APPENDIX A

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	*Opinion issued July 16, 2019*
	)	
Respondent,	)	
	)	
v.	)	No. SC96924
	)	
CRAIG M. WOOD,	)	
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY
The Honorable Thomas Mountjoy, Judge

Craig Wood appeals a judgment finding him guilty of one count of first-degree murder, § 565.020, RSMo 2000, and sentencing him to death.[1] This Court has exclusive appellate jurisdiction. Mo. Const. art. V, § 3. The judgment is affirmed.

Factual and Procedural Background

On the afternoon of February 18, 2014, Carlos and Michelle Edwards saw 10-year-old Hailey Owens walking down the sidewalk near their home in Springfield. A tan Ford Ranger truck drove past Hailey, turned around, and pulled alongside her. The driver, later identified as Wood, asked Hailey for directions. As Hailey began to walk away, Wood

[1] All statutory citations are to RSMo 2016 unless otherwise indicated.

opened the door and told her to come back. Hailey turned and stepped toward the truck. Wood lunged at Hailey, and pulled her into the truck. Mr. Edwards ran toward the truck, yelling at Wood to stop. Wood sped away. Mrs. Edwards called 9-1-1 to report the incident and the truck's license plate number. The truck was registered to Wood's parents, but Wood was the primary driver.

Springfield police officers surveilled Wood's home. They observed a tan Ford Ranger truck pull into the driveway. The truck's license plate number matched the number Mrs. Edwards reported. As an officer approached, Wood exited the truck and tossed a roll of duct tape into the truck bed. Wood, nervous and smelling of bleach, acknowledged he knew why the officers were there.

Wood voluntarily accompanied officers to police headquarters. Wood admitted the Ford Ranger was his, but declined to answer any questions regarding Hailey's location. Officers observed an abrasion and dried blood on Wood's lower lip, dried blood on one of his fingers, and red vertical marks on his neck and near his groin. His hat appeared to have bleach stains. Wood told officers he made two trips to Walmart earlier in the day to purchase bleach and drain cleaner. Wood also said he went to a laundromat, and his laundry was still there.

Officers went to Wood's house to look for Hailey. They entered through an unlocked back door. A strong odor of bleach emanated from the basement. The basement steps and floor were wet. A fan was running, and a scrap of duct tape was on the floor. There were empty bleach bottles and several plastic storage tubs. The officers secured the house and left.

After obtaining a search warrant, the officers returned and fully searched Wood's home. Wood's bed was stripped of sheets and blankets. On the bedroom dresser, police found a folder containing two handwritten stories detailing fantasies of sexual encounters between an adult male and 13-year-old girls. The folder also contained photographs of girls who were students at the middle school where Wood worked as an aide and football coach.

In the basement, the officers found Hailey's nude body wrapped in black plastic bags, stuffed into a 35-gallon plastic tub. Hailey's body, stiffened from rigor mortis, was wet and smelled of bleach. Her lips, cheek, and ear were bruised. Ligature marks indicated Wood tied Hailey by the wrists, and she struggled to free herself. A .22-caliber shell casing lay on the basement floor. The shell casing was fired from a .22-caliber rifle locked inside a gun safe in a storage room.

An autopsy showed Hailey died from a gunshot to the back of her neck, killed by a .22-caliber bullet that passed through the base of her brain. Wood fired the fatal shot from point blank range, placing the barrel of the gun on the back of Hailey's neck before pulling the trigger. Hailey's vagina and anus were lacerated and bruised in a manner consistent with sexual assault.

While Wood had locked the murder weapon away in a safe, officers found several guns larger than .22-caliber and several shotguns left in open view throughout Wood's home. In the bedroom, officers found a shotgun leaning against the wall and a larger caliber handgun on the nightstand next to the bed. An FBI agent testified the .22-caliber rifle would make less noise and less mess than other weapons found in the house.

Officers discovered Hailey's clothing in a dumpster behind a strip mall near Wood's home. Surveillance video showed Wood placing Hailey's clothes in the dumpster. A receipt in Wood's truck showed he purchased a laundry bag and duct tape from Walmart on the evening of Hailey's murder. Police also obtained video footage from Walmart showing Wood purchased bleach and drain cleaner approximately an hour after abducting Hailey.

Wood did not testify or present evidence during the guilt phase. During guilt phase opening statements, Wood's counsel argued Wood did not deliberate before killing Hailey. The state's closing argument emphasized the evidence showing Wood purposely and deliberately killed Hailey. The state argued, "I submit to you that when you place the muzzle, the end of the barrel of a gun, against the back of the base of the skull and you pull the trigger, there's only one purpose you can have, and that's to kill someone. Your common sense tells you that." The state argued Wood deliberately killed Hailey because he chose "the smallest caliber weapon he has, that will make the least mess and the least noise," and then locked the murder weapon away in a gun safe. The state concluded that considering this evidence in conjunction with evidence Wood attempted to conceal his crime by stripping the sheets from his bed, bleaching and hiding Hailey's body, and disposing of her clothes in a dumpster behind a strip mall proved beyond a reasonable doubt Wood deliberately killed Hailey. The jury found Wood guilty of murder in the first degree.[2]

[2] In addition to one count of first-degree murder, the state charged Wood with one count of armed criminal action, § 571.015, RSMo 2000, one count of child kidnapping, § 565.115, RSMo Supp.

During the penalty phase, the state presented a detective's testimony that he found no connection between Wood and Hailey or her family. A computer forensic examiner testified that after an Amber alert was issued for Wood's truck, a friend sent a text message to Wood asking "You haven't been hunting, have you." Another friend texted, "Oh, great, I just got an Amber Alert about a gold Ford Ranger. What have you and bear done???" Wood's dog was named Bear.

The state presented victim impact testimony from the mother of one of Hailey's friends, Hailey's teacher, her great-grandmother, two aunts, and a pastor. The witnesses testified Hailey was a happy and loving child. Hailey's death left an "unfillable void" in her family and traumatized her brother. Hailey's teacher testified that, after Hailey's murder, her classmates' behavior changed and they struggled to cope with Hailey's death. Hailey's aunt testified more than 10,000 people attended a vigil for Hailey. The pastor testified "countless parents" told him they no longer allowed their children to play unsupervised in their front yards or walk to a friend's house.

Wood presented testimony from his parents, three friends, a priest, and two guards from the Greene County jail. Wood's parents testified regarding Wood's problems with depression and substance abuse, but noted he was employed consistently and had no significant criminal history. Wood's friends testified they were shocked when he was arrested because such a crime was out of character. One friend noted Wood once saved a

---

2004, one count of first-degree rape, § 566.030, RSMo Supp. 2013, and one count of sodomy, § 566.060, RSMo Supp. 2013. The state proceeded to trial only on the murder count. Because of intensive pretrial publicity, a jury was chosen from Platte County.

man from an apartment fire. None of Wood's friends were aware he had sexual fantasies about young teenage girls. The priest testified that, since his arrest, Wood renewed his faith, studied the Bible, and regularly met to discuss what he had done. The jail guards testified that, aside from hoarding pills for an apparent suicide attempt, Wood caused no problems.

The jury found the following statutory aggravating circumstances beyond a reasonable doubt:

> The murder of Hailey involved torture and depravity; that the defendant killed Hailey after she was bound or otherwise rendered helpless by the defendant, and the defendant thereby exhibited a callous disregard for the sanctity of all human life;
>
> The defendant's selection of the person he killed was random and without regard to the victim's identity and that defendant's killing of Hailey thereby exhibited a callous disregard for the sanctity of human life;
>
> The murder of Hailey was committed for the purpose of avoiding arrest;
>
> The murder of Hailey was committed while the defendant was engaged in rape;
>
> The murder of Hailey was committed while the defendant was engaged in sodomy;
>
> The murder of Hailey was committed while the defendant was engaged in kidnapping;
>
> Hailey was a witness or potential witness of a pending investigation of the kidnapping of Hailey.

The jury unanimously found the foregoing aggravating circumstances but deadlocked on punishment. The jury did not unanimously determine the mitigating circumstances outweighed the aggravating circumstances.

