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 REPLY BRIEF

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I.

The trial court erred in admitting 32 photographs from Hailey's cell phone. The State attempts to justify the photographs' admission on the grounds that they showed Hailey's timeline on the day she was killed, the clothing she was wearing, and the absence of injuries (Resp.Br.26-27). But even on appeal, the State fails to explain why the timeline needed to start at 11:09 a.m. (St.Ex.14) given that the crime occurred almost six hours later (Tr.2924), or why the timeline was necessary at all. After all, it did not matter where Hailey was walking from when she was kidnapped. The jury did not need to view 14 selfies (not counting photos showing marks on torso and hand) to know what clothing Hailey was wearing, that her face was not bruised, and that she had no ligature marks on her wrist (St.Ex.18, 21-26, 30-31, 35-37, 41-45). The State fails to provide any justification for photographs of Hailey's dog, children's toys, her friends, lyrics to a song, or multiple photographs of Hailey in close chronological order in the guilt phase.

While the State has to establish every element of the crime, it does not have free rein to introduce duplicative, irrelevant, and prejudicial evidence. *State v. Anderson*, 76 S.W.3d 275, 276 (Mo. banc 2002). The court failed to balance the probative value of the photographs against their prejudicial effect. *Id*. It failed in its duty to curb the State's excesses. *State v. Goodwin*, 217 S.W. 264, 267 (Mo.1919). The State does not have the right to inundate the jury with photographs that have little to no probative value yet are highly likely to stir the jury's emotions and ensure that the jurors view the guilt phase evidence with a highly sympathetic leaning toward the prosecution.

Although the prosecutors told the Court that all 32 photographs were necessary, only four of these photographs were the subject of any further guilt phase evidence (Ex.24, Tr.3277; Ex.40, Tr.3426, 3538; Ex.42, Tr.3278[1]; Ex.43, Tr.3426, 3538). The State's true intent was to use the cell phone photographs as victim impact evidence to arouse the passions of the jury.

Despite the State's contention, this Court's holding in *State v. Whitfield*, 837 S.W.2d 503, 511 (Mo. banc 1992), applies here. It does not matter that *Whitfield* concerned an improper closing argument, not the introduction of victim impact evidence in the guilt phase (Resp.Br.27-28). The principle remains the same –victim impact evidence or argument may be relevant to sentencing but typically is not relevant to guilt. *Id*. at 511. It is improper for the State to enflame the emotions of the jurors by victim impact evidence ***or*** victim impact closing arguments in the guilt phase.

The holding in *State v. Earvin*, 743 S.W.2d 125, 128 (Mo. App. E.D. 1988) (Resp.Br.28), is relevant too. It held that, "it is error to admit evidence of an inflammatory nature if it does not reasonably tend to prove or disprove a disputed fact in issue." *Id*. Although *Earvin* dealt with a different factual scenario, the court's admonition is directly on point here. The State presented photo after photo of the victim for no valid purpose other than to rile the passions of the jurors.

[1] Although the prosecutor called this photograph Exhibit 43, it appears he was actually referring to Exhibit 42 (Tr.3278). The chart at p. 42-44 of Appellant's opening brief inadvertently omitted several citations to the transcript. State's Exhibit 26 was discussed in the penalty phase at transcript page 3707, and Exhibits 30-33 and 41 were discussed at transcript page 3708.

Despite the State's assertions, Wood suffered prejudice from admission of the 32 cell phone photographs. First, the jurors did view each of the cell phone photographs, one after the other, early in the case (Tr.3005-3008). Immediately after the 32 cell phone photographs were admitted, Sergeant Schwind relayed to the jurors "what was on the back, as to the date and time each photograph was taken" (Tr.3005-3008). The prosecutor displayed each of the 32 cell phone photographs on a "big screen" (Tr.2937) in the courtroom (Tr.3005-3008).[2]

Second, the photographs contained highly prejudicial material – 14 selfies, Hailey's stuffed animals and toys, her friends, family, and even the family dog. The State called these photographs mundane, everyday (Resp.Br.32), but photographs depicting a victim's commonplace actions can elicit even more emotion because they are so relatable to the jurors, who, through these everyday actions, could see their own child in Hailey, their own children's toys in Hailey's toys, etc.

