *Monge v. California*, 524 U.S. 721, 732 (1998). Here, without presenting evidence that Wood actually would be a future danger to others in prison, the State presented inference and innuendo that he was gun-crazed, potentially unstable, and dangerous.

> The present appeal presents another example of an unsatisfied prosecutor who comes by an acceptable case, yet unnecessarily tries to decorate it with statements and testimony which can only serve to excite passion and engender prejudice against the accused.

State v. Hicks, 535 S.W.2d 308, 313 (Mo.App.Springfield,1976). Reversal is mandated.

III.

The trial court abused its discretion in overruling Wood's objections and allowing the State to present guilt phase testimony and evidence (State's Exhibits 340-348) regarding the contents of a purple folder containing photographs of four of Wood's female students, a letter, and two fictional stories Wood wrote depicting graphic details of two sexual interludes with thirteen-year-old girls, because this violated Wood's right to due process, a fair trial, and to be tried for the offense with which he was charged, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§10, 17, and 18(a) of the Missouri Constitution, in that the evidence was impermissible evidence of uncharged bad acts because it was intended to show that Wood was a pervert who acted in conformity with that character trait; Wood's motive for the kidnapping, rape, and sodomy was not truly at issue and, at any rate, was obvious from the nature of the crime; and the prejudicial effect of the stories and photographs far exceeded any possible probative value.

The trial court abused its discretion in admitting guilt phase evidence of a purple folder found in Wood's house. The folder contained (1) class schedules of two students at the middle school where Wood coached football and supervised in-school suspension (Tr.3170); (2) five photographs of four female students (Tr.3220-24;Ex.345); and (3) three fictional writings, of which two specifically and in graphic detail involved sexual encounters with 13-year-old girls (Tr.3171,3173-74;Ex.343,344,347,348). Although the

State supposedly presented the folder to show Wood's motive for the charged crime, Wood's motive was obvious from the nature of the crimes. Any scant probative value the purple folder had was vastly outweighed by the hugely prejudicial effect the lewd, repulsive stories undoubtedly had on the jurors. Evidence from the purple folder violated Wood's right to due process, a fair trial, and to be tried for the offense with which he was charged. U.S.Const.,Amends. V,VI,XIV;Mo.Const.,Art.I,§§10,17,18(a).

I. Preservation

This issue is preserved. Pretrial, Wood argued that the purple folder was inadmissible "bad acts" evidence used to prove Wood's guilt by propensity (D.816,p.1;Tr.1179-89). The State countered that the evidence was admissible to show Wood's motive for kidnapping, raping, sodomizing, and murdering Hailey (D.831,p.4,7;Tr.1183-84). The court denied Wood's pretrial and trial objections (D.607,p.86;Tr.2869,2871,2873,2887-88,3130-31,3163,3169). The issue is included in the motion for new trial (D.871,p.15-16).[8]

II. Factual Background

The prosecutor elicited that a folder found in Wood's bedroom contained a handwritten, fictional letter about a consensual sexual encounter; the class schedules of two students at Wood's school; and five yearbook photographs of four female students at the school (Tr.3167,3170-71,3220-24;Ex.340-45). In addition, the folder contained two handwritten fictional stories Wood wrote, each graphically describing sexual acts with a

[8] The standard of review is set forth, *supra*, p.29.

13-year-old girl (Tr.3171,3173-74,3216-17,3466,3473;Ex.347,348). In the three-page story, Wood drugged a 13-year-old he was minding and then filmed himself sexually assaulting the unconscious girl orally, vaginally, and anally (Ex.347). In the six-page story, Wood and a 13-year-old girl played truth-or-dare, escalating into oral sex and sexual intercourse (Ex.348).

III. The Contents of the Purple Folder Constituted Impermissible Evidence of Prior Bad Acts

Wood's fictional stories about having sexual encounters with 13-year-old girls constituted evidence of prior bad acts. Although writing the stories was not illegal, it was a bad, morally offensive act that must have evoked disgust and revulsion in the jurors. See, e.g., *State v. Barriner*, 34 S.W.3d 139, 145 (Mo.banc2000)(evidence that defendant engaged in consensual sex with girlfriend was considered impermissible bad acts evidence); *State v. Alexander*, 875 S.W.2d 924, 929 (Mo.App.S.D.1994)(defendant's possession of pornographic playing cards was inadmissible bad acts evidence used to portray defendant as person obsessed with sex).

"As a general rule, evidence of uncharged crimes, wrongs, or acts is not admissible for the purpose of showing the propensity of the defendant to commit such crimes." *State v. Barton*, 998 S.W.2d 19, 28 (Mo.banc1999).[9] Such evidence is inadmissible for the purpose of showing that the defendant had "a general criminal disposition, a bad character,

[9] The only exception is set forth in Mo. Const., Art. I., §18(c). In cases involving crimes of a sexual nature against minors, §18(c) allows the admission of relevant evidence of prior criminal acts to demonstrate the defendant's propensity to commit the charged crime. The State has conceded that nothing within the purple folder constituted a criminal act (D.831,p.2), so §18(c) is inapplicable.

or a propensity or proclivity to commit the type of crime charged." *State v. Kitson*, 817 S.W.2d 594, 597 (Mo.App.E.D.1991). Prior acts need not rise to the level of an uncharged crime to fit within the ban. *Id*. at 598; *State v. Coutee*, 879 S.W.2d 762, 767 (Mo.App.S.D.1994). As long as the uncharged act creates an inference that the defendant had the propensity to commit the charged crime, the evidence is inadmissible. *Id*.

Evidence of a defendant's prior bad acts, while not admissible to show propensity, is admissible if the evidence if logically and legally relevant. *State v. Burns*, 978 S.W.2d 759, 761 (Mo.banc1998); see also *State v. Ellison*, 239 S.W.3d 603, 606-607 (Mo.banc 2007)(superceded by constitutional amendment). Evidence is logically relevant if "it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial." *State v. Davis*, 211 S.W.3d 86, 88 (Mo.banc2006). Evidence of uncharged bad acts is logically relevant if it establishes: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan; or (5) identity of the perpetrator. *Id*.

If the trial court finds that the bad acts evidence fits within one of these exceptions or otherwise is logically relevant, it must then determine whether it is legally relevant. *State v. Davis*, 318 S.W.3d 618, 639-40 (Mo.banc2010). Evidence is legally relevant if its probative value "outweighs unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness." *State v. Blurton*, 484 S.W.3d 758, 777 (Mo.banc2016). "If the prejudice of the logically relevant evidence outweighs its probative value, it should be excluded." *State v. Prince*, 534 S.W.3d 813, 818 (Mo.banc2017). Bad acts evidence "should be subjected by the courts to rigid scrutiny" and admitted only with great caution. *State v. Reese*, 274 S.W.2d 304, 307 (Mo.1954).

The admission of improper evidence violates a defendant's rights to due process and a fair trial. *See State v. Davis*, 474 S.W.3d 179, 190 (Mo.App.E.D.2015); U.S.Const.,Amends.V,VI,XIV; Mo.Const.Art.I.,§10. Evidence of prior bad acts, when not properly related to the charged crime, violates the defendant's right to be tried for the offense for which he is indicted. *Reese*, 274 S.W.2d at 307; *Burns*, 978 S.W.2d at 760; Mo.Const. Art.I.,§§17,18(a). The use of propensity evidence violates due process because it denies the defendant a fair opportunity to defend against the charged crime. *Old Chief v. United States*, 519 U.S. 172, 181 (1997); U.S.Const.,Amends.V,XIV;Mo.Const.Art.I., §10.

V. The Evidence Was Not Logically Relevant

Although the prosecution argued that the evidence was relevant to show Wood's alleged motive, "satisfaction of defendant's sexual desire for the victim" (D.831,p.3), it truly showed only that Wood was the ***type of person*** who would commit the charged crime. Where the defendant is charged with a sexual offense, "there is little doubt the motivation for such offenses is, at least in part, sexual gratification." *State v. Nelson*, 501 S.E.2d 716, 721 (S.Car.1998); *State v. Smith*, 617 N.E.2d 1160, 1172-73 (OhioApp.1992).

Moreover, defense counsel conceded in opening statement that Wood kidnapped, raped, sodomized, and killed Hailey (Tr.2899). The only issue was whether the killing was after deliberation (Tr.2899). Motive was apparent from the rape and sodomy and not relevant to the ultimate issue of whether Wood killed Hailey after deliberation. Because evidence of prior bad acts "should be received only when there is strict necessity," the

purple folder should have been excluded. *State v. Collins*, 669 S.W.2d 933, 936 (Mo.banc 1984).

Wood acknowledges that in cases involving sexual crimes against a child, Missouri courts have allowed evidence of prior sexual conduct by the defendant toward ***that*** victim, in that it tends to establish a motive, *i.e.*, satisfaction of the defendant's sexual desire for ***that*** victim. *State v. Primm*, 347 S.W.3d 66, 70 (Mo.banc2011). But here, the folder does not evince any prior sexual conduct by Wood toward Hailey. The folder does not show ***any actual real-life*** sexual conduct by Wood toward ***anybody***. Moreover, each girl whose photograph was in the folder was interviewed at the Child Advocacy Center; each stated that Wood had never said or done anything to make her feel the least bit uncomfortable (Tr.3554).

The fact that Wood wrote stories about having sex with 13-year-olds does not mean he ever intended to act on those fantasies. "The link between fantasy and intent is too tenuous for fantasy to be probative. People commonly fantasize about doing things they have no intention of actually doing, or even firmly intend not to do." *United States v. Curtin*, 489 F.3d 935, 961 (9thCir.2007)(Kleinfeld et.al.,JJ,concurring).

Here, the only similarity between Wood's stories and the charged crime is that they involve sexual encounters with young girls. Neither of the fantasy stories involve a kidnapping, ligatures, or murder. "Even if proving a person's sexual fantasy were relevant to show an intention to carry it out, a doubtful proposition, it would not be relevant to show conduct quite different from the fantasy." *Curtin*, 489 F.3d at 961 (Kleinfeld, et.al.,JJ,concurring).

In *Dyer v. Commonwealth*, 816 S.W.2d 647, 648 (Ky.1991), the defendant was charged with sodomizing a twelve-year-old boy. The State presented evidence of various items taken from the apartment the defendant shared with his girlfriend, including a page from "Hustler" magazine discussing adolescent sexual behavior, pictures of a naked man with two naked women, a pamphlet graphically illustrating and describing hard-core homosexual activity, and miscellaneous magazine cut-out pictures of boys. *Id*. at 648-49. The Kentucky Supreme Court held that the evidence was inadmissible:

> It is obvious the real purpose, the sole purpose, of this evidence was, in general, to prove the appellant was a sexual pervert, and, in particular, to prove that his perversion was pedophilia, and to do so on the basis of reading material found in his possession some of which would offend a substantial number of jurors, prejudicing them against the appellant without regard to whether it proved anything against him.