Because the jury deadlocked on punishment, the circuit court determined the appropriate sentence as required by § 565.030.4. The circuit court specifically referenced the six aggravating circumstances found unanimously by the jury and stated it "does accept and agrees with the factual findings of the jury as set forth in its verdict as to punishment." The circuit court then determined "the facts and circumstances in mitigation of punishment were not sufficient to outweigh facts and circumstances in aggravation of punishment." Finally, "based upon factual findings of the jury," the court determined death was the appropriate sentence.

Wood presents nine points on appeal challenging the circuit court's evidentiary rulings, the state's closing argument, the decision to strike a juror for cause, and the constitutional validity of § 565.030 and § 565.032 governing Missouri's death penalty procedure.[3]

I. Evidentiary Claims

Wood raises four points asserting the circuit court erred by overruling his objections to the admission of evidence. "A trial court has broad discretion to admit or exclude evidence during a criminal trial, and error occurs only when there is a clear abuse of this discretion." *State v. Hartman*, 488 S.W.3d 53, 57 (Mo. banc 2016) (internal quotation omitted). "A trial court abuses its discretion only if its decision to admit or exclude evidence is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful,

[3] For organizational purposes, Wood's points on appeal are addressed out of order.

deliberate consideration." *State v. Blurton,* 484 S.W.3d 758, 769 (Mo. banc 2016) (internal quotation omitted). "This Court will reverse the trial court's decision only if there is a reasonable probability that the error affected the outcome of the trial or deprived the defendant of a fair trial." *Id*.

A. Cell phone photographs properly admitted

Wood claims the circuit court abused its discretion during the guilt phase by overruling his objection to the admission of 32 photographs from Hailey's cellphone. The circuit court reviewed the photographs before overruling Wood's objection and concluded they were relevant and admissible.

The photographs were taken from 11:10 a.m. to 4:40 p.m., just minutes before Wood abducted Hailey. The photographs depicted Hailey, her dog, family, friends, stuffed animals, the neighborhood where she was walking, and her friend's handwritten lyrics to a popular song. Wood argues the photographs were improper victim impact evidence during the guilt phase because most of the photographs were cumulative and had no logical or legal relevance to disputed facts pertaining to the murder charge.

"Evidence must be logically and legally relevant to be admissible." *State v. Prince*, 534 S.W.3d 813, 817 (Mo. banc 2017). "Evidence is logically relevant if it tends to make the existence of a material fact more or less probable." *Id.* (internal quotation omitted). "Evidence is legally relevant when the probative value of the evidence outweighs unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness." *State v. Taylor,* 466 S.W.3d 521, 528 (Mo. banc 2015) (internal quotation omitted). "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. banc 2014) (internal quotation omitted).

The disputed element during the guilt phase was deliberation. Section 565.002(3), RSMo 2000, defined deliberation as "cool reflection for any length of time no matter how brief."[4] The element of deliberation may be proven by the circumstances surrounding the crime. *Collings*, 450 S.W.3d at 760. Although Wood admitted he killed Hailey, "the state, having the burden of proving defendant's guilt beyond a reasonable doubt, should not be unduly limited in its quantum of proof." *State v. Griffin*, 756 S.W.2d 475, 483 (Mo. banc 1988).

The photographs of Hailey and the neighborhood where she was walking were logically and legally relevant because they assisted the jury with understanding the circumstances surrounding the crime. The photographs confirmed the timeline of events and showed Hailey was wearing the same clothing Wood later discarded in the dumpster. Wood's attempt to dispose of Hailey's clothing and conceal the crime supports an inference of deliberation. *See State v. Tisius*, 92 S.W.3d 751, 764 (Mo. banc 2002). Finally, the photographs assisted the jury with understanding the nature and extent of the injuries Wood inflicted on Hailey by showing she lacked any significant injuries prior to the abduction. The fact Hailey lacked injuries prior to the abduction assisted the jury with understanding

[4] Section 565.002 was amended effective January 1, 2017. The definition of "deliberation" remained the same but is now found in § 565.002(5).

the multiple injuries Wood inflicted, including ligature marks indicating Hailey struggled to free herself. Evidence of multiple injuries and prolonged struggle are relevant to the state's burden of proving the disputed element of deliberation beyond a reasonable doubt. *Id.* The photographs were relevant and admissible.

To the extent the photographs of Hailey's stuffed animals, pets, family, and song lyrics are less relevant, the issue is whether the allegedly erroneous evidentiary ruling was so prejudicial that there is a reasonable probability it affected the outcome of the trial. *Hartman*, 488 S.W.3d at 57. The state briefly mentioned the photographs in the guilt phase closing argument to establish the timeline of events and the fact Hailey had no injuries before Wood abducted her. The state's argument, therefore, was limited to referencing the most relevant photographs. In any event, the overwhelming weight of the evidence clearly established deliberation, and negates any reasonable probability the outcome would have been different even if the circuit court had excluded some of the less logically relevant photographs.[5]

B. Gun evidence properly admitted

Wood claims the circuit court abused its discretion by admitting photographs and testimony regarding firearms, ammunition, and related items found in his home. Wood argues the evidence was logically irrelevant and prejudicial because the only possible

[5] Wood argues the photographs may have affected the jury's subsequent deliberations in the separate penalty phase. This speculative argument fails because the circuit court did not abuse its discretion by admitting the photographs in the guilt phase.

purpose was to show he was a "gun-crazed, dangerous person with a propensity for violence."

Evidence of weapons not connected to the accused or the offense at issue are generally inadmissible. *State v. Hosier*, 454 S.W.3d 883, 895 (Mo. banc 2015). Because Wood's sole defense during the guilt phase was lack of deliberation, the state's case hinged on showing deliberation. The evidence of firearms of varying calibers and gauges found throughout Wood's home shortly after he killed Hailey was logically and legally relevant to show deliberation because it tended to prove Wood deliberately chose the smallest weapon from his collection to facilitate his efforts to cover up the murder. In addition to Wood foregoing the multiple weapons stored throughout the house, the evidence also showed that in the bedroom where the evidence suggested Wood raped Hailey, officers found a shotgun leaning against the wall and a large-caliber handgun on the nightstand next to the bed. Wood used neither one of those readily accessible weapons. Instead, Wood used the small, .22-caliber rifle officers found locked in a gun safe in the basement. The state made precisely this point during closing argument:

> He deliberately unloads and hides the rifle. Do you remember all those guns he had around of a higher caliber? In fact, when he's raping her in the bedroom, he's got a handgun right there he could have used. Does he use that? No, he doesn't. He chooses the smallest caliber weapon he has, that will make the least mess and the least noise, and then he hides it in the gun safe, doesn't leave it out like the other guns, and he unloads that magazine.

The state's closing argument emphasized and was consistent with the fact the gun evidence was both logically and legally relevant to refute Wood's argument he did not deliberately kill Hailey. The dissenting opinion, by relying on fundamentally

distinguishable cases, overlooks the fact the logical and legal relevance was amplified by the number of weapons precisely because it showed Wood deliberately chose the .22-caliber rifle even though multiple other weapons were more readily accessible.[6] Further, unlike the cases cited by the dissenting opinion, any alleged prejudicial effect of the gun evidence "was minimized by admitting only photographs of the evidence, not the guns and ammunition themselves." *Id.* at 896. The circuit court did not abuse its discretion