Third, the photographs were excessive even for the penalty phase. On top of the 32 cell phone photographs and one other in-life photograph (Ex.87) of Hailey in the guilt phase, the State presented 14 ***additional*** in-life photographs of Hailey in the penalty phase (Ex.600, 602-10, 612-13, 616-17). The jury saw 29 in-life photos of Hailey, in addition to photographs of her dog, friends, toys, family, and even emotional song lyrics. Aside from the excessive number of photographs, many of the cell phone photographs were not

[2] After Respondent's Brief was filed, the parties stipulated that the 32 photographs were displayed on a screen in the courtroom as Sergeant Schwind testified. *See Stipulation* (filed Mar 13, 2019).

permissible even as victim impact evidence. Photographs of Hailey's dog, her toys, her friends, and song lyrics should not have been admitted in either phase of trial. They had no probative value for the guilt phase and failed to show what Hailey was like so as to justify admission in the penalty phase.

In penalty phase closing argument, the State took advantage of the cell phone photographs, displaying in its powerpoint the cell phone photographs of the stuffed animals, toys, and Katy Perry lyrics (*See* Penalty Phase Powerpoint). The State reminded the jurors of the emotional song lyrics, again showed the jurors the handwritten lyrics, and then showed them the transcribed lyrics as the prosecutor argued that the jurors should sentence Wood to death (Tr.4082; Ex.29; *See* Penalty Phase Powerpoint).

Because most of the 32 cell phone photographs had no true purpose but to enflame the jurors' emotions and color how they viewed the evidence from early in the guilt phase to the State's penalty phase closing argument, this Court must remand for a new trial.

II.

The trial court abused its discretion in allowing 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.

Once again, the State advocates the incorrect belief that, if any slight relevance can be shown, the floodgates are open, and any amount of evidence, however excessive, cumulative, or prejudicial, must be allowed (Resp.Br.35). This simply is not true. Even when evidence is logically relevant, it is only admissible if it is also legally relevant. *State v. Anderson*, 76 S.W.3d 275, 276 (Mo. banc 2002). The trial court must weigh "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*. If the costs outweigh the benefits, the court cannot admit the evidence. *Id*.

As with the cell phone photographs in Argument I, the court admitted the gun photographs *en masse* upon the State's assertion that the evidence was logically relevant (Tr.1191-92). The court failed to individually consider each photograph to assess whether each was truly both logically and legally relevant. Such an assessment would have shown that the testimony and evidence were improper. None of these other guns was relevant and admissible. Even if the guns, ammunition, and supplies that were not used in the crime had some probative value, it was vastly outweighed by their prejudicial effect. Presenting two or three photographs when one would suffice was cumulative, a waste of time, and distracted the jurors from the real issues. Neither at trial nor in its brief has the State

justified testimony and the admission of multiple photographs of the guns. Nor has it demonstrated why evidence of the reloader and the reloading station with boxes of ammunition, reloading supplies, and reloading equipment was at all relevant.

The State notes that the prosecutor did not argue that Wood was an evil man because he owned multiple guns (Resp.Br.36). The State did not need to make that express argument because the inherently prejudicial gun evidence did it for the State. Many people view guns "with fear and distrust," especially when photographs of multiple guns are presented. *United States v. Hitt*, 981 F.2d 422, 424 (9th Cir.1992); *Smith v. State*, 98 A.3d 444, 454 (Md.Ct.Spec.App.2014). This Court has repeatedly acknowledged the prejudicial effect of guns unconnected to the crime. *Anderson*, 76 S.W.3d at 277; *State v. Wynne*, 182 S.W.2d 294, 289 (Mo. 1944).

This Court's holding in *State v. Hosier*, 454 S.W.3d 883, 895 (Mo. banc 2015), does not advance the principle that guns found in a defendant's possession shortly after the crime are automatically admissible as evidence (Resp.Br.35). In *Hosier*, the defendant had 15 weapons, a bulletproof vest, and 400 rounds of ammunition in his car as he fled immediately after the murders. *Id.* at 890. As this Court recognized, "[t]he fact that Defendant left Jefferson City right after the murders occurred and did so armed with 14 other guns and ammunition was probative of his guilt." *Id.* at 895.

Wood was apprehended outside his house (Tr.2981-83). He was unarmed (Tr.2982). No evidence was presented that Wood's possession of the guns, ammunition, and other gun-related items found within his home was anything but legal. The fact that Wood owned guns was not relevant and should not have been exploited by the State.

The State argues that evidence of the guns would have been admissible in the penalty phase under the theory that the State is allowed to present any evidence related to the defendant's character (Resp.Br.39). But 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 within his home. As such, the State cannot use his legal gun ownership as the basis for seeking a death sentence. An aggravating circumstance is invalid if it "authorizes a jury to draw adverse inferences from conduct that is constitutionally protected." *Zant v. Stephens*, 462 U.S. 862, 885 (1983). If the State obtains a death sentence based on such evidence, due process requires that the "decision to impose death be set aside." *Id*.; see also *State v. Rupe*, 683 P.2d 571, 594-97 (Wash.1984).