Id. at 652; see also *United States v. Preston*, 873 F.3d 829, 842 (9thCir.2017)(evidence that defendant masturbated to photograph of his eight-year-old stepson was inadmissible propensity evidence; defendant's "sexual proclivities toward children contributes little to the government's case. It just tempts the jury to draw the impermissible inference that the defendant has a propensity to sexually abuse children.").

VI. The Evidence Was Not Legally Relevant

Even if evidence has some probative value, it is not admissible unless that probative value exceeds the evidence's prejudicial effect. See, e.g., *State v. Dudley*, 912 S.W.2d 525, 528-29 (Mo.App.W.D.1995)(warning against tendency to believe that other crimes evidence is admissible whenever there is issue as to motive or intent; courts must still assess

whether probative value outweighs its prejudicial effect). Here, the purple folder's scant value of showing motive – where motive was obvious from the nature of the crime – was greatly outweighed by the unfair prejudice it engendered.

In *State v. Nelson*, 501 S.E.2d 716, 717 (S.Car.1998), the State presented evidence that the defendant, charged with child sexual abuse, admitted to fantasizing about children and had in his bedroom various children's toys, videos of children's television shows, and numerous photographs of young girls. *Id*. at 717-18. The Supreme Court of South Carolina held the evidence was inadmissible, as it was intended to show that the defendant was a pedophile and acted in conformity with that character trait when he committed the charged crimes. *Id*. at 719. The State's argument that that the evidence was relevant to show motive or intent was "merely a cleverly disguised way of asserting Petitioner committed the crimes because he has a propensity to commit sexual offenses" *Id*. at 722. Moreover, the defendant's admission that he fantasized about children was inadmissible; his "general sexual attitudes were not relevant or material to the crime charged because they were admitted to show character." *Id*. at 724. Because "the very apparent prejudicial impact" the propensity evidence would have upon a jury outweighed any probative value, reversal was warranted. *Id*. at 721, 724.

Here, the trial court once again failed to assess whether evidence offered by the prosecution over defense objection was truly legally relevant by weighing its probative value against its prejudicial effect. Even without the purple folder, the jury would have known that Wood's motive for kidnapping and sexually assaulting Hailey was his sexual desire for her. The purple folder added nothing of value to the State's case yet

overwhelmingly prejudiced Wood. Wood's stories must have repulsed the jurors and made them hate Wood. This evidence presented far too great a danger that the jurors convicted Wood based on his propensity to lust after young girls, and the jurors' resulting abhorrence and revulsion, rather than on whether he actually deliberated in killing Hailey.

VII. The Error Was Not Harmless

Reversal is warranted when improper evidence "had an effect on the jury's deliberations to the point that it contributed to the result reached." *Barriner*, 34 S.W.3d at 151. In *Barriner*, the defendant admitted he killed Candy and Irene Sisk. *Id*. at 143. Candy had her neck slashed multiple times, was bound with rope, and had been anally violated with a blunt object. *Id*. at 142. Irene was hogtied, had multiple stab wounds, five of which penetrated her chest cavity and lung, and her throat was repeatedly slashed. *Id*. Blood found in Barriner's car contained Irene's DNA. *Id*. at 144.

In his bedroom, Barriner had multiple ropes and cords consistent with the ropes used in the crimes. *Id*. He had handwritten directions to the Sisk home and a list of "things for first entrance," such as a gun, handcuffs, and rope. *Id*. at 143-44. He also had handcuffs, dildos, homemade sex videos, and a bondage magazine. *Id*. at 144.

At trial, Barriner's ex-girlfriend, Shirley Niswonger (Candy's mother), testified that Barriner liked to tie her up and penetrate her anally with his penis and a dildo. *Id*. at 145. The jury viewed clips of a videotape of Barriner and Niswonger engaging in consensual acts of bondage, anal sex, oral sex, and the use of sex toys. *Id*. at 145-48. Supposedly to show showed Barriner's animus against Niswonger and a motive to kill the victims, the

State elicited that Barriner once threatened to take Niswonger's son into the woods and shoot him. *Id*. at 148.

This Court held that Niswonger's testimony, the videotape of sex acts, and much of the other "bad acts" evidence was improperly admitted under the modus operandi exception. *Id*. at 145-47, 149. Even if evidence of the dildos had been logically relevant, any probative value was substantially outweighed by its prejudicial effect, "especially given that appellant was charged with murder, not with a sex crime involving the use of inanimate objects." *Id*. at 147. Barriner's alleged threat to Niswonger's son was not legally relevant to prove motive because there was no evidence that Barriner ever threatened Niswonger or either victim. *Id*. at 148. The prejudicial effect of the threat outweighed any probative value because it could have led the jury to convict Barriner based on propensity evidence. *Id*.

The error in admitting this evidence mandated reversal. *Id*. at 149-52. Much of the improperly admitted evidence related to anal penetration and bondage, circumstances related to the crime. *Id*. at 150-51. With no limiting instruction by the trial court, this Court could not confidently conclude that "the jury did not misuse the evidence to convict appellant because of his bad character, sexual proclivities, or perversions." *Id*. at 151. Additionally, the prosecutor actively argued for admission of the evidence, deliberately adduced it at trial, and repeatedly referenced it in closing argument. *Id*. Even though Barriner confessed to the crimes, had Irene's blood in his car, and told friends he was going to the victims' house to get money – not to mention the numerous stab wounds supporting a finding of deliberation – the Court reversed. *Id*. at 152-53.

Reversal is warranted here too. As *Barriner* recognized, "[t]he jury is more likely to attach significant probative value to the improperly admitted evidence if it relates directly to the charged offenses." *Id*. at 150. Here, because both the charged crime and the prior bad acts involved sexual conduct with young girls, the jury would have attached significant probative value to the bad acts evidence when it should have attached none.

As in *Barriner*, the court provided no limiting instruction to advise the jury on the proper use of this evidence. *Id*. at 151. Thus, "this Court's confidence that the jury did not misuse the evidence to convict appellant because of his bad character, sexual proclivities, or perversions is diminished." *Id*. Moreover, the prosecutor did in fact urge the jurors to use the evidence for an improper purpose – it urged the jurors to believe they could fill in the gaps in the State's case by assuming that Wood engaged in the same conduct with Hailey as he had in his fictional stories. For example, the evidence showed that Hailey had vaginal bruising consistent with penetration by a penis (Tr.3427), but no evidence that the bruising was, in fact caused by Wood's penis or that Wood had ejaculated. As in *Barriner*, the prosecutor improperly used the stories as evidence of Wood's *modus operandi*:

> And you know his intent was to have vaginal and anal sex because he wrote about it. He wrote about that that's what he wanted to do to a little girl. What else did he write about when he was talking in those stories when he was actually having either anal sex or vaginal sex? ***What does he do? He pulls out when he ejaculates.*** That's what he tells us he does. That's his intent.

(Tr.3602)(emphasis added). Although the State argued for admission on the theory that the purple folder showed motive, the State's true purpose was to show Wood's propensity to engage in certain behaviors.

Finally, the prosecutor intentionally elicited the testimony and evidence about the folder's contents and highlighted the evidence in the guilt and penalty phases of trial. The prosecutor presented nine exhibits regarding the contents of the folders (Ex.340-348). If the evidence was truly meant just to show Wood's motive, the State could have elicited testimony about one story or just presented a segment of the stories. Instead, the prosecution presented ***both*** stories, ***in full*** to the jurors for them to read (Tr.3171-73). The prosecutor repeatedly referred to the evidence in closing argument in both the guilt and penalty phases of trial (Tr.3602,3614,4106).

The prosecution's excesses in presenting to the jury this irrelevant yet extremely graphic and disturbing material and then urging the jury to believe – despite any evidence in support – that Wood acted in conformity with the fictional acts, denied Wood a fair trial. The State cannot show that this evidence did not contribute to the guilty verdict. Reversal is warranted.

IV.

The trial court erred in overruling Wood's motion regarding the unconstitutionality of Missouri's death penalty procedure, his written and oral objections to the judge repeating the steps of the death penalty procedure and determining the sentence, and in imposing a death sentence after the jury deadlocked on punishment, because Missouri's capital sentencing procedure impermissibly allows the imposition of a death sentence that is based on a judge's fact-finding on the critical issues in the sentencing process in violation of Wood's right to trial by jury, due process, and unanimous jury findings at each critical step including the final assessment of sentence, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §22(a) of the Missouri Constitution, in that §565.030 and §565.032 impermissibly allow a judge to make the critical findings necessary for imposition of a death sentence when the jury is not unanimous in weighing aggravating and mitigating circumstances and when the jury cannot unanimously decide that death is the appropriate punishment.

The framers of the federal 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 judge. 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 and proceed via judicial fiat. Such a sentence violates the defendant's right to trial by jury, due process, and unanimous jury findings at each critical step including the final assessment of sentence. U.S.Const.,Amends.VI,XIV; Mo.Const.,Art.I,,§22(a).

I. Preservation and Facts Related to the Claim

The issue is preserved. Pretrial, Wood filed a motion arguing that Missouri's death penalty scheme was unconstitutional because Missouri's deadlock procedure violated the Sixth Amendment right to trial by jury by allowing the judge to make the critical findings necessary to impose the death penalty (D.782,p.5-9,13). It alleged that Missouri's procedure had the same flaws that caused the states of Florida and Delaware to amend their death penalty procedures to require unanimity in finding (1) an aggravator; (2) that the evidence in aggravation outweighs the evidence in mitigation; and (3) that the defendant should receive the death penalty (D.782,p.5-9,12-13). It also alleged that Missouri's deadlock procedure violated the right to a unanimous verdict as required by Article I, §22(a) of the Missouri Constitution (D.782,p.7,12-13). The court overruled the motion pretrial and before the case was submitted to the jury in the penalty phase (Tr.1054-55,4044-48). The issue was included in the motion for new trial (D.871,p.36-39;Tr.4131).

The State failed to convince the jury, as is their burden under §565.030.4, that Wood should receive a death sentence (Tr.4110). The jury listed six statutory aggravating circumstances it found beyond a reasonable doubt and vouched it did not "unanimously find there are facts and circumstances in mitigation of punishment sufficient to outweigh

facts and circumstances in aggravation of punishment" (Tr.4111-12;D.867,p.18-19).

The trial court denied Wood's written and oral arguments that the court must sentence him to life without parole because judicial assessment of sentence after jury deadlock violates the Sixth Amendment right to jury trial, due process under the Fourteenth Amendment, and a unanimous jury decision under Article I, §22(a) of the Missouri Constitution (D.869,p.4,6-17,22-23;Tr.4132-47,4153,4160-63).

Judge Mountjoy then reconsidered the facts and made his own independent findings (Tr.4166-69;Appx.A8-A9). He found that the State had proven each of the six aggravating circumstances beyond a reasonable doubt (Tr.4166;Appx.A8-A9). He also found that the circumstances in mitigation did not outweigh the circumstances in aggravation (Tr.4166; Appx.A8-A9). Judge Mountjoy imposed a death sentence (Tr.4169;Appx.A8-A9).[10]

II. Hurst Declared Advisory Juries Unconstitutional

In *Hurst v. Florida*, 136 S.Ct. 616, 619 (2016), the Supreme Court struck down Florida's capital sentencing procedure because it delegated to the judge 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

[10] The standard of review is set forth, *supra*, p.29.