[6] The dissenting opinion's argument that allowing the state to carry its burden of proving deliberation by showing Wood chose the smallest weapon from his large collection requires "jettisoning of decades of case law" is based on a misreading of that case law. Missouri law cautions against evidence of weapons ***unrelated*** to the offense, particularly when the weapons themselves are displayed to the jury. The cases cited by the dissent illustrate this principle. For instance, in *State v. Wynne*, 182 S.W.2d 294, 297 (Mo. 1944), the issuing opinion was "whether the appellant was unfairly and unjustly prejudiced by the prosecuting attorney's exhibition and demonstration with a pistol as he cross-examined her." This Court held the appellant was prejudiced because, "as the court told the jury, the .25-caliber gun in question had no connection whatever with the defendant or the crime." *Id*. at 299. Similarly, in *State v. Perry*, 689 S.W.2d 123, 124-25 (Mo. App. 1985), the court held the defendant was prejudiced by "admitting the loaded 20-gauge shotgun into evidence" because it had no relation to the defendant and the alleged robbery occurred "by means of a 'handgun' or 'pistol.'" In *State v. Charles*, 572 S.W.2d 195, 199 (Mo. App. 1978), the court of appeals reversed murder and robbery convictions because the circuit court erroneously permitted the state "to prove collateral criminal offenses never admitted or for which there was no conviction . . . by the admission of lethal weapons totally foreign to the offense for which an accused is standing trial." Finally, in *State v. Holbert*, 416 S.W.2d 129, 133 (Mo. 1967), this Court reversed a conviction for carrying a concealed weapon because the circuit court erroneously permitted the state to introduce two unrelated pistols into evidence, leave the pistols in bags on the counsel table, and pass the pistols to the jury for examination. In *Holbert*, the prejudice resulted from the fact the pistol recovered from the defendant's shirt pocket "was admitted without objection" and was "in no way connected with the present offense" involving a weapon recovered from the defendant's pants pocket. *Id.* Conversely, the photographs and testimony regarding weapons found throughout Wood's residence were both logically and legally relevant to the central, disputed element of deliberation.

by overruling Wood's objection to evidence of the firearms, ammunition, and related items found throughout his home.[7]

C. Contents of folder properly admitted

Wood claims the circuit court abused its discretion by overruling his objection to evidence of the contents of the folder containing photos of four of Wood's female, middle school students and handwritten accounts of fictional sexual encounters with 13-year-old girls. Wood argues the photos and stories were inadmissible evidence of uncharged crimes relevant only for the impermissible purpose of showing his propensity to commit the offense.

It is unnecessary to address the merits of Wood's argument because a party can open the door to the admission of evidence "with a theory presented in an opening statement, or through cross-examination." *State v. Shockley*, 410 S.W.3d 179, 194 (Mo. banc 2013) (internal quotation and citation omitted). During opening statements, defense counsel argued the contents of the folder showed Wood acted out of compulsion, not deliberation, because his drug use unleashed suppressed sexual desire for young teenage girls. Wood argues defense counsel strategically chose to discuss the folder because the circuit court overruled his motion in limine to exclude the contents of the folder from evidence. But Wood's counsel recognizes a ruling on a motion in limine is interlocutory and subject to

[7] The dissenting opinion asserts "it appears the circuit court skipped" its "duty to weigh the probative value of each additional piece of gun evidence against the inherently prejudicial nature of gun evidence." The dissenting opinion improperly presumes the circuit court failed to analyze the evidence, even though the record confirms the circuit court considered the logical and legal relevance of this evidence when it considered Wood's motion in limine and when objections were made at trial.

change during trial. *See Hancock v. Shook*, 100 S.W.3d 786, 802 (Mo. banc 2003). Despite the interlocutory nature of the ruling, counsel chose to address the folder in opening statements, and one consequence of that strategic decision was to open the door to the admission of the evidence at trial. *State v. Mickle*, 164 S.W.3d 33, 57 (Mo. App. 2005); *see also Bucklew v. State*, 38 S.W.3d 395, 401 (Mo. banc 2001) (concluding defense counsel opened the door to the admission of evidence the defendant previously committed an assault by mentioning background facts of the assault during opening statements).

D. Victim impact evidence properly admitted

Wood claims the circuit court abused its discretion by overruling his objection to the state's penalty phase evidence regarding the effect of Hailey's murder on the Springfield community and allowing the state to question witnesses in a manner intended to elicit emotional responses. Specifically, Wood challenges testimony that more than 10,000 people attended a vigil for Hailey, Hailey's murder changed Springfield from a town to a city, and "countless parents" indicated they feared for their children's safety.

"Victim impact evidence is admissible under the United States and Missouri Constitutions." *State v. Driskill*, 459 S.W.3d 412, 431 (Mo. banc 2015). "The state is permitted to show the victims are individuals whose deaths represent a unique loss to society and to their family and that the victims are not simply faceless strangers." *Id.* Further, § 565.030.4 provides penalty phase "evidence may include, within the discretion of the court, evidence concerning the murder victim and the impact of the offense upon the family of the victim and others." "Victim impact evidence violates the constitution if it is

so unduly prejudicial that it renders the trial fundamentally unfair." *Driskill*, 459 S.W.3d at 431. (internal quotation omitted).

The testimony regarding the vigil was relevant to show Hailey's murder resulted in a "unique loss to society" and she was "not simply a faceless stranger[.]" *Id.* Similarly, the testimony that Hailey's murder changed Springfield from a town to a city and parents now feared for the children's safety was relevant to the impact of the offense on "the family of the victim ***and others***." Section 565.030.4 (emphasis added).[8] There is no specific constitutional limitation on the consideration of community impact, and § 565.030.4 broadly and expressly authorizes evidence of the impact on "others."

Finally, Wood's argument that the state's questioning was aimed solely at eliciting emotional responses fails because a defendant is not necessarily prejudiced by the fact some jurors or audience members in a murder trial exhibited emotional responses to admissible evidence. The circuit court considered the fact some jurors and an audience member wept, but concluded it was simply an "emotional response to the testimony which again I would put in the category of being natural. Nothing disruptive about it to anyone." In other words, the argument was "emotionally charged" because "the facts of this case are inherently emotionally charged." *State v. McFadden*, 391 S.W.3d 408, 425 (Mo. banc 2013). The evidence reflected the brutal facts of the case, and jurors and audience members

[8] Wood asserts the pastor's testimony regarding what parents told him was inadmissible hearsay. "To properly preserve an issue for an appeal, a timely objection must be made during trial." *State v. McFadden*, 369 S.W.3d 727, 740 (Mo. banc 2012) (internal quotation omitted). Wood did not preserve a hearsay argument because he did not make a specific hearsay objection to the pastor's testimony.

cannot be expected to share Wood's stoicism. The circuit court did not abuse its discretion by overruling Wood's objection to the penalty phase victim impact evidence.

II. Closing Argument

Wood claims the circuit court plainly erred during the penalty phase closing argument by permitting the state to argue the jury could speak for Hailey and her family by sentencing Wood to death. Wood timely objected, but did not raise the issue in his motion for a new trial. "An issue is not preserved for appellate review if the issue is not included in the motion for a new trial." *State v. Clay,* 533 S.W.3d 710, 718 (Mo. banc 2017). This Court's consideration of Wood's claim is discretionary and limited to determining whether a plain error resulted in a "manifest injustice or miscarriage of justice[.]" Rule 30.20.

The threshold issue in plain error review is whether the circuit court's error was facially "evident, obvious, and clear." *State v. Jones*, 427 S.W.3d 191, 195 (Mo. banc 2014) (internal quotation omitted). If the appellant establishes a facially "evident, obvious, and clear" error, then this Court will consider whether the error resulted in a manifest injustice or miscarriage of justice. *Id.* To obtain a new trial on direct appeal based on a claim of plain error, the appellant must show "the error was outcome determinative." *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006) (internal quotation omitted). This Court rarely finds plain error in closing argument, and reversal is warranted only if the defendant shows the improper argument "had a decisive effect on the jury's determination." *McFadden*, 369 S.W.3d at 747 (internal quotation omitted). "The entire record is

considered when interpreting a closing argument, not an isolated segment." *Id*. (internal quotation omitted).

Before trial, Wood argued Hailey's mother should be allowed to testify she wanted Wood sentenced to life without parole. The state objected, arguing a family member's opinions regarding sentencing are inadmissible. The circuit sustained the state's objection, and none of Hailey's family members testified regarding their sentencing preferences.