"[P]robably the *bulk* of what most sentencing is all about" is a determination of the defendant's "acceptance of responsibility, repentance, character, and ***future dangerousness***." *Mitchell v. United States*, 526 U.S. 314, 340 (1999) (Scalia, J., dissenting) (emphasis added). The State impermissibly used Wood's legal possession of multiple firearms, ammunition, and gun-related supplies to paint him as an especially dangerous person, one who should receive the death penalty. The Court must remand for a new trial.

III

Even if the State could establish that the evidence within the purple folder had probative value, a dubious prospect, it has not established that it was legally relevant. When the prejudicial effect of evidence outweighs its probative value, "it should be excluded." *State v. Prince*, 534 S.W.3d 813, 818 (Mo. banc 2017). Trial courts cannot fail to assess whether the probative value of other crimes evidence outweighs its prejudicial effect. *State v. Dudley*, 912 S.W.2d 525, 528-29 (Mo. App. W.D. 1995). Evidence of uncharged bad acts "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). Such mandated scrutiny did not occur here.

The State argues that the contents of the folder "tended to establish" that Wood did in fact commit rape and sodomy and thus, that he deliberated (Resp.Br.47). But this is a pure propensity argument, that because Wood at some time wrote stories about an act, he must have acted in accord with the fictionalized conduct. Evidence of other uncharged bad acts is inadmissible for the purpose of showing that the defendant had "a general criminal disposition, a bad character, 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). Yet that is exactly what the State admits was done here. Moreover, as the State admits (Resp.Br.47), the propensity evidence was used to prove the crucial element of the case, whether Wood deliberated, and thus was hugely prejudicial.

The court's error in allowing the State to present the contents of the purple folder should not be dismissed because of defense counsel's mention of the evidence in opening

statement. Defense counsel advised the court that the evidence was so shocking and prejudicial that he had to address it in opening statement even if the prosecutor did not (Tr.2871-72). The prosecutor did not mention the evidence in his opening (Tr.2888). In the defense opening, counsel summarized the two fictional stories, mentioned the students' photographs, and noted that the students told the police that Wood had never done anything to make them feel uncomfortable (Tr.2901-2903). He told the jurors that Wood was driven to the acts because of his methamphetamine use and an unhealthy impulsive compulsion (Tr.2899).

This did not waive appellate review. Wood acknowledges that appellate review is waived when, after the defendant unsuccessfully moves *in limine* to exclude evidence, he then introduces the evidence he sought to exclude. *State v. Mickle*, 164 S.W.3d 33, 58 (Mo. App. W.D. 2005). In *Mickle*, appellate review was waived when the defense, not the State, first elicited testimony that was the subject of defendant's unsuccessful pretrial motion to exclude. *Id*. at 55-57.

But here, counsel's remarks in opening statement do not constitute evidence. *State v. McFadden*, 369 S.W.3d 727, 742 (Mo. banc 2012). Additionally, the defense has the right to inform the jury of the evidence that counsel in good faith believes will be presented. *White v. State*, 939 S.W.2d 887, 902 (Mo. banc 1997). The purpose of opening statement is "to inform the jury in a general way of the nature of the action and defense so that they may better be prepared to understand the evidence." *Best v. District of Columbia*, 291 U.S. 411, 415 (1934); see also *State v. Thompson*, 68 S.W.3d 393, 394 (Mo. banc 2002). It would be fundamentally unfair to force the defendant to forego telling the jury how this

evidence fits within the defense roadmap of the case, merely because the State chooses not to mention it in its opening. The prosecution should not be able to control the defense's presentation of its case in such a way. See also *State v. Taylor*, 739 S.W.2d 220 (Mo. App. S.D. 1987) (in drug case, defense counsel's mention of unrelated assault in opening statement did not waive defendant's objection to that evidence).

Reversal is warranted.

IV.

The State makes two primary arguments against Wood's contention that Missouri's capital deadlock procedure is unconstitutional. The State's arguments are wrong.

A.

The Court should disregard the State's suggestion that this Court and the Eighth Circuit have rejected this issue (Resp.Br.53-54). While this Court has denied several petitions for writ of habeas corpus or motions to recall the mandate, it has not yet decided the constitutionality of its deadlock procedure after *Hurst v. Florida*, 136 S.Ct. 616 (2016), in a properly preserved direct appeal. The Court issued no opinions in the cases cited by the State (Resp.Br.54).[3] "[T]he denial of a writ without the issuance of an opinion 'is not a conclusive decision on the merits of the issue presented.' " *McKim v. Cassady*, 457 S.W.3d 831, 839 (Mo. App. W.D. 2015) (quoting *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 61 (Mo. banc 1999)); see also *Willbanks v. State Dep't of Corr.*, 522 S.W.3d 238, 246 n.9 (Mo. banc 2017) ("[t]here are numerous factors appellate courts with discretionary review powers consider when deciding whether to review a lower court's decision, and it is inappropriate to extrapolate on a court's opinion when it denies review.").