(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, the Supreme 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)). Florida erred in not requiring the jury to find the "critical findings necessary to impose the death penalty." *Hurst*, 136 S.Ct. at 622. 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.'" *Id*.; see also *id*. (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"). Without jury-made findings, the only sentence Hurst could have received was life without parole. *Id*. 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*.

III. Florida and Delaware Have Interpreted Hurst as Requiring that All Factual Findings Necessary to Impose a Death Sentence, Including the Decision of Whether to Impose a Death Sentence, Must be Made by a Unanimous Jury

A. 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 40, 51 (Fla.2016)(*Hurst II*). These critical findings were elements, "the sole province of the jury," and had to be found unanimously. *Id*. 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 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).

B. Supreme Court of Delaware, *Rauf v. Delaware*

Delaware also recognized the need for drastic change following *Hurst*. In *Rauf v. Delaware*, 145 A.3d 430, 433 (Del.2016)(per curiam), the Delaware Supreme Court held its death penalty procedure violated "the Sixth Amendment role of the jury as set forth in *Hurst*." The 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,[11] 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, Strine, Seitz JJ.,concurring)(*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 must be made if the defendant is in fact to receive a death sentence." *Rauf*, 145 A.3d at 435-36, 460 (Strine, Holland, Seitz JJ.,concurring). 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.

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

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

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 cannot conclude that the evidence in mitigation outweighs the evidence in aggravation. §565.030.4(2),(3). Only after the jurors make these two required findings may they decide whether to recommend a death sentence. §565.030.4(4); *State v. Shockley*, 410 S.W.3d 179, 198 (Mo.banc2013).

If the jury cannot agree whether to recommend a death sentence, the court must "follow the same procedure as set out in this section." §565.030.4. This Court itself has held that Missouri's statutory deadlock procedure is unconstitutional. In *State v. Whitfield*, 107 S.W.3d 253, 261-62 (Mo.banc2003), the Court held that allowing a trial court to assume the jury's role as §565.030.4(4) mandates upon deadlock, "clearly violated the requirement of [*Ring v. Arizona*, 536 U.S. 584 (2002)] that the jury rather than the judge determine the facts on which the death penalty is based." *Id*. at 262. The Court noted that once the jury deadlocked on Whitfield's sentence, the jury's findings "simply disappear[ed] from the case." *Id*. at 271. The trial judge then "independently went through each of the four statutory steps, independently determined each fact against Mr. Whitfield, and imposed a death sentence." *Id*. at 261. The resulting death sentence "was not based on a jury finding of any fact, but rather was entirely based on the judge's findings that all four steps favored imposition of the death penalty." *Id*. at 261-62; 271 (any resulting judgment of death is "based on the court's findings"); *State v. McLaughlin*, 265 S.W.3d

257, 264 (Mo.banc2008)(trial court may reconsider the facts in making its own determinations); *State v. Smith*, 944 S.W.2d 901, 920 (Mo.banc1997)(trial court independently considers each aggravating circumstance); *State v. Griffin*, 756 S.W.2d 475, 488 (Mo.banc1988)(upon deadlock, trial court "must determine punishment independently and without reliance on the results of any deliberations of the jury").

Instead of the legislature amending the statute after *Whitfield* to correct the unconstitutional provision, this Court attempted to render the constitutional error harmless in future cases by changing the jury instructions to require that deadlocked juries answer several interrogatories. *McLaughlin*, 265 S.W.3d at 264. First, the deadlocked jurors must list the statutory aggravators they found beyond a reasonable doubt. MAI-CR3d 314.58. Second, they must answer whether they "unanimously [found] that there are facts and circumstances in mitigation of punishment sufficient to outweigh facts and circumstances in aggravation of punishment." *Id*. These interrogatories are intended to show that the jury deadlocked at the final step. *McLaughlin*, 265 S.W.3d at 264.

In *Shockley*, 410 S.W.3d at 198, Shockley contended that his death sentence was unconstitutional because it was the product of judicial fact-finding. Rejecting the claim, this 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*. This 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*.

This Court must reconsider *Shockley* and *McLaughlin* in light of *Hurst*. Missouri's procedure for dealing with penalty phase deadlock mirrors the hybrid procedure struck down in *Hurst*. In both this case and *Hurst*, the jurors found that the State had proven one or more statutory aggravators. *Hurst*, 136 S.Ct. at 625 (Alito, J.,dissenting); D.867,p.19. In both, the jurors made a finding as to the relative weight of the statutory and mitigating evidence. *Hurst*, 136 S.Ct. at 620; 625 (Alito, J.,dissenting); D.867,p.18. In both, after the jury made its findings, the judge reconsidered the facts and made his or her own independent findings. *Hurst*, 136 S.Ct. at 620;Tr.4166-69;Appx.8-9. 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. 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; *State v. McLaughlin*, 265 S.W.3d at 264.

As in *Hurst*, since the decision was death, the judge set forth his own independent factual findings. *Hurst*, 136 S.Ct. at 620; Tr.4166-69. In both this 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; Tr.4169. As a consequence of the State's failure to satisfy its burden and persuade the entire jury, the State effectuated a waiver of Wood's right to a jury. The State should not be allowed to waive a right asserted by a defendant.

In *Shockley*, this Court reasoned that 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). The Supreme 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 Wood'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 Wood'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

This Court held that because the State violated Whitfield's Sixth Amendment jury trial right, the State had the burden of proving the error was harmless beyond a reasonable doubt. *Whitfield*, 107 S.W.3d at 262; *see also State ex rel. Taylor v. Steele*, 341 S.W.3d 634, 640 (Mo.banc2011); *see also id.* at 661 (Stith, J., dissenting). The Court held that the

State could not prove the error harmless as to the weighing step. *Whitfield*, 107 S.W.3d at 263-64. The record did not show "that the jury deadlocked after rather than before it made the requisite finding under [the weighing step]." *Id*. at 264. Under the instructions, the jurors could believe they were deadlocked and return a deadlocked "verdict" if they were unable to agree at the weighing step. *Id*. at 264 (*citing* § 565.030.4; *see also State v. Thompson*, 85 S.W.3d 635, 639 (Mo.banc2002); MAI–CR3d 314.48).

For the following reasons, the State cannot meet its burden here either.

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 only court to have assessed the validity of Missouri's sentencing scheme after *Hurst* held that §565.030 violated the Sixth Amendment by allowing the judge to assume the jury's sentencing responsibility when the jurors could not agree on punishment. *McLaughlin v. Steele*, 173 F.Supp.3d 855 (E.D.Mo.2016)(*McLaughlin II*). In *McLaughlin II*, as here, the jurors stated in the second interrogatory that they did not unanimously find that the evidence in mitigation outweighed the evidence in aggravation. 173 F.Supp.3d at 896; (D.867,p.18); MAI-CR3d 314.58. But this response failed to show what the jury found; it only showed what the jury ***did not find***. *McLaughlin II*, 173 F.Supp.3d at 896. As many as eleven jurors could have found that the evidence in mitigation did outweigh the evidence in aggravation. *Id*. 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. *Id*.

Because the interrogatory does not show what the jury found, the procedure violates *Mills v. Maryland*, 486 U.S. 367, 370 (1988). There, 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. *Id*. 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*.; see also *McLaughlin II*, 173 F.Supp.3d at 896-97.

We cannot rule out that same possibility here. It is plausible, and indeed possible, 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.

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[.]" §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 §565.030.4, must be unanimous); *but see State v. Johnson*, 284 S.W.3d 561, 585 (Mo.banc2009)(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. For example, the State urged the jury and the judge to consider the impact of the crime on the community (Tr.4079,4086,4105,4107,4156,4159). The record shows that the court considered this fact in imposing a death sentence (Tr.4168), but it fails to show whether the jury did too. This 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. Because the State cannot show that the jury and the court made the same factual findings, it cannot show that the constitutional violation was harmless.

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).

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. 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*.

C. The final step, asking the jury to decide if the death penalty is justified, is a required factual finding that must be made by the jury, unanimously.

Section 565.032.1, RSMo, provides that in all death penalty cases, the court "shall include" in the jury instructions for the jury to consider:

> … (2) If a statutory aggravating circumstance or circumstances is proven beyond a reasonable doubt, **whether the evidence as a whole justifies a sentence of death or a sentence of life imprisonment without eligibility for probation, parole, or release except by act of the governor**.

(Emphasis added). The statute frames the "issue" posited in paragraph (2) as being a determination to be made by the jury. Because the Legislature chose the operative language in §565.032 that the jury "determine" this "issue," it must be proved unanimously and beyond a reasonable doubt. *Hurst*, 136 S.Ct. at 621 (*citing Alleyne*, 570 U.S. at 104); *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993).

VI. Missouri's Constitution Requires Jury Unanimity

Article I, §22(a) of the Missouri Constitution ("that the right of trial by jury as heretofore enjoyed shall remain inviolate") guarantees the right to a unanimous jury verdict. *State v. Celis-Garcia*, 344 S.W.3d 150, 155 (Mo.banc2011). This applies just as much to death verdicts as it does to guilt/innocence verdicts. After all, a Missouri capital sentencing trial is "like the trial on the question of guilt or innocence." *Bullington v. Missouri*, 451 U.S. 430, 446 (1981). In the penalty phase, "Missouri *explicitly requires* the jury to determine whether the prosecution has 'proved its case.'" *Id*. at 444 (emphasis in original).

Florida has an almost identical constitutional provision. Article I, §22 of the Florida Constitution guarantees that "[t]he right of trial by jury shall be secure to all and remain inviolate." *Hurst II*, 202 So.3d at 54-55. The Florida Supreme Court relied on that constitutional provision, as well as Blackstone's writings on the right to a unanimous jury in English jurisprudence and the common law principle that jury verdicts be unanimous, in holding that the jury's death verdict must be unanimous. *Id*. Missouri should do the same regarding Article I, §22(a) of the Missouri Constitution.

VII. Allowing a Judge to Impose a Death Sentence after a Jury Could Not Violates Core Principles Underlying the Sixth and Fourteenth Amendments

Core constitutional principles underlying the right to trial by jury are significantly jeopardized, if not outright defeated, when a trial court replaces the jury in a capital sentencing trial. The right to trial by jury is "fundamental to the American scheme of justice." *Sullivan*, 508 U.S. at 277. Its inclusion in the federal constitution and all state constitutions reflects the founders' "reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). 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). As a buffer between the defendant and the State, the jury is an essential protection against governmental oppression. *Baldwin v. New York*, 399 U.S. 66, 72 (1970). Moreover, trial by jury gives voice to "the commonsense judgment of the community" and allows "community participation and shared responsibility" in the administration of justice. *Williams v. Florida*, 399 U.S. 78, 100 (1970); *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975).