During the penalty phase closing argument, the state recounted the circumstances of Hailey's death and argued the evidence warranted a death sentence. The state then asserted, "With your verdict, sentencing [Wood] to the ultimate punishment, you speak for Hailey. . . ." Wood objected. The state continued, stating, "You speak for her family . . . ." Wood once again objected. The circuit court overruled Wood's objection. The state continued, arguing Wood "not only brutalized Hailey, but he damaged her family, her brother, her school, her entire community, and changed our community, and your verdict will send a message to this defendant." The state concluded, "For all those harms, this is the case. This is the case that calls for the ultimate punishment, and I ask you to sentence the defendant to death."

Wood relies on *State v. Roberts*, 838 S.W.2d 126 (Mo. App. 1992), and *Bosse v. Oklahoma*, 137 S. Ct. 1 (2016), for the proposition the state's reference to Hailey and her family in closing argument resulted in a manifest injustice. Both cases are distinguishable.

In *Roberts*, the state's argument that the jury spoke for the victim's family was improper because there was no evidence the victim had any family members. 838 S.W.2d

at 131. In this case, there was ample evidence of the devastating impact Hailey's murder had on her family.

In *Bosse*, the defendant objected to the state asking three of the victim's family members to recommend a sentence. 137 S. Ct. at 2. All three testified and recommended death. *Id.* Under these circumstances, the United States Supreme Court held admitting evidence of the family's sentencing recommendations violated the Eighth Amendment. *Id.* *Bosse* is distinguishable because none of Hailey's family members testified regarding their sentencing preference.

The crux of the state's argument was the brutality of Hailey's murder and its impact on her family and the community required the jury to "send a message" that such actions deserve a death sentence.[9] "This Court has held that 'send a message' statements are permissible." *McFadden*, 391 S.W.3d at 425. Further, the state did not explicitly argue any of Hailey's family members wanted Wood to receive the death penalty. The state's

[9] The dissenting opinion's argument rests on vigor alone, for it does not cite a single case holding that, during the course of a closing argument detailing the impact of the murder on the victim's family and community, a single sentence fragment referring to the victim's family constitutes plain error. *Bosse* did not hold a fleeting reference to the family's wishes during closing argument results in plain error. *Bosse* held it was error to permit three family members to testify directly to the jury that they wanted the defendant sentenced to death. *Bosse*, 137 S. Ct. at 2. In *State v. Barnett,* 103 S.W.3d 765, 772 (Mo. banc 2003), this Court held defense counsel was not ineffective for declining to call the victims' family to testify in favor of a life sentence because such evidence is "irrelevant." In *State v. Williams*, 119 S.W.3d 674, 681 (Mo. App. 2003), the court of appeals found plain error because the circuit court erroneously excluded an exculpatory recording on the basis of a discovery sanction, and the state then argued there was no exculpatory evidence. Finally, in *State v. Weiss*, 24 S.W.3d 198, 204 (Mo. App. 2000), the court of appeals held the state's misrepresentations regarding existence of possibly exonerating documents constituted plain error. As these cases illustrate, the dissenting opinion relies exclusively on materially distinguishable cases to take the extraordinary step of finding plain error in closing argument by divorcing the state's brief reference to Hailey's family from the broader context of a closing argument detailing the impact on the community.

isolated reference to speaking for Hailey and her family in the context of making a permissible "send a message" argument by imposing a death sentence did not change the outcome of this case. Wood has not shown a manifest injustice justifying the rare step of finding plain error based on statements made in closing argument. *State v. Anderson*, 79 S.W.3d 420, 439 (Mo. banc 2002) ("Statements made in closing argument will only rarely amount to plain error.").

III. Juror Properly Stricken for Cause

Wood claims the circuit court abused its discretion by sustaining the state's motion to strike a venireperson for cause during the death qualification voir dire.

The circuit court's "ruling on a challenge for cause will not be disturbed on appeal unless it is clearly against the evidence and constitutes a clear abuse of discretion." *State v. Deck*, 303 S.W.3d 527, 535 (Mo. banc 2010) (internal quotation omitted). "Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." *McFadden*, 369 S.W.3d at 738 (internal quotation omitted). "The qualifications for a prospective juror are not determined from a single response, but rather from the entire examination." *Deck,* 303 S.W.3d at 535.

In her jury questionnaire, the venireperson stated she opposed the death penalty. On a scale of one to seven, with one denoting strong opposition to the death penalty and seven denoting strong support, she rated her position as two. The venireperson explained she opposed the death penalty because she believed it was imposed disproportionately on

"poor people or minorities." She stated life without parole is the best option, and said she is a "very peaceful and non-violent believer." Finally, she stated the death penalty is "barbaric" and "We should not stoop to the level of a criminal. We are better than that."

During voir dire, the venireperson stated she could consider the death penalty, but reiterated she is "strongly against it in general" because it is not distributed fairly. She stated she did not believe the state commits a wrong by executing someone, but explained "we should not act as criminals ourselves in ending a life. I feel like, you know, it's – I guess I don't believe in the eye for an eye type of punishment. I'm not sure if that answers your question." She stated, "I could consider it even though I am, on principle, opposed in general." The venireperson stated, if she were jury foreman, her conscience would not permit her to sign a death verdict, but she could if it indicated the jury unanimously agreed to the verdict.

The state asked the venireperson if her conscience would "let you vote in favor of a death verdict?" She responded, "I think that's really what I meant, is my gut instinct is no, my conscience wouldn't – I'm against the death penalty." The state asked, "your gut instinct is you could not vote for it?" The venireperson responded "Yes, that's right."

During surrebuttal voir dire, the venireperson told defense counsel she did not believe in the death penalty and would have a very hard time making that call. She stated she would consider the death penalty if certain things fell into place and that she owed it to the victim to listen to both sides.

The state moved to strike the venireperson for cause. Wood objected. The circuit court sustained the state's motion. The court noted the venireperson's answers that her

conscience would not let her vote for the death penalty, and that she could consider the death penalty only because she owed it to the victim's family.

Just as the defendant has an interest in an impartial jury without an uncommon willingness to impose a death sentence, the state has a "strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." *White v. Wheeler*, 136 S. Ct. 456, 460 (2015) (internal quotation omitted). When there is ambiguity in the venireperson's statements, the circuit court can resolve the ambiguity in favor of the state. *Id.; State v. Roberts,* 948 S.W.2d 577, 597 (Mo. banc 1997).

After a complete review of the juror questionnaire and the record of the entire examination rather than individual responses, the circuit court was faced with a situation on which it was uncertain whether the venireperson could "apply capital punishment within the framework state law prescribes." *Wheeler*, 136 S. Ct. at 460. The circuit court did not abuse its discretion by resolving the ambiguity in the state's favor and sustaining the state's motion to strike the venireperson for cause.

IV. Constitutional Arguments

Wood claims § 565.030 violates his Sixth Amendment right to a jury trial by permitting the circuit court to impose a death sentence when the jury deadlocks on punishment. Wood also claims § 565.030 violates his right to be free from cruel and unusual punishment pursuant to the Eighth Amendment and article I, § 21 of the Missouri Constitution because the statute permits the circuit court to impose a death sentence following the jury's deadlock on punishment. Finally, Wood claims § 565.032 fails to sufficiently narrow the class of persons eligible for a death sentence.

"Challenges to the constitutional validity of a state statute are subject to de novo review." *State v. Shanklin*, 534 S.W.3d 240, 241 (Mo. banc 2017) (internal quotation omitted). "A statute is presumed constitutional and will be found unconstitutional only if it clearly and unambiguously contravenes a constitutional provision." *Id.* at 241-42 (internal quotation omitted). "The person challenging the validity of the statute has the burden of proving the act clearly and undoubtedly violates the constitutional limitations." *Id.* at 242 (internal quotation omitted).