The State also cites four opinions from the Eighth Circuit (Resp.Br.53), but only one of those decisions is even arguably relevant. Three of the federal decisions dealt with the wording of an instruction that was significantly revised in 1994. In *Griffin v. Delo*, 33 F.3d 895, 905-906 (8th Cir. 1994) and the other cases cited by the State, the defendants

[3] Mr. Wood requests that the Court take judicial notice of the manner in which the Court resolved those cases cited by the State.

challenged the version of the weighing instruction then in effect because it led the jurors to believe they had to find each mitigating circumstance unanimously before that mitigator could be considered. *Id*. at 905.[4] The Eighth Circuit held that the instruction did not lead jurors to believe they had to be unanimous as to each mitigating circumstance. *Id*. at 903, 905-906; *see also Battle v. Delo*, 19 F.3d 1547, 1560-62 (8th Cir. 1994) (same issue and result); *McDonald v. Bowersox*, 101 F.3d 588, 599-600 (8th Cir. 1996) (same issue and result).

Last, the State cites *Johnson v. Steele*, No. 4:13-CV-2046-SNLJ, 2018 WL 3008307, at *23 (E.D. Mo. June 15, 2018). Ironically, while the State chastises Wood for citing a federal district court opinion that is not yet final (Resp.Br. 59), the State does precisely that (Resp.Br.53). The *Johnson* opinion is not yet final, as an application for certificate of appealability has been filed. See *Johnson v. Steele*, No. 18-2513 (8th Cir.).

In sum, the State erroneously relies on non-merit rulings as a basis to deny this prescient and undecided claim.[5] This Court has no post-*Hurst* precedent addressing the *Hurst* decision. The State's reliance on federal authority, addressing an outdated version of the weighing instruction and a different issue, does not illuminate the issue now before the Court. The cases do not refute Mr. Wood's contention, supported by *Mills v. Maryland*, 486 U.S. 367, 374 (1988), that any death procedure that potentially allows a death sentence against the will of 11 jurors at the weighing step or the final step "would certainly be the height of arbitrariness."

[4] See MAI-CR2d 15.44; *State v. Young*, 701 S.W.2d 429, 436-37 (Mo. banc 1985).
[5] This issue is also pending in *State v. Rice*, SC # 96737.

B.

1. Section 565.030.4 Mirrors the Unconstitutional Florida Statute

The State erroneously argues that *Hurst v. Florida*, 136 S.Ct. 616 (2016), does not help Wood because Florida's death penalty statute differed from the one in Missouri (Resp.Br. 54-56). Of course, the State would be wrong to say that the Supreme Court would issue precedent that only applies to Florida; simply, the constitutional principles of *Hurst* must be applied regardless of minor variances in the respective statutes. While the statutes have some minor variances, the impact of *Hurst* is profound given their striking similarities:

Florida	**Missouri**
Jury must find at least one statutory aggravator beyond a reasonable doubt	Jury must find at least one statutory aggravator beyond a reasonable doubt
Findings are not written	Findings are written
Jury must weigh aggravating and mitigating factors[6]	Jury must weigh aggravating and mitigating factors
Jury decides whether the defendant should get death	Jury decides whether the defendant should get death

[6] The State argues that in Florida, the court alone made the weighing determination (Resp.Br.61). More accurately, a Florida jury could not have recommended a death sentence had it not first found an aggravating circumstance ***and*** weighed the aggravating and mitigating circumstances. *Hurst*, 136 S.Ct. at 620; 625 (Alito, J.,dissenting); *see also State v. Steele*, 921 So. 2d 538, 545 (Fla.2005).

Judge repeats steps, makes independent findings, and decides sentence	If jury deadlocks, judge repeats steps, makes independent findings, and decides sentence
Judge must give jury's findings great weight	No requirement that judge give jury's findings any weight

The State argues that Missouri's statute differs from Florida's in that in Missouri, a deadlocked jury must make a specific factual finding as to the existence of statutory aggravating circumstances (Resp.Br.56-57). But while the Missouri jury's finding as to aggravating circumstances may be a specific factual finding, the Missouri jury's "no" response to the weighing interrogatory is not a specific factual finding. Based on a "no" response, the jury may be stating that all the jurors found that the mitigating circumstances did not outweigh the aggravating circumstances. But it is just as possible, if not probable, that the jurors are split on whether mitigating circumstances outweighed the aggravating circumstances. As the federal district court held in *McLaughlin v. Steele*, 173 F.Supp.3d 855, 896 (E.D. Mo. 2016), the record simply does not show what the jurors found at the weighing step. A "no" response to the interrogatory is not a specific finding.