A jury also enhances the fairness and reliability of the sentencing determination and thus ensures due process under the Fourteenth Amendment. 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). 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). Judicial sentencing is often affected by extraneous factors resulting in arbitrary and unreliable death sentences, such as the judge's fear that sentencing a defendant to life without parole instead of death will jeopardize the judge's chance of re-election. *See Woodward v. Alabama*, 134 S.Ct. 405, 408-09 (2013)(Sotomayor, J.,dissenting, denial cert.); *Harris v. Alabama*, 513 U.S. 504, 519 (1995)(Stevens, J.,dissenting).

Because of the importance of the right to trial by jury and its correlation to other constitutional rights, the Supreme Court has been vigilant to curb any encroachment. See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring*, 536 U.S. 584; *Hurst*, 136 S.Ct. 616; *Alleyne*, 570 U.S. at 115-16 (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 conviction). This 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.[12]

This Court must order that Wood be resentenced to life without the opportunity for probation or parole under §565.040.

[12] 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 conviction, *Mathis*, 136 S.Ct. at 2252, 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.* 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").

V.

The trial court erred in overruling Wood's motions regarding the unconstitutionality of Missouri's death penalty procedure and in sentencing Wood to death, because Missouri's procedure for dealing with juror deadlock in the penalty phase violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §21 of the Missouri Constitution, in that, by allowing the judge to impose a death sentence after the jury cannot unanimously decide that death is an appropriate punishment, Missouri's procedure violates evolving standards of decency that require that no defendant receive a death sentence but by a unanimous jury decision. A national consensus has emerged mandating that if the jury cannot unanimously decide that death is the appropriate punishment, the defendant must receive, at most, a sentence of life without parole, or a new penalty phase trial must be held; there is a consistent direction of change favoring this requirement; and strong policy considerations support it.

In allowing a trial judge, upon penalty phase deadlock, to reconsider the facts, make his or her own findings, and impose the death penalty, Missouri is an extreme outlier. The vast majority of death penalty states recognize that no defendant should die at the hands of the State except by the unanimous decision of the jurors. Only Missouri and Indiana allow a judge to impose a death sentence when the jury could not agree that death was an appropriate punishment. By not requiring a unanimous decision for the defendant to receive the death penalty, Missouri's death penalty procedure violates the Eighth and

Fourteenth Amendments to the United States Constitution and Article I, §21 of the Missouri Constitution.

I. Facts and Preservation

Prior to trial, Wood filed a motion asking the court to strike the State's notice of intent to seek the death penalty (D.782). Wood argued that Missouri was an extreme outlier by its continual broadening of the State's ability to obtain the death penalty, while other states were restricting it; any death verdict must express the conscience of the community and thus must be imposed by a unanimous jury (D.782,p.6-9,11-13). In an interrelated motion, Wood specified that Missouri was an extreme outlier because it was one of only two states that allowed the judge to assess sentence in the event of jury deadlock (D.801,p.7-8). Missouri has failed to conform to evolving standards of decency by allowing a judge to assess sentence in the event of jury deadlock, and as a result, any death sentence would violate the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §21 of the Missouri Constitution (D.801,p.1-2,7-8,17).

The court denied these motions pretrial (Tr.1054-55,1074). During the penalty phase, counsel again argued that, considering evolving standards of decency, Missouri's procedures violated the Eighth Amendment (Tr.4044-48). The court again rejected Wood's arguments (Tr.4048). The issue was included in the motion for new trial (D.871,p.36-40).

After the jurors could not agree that Wood should receive a death sentence (Tr.4110; Appx.A2-A3), Wood filed a motion asking that the court sentence him to life without parole (D.869). He argued Missouri was an extreme outlier by allowing judicial

assessment of sentence following jury deadlock (D.869,p.3-4,17-22). Wood argued that any death sentence imposed in the absence of a unanimous jury verdict violated the Eighth Amendment's prohibition of cruel and unusual punishment, applicable to the States through the Fourteenth Amendment, as well as Article I, §21 of the Missouri Constitution (Tr. 4146-47). The court denied the motion (Tr. 4153).[13]

II. The Eighth and Fourteenth Amendments and Article I, §21 of the Missouri Constitution Mandate that any Death Sentence be Imposed by a Jury, Unanimously

The Eighth Amendment of the United States Constitution bars the infliction of "cruel and unusual punishments" and reaffirms the states' duty "to respect the dignity of all persons." *Roper v. Simmons*, 543 U.S. 551, 560 (2005); see also Mo.Const.,Art.I,§21. To enforce the Constitution's protection of human dignity, the Court must consider "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). "It is an established principle that decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment." *Kennedy v. Louisiana*, 554 U.S. 407, 435 (2008).

The Court has construed the Eighth Amendment in light of evolving standards of decency in holding that certain classes of defendants or crimes are exempt from the death penalty. See, *e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 321 (2002)(barring death penalty for intellectually disabled); *Kennedy*, 554 U.S. at 412 (barring death penalty for rape of child). But it also has considered the doctrine in striking down procedures that may allow the

[13] The standard of review is set forth, *supra*, p.29.

undeserved imposition of the death penalty. See, *e.g.*, *Hall v. Florida*, 572 U.S. 701, 715-24 (2014)(using evolving standards of decency analysis to strike down unconstitutional procedure for assessing intellectual disability); *Mills v. Maryland*, 486 U.S. 367, 383–84 (1988)("[e]volving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case"); *Gardner v. Florida*, 430 U.S. 349 (1977)(Court acknowledged "its obligation to re-examine capital-sentencing procedures against evolving standards of procedural fairness in a civilized society"). Procedures that risk the erroneous imposition of the death penalty are "incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

A. National Consensus Exists

To the greatest extent possible, the Court must base its review of "evolving standards of decency" on objective factors. *Atkins*, 536 U.S. at 312. Laws enacted by state legislatures provide "the clearest and most reliable objective evidence of contemporary values." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). After all, "in a democratic society[,] legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." *Gregg v. Georgia*, 428 U.S. 153, 175-76 (1976) (joint opinion, Stewart, Powell, Stevens,JJ).

Currently, 30 states have the death penalty and 20 do not.[14] The 20 states without the death penalty count toward the national consensus. See, *e.g.*, *Roper v. Simmons*, 543

[14] *See* Death Penalty Information Center website: https://deathpenaltyinfo.org/states-and-without-death-penalty (last viewed Nov.26,2018).

U.S. 551, 564 (2005)(finding national consensus by counting 12 states that abolished death penalty and 18 that have death penalty but exclude juveniles); see also *Atkins*, 536 U.S. at 314-15.

Here, the consensus is even stronger. In addition to the 20 states that now have abolished the death penalty, another 25 states and the federal government have enacted legislation mandating that any death sentence be imposed by a jury, unanimously.[15] All but four states – Montana, Nebraska, Indiana and Missouri – require that any decision to impose a death sentence be made by a jury.[16] All but five states – the above four plus Alabama – require the jury to make that decision unanimously.[17]

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[15] In 25 of the 30 death penalty states, if the jury cannot unanimously decide to impose a death sentence, the defendant receives a sentence of life or life without parole (LWOP), or a new penalty phase: Arizona,A.R.S.§13-752(K) (retrial, but life/LWOP after second deadlock); Arkansas,A.C.A.§5-4-603 (LWOP); California,Cal.Penal.Code§190.4(b) (retrial; after second deadlock, life or retrial); Colorado,C.R.S.§18-1.3-1201 (LWOP); Florida,Fla. Stat.§921.141 (LWOP); Georgia, Ga.CodeAnn.§17-10-31(life/LWOP); Idaho, I.C.A.§19-2515 (LWOP); Kansas,K.S.A.§21-6617 (LWOP); Kentucky,K.R.S. §532.025 (retrial); Louisiana,L.S.A.-C.Cr.P.Art.905.8 (LWOP); Mississippi, Miss.Code Ann.§99-19-101 (life); Nevada: N.R.S. Ann. §175.556(1) (retrial/LWOP); New Hampshire, N.H.Rev. Stat.§630:5(IX)(LWOP); North Carolina, N.C.G.S.A.§15A-2000(b) (LWOP); Ohio, R.C.Ann.§2929.03 (life/LWOP); Oklahoma,21Okla.St.Ann. §701.11 (LWOP); Oregon, O.R.S.§163.150 (life/LWOP); Pennsylvania, 42 Pa.C.S.§9711 (life); South Carolina, S.C.CodeAnn.§16-3-20 (LWOP); South Dakota,S.D.C.L.§23A-27A-4 (LWOP); Tennessee,Tenn.CodeAnn.§39-13-204 (life/LWOP); Texas,Tex.C.C.P. art.37.071 (LWOP); Utah,UtahCodeAnn.§76-3-207 (life/LWOP); Virginia,Va.CodeAnn. §19.2-264.2 (LWOP); Wyoming, Wyo.Stat.Ann.§6-2-102 (life/LWOP); U.S.Govt.,18 U.S.C.§3593 (life/LWOP). See Appendix, p.A14-A32.

[16] See Mont.Code Ann.§46-18-301; Neb.Rev.St.§29-2520-§29-2522; Ind.CodeAnn.§35-50-2-9(f); and §565.030.4, RSMo. See Appendix, p.A14-A32.

[17] See Ala.Stat.Ann.§13A-5-46. See Appendix, p.A14.

Like Missouri, Indiana normally requires a unanimous jury decision to impose a death sentence, but if the jurors cannot agree, the judge takes over and decides. Ind.CodeAnn.§35-50-2-9(f). In Montana and Nebraska, a judge or a panel of judges makes the ultimate decision. Mont.CodeAnn.§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.[18] 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.[19] Thus, in the vast majority of death penalty states, as well as the federal government, 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.

Also of importance in determining whether a consensus exists is the consistency or direction of change. *Atkins*, 536 U.S. at 315. This too demonstrates a national consensus against judicially assessed death sentences. Since 2007, eight more states have eliminated

[18] Since 1976, Montana has only imposed the death penalty eight times; the last time was in 1997. *See* Death Penalty Information Center website: http://www.deathpenaltyinfo.org/montana-1#sent (last viewed Nov.20,2018).

[19] Ala.Stat.Ann.§13A-5-46. 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. *Id*. See Appendix, p.A14.

the death penalty legislatively or by caselaw.[20] Meanwhile, only one state, Nebraska, has reinstated the death penalty. In addition, since 2002, at least six more states have started requiring that a jury assess any death sentence.[21]

B. No Reason to Disagree with the National Consensus

If a challenged practice contravenes a clear national consensus, the Court then must use its own judgment to determine "whether there is reason to disagree with the judgment reached by the citizenry and its legislatures." *Atkins*, 536 U.S. at 313. No good reason exists to disagree with the overwhelming national consensus that any death sentence verdict must be the product of a unanimous jury decision. Requiring a unanimous jury verdict to impose a death sentence supports the core principles underlying the Sixth, Eighth, and Fourteenth Amendments, as set forth in Argument IV, *supra*, p.93-94.