A. Sixth Amendment

Section 565.030.4 establishes the procedure for the penalty phase of a first-degree murder trial when the state does not waive the death penalty. Assuming the defendant is not intellectually disabled, § 565.030.4(1), the defendant is eligible for a death sentence only when the jury finds at least one statutory aggravating circumstance beyond a reasonable doubt. § 565.030.4(2). When the jury finds a statutory aggravating circumstance, the jury proceeds to the weighing step, and must impose a life sentence if it "concludes" evidence in mitigation outweighs the evidence in aggravation. § 565.030.4(3). If the jury concludes the evidence in mitigation does not outweigh evidence in aggravation, the jury "decides" whether to "assess and declare the punishment at death." § 565.030.4(4). If the jury deadlocks on punishment, the circuit court determines punishment by following "the same procedure as set out in this section[.]" § 565.030.4. Wood argues this sentencing procedure violated his Sixth Amendment right to a jury trial because it permitted the circuit court to impose a death sentence following the jury's deadlock on punishment.

Wood's argument was considered and rejected by this Court. *State v. Shockley,* 410 S.W.3d 179, 198-99 (Mo. banc 2013). As in this case, the jurors in *Shockley* answered special interrogatories listing several statutory aggravators that they found unanimously beyond a reasonable doubt. *Id.* at 198. As in this case, the jurors in *Shockley* also stated they did not conclude unanimously that the mitigating circumstances outweighed those in aggravation. *Id.* Like Wood, Shockley argued § 565.030.4 violates the Sixth Amendment by permitting the circuit court, rather than the jury, to weigh the aggravators and mitigators and determine punishment if the jury is unable to reach a penalty phase verdict. *Id.* This Court held:

> Permitting a judge to consider the presence of statutory aggravators and to weigh mitigating evidence against that in aggravation in deciding whether to impose a death sentence when the jury did not unanimously agree on punishment does not negate the fact that the jury already had made the required findings that the State proved one or more statutory aggravators beyond a reasonable doubt and that it did not unanimously find that the factors in mitigation outweighed those in aggravation. Rather, the statute provides an extra layer of findings that must occur before the court may impose a death sentence.

Id. at 198-99. *Shockley* establishes that, when the jury finds the facts making a defendant eligible for a death sentence, the Sixth Amendment does not prohibit the circuit court from resolving the jury's penalty phase deadlock by imposing a death sentence. *Id.* at 199 n.11; *see also State v. McLaughlin*, 265 S.W.3d 257, 264 (Mo. banc 2008).

The jury unanimously found beyond a reasonable doubt the existence of six aggravating factors:

> The murder of Hailey involved torture and depravity; that the defendant killed Hailey after she was bound or otherwise rendered helpless by the

> defendant, and the defendant thereby exhibited a callous disregard for the sanctity of all human life;
>
> The defendant's selection of the person he killed was random and without regard to the victim's identity and that defendant's killing of Hailey thereby exhibited a callous disregard for the sanctity of human life;
>
> The murder of Hailey was committed for the purpose of avoiding arrest;
>
> The murder of Hailey was committed while the defendant was engaged in rape;
>
> The murder of Hailey was committed while the defendant was engaged in sodomy;
>
> The murder of Hailey was committed while the defendant was engaged in kidnapping;
>
> Hailey was a witness or potential witness of a pending investigation of the kidnapping of Hailey.

The jury did not unanimously determine the mitigating circumstances outweighed the aggravating circumstances and deadlocked on punishment. The circuit court resolved the deadlock by accepting and reciting the jury's findings that the state proved six aggravating factors beyond a reasonable doubt. The circuit court then concluded the aggravating circumstances outweighed mitigating circumstances, and decided a death sentence was appropriate.

Wood argues this Court must reexamine *Shockley* and *McLaughlin* in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016). Wood argues *Hurst* prohibits Missouri's death penalty by allowing the circuit court, following the jury's deadlock on punishment, to find the aggravating circumstances outweighed the mitigating circumstances. Wood's argument is that the weighing step is a factual finding constitutionally entrusted to the jury.

The Sixth Amendment, "in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 104 (2013). In addition to the facts underlying the charged offense, an "element" includes any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict[.]" *Apprendi v. New Jersey,* 530 U.S. 466, 494 (2000). Therefore, "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Alleyne*, 570 U.S. at 114-15.

In death penalty cases, the existence of an aggravating circumstance exposes the defendant to a greater punishment and, therefore, is a factual element the jury must find beyond a reasonable doubt. *Ring* v. *Arizona*, 536 U.S. 584, 604 (2002). In *Ring*, the statute at issue provided the trial judge could impose a death sentence only after independently finding at least one aggravating circumstance. *Id.* at 592-93. The statute violated the Sixth Amendment right to a jury trial because it authorized the trial judge alone to find aggravating circumstances making the defendant eligible for a death sentence. *Id.* at 609.

In *Hurst*, 136 S. Ct. 616, 624 (2016), the United States Supreme Court applied *Ring* to invalidate Florida's statutory death penalty sentencing procedure because it authorized "the judge alone" to find the existence of aggravating circumstances. Under Florida's procedure, the jury recommended an "advisory sentence" without specifying the factual basis for its recommendation. *Id.* at 620. Following the jury's advisory sentence, Florida's statute required the judge to impose a sentence of life imprisonment or death based on "the trial judge's independent judgment about the existence of aggravating and mitigating

factors[.]" *Id*. (internal quotation omitted). Because of the jury's limited, advisory role, Florida juries did "not make specific factual findings with regard to the existence of mitigating or aggravating circumstances," and the trial judge assumed the "central and singular role" in finding the facts necessary to impose a death sentence. *Id.* at 622. Given this procedural framework, the jury in *Hurst* found no specific aggravating circumstance, but nonetheless returned a non-unanimous advisory sentence recommending a death sentence. *Id.* at 620. The trial judge independently found the facts supporting two specific statutory aggravating circumstances and sentenced the defendant to death. *Id.*

Hurst held Florida's death penalty sentencing procedure violated the Sixth Amendment because it "**required the judge alone to find the existence of an aggravating circumstance**[.]" *Id.* at 624 (emphasis added). *Hurst* emphasized the limited scope of its holding by overruling *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989), only "**to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty**." *Id.* (emphasis added). *Hurst* is a straightforward application of *Ring* and stands only for the proposition that, in a jury tried case, aggravating circumstances are facts that must be found by the jury beyond a reasonable doubt. *Hurst* does not hold the determination of whether mitigating factors outweigh aggravating factors or that death is an appropriate sentence are factual elements that must be found by a jury.[10]

[10] *See In re Bohannon*, 222 So. 3d 525, 531-33 (Ala. 2016) (*Hurst* requires only that the jury find the existence of an aggravating factor to make a defendant death eligible); *see also Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1198 (11th Cir. 2013) ("*Ring* does not foreclose the ability of the trial judge to find the aggravating circumstances outweigh the mitigating circumstances").

Wood's argument ignores the limited holding in *Hurst* and settled precedent that a death sentence requires two distinct determinations: "the eligibility decision and the selection decision." *Tuilaepa v. California*, 512 U.S. 967, 971 (1994). The eligibility decision is based on factual findings that the defendant has a conviction "for which the death penalty is a proportionate punishment" and the existence of an "aggravating circumstance (or its equivalent) at either the guilt or penalty phase." *Id.* at 971-72 (internal quotation omitted). The factual findings underlying the eligibility decision are verifiable; they either do or do not exist. *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016). Unlike the factual findings underlying the eligibility decision, the selection decision requires the sentencer to consider "the character of the individual and the circumstances of the crime" and "relevant mitigating evidence[.]" *Tuilaepa*, 512 U.S. at 972. Once the jury finds the facts showing the defendant is eligible for a death sentence, the sentencer has "unbridled discretion" in making the selection decision. *Id.* at 979-80.