It is not just the lack of specific findings that doomed the Florida statute. The other problem was that the judge was not bound by the jury's findings. *Hurst*, 136 S.Ct. at 622. The judge had to give the jury's findings great weight, but was free to reject them. *Id*. at 619-20 (majority op.); *id*. at 625 (Alito, J., dissenting). As Justice Alito noted, "the Court's decision is based on a single perceived defect, *i.e.*, that the jury's determination that at least

one aggravating factor was proved is not binding on the trial judge." *Id*. at 626 (Alito, J., dissenting).

Missouri's deadlock procedure is more seriously flawed by the same problem. Nothing in Section 565.030.4 requires the judge to give ***any*** weight to the jury's findings. Once the jury deadlocked, the jury's findings were merely "advisory" and the judge made the "ultimate sentencing determination." *Hurst*, 136 S.Ct. at 620 (*quoting Ring v. Arizona*, 536 U.S. 584, 608, n.6 (2002)). Thus, Florida provided more protections yet was found unconstitutional.

The State attempts to draw another distinction between the Florida and Missouri statutes: in Florida, the judge could impose a death sentence even after the jury recommended a life sentence (Resp.Br.62). But that is directly akin to what happened here. The State failed to convince a jury that Wood deserved the death penalty, yet Wood still received the death penalty. Missouri's statute is not significantly different from Florida's.

The State places great weight on the Supreme Court's language that in Florida, the judge plays a "central and singular role" in deciding the defendant's punishment (Resp. Br. 56, referring to *Hurst*, 136 S.Ct. at 622). In the normal course of events in Missouri, when the jury decides the punishment, Missouri does not share this problem. But when the jury deadlocks, Missouri's sentencing procedure becomes a hybrid procedure like Florida's, with the judge playing the central and singular role in assessing the punishment. The judge starts from scratch, independently going through each of the statutory steps, independently determining each fact against the defendant, and ultimately deciding the sentence. Section 565.030.4; *State v. Whitfield*, 107 S.W.3d 253, 261, 263-64 (death sentence was based

"entirely on the judge's findings"); *State v. McLaughlin*, 265 S.W.3d 257, 264 (Mo. banc 2008) (trial court may reconsider the facts in making its own determinations). As with the Florida procedure, once the jury deadlocked, Wood could "be punished by death only if an additional sentencing proceeding resulted in findings by the court that such person shall be punished by death." (*citing Hurst*, 136 S.Ct. at 620).

Wood has not taken *Whitfield* out of context (Resp.Br.58). Even though the jury must answer interrogatories now, the deadlock procedure is still unconstitutional because no matter what findings were made by the jury, the judge must make independent findings and it is ***those*** findings upon which the death sentence is based. *Whitfield* held that Section 565.030.4, RSMo, violated the Sixth Amendment by allowing the judge to repeat the jury's steps, make independent findings, and decide to impose a death sentence. *Id.*, 107 S.W.3d at 362-62. Only in discussing whether the error was harmless did the Court consider whether the record showed what the jury had found. *Id*. at 262-64. The Court went so far as to hold that it did not matter what the jury found, because those findings had disappeared and the death sentence was based on the judge's findings:

> [S]ection 565.030.4 provides that a defendant shall be sentenced to life imprisonment *unless* the jury finds steps 1, 2, 3, and 4 against him or her. It also provides that, when the jury deadlocks, the jury's findings simply disappear from the case and the court is to make its own independent findings. That is what occurred here. **Thus, any presumptions as to what the jury may have found are simply irrelevant**. Here, the judgment of death, based on the court's findings, constituted constitutional error.

Id. at 270–71 (bold emphasis added). The jury's findings did not disappear because the record failed to show what the jury found; rather, the findings disappeared because the judge made new, independent findings. *Id*. at 256, 261-62. The judge's findings ***replaced***

the jury's findings and became ***the*** basis for the death sentence. *Id*. at 256. Notably, the Court rejected the dissent's view that the judgment was based on the jury's findings. *Id*. at 270.

In sum, while the Missouri and Florida statutes differ in some respects, their similarities as to the factors most important under *Hurst* are striking. As with the unconstitutional Florida statute, Section 565.030.4 fails to require specific factual findings at the weighing step and a Missouri judge is not bound by any of the jury's findings. When the jury deadlocks, the judge takes over, makes independent findings, and determines the punishment, thus assuming the "central and singular" role in assessing punishment. Upon deadlock, Missouri's procedure becomes a hybrid procedure like that struck down in *Hurst*.