Trial by jury also ensures that a death sentence reflects contemporary standards of morality and the conscience of the community as required by the Eighth Amendment. *Thompson v. Oklahoma*, 487 U.S. 815, 822-23, 832 (1988); *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). Without a link to community values, a death sentence loses its moral

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[20] New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), Delaware (2016), and Washington (2018). See Death Penalty Information Center website: https://deathpenaltyinfo.org/states-and-without-death-penalty (last viewed Nov.21,2018).

[21] Arizona's statute, A.R.S. §13-703, no longer allows judicial fact-finding in the penalty phase A.R.S.§13-752. The same is true in Colorado (compare 6 C.R.S.§16–11–103 (2000) and C.R.S.§18-1.3-1201 (2002)); Delaware (see *Rauf v. Delaware*, 145 A.3d 430 (Del. 2016)); Florida (see *Hurst v. State*, 202 So.3d 40 (Fla. 2016)); Idaho (compare I.C.A.§19-2515 (2000) and I.C.A.§19-2515 (2003)); and Nevada (see *Johnson v. State*, 59 P.3d 450 (Nev.2002), N.R.S.§175.556 (2003)). See Appendix, p.A14-A32.

and constitutional legitimacy. *Spaziano v. Florida*, 468 U.S. 447, 482 (1984)(Stevens, J, dissenting)(majority opinion overturned in rel. part by *Hurst*, 136 S.Ct. at 623).[22] 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).

In *Hurst v. State*, 202 So.3d 40, 59-60 (Fla.2016), 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. Death sentences must not be arbitrarily imposed and must meet the highest standards of reliability. *Id*. at 60. Unanimity provides the highest degree of reliability and "furthers the deliberative process by requiring that the minority view be thoroughly examined and then rejected or accepted by the entire jury." *Id*. at 58,60. 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 and that the verdict expresses the conscience of the community. *Id*. at 60. Because Florida did not require a unanimous jury decision for death, any imposition of the death penalty was cruel and unusual. *Id*. at 61; also 70 (Pariente, J.,concurring).

So too, the Delaware Supreme Court held that, in addition to violating the Sixth Amendment, Delaware's statute violated the Eighth Amendment because "the practice of executing a defendant without the prior unanimous vote of a jury is so out of keeping with

[22] While the Supreme Court only partially overruled *Spaziano v. Florida*, 468 U.S. 447 (1984), "time and subsequent cases have washed away the logic of *Spaziano"* as it pertains to the Eighth Amendment, too. *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016).

our history as to render the resulting punishment cruel and unusual." *Rauf v. Delaware*, 145 A.3d 430, 437, 465 (Del. 2016)(per curiam). The right to trial by jury encompassed "the right to have a jury drawn from the community and acting as a proxy for its diverse views and mores, rather than one judge, make the awful decision whether the defendant should live or die." *Id*. at 436, 478-79, 482.

Wood's sentence was imposed contrary to 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. Without a unanimous jury verdict for death, Wood's death sentence violates the Eighth and Fourteenth Amendments and Article I, §21 of the Missouri Constitution. This Court must order that Wood be resentenced to life without parole under §565.040, RSMo.[23]

[23] Ruling in Wood's favor would not "open the floodgates." Counsel knows of only three other defendants under a judicially-assessed death sentence following juror deadlock: Marvin Rice (SC96737), Lance Shockley (SC90286), and Scott McLaughlin (SC88181).

VI.

The trial court abused its discretion in allowing the State, over objection, to elicit testimony exceeding the proper scope of victim impact evidence, to pose questions to witnesses that were intended to evoke emotional responses, and to argue the improper victim impact evidence in closing:

(1) evidence that over ten thousand people had attended a vigil for Hailey;

(2) hearsay evidence and argument that "countless parents" now feared for their children's safety and that the crime changed Springfield from a town into a city;

(3) questioning of witnesses intended to elicit strong emotional responses,

because the excessive and improper victim impact evidence and argument and the State's deliberate attempts to create a funereal atmosphere through its questioning violated Wood's right to due process, a fair and reliable sentencing, confrontation, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§10, 18(a), and 21 of the Missouri Constitution, in that the State's actions were so excessive and geared toward encouraging the jury to make its decision based on passion, prejudice, and emotion, as to render the penalty phase fundamentally unfair.

I. The Proper Scope of Victim Impact Evidence[24]

In *Payne v. Tennessee*, 501 U.S. 808 (1991), the Supreme Court held that the Eighth Amendment did not bar the admission of victim impact testimony in the penalty phase. There, the only victim impact testimony offered was a mere six sentences of 53 words. *Id.* at 814-15. The Court held that this evidence did not violate due process because it was a response to a single question and the prosecutor's penalty argument referred to it only briefly. *Id*. at 815-16. The jury may see a "quick glimpse" of the life of the person who was killed. *Id*. at 822, 830 (O'Connor, J., concurring).

But the Court warned that it was possible for a witness' testimony or a prosecutor's remark to so infect the sentencing decision as to render it fundamentally unfair and thereby violate due process. *Payne*, 501 U.S. at 825, 831 (O'Connor, J.,concurring); *see also Darden v. Wainwright*, 477 U.S. 168, 179-183 (1986). Further, the Court affirmed the trial court's duty to restrict victim impact evidence by noting that such evidence and prosecutorial argument "can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation." *Payne*, 501 U.S. at 836 (Souter, J.,concurring). The Court warned lower courts to be ever vigilant to protect a capital defendant's constitutional rights: "With the command of due process before us, this Court and the other courts of the State and Federal systems will perform the 'duty to search for constitutional error with painstaking care, 'an obligation' never more exacting than it is in

[24] The standard of review is set forth, *supra*, p.29.

a capital case.'" *Id*. at 837 (Souter, J.,concurring)(*citing Berger v. Kemp*, 483 U.S. 776, 785 (1987)).

Missouri allows the admission of "evidence concerning the murder victim and the impact of the offense upon the family of the victim and others." §565.030.4. The State "may show that the victims were individuals whose deaths are unique losses to society and to their families." *State v. Johnson*, 22 S.W.3d 183, 190 (Mo.banc2000).

II. The State Used the Pretext of Victim Impact Evidence to Create an Atmosphere that More Closely Resembled a Funeral than a Capital Penalty Phase Trial

A. Effect of the Crime on the Community of Springfield

Pretrial, Wood asked the court to bar the State from presenting victim impact testimony, or to limit it by excluding witnesses who were removed from Hailey's life (D.832). Such testimony was so unduly prejudicial, inflammatory and irrelevant as to violate Wood's right to due process, a fair trial, reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a), 21 (D.832,p.7). Wood renewed the motion, specifically asking that the court bar testimony about how the crime affected the Springfield community (Tr.3647-48,3651,3664-67). Wood also objected that Pastor Findley would be testifying about the effect of the crime on non-testifying witnesses, which was hearsay and violated Wood's right to confrontation (Tr.3669-70,3750,3770). The court denied Wood's objections (Tr.3647-48,3651,3664-67,3669-70,3756-57,3759,3770).[25]

[25] Each segment of this Point was included in the motion for new trial (D.871,p.20-23) and is properly preserved for review.

i. The 10,000-Person Vigil

Over defense objection, the prosecution elicited that a few days after Hailey's death, over 10,000 people attended a vigil in downtown Springfield (Tr.3760-61). The court abused its discretion in permitting this testimony.

Undersigned counsel could find only one case where evidence of a candlelight vigil was admitted as victim impact evidence in a capital trial. There, the evidence was a photograph of a ***flier*** announcing that a candlelight vigil would be held. *State v. Magee*, 103 So.3d 285, 330 (La.2012). The Louisiana Supreme Court held that the photograph showed the neighborhood's efforts to honor the victims; the murders occurred in the victims' subdivision and people from the neighborhood struggled to save their lives. *Id.* The court noted that the photographs "do not demonstrate an attempt to introduce evidence of the crime's influence on the entire parish." *Id.*[26]

The fact that 10,000 people attended a vigil did not offer a "quick glimpse" of Hailey's life or show the impact of the offense upon Hailey's family and others. §565.030.4. It had very little, if any, probative value. Perhaps some of the attendees knew Hailey or her family, but the vast majority were faceless strangers who attended because they were sad that a child had been killed or any number of reasons. Their appearance at the vigil for an hour or two did not show that the crime had any lasting impact on them.

[26] Louisiana limits victim impact evidence to "the impact that the crime has had on the victim, family members, friends, and associates." La. Code Crim. Proc. Ann. art. 905.2.

Yet the evidence carried a high risk to be misconstrued by the jury. It impermissibly suggested to jurors that the community in which the case arose (1) had an unusually high interest in this case, (2) empathized and sympathized with Hailey and her family, and (3) would want justice in the case, a death verdict. It contorted *Payne's* "quick glimpse" of the life of the person killed into a public poll of Springfield's citizens on whether Wood should live or die.

The jurors in this case were chosen from Platte County for a reason – the pervasive, hostile and prejudicial publicity Wood's case had received in Greene County (D.659,707). If the passions and prejudices of the citizens of Springfield and the surrounding area were sufficiently damning to Wood to warrant a change of venue, then such intolerance and condemnation should never be admissible against him ***at trial***. Yet the court allowed just that, evidence and argument that the Springfield community collectively suffered from Hailey's death and supported a death verdict for Wood. It was bad enough that the court subjected these Platte County jurors to the scourge of local television and reporters' cameras clicking throughout the trial (Tr.2876,2967-68,3480,4097). Yet to expose them to the pressure of satisfying the 10,000 local citizens who marched for little Hailey, was beyond the pale.

ii. Hearsay Testimony about the Crime's Impact on the Springfield Community

In addition, Pastor Findley testified, over objection, that the crime changed how residents saw Springfield; it was no longer a town but a city (Tr.3770). "Countless parents" told him they no longer let their children play unsupervised in the front yard, and they "think a lot harder before they let their kids walk to school or just walk down the street to

a friend's house" (Tr.3770-71).

Pastor Findley's testimony was impermissible hearsay. Hearsay evidence is "in-court testimony of an extrajudicial statement offered to prove the truth of the matters asserted therein, resting for its value upon the credibility of the out-of-court declarant." *State v. McElroy*, 838 S.W.2d 43, 46 (Mo.App.E.D.1992). Through Pastor Findley, the prosecution used the out-of-court statements of "countless parents" to show that Springfield parents were in fact afraid to let their children play unsupervised or walk the streets alone (Tr.3770-71). This impermissible hearsay violated Wood's right to due process and to confront the witnesses against him. U.S.Const.,Amends.V,VI,XIV; Mo.Const.,Art.I,§§10,18(a).

The testimony also exceeded the proper scope of *Payne*. *Payne* did not hold that "the 'floodgates have opened' and that everything the prosecution wishes is admissible." *Cargle v. State*, 909 P.2d 806, 826 (Okla.Crim.App.1995)(*affirmance reversed by Cargle v. Mullin*, 317 F.3d 1196, 1224 (10thCir.2003)(granting habeas relief due to cumulative error including excessive victim impact evidence)). Instead, *Payne* required "a balance to keep the scales of a capital trial from being 'unfairly weighted' in favor of one side or the other." *Id., quoting Payne*, 501 U.S. at 822. *Cargle* recognized:

> The more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict will be a "reasoned moral response" to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of Due Process.