The selection decision is fundamentally different than the eligibility decision. "[T]he ultimate question [of] whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy[.]" *Carr*, 136 S. Ct. at 642. Unlike the factual finding that an aggravating circumstance does or does not exist, the selection decision is a discretionary judgment, and "jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve." *Id.*[11]

---

[11] While *Tuilaepa* and *Carr* involved Eighth Amendment challenges to the burden of proof in death penalty sentencing, both cases establish the selection decision is not itself a factual element and is, instead, a discretionary judgment. These cases are instructive because the Sixth

Wood's case illustrates this concept. There is no factually verifiable answer to the question of whether Wood's lack of a significant criminal record and struggle with depression outweigh the fact he raped and sodomized Hailey before shooting her in the back of the neck at point blank range and discarding her body in a plastic tub. Neither a jury nor a judge can prove or disprove a conclusion the evidence on one side outweighs the evidence on the other. After the jury found the existence of multiple aggravating circumstances beyond a reasonable doubt, the determination of whether Wood's personal circumstances mitigated the brutality of his crime was a discretionary judgment call that neither the state nor federal constitution entrusts exclusively to the jury.[12]

This Court's decision in *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003), does not dictate a different result. In *Whitfield,* this Court applied *Ring* and recalled the mandate in a death penalty case because the jury did not decide all the facts necessary for a death sentence. 107 S.W. at 261-62. Although *Whitfield* properly recognized the existence or non-existence of an aggravating circumstance is a factual finding the jury must make, *Whitfield* erroneously suggested weighing the aggravating and mitigating circumstances is also a factual finding reserved for the jury. *Id.* at 261, 270. This Court's more recent cases corrected this aspect of *Whitfield*, and now uniformly recognize the weighing step is ***not*** a factual finding that must be found by the jury beyond a reasonable doubt.

Amendment requires only that the jury find the factual elements exposing the defendant to a greater punishment. *See Ring*, 536 U. S. at 604.

[12] Wood relies on *Rauf v. State*, 145 A.3d 430, 432-33 (Del. 2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), for his proposition that determining whether the aggravating circumstances outweigh the mitigating circumstances is a factual element the Sixth Amendment requires the jury to find. These cases are not binding, and both are wrongly decided.

In *Zink v. State*, 278 S.W.3d 170, 192-93 (Mo. banc 2009), this Court held appellate counsel was not ineffective for declining to argue the penalty phase instructions violated *Ring* and *Apprendi* by not instructing the jury to find beyond a reasonable doubt that mitigating circumstance outweighed aggravating circumstances. *Zink* held appellate counsel was not ineffective for declining to raise this "meritless" claim because the weighing step is not "a finding of a fact that may increase Mr. Zink's penalty. Instead, the jury is weighing evidence and all information before them." *Id*. at 193.

In *State v. Anderson*, 306 S.W.3d 529, 540 (Mo. banc 2010), this Court rejected the defendant's argument that the existence and weight of mitigating circumstances were facts that must be proven to the jury beyond a reasonable doubt. This Court reasoned *Ring* and *Apprendi* only require the state to prove beyond a reasonable doubt factual elements, including statutory aggravating circumstances. *Id.* Therefore, "neither the constitution nor the Missouri death penalty statute require that the State prove the weighing step beyond a reasonable doubt." *Id.*

In *State v. Dorsey*, 318 S.W.3d 648, 653 (Mo. banc 2010), this Court cited *Zink* and again held "**the jury's 'weighing' of the aggravation and mitigation evidence is not subject to proof beyond a reasonable doubt because it is not a factual finding that increases the potential range of punishment**." (Emphasis added). Similarly, in *State v. Nunley*, 341 S.W.3d 611, 626 n.3 (Mo. banc 2011), this Court noted a number of federal and state cases holding the weighing step is not a factual determination implicating the

Sixth Amendment right to a jury trial.[13] To the extent *Whitfield* presumes the weighing step is a factual finding constitutionally reserved for the jury, it should no longer be followed.[14]

---

[13] *Nunley* cited the following cases: *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); *United States v. Purkey*, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); *Ford v. Strickland*, 696 F.2d 804, 818 (11th Cir. 1983) ("While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard, ... the relative *weight* is not."); *Gray v. Lucas*, 685 F.2d 139, 140 (5th Cir. 1982) ("[T]he reasonable doubt standard simply has no application to the weighing of aggravating and mitigating circumstances."); *Higgs v. United States*, 711 F.Supp.2d 479, 540 (D. Md. 2010) ("Whether the aggravating factors presented by the prosecution outweigh the mitigating factors presented by the defense is a *normative* question rather than a *factual* one."); *State v. Fry*, 126 P.3d 516, 534 (N.M.2005) ("[T]he weighing of aggravating and mitigating circumstances is thus not a 'fact that increases the penalty for a crime beyond the prescribed statutory maximums."); *Commonwealth v. Roney*, 866 A.2d 351, 360 (Pa. 2005) (finding *Apprendi* does not apply to weighing evidence because it "is a function distinct from fact-finding"); *Ritchie v. State*, 809 N.E.2d 258, 266 (Ind. 2004) (concluding the relative weight of aggravating and mitigating circumstances is a balancing process, not a fact that must be proved beyond a reasonable doubt); *Brice v. State*, 815 A.2d 314, 322 (Del. 2003) (finding *Ring* does not apply to the weighing phase because weighing "does not increase the maximum punishment"), *overruled by Rauf v. State*, 145 A.3d 430, 433 (Del. 2016) (holding *Hurst* requires the jury to weigh aggravating and mitigating circumstances); *State v. Gales*, 658 N.W.2d 604, 629-30 (Neb. 2003) ("[W]e do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review be undertaken by a jury."); *Oken v. State*, 835 A.2d 1105, 1158 (Md. 2002) ("[T]he weighing process never was intended to be a component of a 'fact finding' process[.]"); *Ex parte Waldrop*, 859 So.2d 1181, 1190 (Ala. 2002) ("*Ring* and *Apprendi* do not require that a jury weigh the aggravating circumstances and the mitigating circumstances.")

[14] Wood claims the special interrogatory showing the jury did not unanimously find the evidence in mitigation outweighed the evidence in aggravation does not show what the jury found and, instead, shows only what the jury did not find. Wood argues it is possible eleven jurors found the mitigating circumstances outweighed the aggravating circumstances. Wood's argument is irrelevant to his Sixth Amendment claim because it is premised on the faulty proposition the weighing step is a factual finding only the jury can make.

Neither Wood's point relied on nor his argument raised the additional meritless argument urged by the dissenting opinion. The dissenting opinion *sua sponte* asserts, as a matter of statutory interpretation, that § 565.030.4 requires the jury to make a factual finding that the mitigating evidence either does or does not outweigh the aggravating evidence. The dissenting opinion reasons that holding the weighing step is not a factual finding conflates the jury's role in the third and fourth steps. In other words, the dissenting opinion reasons that unless the weighing step is a factual finding, it is identical to the discretionary "mercy" determination in the fourth step.

Wood also cites *Whitfield* for the proposition that the § 565.030.4 deadlock procedure is equivalent to the Florida death penalty procedure held unconstitutional in *Hurst*. Wood relies on *Whitfield* to argue the § 565.030.4 deadlock procedure provides the jury's factual findings "simply disappear," and the circuit court independently finds the facts necessary to impose a death sentence. 107 S.W.3d at 271.

In *Whitfield*, the record did not demonstrate whether the jury made the required factual findings. *Id*. at 270. The resulting death sentence was not based on the jury's factual findings and, instead, was "entirely based" on the circuit court's findings. *Id*. at 261. In that circumstance, when there was no record the jury made the constitutionally required findings in the first place, *Whitfield* concluded the circuit court's "independent" findings resulted in a death sentence that violated the Sixth Amendment. *Id.* at 261.

Rather than limiting its holding to the determination there was no record the jury made any constitutionally required findings, *Whitfield* unnecessarily extrapolated a general rule that the § 565.030.4 deadlock procedure always eliminates the jury's factual findings and replaces them with the circuit court's factual findings. *See id.* at 271. Section 565.030.4, however, provides only that if the jury deadlocks on punishment, the court is to "follow the same procedure as set out in this section[.]"[15] Requiring the circuit court to

---

The plain language of § 565.030.4, however, establishes distinct inquiries for the jury at both steps. The weighing step balances the mitigating and aggravating circumstances, while the final step requires the jury to engage in a separate inquiry to determine "under all the circumstances" whether a death sentence is warranted. This Court's conclusion that neither of these determinations is a factual finding constitutionally entrusted to the jury does not mean they are the same.