2. Under Hurst, Any Determination Necessary for Imposition of the Death Penalty is a Critical Finding that Must Be Made by a Jury

The Court should grant Wood relief because Missouri's deadlock procedure mirrored the procedure found unconstitutional in *Hurst*. The Court need go no further.

But *Hurst* also supports the principle that every finding essential to imposition of the death penalty must be made by the jury. *Id.*, 136 S.Ct. at 621-22. The State points to a few Alabama state decisions holding that *Hurst* should be interpreted narrowly (Resp.Br. 64).[7] It urges the Court to believe that *Hurst* had "a narrow focus … on the judge's unique

[7] Although the Alabama Supreme Court refused to yield to the Supreme Court's holding in *Hurst*, the Alabama Legislature took the cue and radically changed the Alabama statute. Now, no death sentence may be imposed in Alabama without the jury finding an aggravating circumstance beyond a reasonable doubt and finding that any aggravating circumstances outweigh the mitigating circumstances. Ala. Code § 13A-5-46(e)(2), (3). Also, a judge may no longer override the jury's decision of life without parole. *Id*. at § 13A-5-47(a).

role in finding the existence of an aggravating circumstance under Florida law." (Resp.Br.64-65, citing *Hurst*, 136 S.Ct. at 621-22). The State errs.

While *Ring* dealt primarily with the finding of an aggravating circumstance, 536 U.S. at 597, *Hurst* swept more broadly, focusing on "each fact necessary to impose a sentence of death." 136 S.Ct. at 619; see also *id*. at 626 (Alito, J., dissenting) (stating *Hurst* was an expansion of *Ring*). Under *Hurst*, a capital defendant had the right to have a jury find "the facts behind his punishment," *id*. at 621, or otherwise stated, "the facts necessary to sentence a defendant to death," *id*., or "the critical findings necessary to impose the death penalty," *id*. at 622, or the "findings of fact regarding sentencing issues." *Id*. at 622. *Hurst* referred to the "findings," plural, that must be found, not just the finding of an aggravating circumstance. Notably, the Court held that the Sixth Amendment "required Florida to base Timothy Hurst's death sentence on ***a jury's verdict***, not a judge's factfinding." *Id.* at 624 (emphasis added). The Court overturned two prior decisions that held that the Sixth Amendment "does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Id*. at 621, 624 (*overturning Hildwin v. Florida*. 490 U.S. 638, 640–641 (1989) and *Spaziano v. Florida*, 468 U.S.447, 457-65 (1984)).

The State tries to diminish the import of the weighing step by arguing that it is not a fact-finding but merely an opportunity for the jury "to *automatically* remove the defendant from the pool of death-eligible offenders, due to the strength of the mitigating evidence" (Resp.Br.61) (emphasis in original). But the relative weight of the aggravating and mitigating circumstances, like the finding that the defendant is not intellectually disabled (when at issue in the case) or the finding of an aggravating circumstance, is a

required finding. It is a finding that must be made ***against the defendant*** before the death penalty may be considered. *McLaughlin*, 265 S.W.3d at 262-63 (Under Section 565.030.4, "all but the last step … required the jury to make specific factual findings…. [T]he statute required the jury to find all three of the facts submitted in steps one through three in order to impose a death sentence,…"); *see also Whitfield*, 107 S.W.3d at 258; *accord, People v. Montour*, 157 P.3d 489, 496 (Colo. 2007). Without the weighing finding, there could be no death sentence.

Whether one calls the finding at the weighing step a "determination" or a fact-finding, it is still a finding of fact that must be made before the jury can consider imposing a death sentence. As Justice Scalia noted in his concurring opinion in *Ring*:

> I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.

Ring, 536 U.S. at 610 (Scalia, J., concurring).

Alleyne v. United States, 570 U.S. 99 (2013), supports Wood's argument that the finding of an aggravating circumstance, the finding of the relative weight of the aggravating and mitigating circumstances, and the decision to impose death, all must be made by the jury. Each of those facts is essential to the punishment of death. In *Alleyne*, the Court looked to the original meaning of the Sixth Amendment in explaining the difference between elements or "ingredients" of a crime and sentencing factors. *Id*. at 107-109. The Court explained that, at common law, the crime and punishment were closely linked; the jury found all the facts of the offense and the judge merely imposed the

prescribed sentence. *Id*. at 108. Later, when early American statutes introduced ranges of punishment, the ranges were linked to particular facts constituting the elements of the crime. *Id*. at 108-109. Because of this "intimate connection" between crime and punishment, "various treatises defined 'crime' as consisting of every fact which 'is in law essential to the punishment sought to be inflicted.'" *Id*. at 109 (citing authorities). This view was widely held:

> Numerous high courts agreed that this formulation "accurately captured the common-law understanding of what facts are elements of a crime." If a fact was by law essential to the penalty, it was an element of the offense.