909 P.2d at 830.

This case is similar to *State v. Young*, 196 S.W.3d 85, 109-10 (Tenn.2006). There, the victim was a university teaching assistant. *Id*. at 95. A professor testified that her death affected everyone in his department. *Id*. at 109. Students and professors were unable to function, and the murder even "threatened the career aspirations of some of the students." *Id*.

The Tennessee Supreme Court noted that the testimony showed "the far-reaching effects that a single murder can have" and "how interwoven a single individual's life is with many others." *Id*. To such an extent, the victim impact evidence had probative value. *Id*. But the danger of unfair prejudice outweighed the testimony's probative value. *Id*. at 110.

> [The professor's testimony] was not limited to a 'brief glimpse' of the victim's life, but rather laid the debilitating grief of over one hundred people at Defendant's feet. The risk of inflaming a jury's passions with such testimony is simply too great to allow its admission.

Id.; see also *State v. Burns*, 979 S.W.2d 276, 282–83 (Tenn.1998)(testimony and argument that the murders adversely affected the entire community, *e.g.*, people now were afraid and locked their doors, exceeded the scope of victim impact evidence).

"Including the community in the victim-impact inquiry is fraught with complication." *United States v. Fields*, 516 F.3d 923, 947 (10thCir.2008).

> It would involve not just the incremental extension from family to friends (and even to co-workers), but a radical change in perspective: replacing a close-in focus on persons closely or immediately connected to the victim with a wide view encompassing generalized notions of social value and loss. Even if justified in principle, such an approach would be difficult to delimit and police to ensure it stayed within proper bounds.

Id. See also *Stone v. State*, 798 S.E.2d 561, 569 (S.Car.2017)(evidence of how crime affected community "pushes the limits of permissible victim impact").

In closing, over defense counsel's continuing objection (Tr.4072-74), the State repeatedly referenced the victim impact testimony:

> Springfield went from a town to a city. It just shifted in our minds how people think about Springfield. [Pastor Findley] told you about the countless parents who won't let their kids play in the front yard anymore without them being there. They think a lot harder before they let their kids walk to a friend's house or to school.

(Tr.4079). The prosecutor urged the jurors to return a death sentence because Wood "not only brutalized Hailey Owens, but he damaged her family, her brother, her school, her entire community, and changed our community" (Tr.4086). The prosecutor's last words to the jurors were that Wood did not deserve mercy:

> This is a case where we say to [Wood] that you don't deserve [mercy], and if you do this to a child and to her family, friends, school, and community, you will pay the ultimate price.

(Tr.4107-4108). In imposing a death sentence, the court itself mentioned the impact of the crime on the community:

> I would have to say there was… in this case a real factor of a death of innocence, the death of innocence of a ten-year-old little girl, Hailey, and not only death of innocence but she gave her life, but also death of innocence for a neighborhood, for a community, for a family. Again, I think the earthquake analogy may be very accurate, indeed.

(Tr.4168). Because the death sentence was based on this improper evidence, it cannot stand.

B. Provoking Emotional Scenes in the Courtroom

During Savannah Taylor's testimony, defense counsel noted, "[i]t wasn't three questions before this young lady is crying on the witness stand, sniffling the whole time. She's been able to answer the questions by struggling through but the whole time crying,

without exception." (Tr.3713). Counsel objected that, to top it off, the prosecutor then asked Ms. Taylor whether she had any regrets about the day Hailey was murdered, *i.e.*, did she regret sending Hailey home, to be kidnapped, raped, sodomized and murdered? (Tr. 3712-13). Defense counsel argued that this was not valid victim impact questioning but an intentional effort by the prosecution to prompt Ms. Taylor to be even more emotional, inflame the passions and prejudices of the jury, and create a funeral-like atmosphere in the courtroom (Tr.3713-15). The court overruled the objection (Tr.3715-16).

The court also overruled defense counsel's objection during Tara Tharp's testimony (Tr.3726). Defense counsel noted that, like Ms. Taylor, Ms. Tharp had been crying through much of her testimony, but had now broken down and was sobbing so much that the court asked whether she needed a break (Tr.3722). The victim's family members, sitting in the first two rows of pews, were also crying, as were at least five of the jurors (Tr.3723). Defense counsel asserted that the prosecutor was asking questions intended to elicit strong emotional responses and that were not proper victim impact questions (Tr.3723-24). The court did not refute counsel's assertion as to the number of jurors crying but found no "uncontrollable sobbing" from the jury (Tr.3725). The court noted it saw just one spectator crying and overruled counsel's objection (Tr.3726).

"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 357–358 (1977). The jury's decision in the penalty phase "should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion." *California v. Brown*, 479

U.S. 538, 545 (1987)(O'Connor, J., concurring)(emphasis in original). This Court too has held, "it is improper to urge the jury to impose the death penalty based on emotion, not reason." *State v. Taylor*, 944 S.W.2d 925, 937 (Mo.banc1997)(reversed for new penalty trial because prosecutor urged jurors to get mad and decide punishment using their emotions).

The State's excessive, emotionally-laden victim impact evidence, its questioning intended to stoke the emotions of the witnesses, spectators and jurors, and its arguments in closing were calculated to overwhelm the jurors with emotion and encourage them to base their punishment verdict on emotion rather than reason. By overruling Wood's objections, the court communicated to the jurors that it was okay to let their emotions rule the day. The effect of these multiple errors, individually and cumulatively, was a penalty phase trial that was fundamentally unfair, a denial of due process. U.S.Const.,Amends.V,VI,VIII, XIV;Mo.Const.,Art.I,§§10,18(a). Wood was prejudiced because this was a very close penalty phase case; he presented strong mitigating evidence, see *supra*, p.25-27,50-51, and the jurors could not decide that a death sentence was warranted. Had the State not inundated the jurors with excessive, emotionally-laden victim impact evidence, the jury very well could have returned a verdict of life without parole. The Court should remand for a new penalty phase.

VII.

The trial court plainly erred in overruling Wood's objection to the prosecutor's argument in penalty phase closing that, with a verdict sentencing Wood to death, the jury spoke for Hailey and her family, because the argument violated Wood's right to due process, a fair trial, and freedom from the capricious and arbitrary infliction of the death penalty, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, §§10, 18(a), and 21 of the Missouri Constitution, in that no evidence was presented regarding the sentence Hailey or her family wanted, the law specifically prohibits family members from commenting upon which verdict they think is appropriate, and the prosecutor sought and obtained the exclusion of testimony by Hailey's mother that she wanted Wood to receive a sentence of life without parole.

Pretrial, Wood argued that he should be allowed to elicit in penalty phase that Hailey's mother, Stacey Barfield, wanted him to receive a sentence of life without parole (D.777;Tr.823-32). At a hearing, Ms. Barfield testified that, if called in the penalty phase and asked what sentence she wanted Wood to receive, she would say life without parole (Tr.820,822-23). The prosecutor vigorously objected, noting that this Court held in *Barnett v. State*, 103 S.W.3d 765, 772 (Mo.banc2000), that "[o]pinions of family members as to the appropriate punishment are irrelevant" and "inadmissible" (D.780,p.1-2), and that "[t]he jury should not be put in the position of carrying out the victims' wishes, whether they are for or against the death penalty" (D.780.p.3;Tr.832-33,848-49). The court denied

Wood's motion (D.607,p.77). No evidence was presented on the family members' wishes for sentence.

During penalty phase closing, the prosecutor argued as follows:

> MR. PATTERSON: With your verdict, sentencing [Wood] to the ultimate punishment, you speak for Hailey --
>
> MR. BERRIGAN: We'd object, Judge.
>
> MR. PATTERSON: You speak for her family --
>
> MR. BERRIGAN: I have to object. May we approach?

(Tr.4082). Defense counsel argued that the prosecutor's argument improperly "attributes the decision regarding life or death to Hailey Owens and her family" (Tr.4083). Defense counsel argued that the jurors should be deciding punishment based on the evidence in the courtroom, not what they think the victim's family feels is appropriate (Tr.4083). He asserted that the argument violated Wood's right to due process, a fair trial, and freedom from the capricious and arbitrary infliction of the death penalty, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21(Tr.4083-84).The court overruled the objection (Tr.4084).

I. Standard of Review and Preservation

Wood timely objected to the argument (Tr.4082-84), but did not include the issue in the motion for new trial. Rule 30.20. Reversal is warranted under plain error review when the improper argument "had a decisive effect on the outcome of the trial and amounts to manifest injustice." *State v. Edwards*, 116 S.W.3d 511, 536-37 (Mo.banc2003).

II. The State's Argument Was Grossly Improper

Missouri courts have long held that an accused is entitled to a fair trial, and it is the duty of both the court and the prosecutor to see that he gets one. *State v. Tiedt*, 206 S.W.2d 524, 526 (Mo.banc1947). The prosecutor must remain impartial and seek justice. *State v. Storey*, 901 S.W.2d 886, 901 (Mo.banc1995). "The prosecutor may prosecute with vigor and strike blows but he is not at liberty to strike foul ones." *State v. Banks*, 215 S.W.3d 118, 121 (Mo.banc2007)(*quoting State v. Burnfin*, 771 S.W.2d 908, 912 (Mo.App.W.D. 1989)).

Here, the prosecutor failed in this duty; his argument was grossly improper. No evidence was presented as to what Hailey's family members wanted the sentence to be. A prosecutor "may not express an opinion implying awareness of facts not available to the jury." *Grubbs v. State*, 760 S.W.2d 115, 119 (Mo.banc1988). Closing argument must conform to the evidence and the reasonable inferences fairly drawn from the evidence. *State v. Hill*, 866 S.W.2d 160, 164 (Mo.App.S.D.1993). A prosecutor's attempts to "inflame the passions and prejudices of the jury by reference to facts outside the record are condemned by ABA standards and constitute unprofessional conduct." *Burnfin*, 771 S.W.2d at 912. Argument outside the record "essentially turns the prosecutor into an unsworn witness not subject to cross-examination. The error is compounded because the jury believes - properly - that the prosecutor has a duty to serve justice, not merely to win the case." *Storey*, 901 S.W.2d at 900.

In *State v. Roberts*, 838 S.W.2d 126, 130-31 (Mo.App.E.D.1992), the prosecutor argued that it was his job to speak for the victim's family. He argued the victim "isn't here

to speak for himself and able or not, it is my job to speak for Mr. Booker and Mr. Booker was a man with a family." *Id*. The court sustained defense counsel's motion. *Id*. On appeal, the Court of Appeals agreed that the objection was properly sustained, as the argument had no factual basis. *Id*. at 131; see also *State v. Reese*, 633 S.E.2d 898, 901-902 (S.Car.2006)(overturned on other ground)(defendant was prejudiced by argument that jurors speak for victim with their verdict; argument "indisputably asked jurors to abandon their impartiality and view the evidence from [victim's] viewpoint").