[15] Following *Whitfield*, the jury instructions in capital cases were revised to require jurors to answer special interrogatories indicating whether they found a statutory aggravating factor to be present, and if so, what factor, and whether they found that mitigating evidence did not outweigh aggravating evidence. *Shockley*, 410 S.W.3d at 199 n.11. Section 565.030.4 provides:

"follow the same procedure" does not necessarily mean the jury's constitutionally required findings "simply disappear" or that the circuit court must displace the jury's constitutionally required factual findings with the court's independent findings. The Sixth Amendment

---

> If the trier at the first stage of a trial where the death penalty was not waived finds the defendant guilty of murder in the first degree, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. Evidence in aggravation and mitigation of punishment, including but not limited to evidence supporting any of the aggravating or mitigating circumstances listed in subsection 2 or 3 of section 565.032, may be presented subject to the rules of evidence at criminal trials. Such evidence may include, within the discretion of the court, evidence concerning the murder victim and the impact of the offense upon the family of the victim and others. Rebuttal and surrebuttal evidence may be presented. The state shall be the first to proceed. If the trier is a jury it shall be instructed on the law. The attorneys may then argue the issue of punishment to the jury, and the state shall have the right to open and close the argument. The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:
>
> (1) If the trier finds by a preponderance of the evidence that the defendant is intellectually disabled; or
>
> (2) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or
>
> (3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or
>
> (4) If the trier decides under all of the circumstances not to assess and declare the punishment at death. If the trier is a jury it shall be so instructed.
>
> If the trier assesses and declares the punishment at death it shall, in its findings or verdict, set out in writing the aggravating circumstance or circumstances listed in subsection 2 of section 565.032 which it found beyond a reasonable doubt. If the trier is a jury it shall be instructed before the case is submitted that if it is unable to decide or agree upon the punishment the court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor or death. The court shall follow the same procedure as set out in this section whenever it is required to determine punishment for murder in the first degree.

does not prohibit the circuit court during sentencing from finding facts previously found by the jury. *State v. Johnson*, 524 S.W.3d 505, 512 (Mo. banc 2017). As this Court observed in *Shockley*, § 565.030.4 "provides an extra layer of findings that must occur before the court may impose a death sentence." 410 S.W.3d at 198-99.[16]

Missouri's death penalty sentencing procedure is fundamentally different from the Florida statute the Supreme Court invalidated in *Hurst.* Unlike the Florida statute, § 565.030 does not limit the jury to providing an "advisory sentence" without making the constitutionally required factual findings rendering the defendant eligible for a death sentence. When, as in this case, the jury deadlocks on punishment, it has necessarily already made the constitutionally required factual finding of an aggravating circumstance. When the circuit court follows "the same procedure set out in this section" to resolve the jury's deadlock on punishment, the constitutional role of the jury as the finder of fact has already been fulfilled and the circuit court may only impose a death sentence when it confirms the finding of at least one aggravating circumstance and makes the non-factual, discretionary determinations that the aggravating circumstances outweigh mitigating circumstances and death is an appropriate sentence. This Court has repeatedly held neither of these determinations is a factual finding that must be performed by the jury. *Shockley,*

[16] Because the expansive interpretation of § 565.030.4 in *Whitfield* and advocated for by Wood is not compelled by the plain language of the statute, it violates the "accepted canon of statutory construction that if one interpretation of a statute results in the statute being constitutional while another interpretation would cause it to be unconstitutional, the constitutional interpretation is presumed to have been intended." *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838-39 (Mo. banc 1991).

410 S.W.3d at 198-99; *Dorsey*, 318 S.W.3d at 653; *Anderson*, 306 S.W.3d at 540; *Zink*, 278 S.W.3d at 193. *Hurst* does not hold or imply otherwise. The § 565.030.4 penalty phase deadlock procedure does not violate the Sixth Amendment.

B. Eighth Amendment

Wood claims § 565.030.4 violates the Eighth Amendment and article I, § 21 of the Missouri Constitution because "evolving standards of decency" prohibit a judge from imposing a death sentence after the jury finds aggravating circumstances but deadlocks on punishment. The Eighth Amendment and article I, § 21 of the Missouri Constitution provide the same protection against cruel and unusual punishment. *State v. Nathan*, 522 S.W.3d 881, 882 n.2 (Mo. banc 2017); *State v. Lee*, 841 S.W.2d 648, 654-55 (Mo. banc 1992). Wood asserts § 565.030.4 is unconstitutional because Missouri's procedure is "an extreme outlier," with only Indiana employing a similar process.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." "The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances." *Graham v. Florida*, 560 U.S. 48, 59 (2010). "While the Eighth Amendment doesn't forbid capital punishment, it does speak to how States may carry out that punishment, prohibiting methods that are cruel and unusual." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019) (internal quotation omitted).

In addition to categorically prohibiting cruel and unusual methods of punishment, the United States Supreme Court has construed the Eighth Amendment to prohibit punishments disproportionate to the offense because "[t]he concept of proportionality is

central to the Eighth Amendment." *Graham*, 560 U.S. at 59. In the death penalty context, proportionality requires "that 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." *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (internal quotation omitted). Therefore, when the method of execution is not at issue, the analysis of Eighth Amendment challenges to a death sentence begins with "two subsets, one considering the nature of the offense, the other considering the characteristics of the offender." *Graham,* 560 U.S. at 60.

Wood's argument that the circuit court cannot resolve the jury's deadlock and impose a death sentence does not state an Eighth Amendment claim. First, there is no dispute the nature of the offense rendered Wood constitutionally eligible for a death sentence. "To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase." *Tuilaepa*, 512 U.S. at 971-72. The jury found beyond a reasonable doubt Wood committed a first-degree murder and also found multiple aggravating circumstances.

Second, the fact the circuit court resolved the jury's penalty phase deadlock by determining the mitigating factors did not outweigh the aggravating factors and sentencing Wood to death does not relate to a "characteristic of the offender," like age or intellectual disability. *See Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding the Eighth Amendment prohibits the death penalty for juvenile offenders); *Atkins v. Virginia,* 536 U.S. 304, 321 (2002) (holding the Eighth Amendment prohibits the death penalty for offenders

who are "mentally retarded"). As Wood notes, sentencing procedures that fail to provide adequate standards to guide the sentencer's assessment of offender's characteristics may violate the Eighth Amendment. *See Hall v. Florida*, 572 U.S. 701, 715-24 (2014) (holding a statute requiring the defendant show an IQ score of 70 or below before being allowed to present additional evidence of intellectual disability evidence violated the Eighth Amendment). Wood's argument the Eighth Amendment prohibits the judge from resolving the jury's penalty phase deadlock does not show § 565.030 fails to provide adequate standards to guide the sentencer's assessment of the offender's characteristics and limit the death penalty to the most culpable offenders. Instead, Wood's argument distills to a recycled version of his meritless argument that the Sixth Amendment requires the jury to find the aggravating circumstances outweigh the mitigating circumstances and that death is an appropriate sentence. The § 565.030.4 deadlock procedure does not violate the Eighth Amendment.

Finally, Wood argues the circuit court erred by overruling his pretrial objection that § 532.030 and § 532.032 are unconstitutional because they fail to genuinely narrow the class of persons eligible for the death penalty to the most serious crimes and the most culpable offenders. Wood asserts the 17 aggravating circumstances set forth in § 532.032 are too numerous, unconstitutionally broad, and vest prosecutors with too much discretion. Wood cites no case supporting his arguments. This Court previously rejected similar arguments, and does so once again. *State v. Williams*, 97 S.W.3d 462, 473-74 (Mo. banc 2003) (statutory aggravators not unconstitutionally broad); *State v. Taylor*, 18 S.W.3d 366,

376 (Mo. banc 2000) ("Prosecutors are given broad discretion in seeking the death penalty").

V. Proportionality

Section 565.035.3 imposes an independent duty on this Court to undertake a proportionality review to determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found; (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant.

There is no indication Wood was sentenced to death as a result of passion, prejudice, or any other arbitrary factor. The evidence vividly demonstrated how Wood brutally and deliberately killed Hailey after abducting her, restraining her, and raping her. Wood's death sentence resulted from the brutality of his crime, not the passion, prejudice or arbitrariness of the sentencer.