Id. (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 511–512 (2000) (Thomas, J., concurring) (collecting cases)).

Even the dissenting judges agreed on this point: "With remarkable uniformity, those authorities provided that an element was 'whatever is in law essential to the punishment sought to be inflicted.'" *Alleyne*, 570 U.S. at 124-25 (Roberts, Scalia, and Kennedy, J.J., dissenting) (citing 1 J. Bishop, Criminal Procedure 50 (2d ed. 1872); *Apprendi*, 530 U.S. at 489, n. 15 (elements of the crime included "'every fact which is legally essential to the punishment to be inflicted'" (quoting *United States v. Reese*, 92 U.S. 214, 232 (1876) (Clifford, J., dissenting))); 1 Bishop, *supra*, § 87, at 55 (elements included "any particular fact which the law makes essential to the punishment")).

The State tries to minimize the importance of *Hurst v. State*, 202 So.3d 40 (Fla. 2016), by arguing that the Florida Supreme Court merely complied with the Supreme Court's mandate (Resp.Br.63, n.7). Yes, the Florida Supreme Court did comply with the *Hurst* opinion. And in doing so, it required unanimous jury findings (1) that aggravating

circumstances exist; (2) that the aggravating circumstances are sufficient; (3) that the evidence in aggravation outweighs the evidence in mitigation; and (4) that the defendant should receive a death sentence. *Id.* at 53-55, 57. The Florida Supreme Court reiterated that 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). Missouri must follow the example of the Florida and Delaware courts and comply with the *Hurst* opinion too.

V.

It is beyond dispute and well-settled that a denial of a petition for writ of certiorari is not a merits review. *See Martin v. Blessing*, 571 U.S. 1040, 1045 (2013) ("denial of certiorari does not constitute an expression of any opinion on the merits"); *Boumediene v. Bush*, 549 U.S. 1328, 1329 (2007) (same) (Stevens and Kennedy, JJ., statement respecting denial of certiorari).

This Court agrees. In *Willbanks v. State Dep't of Corr.*, 522 S.W.3d 238, 246, n.9 (Mo. banc 2017), this Court echoed *Boumediene* and stressed, "[t]here are numerous factors appellate courts with discretionary review powers consider when deciding whether to review a lower court's decision, and it is inappropriate to extrapolate on a court's opinion when it denies review." For example, in *Hidalgo v. Arizona*, 138 S.Ct. 1054 (2018), four justices wrote to say that, although they believed the Arizona Supreme Court misapplied Supreme Court precedent, they voted to deny the cert petition because the record below was not fully developed. *Id*. at 1057 (Breyer, Ginsburg, Sotomayor, and Kagan, JJ., concurring).

The Court should not accept the State's improper invitation to hold otherwise. Rather, this Court should reject the State's assertion that the fact that the Supreme Court "essentially rejected a similar argument in 2013" in a petition for writ of certiorari that challenged Alabama's judicial override procedure is of precedential value. (Resp.Br.67-69).

The State points to the fact that in 1995, the Supreme Court upheld the constitutionality of Alabama's use of an advisory jury and judicial override (Resp.Br.,

citing Harris v. Alabama, 513 U.S. 504, 515 (1995)). Notably, in the last two-and-a-half decades, the Supreme Court has issued the following binding precedent as well: *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584, 608, n.6 (2002), *Blakely v. Washington*, 542 U.S. 296 (2004), *Alleyne v. United States*, 570 U.S. 99 (2013), *Hurst v. Florida*, 136 S.Ct. 616 (2016), and *Mathis v. United States*, 136 S.Ct. 2243 (2016). In *Harris*, the Supreme Court noted that Alabama's statute was "much like that of Florida," except that an Alabama judge only had to consider the jury's findings, while the Florida judge had to give those findings great weight. *Id.*, 513 U.S. at 508-509. Given that Alabama's statute was so similar to Florida's and Florida's was struck down by *Hurst*, it is questionable that Alabama's statute survived *Hurst*. Notably, although the Alabama Supreme Court upheld its capital sentencing procedure in *Ex Parte Bohannon*, 222 So.3d 525 (2016), the Alabama legislature saw the writing on the wall and in 2017, revised its statute to require that any decision to impose a death sentence be made by a jury, not a judge. Ala. Code § 13A-5-47 (2017). Thus, the Supreme Court will never have the opportunity to reconcile *Harris* with its subsequent binding authority.