Moreover, the argument was impermissible because it communicated to the jury that Hailey's family would want the jurors to impose "the ultimate punishment" (Tr. 4082). But admission of a victim's family member's characterizations and opinions about the crime, the defendant, and the appropriate sentence violate the Eighth Amendment. *Bosse v. Oklahoma*, 137 S.Ct. 1, 2 (2016)(reversing because State elicited that victims' family members wanted death sentence). A victim's family member can never give an opinion about the appropriateness of a particular sentence. *State v. Taylor*, 944 S.W.2d 925, 938 (Mo.banc1997).

The prosecutor's argument was especially egregious because the prosecutor knew that his argument violated this Court's precedents **and** that his argument was factually untrue. After all, as the prosecutor himself argued to the trial court, "[t]he jury should not be put in the position of carrying out the victims' wishes" (D.780,p.3;Tr.832-33, citing *Barnett*, 103 S.W.3d at 772) He knew that Hailey's mother testified at the pretrial hearing that she wanted Wood to get a sentence of life without parole (Tr.820,822-23). Yet while the prosecutor kept the defense from eliciting that Hailey's mother wanted Wood to get a

sentence of life without parole, he then turned around and intentionally argued that Hailey's family members wanted Wood to get a death sentence (Tr.4082), in order to convince the jury to impose a death sentence.

Missouri courts have consistently reversed, ***even under plain error review***, when a prosecutor comments on evidence that the court has excluded. In *State v. Weiss*, 24 S.W.3d 198 (Mo.App.W.D.2000), the defendant allegedly obtained access to the checking account of someone who shared his name, by the bank's mistake, and took money from that account. *Id*. at 199-200. At trial, he attempted to show he had received "buyout" money when he retired, which he thought he was accessing when he got the victim's money. *Id*. at 200-201. The court excluded evidence of the buyout money as hearsay. *Id*. at 201. In closing, the State argued that the defendant failed to produce documentation that the buyout money ever existed. *Id*. at 201-202. No objection was lodged, and the defendant was convicted. *Id*.

The Court of Appeals held that the State committed misconduct warranting a new trial ***even under plain error analysis***. *Id*. at 203-204. The court stressed the "intentional and deliberate nature" of the misstatements. *Id*. at 204. It further stressed that the prosecutor had foreseen the effect of the buyout document on the jury, since he sought its exclusion before the issue arose at trial so that (1) the jury would never know of the document and would not think that the State was trying to hide it from them, and, more importantly, (2) so that he could argue the defendant's failure to present the document meant it did not exist. *Id*. The State's "distasteful tactic" warranted relief under plain error review. *Id*.

In *State v. Luleff*, 729 S.W.2d 530 (Mo.App.E.D.1987), the defendant was convicted of receiving a stolen tractor. At trial, defense counsel tried to introduce a receipt for the sale of the tractor, but the court sustained the State's hearsay objection. *Id*. at 535. During closing, the prosecutor repeatedly referred to the lack of any receipt as evidence. *Id*. The Court of Appeals found that, although the State successfully excluded the receipt from evidence, it then took advantage by arguing that no receipt existed. *Id*. at 536. The court held that the State's argument "were tantamount to an absolute denial of the existence of any such document." *Id*. Because the defendant's objections were overruled, the prosecutor's argument received "the imprimatur of the trial court." *Id*. A new trial was warranted because the "error affected defendant's substantial rights and resulted in manifest injustice." *Id*.

In *State v. Hammonds*, 651 S.W.2d 537, 538 (Mo.App.E.D.1983), the defendant sought to endorse his uncle as a witness on the morning of trial. The State objected on the ground of late notice, and the court sustained the objection. *Id*. During the defendant's cross-examination, the State elicited that the defendant's uncle was in the courtroom, and, at the prosecutor's request, the uncle stood up. *Id*. In closing, the State commented that although the defendant had claimed he was at his uncle's karate studio when the crimes were committed, no one from the studio was willing to commit perjury and testify on his behalf. *Id*., at 538-39.

Based on this argument, the Court of Appeals reversed ***even under plain error review***. *Id*., at 539. It is well-settled in Missouri that "it is improper for a prosecutor to comment on or refer to evidence or testimony that the court has excluded." *Id*. The court

found that the prosecutor had intentionally and inexcusably misrepresented the facts. *Id.* It concluded that, even though the State had a strong case, the defendant had suffered manifest injustice and a miscarriage of justice, warranting a new trial. *Id.*; see also *State v. Williams*, 119 S.W.3d 674, 676, 679-81 (Mo.App.S.D.2003) (reversing after prosecutor obtained exclusion of evidence that defendant paid his child support, then argued there was no evidence defendant paid child support).

Here, there is even more reason to reverse than in *Luleff*, *Weiss*, *Hammonds*, and *Williams*. Closing arguments are "particularly important in capital cases, where there are unique threats to life and liberty." *State v. Barton*, 936 S.W.2d 781, 783 (Mo.banc1996). They must receive a "greater degree of scrutiny" than in non-capital cases. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985).

Manifest injustice resulted from the court's error in overruling Wood's objection to the argument. Not only did the prosecutor make an argument he knew was impermissible under the law, but he misled the jurors to believe Hailey's mother wanted a death sentence when he knew she did not. This is the very type of highly emotional argument that could have pushed jurors to vote for death – especially after the prosecutor stoked the jurors' emotions through excessive and highly emotional victim impact evidence – as the jurors would think they were accommodating Hailey's mother by imposing a death sentence. The fact that the prosecutor's argument was false, and the prosecutor knew it was false, makes the court's error in allowing the argument even more egregious. "Accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976). By intentionally

misleading the jury, the prosecutor created an unacceptable risk that the resulting death sentence was imposed arbitrarily or capriciously. See *Caldwell*, 472 U.S. at 343 (O'Connor, J., concurring).

In addition, as discussed *supra*, p.25-27,50-51, Wood presented strong mitigating evidence. For 45 years, Wood led a productive, law-abiding life (D.609,p.1;Tr.3792-94,3869,3795,3804-05,3808). He had a steady work history and was well-liked; he was thought of as a good coach and a good person (Tr.3249;3792-94,3869,3795,3804-05). Friends and colleagues were shocked that Wood was involved in this crime since it was so far out of character (Tr.3229,3249,3928,3968-69). Wood was a devoted son worked at his elderly parents' farm in all types of weather (Tr.3824-26,3879,3993-94). Wood struggled with depression and substance abuse, and but for those factors, this crime may not have happened (Tr.3916-17,3955). He was repentant (Tr.4016,4018) and was a calm, respectful, and obedient inmate (Tr.3906-07,3946,3948).

Wood acknowledges that in *Taylor*, this Court held that Taylor failed to show prejudice constituting fundamental unfairness by the State's evidence that the victim's family members wanted a death sentence, because the court sentenced Taylor after the jury deadlocked and the court is presumed not to have considered the improper evidence. *Taylor*, 944 S.W.2d at 938. The Court should not apply that reasoning here. But for the improper argument, Wood's jury may have assessed a sentence of life without parole. *Id.* at 937-38. Just as the *Taylor* court found prejudice warranting reversal of Taylor's death sentence based on the State's improper arguement that the jury should "get mad," *id.*, it should reverse here too.

The prosecutor's argument violated Wood's right to due process, a fair trial, and freedom from the capricious and arbitrary infliction of the death penalty. U.S.Const., Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21. See *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *State v. Rhodes*, 988 S.W.2d 521, 528-29 (Mo.banc1999). The Court must reverse and remand for a new penalty phase.

VIII.

The trial court abused its discretion in overruling Wood's objections and sustaining the State's motion to strike Venireperson 114 for cause, in violation of Wood's rights to due process and a fair and impartial jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution, because Venireperson 114 did not express any views that would substantially impair the performance of her duties as a juror or her ability to follow the instructions or her oath, in that although Venireperson 114 stated she was opposed to the death penalty, she stated that she could listen to the evidence and meaningfully consider both life without parole and the death penalty.

I. Preservation

The issue is preserved. Wood objected to the State's motion to strike Venireperson 114 for cause (Tr.2258-65,2267). The court sustained the State's motion (Tr.2457-60). The issue was included in the motion for new trial (D.871,p.2-3).

II. Standard of Review

Because the trial court is in the best position to evaluate a venireperson's responses, it has broad discretion in determining whether the venireperson is qualified to serve. *State v. Rousan*, 961 S.W.2d 831, 839 (Mo.banc1998). See also *supra*, p.29.

III. The Trial Court Abused its Discretion Because Venireperson 114 Could Meaningfully Consider the Death Penalty

The Sixth Amendment forbids the State to exclude venirepersons "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968). While the State has a legitimate interest in excluding jurors whose opposition to the death penalty would not allow them to follow their oath, a juror's mere opposition to the death penalty does not render the juror *per se* ineligible to serve. *Gray v. Mississippi*, 481 U.S. 648, 658 (1987). As the Court stressed,

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

Lockhart v. McCree, 476 U.S. 162, 176 (1986); *Adams v. Texas*, 448 U.S. 38, 44–45 (1980). A juror may be excluded only when her views would "prevent or substantially impair" the performance of her duties as a juror in accordance with her instruction and her oath. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). If a juror is excluded on any broader basis, the death sentence cannot be carried out. *Witherspoon*, 391 U.S. at 522, n.21.

IV. Venireperson 114 Was Qualified to Serve Despite Her Personal Opposition to the Death Penalty

Venireperson 114 was personally opposed to the death penalty (Tr.2186;App.Ex.1, p.8). On a scale of one to seven, with seven being strongly in favor of the death penalty and one being strongly opposed to the death penalty, Venireperson 114 was a two (App. Ex.1,p.8). She had reservations about the death penalty because she had read about it and

believed it was unfairly meted out (App.Ex.1,p.9-10;Tr.2186-87). Those defendants who received the death penalty spent years on appeals, wasting court resources (App.Ex.1,p.9-10). "It is too hard to 'play God' with someone's fate and I am a nonviolent person" (App.Ex.1,p.9). Life without parole was a better option because "someone should have to live with and suffer from the guilt and consequences of their actions" and death was an easy way out (App.Ex.1,p.9;Tr.2186).

But despite her personal beliefs, Venireperson 114 repeatedly stated she could give meaningful consideration to a sentence of death. Asked if her beliefs would prevent her from giving meaningful consideration to the death penalty, Venireperson 114 stated, "[e]ven though I feel strongly about it, I still would have to look at the evidence, and I would be able to consider this individual case" (Tr.2187). She would give the death penalty meaningful consideration even though she was generally opposed to it (Tr.2187). Then, yet again, she stated she could consider the death penalty:

> I would consider [the death penalty] as a parent and as a person who would want the victim to have justice. I could consider it even though I am, on principle, opposed in general. But I also would want to listen to what that victim went through and make a decision based on the evidence.

(Tr.2188-89).