It is appropriate that the State compares Missouri's deadlock procedure to a statute that allowed judicial override. In judicial override cases, the jury does not want death, but the defendant gets death anyway. In deadlock cases, the jury cannot impose death, but the defendant gets death anyway. Florida, Delaware, and Alabama were the last states to allow

judicial override. Florida and Delaware abolished judicial override judicially, while Alabama did so legislatively.[8] Now, ***no*** state allows judicial override.

Missouri's deadlock procedure must go the way of judicial override. Of the 50 states in the Union, only two (Nebraska and Montana) allow judicially-imposed death sentences in every death penalty case and two others (Missouri and Indiana) allow it when the jury deadlocks. But Montana has not imposed a death sentence in over twenty years,[9] so it is functionally abolitionist and should not be considered. *See Hall v. Florida*, 572 U.S. 701, 716 (2014) (Oregon was abolitionist because it suspended the death penalty and executed only two people in fifty years). Moreover, as mentioned in Appellant's opening brief, p. 99, only five states allow a death sentence that is not the product of a unanimous jury decision.

Despite the State's contention (Resp.Br.70), a national trend has arisen against judge-imposed death sentences. In 2002, eleven states allowed the court to decide whether the defendant should receive a death sentence.[10] By 2018, seven of those states (64%) abolished that practice.[11] Even looking at just the past three years, of the seven then-

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[8] *Rauf v. Delaware*, 145 A.3d 430 (Del.2016); *Hurst v. State*, 202 So.3d 40 (Fla.2016); Ala. Code § 13A-5-47 (2017).

[9] See Death Penalty Information Center, *Death Sentences in the United States from 1977 By State and By Year*, http://deathpenaltyinfo.org/death-sentences-united-states-1977-present (last visited March 10, 2019).

[10] These states are Alabama, Arizona, Colorado, Delaware, Florida, Idaho, Indiana, Missouri, Montana, Nebraska, and Nevada.

[11] Alabama: Ala. Code § 13A-5-47 (2017); Arizona (compare A.R.S. §13-703 and A.R.S.§13-752); 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-

remaining states with judicial sentencing, three abolished it.[12] This consistent direction of change shows a national consensus against allowing a judge to decide whether the defendant should live or die.

The Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia, 536 U.S. 304, 311-12* (2002). As shown by the legislation of the vast majority of states and the federal government, current standards of decency mandate that no defendant should be sent to his death but by the unanimous vote of a jury. Because Missouri's deadlock procedure clearly fails to conform to evolving standards of decency, this Court must strike down Craig Wood's death sentence and impose a sentence of life without parole.

2515 (2003)); and Nevada (see N.R.S.§175.556 (2003)). See Appendix to Appellant's opening brief, p.A14-A32.

[12] Delaware (2016), Florida (2016), and Alabama (2017)

VII.

The trial court plainly erred in overruling defense counsel's objection to the prosecutor's argument that through a death verdict, the jurors spoke for Hailey and her family:

> 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 --

(Tr.4082).

Despite the State's argument (Resp.Br.86), this was not a "send a message" argument. A "send a message" argument urges the jury to get tough so that future criminals will know they will be treated harshly. Here, in contrast, the prosecutor stated that by giving a death sentence, the jury spoke for Hailey's family (Tr.4082), *i.e.*, advancing the family's wishes that Wood receive a death sentence.

Moreover, the prosecutor's argument was distinguishable from the argument upheld in *Tisius v. State*, 519 S.W.3d 413, 429 (Mo. banc 2017) (Resp.Br.86-87). There, the prosecutor argued that a death sentence would be an answer to the victims' plea for justice. *Id*. ("prosecutor's statement, when read in context, equated imposition of the death penalty with justice"). Here, in violation of *Bosse v. Oklahoma*, 137 S.Ct. 1, 2 (2016), and *State v. Taylor*, 944 S.W.2d 925, 938 (Mo. banc 1997), the prosecutor communicated that the victim's family wanted the death penalty (Tr.4082).

The argument was incredibly prejudicial, especially in light of the tearful testimony and heightened emotions surrounding the penalty phase. As the Supreme Court recognized in *Booth v. Maryland*, 482 U.S. 496, 508-509 (1987), *overturned on other grounds by Payne v. Tennessee*, 501 U.S. 808 (1991), family members cannot opine on the sentence a defendant should receive:

> [T]he formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant…. The admission of these emotionally charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decisionmaking we require in capital cases.

Id. at 508-509. Although the State did not repeat the argument, the proverbial bell had been rung, and the court did nothing to correct the impression that the jurors should impose a death sentence to fulfill the wishes of Hailey's family. Reversal is warranted.

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 7,605 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

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