Venireperson 114 initially stated she did not think, if selected as foreperson, she could sign the verdict form and put her name on a verdict sentencing Wood to death (Tr.2190). Her personal belief was that taking a life was wrong, and her conscience would not let her do that (Tr.2190). But when defense counsel explained further, Venireperson 114 stated she could sign the form (Tr.2240-41).

The prosecutor would not accept Venireperson 114's response and again asked whether her conscience would let her sign the verdict form (Tr.2249). Venireperson 114 replied no, her gut instinct was that she could not vote for death (Tr.2249). Venireperson 114 then reiterated that she was against the death penalty and would have a very hard time "making that call" (Tr.2251).

But again, through further questioning by defense counsel, Venireperson 114 clarified that she could not only meaningfully consider but also impose the death penalty despite her personal opposition to the death penalty (Tr.2251-53). It would be hard, but she was willing to do it (Tr.2253). She felt she owed "the victim that much to really listen to both sides" (Tr.2253).

The court abused its discretion in striking Venireperson 114 for cause (Tr.2460). The qualifications of a juror are not determined based upon one answer in isolation but upon the entirety of the responses given. *State v. Clayton*, 995 S.W.2d 468, 475 (Mo.banc1999). The overall tenor of Venireperson 114's responses was that although she was opposed to the death penalty, she would listen to the evidence and meaningfully consider both punishments (Tr.2186-89,2251-53). Although she stated that her gut instinct was that she could not vote for it (Tr.2249), this was an isolated response. Ultimately, Venireperson 114 stated she could do it and she would be willing to do it (Tr.2251-53).

Moreover, a venireperson "cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him." *Witherspoon*, 391 U.S. at 522 n.21. The most that can be demanded "is that he be willing to consider all of the penalties…and that he not be irrevocably committed, before the trial has begun, to vote

against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." *Id*. Venireperson 114 did not hold a view that would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and oath. *Adams*, 448 U.S. at 45; *Witt*, 469 U.S. at 424. She should not have been struck for cause.

The State's questioning failed to reach the ultimate question of whether Venireperson 114's personal views about the death penalty would actually prevent her from following her oath or the court's instructions, as required to support a strike for cause. *Adams*, 448 U.S. at 45. "The burden of proving bias rests on the party seeking to excuse the venire member for cause." *Witt*, 469 U.S. at 423; *Lockhart*, 476 U.S. at 170 n.7. Although Venireperson 114 stated her "gut instinct" was that her conscience would not let her vote for the death penalty, she never stated that she was ***unable*** to set aside her personal views (Tr.2459-60).

Venireperson 114's difficulty in sentencing someone to death (Tr.2251) is not a basis for a cause strike. The decision to impose a death sentence is one of awesome responsibility. *Caldwell v. Mississippi*, 472 U.S. 320, 329-30 (1985). It ***should not*** be easy. Striking Venireperson 114 for cause, even though she could meaningfully consider imposing a death sentence, improperly stacked the deck in favor of death and violated Wood's rights to due process and a fair and impartial jury. U.S.Const.,Amends.VI,XIV;Mo.Const.,Art.I,§§10,18(a).

V. Reversal is Mandated

"Among those basic fair trial rights that can never be treated as harmless is a defendant's right to an impartial adjudicator, be it judge or jury." *Gomez v. United States*, 490 U.S. 858, 876 (1989). This Court must re-sentence Wood to life imprisonment without parole or, if that relief is denied, remand the cause for a new trial.

ARGUMENT IX

The trial court erred in overruling Wood's objections that Missouri's death penalty scheme fails to properly narrow the class of persons eligible for the death penalty and in imposing a death sentence upon Wood, because §§565.030 and 565.032 violate Wood's right to be free from cruel and unusual punishment, as guaranteed by the Eighth and Fourteenth Amendments of the United States Constitution and Article I, §21 of the Missouri Constitution, in that the Missouri Legislature adopted so many statutory aggravating circumstances, the aggravating circumstances are so broadly written and interpreted, and the prosecutors have so much individual discretion, that Missouri's death penalty statute does not genuinely narrow the class of persons eligible for the death penalty, does not reasonably justify the imposition of a more severe sentence on any one defendant compared to others found guilty of murder, and allows vast racial, gender, and geographic discrepancies in how the death penalty is imposed, resulting in imposition of the death penalty that is arbitrary and capricious.

I. Preservation

Pretrial, Wood argued that the State could not seek death because Missouri's death penalty procedures fail to genuinely narrow the class of persons eligible for the death penalty (D.783). The court denied the motion pretrial and at the penalty phase instructional

conference (Tr.1055-56,4050-51). The issue is included in the motion for new trial (D.871,p.28).[27]

II. Aggravating Circumstances Must Genuinely Narrow the Class of People Eligible for the Death Penalty

To comply with the Eighth Amendment, States must narrow the range of murder defendants who are eligible for the death penalty.[28] *Lowenfield v. Phelps,* 484 U.S. 231, 244 (1988); *Zant v. Stephens,* 462 U.S. 862, 877 (1983). "Capital punishment must be limited to 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, 568 (2005)(*quoting Atkins v. Virginia,* 536 U.S. 304, 319 (2002)). For the following reasons, Missouri fails to provide any "meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which it is not." *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (White, J., concurring).

A. Too Many Aggravating Circumstances

In 2012, the American Bar Association issued a report that summarized its analysis of all aspects of the death penalty system in Missouri. Evaluating Fairness and Accuracy in State Death Penalty Systems: The Missouri Death Penalty Assessment Report, (Feb.2012)("*Missouri Report*").[29] It concluded:

> Missouri should substantially revise its aggravating circumstances, such that only a "narrow category of the most serious" murder cases are eligible for the

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[27] The standard of review is set forth, *supra*, p.29.

[28] The Eighth Amendment is applicable to the States through the Fourteenth Amendment. *Glossip v. Gross,* 135 S.Ct. 2726, 2737 (2015).

[29]https://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/final_missouri_assessment_report.authcheckdam.pdf

> death penalty, as required by the U.S. Supreme Court. Such revisions would substantially reduce the risk that the death penalty will be arbitrarily applied …

Missouri Report, Page v,147.

Missouri has seventeen statutory aggravating circumstances. §565.032.2. But several may be satisfied in multiple ways. For example, the "depravity of mind" aggravator may be proven if any of ***ten*** subsets exists; each subset is the functional equivalent of a different aggravating circumstance. MAI-Cr3d 314.40, Note on Use 8(B). Moreover, under the fifth statutory aggravating circumstance, the defendant is eligible for the death penalty if he murdered someone from any of ***seven*** categories of people. §565.032.2(5). Under the eighth statutory aggravating circumstance, the defendant is eligible for the death penalty if he murdered someone from ***another two*** categories of people. §565.032.2(8). Thus, Missouri truly has ***at least 35*** statutory aggravating circumstances.

A study of 1,046 first-degree murder, second-degree murder, and voluntary manslaughter cases in Missouri over a five-year period showed that a statutory aggravating circumstance could be found in 91.7% of first-degree murder cases. Barnes, Sloss & Thaman, *Place Matters (Most): Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 Ariz. L. Rev. 305, 322, 326 (2009)("*Barnes Study*"). "In light of these figures, it is doubtful whether the Missouri statute satisfies the constitutional requirement, articulated in *Zant v. Stephens*, that aggravating circumstances 'must genuinely narrow the class of persons eligible for the death penalty.'" *Id*. at 322.

B. Aggravating Circumstances are Too Broad

In addition, "many of Missouri's aggravating circumstances are so broadly written that they are applicable to an overwhelming proportion of first-degree murder cases." *Missouri Report*, Page 141. Thus, "a Missouri prosecutor is able to pursue the death penalty in virtually any case where there is probable cause to believe the defendant committed intentional homicide." *Id.*, p.142.

The *Barnes* study agreed, noting that six of the statutory aggravating circumstances are "quite broad in application." *Barnes Study*, at 322. The worst is the "depravity" aggravator, which was found in over 90% of the 239 capital cases studied. *Id*. Another statutory aggravating circumstance, "murder committed during another felony," was present in over 50% of the cases. *Id*. The aggravating circumstances "murder to avoid arrest" and "murder to silence a witness" were present in just under 50% of the cases. *Id*. Finally, the "murder for money" and "agent/employee" aggravators were found in 44.8% and 41%, respectively, of the 239 capital cases studied. *Id*.

In addition, the statutory aggravators are interpreted very broadly. For example, the first statutory aggravator listed in §565.032.2 asks the jury to consider whether the defendant has a prior conviction for first degree murder or has one or more serious assaultive criminal convictions. But the term "serious assaultive" is interpreted so expansively that it covers ***any*** assaultive behavior that constituted a felony. *State v. Brown*, 998 S.W.2d 531, 551 (Mo.banc1999).

C. Too Much Prosecutorial Discretion

"Without narrowly-defined aggravating circumstances, it is nearly impossible for individual prosecutors in Missouri to consistently and fairly exercise their capital charging discretion in all cases, even when applicable written policies are in place." *Missouri Report*, Page 147. Because individual prosecutors have so much discretion, there are wide-scale gender and racial discrepancies in how the death penalty is imposed. A recent study showed that 81% of the men executed in Missouri between 1976 and 2014 were executed for the murder of white victims, even though only 40% of all homicide victims in Missouri are white. Baumgartner, *Impact of Race, Gender, and Geography on Missouri Executions*, p.1 (July2015).[30] When the victim is white, the murderer is seven times as likely to be executed as when the victim is black. *Id*. When a white *female* is killed, the murderer is 14 times as likely to be executed as when a black male is killed. *Id*. at 1-3.

Geographical disparities are also apparent. From 1976 to 2014, the counties of St. Louis, Jackson, and Callaway, along with the City of St. Louis, had more executions than the other 111 counties combined. *Id*. at 8. St. Louis County had almost three times the executions as the City of St. Louis, even though the City of St. Louis had four times the homicides as St. Louis County. *Id*.

These major racial, gender, and geographic disparities "demonstrate that vast inequities characterize the implementation of capital punishment in Missouri." *Id*. at 9.

[30] See http://fbaum.unc.edu/articles/MissouriExecutions-2015.pdf

"A punishment that is so arbitrarily and unfairly administered could reasonably be deemed unconstitutional." *Id*.

Missouri's death penalty scheme does not narrow the class of people eligible for the death penalty and is arbitrarily administered. Thus, §§565.030 and 565.032 violate Wood's right to be free from cruel and unusual punishment. U.S.Const.,Amends.VIII,XIV;Mo. Const.,Art.I,§21. The Court must remand for imposition of a sentence of life without parole under §565.040.1.

CONCLUSION

As to Points I, II, III, and VIII, Wood requests that the Court remand for a new trial. As to Points VI and VII, Wood requests that the Court remand for a new penalty phase. As to Points IV, V and IX, Wood requests that the Court impose a sentence of life without parole.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief was completed using Microsoft Word, in Times New Roman size 13 point font. The brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, and this certification, the brief contains 30,661 words, which does not exceed the 31,000 words allowed for an appellant's brief.

/s/ Rosemary E. Percival
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