The evidence also overwhelmingly supported the jury's unanimous finding beyond a reasonable doubt of multiple aggravating circumstances. The evidence showed Wood randomly selected Hailey, kidnapped her, raped and sodomized her, and then shot her at point blank range while she was bound and helpless.

Finally, the death sentence in this case not disproportionate to the penalty imposed in similar cases. This Court has affirmed a death sentence when the defendant murdered the victim after raping the victim. *Driskill*, 459 S.W.3d at 433; *Dorsey*, 318 S.W.3d at 659: *McLaughlin*, 265 S.W.3d at 277-78. This Court has affirmed death sentences resulting

from the murder of vulnerable, defenseless victims. *Anderson*, 306 S.W.3d at 544; *State v. Barton*, 998 S.W.2d 19, 29 (Mo. banc 1999); *State v. Clayton*, 995 S.W.2d 468, 484 (Mo. banc 1999). Hailey was vulnerable and defenseless. She was a 10-year-old girl randomly abducted by a grown man who then restrained her, raped her, and killed her before bleaching her lifeless body and stuffing it in a plastic tub. Finally, this Court has repeatedly affirmed death sentences in cases involving the heinous killing of a child. *See State v. Collings*, 450 S.W.3d 741,768 (Mo. banc 2014) (concluding death sentence proportionate when defendant sexually abused and murdered a 9-year-old girl); *State v. Johnson*, 207 S.W.3d 24, 51 (Mo. banc 2006) (concluding death sentence proportionate when defendant admitted he kidnapped, attempted to rape, and then killed a 6-year-old).

This Court's independent research has identified no cases showing a death sentence for the random abduction, rape, and murder of a child is disproportionate. There is overwhelming evidence of Wood's guilt and the existence of multiple aggravating circumstances. The death sentence meets all statutory requirements.

Conclusion

The judgment is affirmed.

_____
Zel M. Fischer, Judge

Wilson, Russell, Powell, and Breckenridge, JJ., concur;
Stith, J., dissents in separate opinion filed;
Draper, C.J., concurs in opinion of Stith, J.;
Breckenridge, J., concurs in section III of the opinion of Stith, J.

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. SC96924
	)	
CRAIG M. WOOD,	)	
	)	
Appellant.	)	

DISSENTING OPINION

I disagree with the principal opinion's determination it was not prejudicial error to permit the prosecution to introduce testimony and some 29 photographs of weapons and gun accessories that were *not* used in the murder. I also disagree with its handling of the prosecution's intentional reference to evidence of the family's wishes for a death sentence, for such evidence is categorically inadmissible. The error was compounded by the fact the prosecutor had purposely kept out evidence that the victim's mother did not wish a death sentence to be imposed.

Finally, while I agree the jury made the three factual determinations required by section 565.030.4 and, therefore, the statute permitted the judge to determine whether to impose a death sentence, I disagree with the principal opinion that the third of the four questions the statute requires does not require the jury to make a factual determination. It

does. It requires the jury to weigh and balance the evidence supporting mitigation with the evidence in aggravation – a weighing and balancing each of our jurors is called on to make every day in our courts. The principal opinion's conclusion otherwise makes question three merely redundant of question four, which allows the jury to exercise mercy even if it has not found any of the three facts set out in questions one, two or three that would have required imposition of a life sentence.

The facts presented by the underlying crime are appalling and horrifying. This makes it even more important to apply settled legal principles. "It is the duty of all courts of justice to take care, for the general good of the community, that hard cases do not make bad law." *Seilert v. McAnally, 122 S.W. 1064, 1068 (Mo. 1909)*. While I agree with much of the principal opinion, I am concerned that the terrible nature of the crime makes this the type of hard case about which *Seilert* cautioned.

I. IT WAS AN ABUSE OF DISCRETION TO ALLOW TESTIMONY AND 29 PHOTOS OF GUNS AND GUN-RELATED ITEMS AT MR. WOOD'S HOUSE THAT WERE UNRELATED TO THE CHARGED CRIME

"The objection to the introduction of weapons or other demonstrative evidence, especially when not connected with the defendant or his crime, on the ground of unfair prejudice is based on sound psychological and philosophical principles." *State v. Wynne, 182 S.W.2d 294, 288 (Mo. 1944)*. But the principal opinion finds no error in the admission of what it terms "evidence of firearms of varying calibers and gauges found throughout Wood's home shortly after he killed Hailey." *Slip. Op. at 11*. In so ruling, it fails to acknowledge the staggering depth and breadth of unrelated gun evidence that the trial court

admitted. This is a horrific case. That does not justify the jettisoning of decades of case law.

"The courts of this state, with notable consistency, have recognized that weapons unconnected with either the accused or the offense for which he is standing trial lack any probative value and their admission into evidence is inherently prejudicial and constitutes reversible error." *State v. Perry, 689 S.W.2d 123, 125 (Mo. App. 1985)*. "[T]he sight of deadly weapons or of cruel injuries tends to overwhelm reason and to associate the accused with the atrocity without sufficient evidence." *Wynne*, *182 S.W.2d at 289*, *quoting 4 Wigmore, Evidence § 1157 (1940)* (reversing a second-degree murder conviction after demonstration to the jury with a weapon unconnected to the crime). "Lethal weapons completely unrelated to and unconnected with the criminal offense for which an accused is standing trial have a ring of prejudice seldom attached to other demonstrative evidence, and the appellate courts of this state have been quick to brand their admission into evidence … as prejudicial error." *State v. Charles, 572 S.W.2d 193, 198 (Mo. App. 1978)*.

The only reason advanced by the State that evidence of more than 20 unrelated guns and accessories is logically relevant is that the evidence goes to "prove he deliberately chose the smallest weapon from his collection to facilitate his efforts to cover up the murder" despite the fact other weapons were closer at hand. *Slip. Op. at 11*. But logical relevance is not sufficient – the circuit court also must determine legal relevance by weighing "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." *State v. Anderson*, *76 S.W.3d 275, 276 (Mo. banc 2002)*. The State could have made its point

simply by introducing evidence Mr. Wood owned numerous guns, he had to pass one or more to get to the gun he used, and it was the smallest. The judge might have permitted introduction of a picture of one or two of those guns. This would have balanced the prejudice resulting from introduction of this only minimally probative but highly prejudicial gun evidence.

Instead, the gun evidence became a centerpiece of the trial and went far beyond what was necessary to present the facts deemed relevant. During the guilt phase, the State presented evidence of the .22-caliber shell casing and rifle which appeared to be the weapon used to kill Hailey. Then, over Mr. Wood's objection, it also presented lengthy testimony from F.B.I. Special Agent Tucker about more than 20 other guns and gun-related accessories accompanying the guns. Agent Tucker testified Mr. Wood had a holstered Ruger .44 pistol on his dining room table, a .45-caliber pistol on a nearby bookshelf, a .38-caliber revolver on the bookshelf, a gun case with two semiautomatic handguns, a pump action shotgun just inside his bedroom, a .40 Springfield semiautomatic in his bedroom, a Smith and Wesson revolver in his storage room, a gun safe with 10 more guns in it, and a pump action shotgun to the right of the gun safe.

For each of these guns, the jury was shown a photograph of the weapon as Agent Tucker described the weapon. The State also asked Agent Tucker to describe finding weapon accessories, including: a speed reloader, the gun cases, and a bookshelf with a box of ammunition, and reloading supplies, which Agent Tucker described as a "reloading station." The State asked Agent Tucker to describe how a speed reloader worked, and why a person may purchase one, and showed the jury photographs of all of these items.

In total, the jury viewed **29** photographs of different weapons and accessories. The testimony by Agent Tucker accompanying the photographs stretches more than 20 pages in the transcript and likely took more than an hour. The jury also was shown a large diagram of Mr. Wood's home, and saw Agent Tucker mark an "X" where each of these weapons or accessories was located. At no time has it been argued any of these items besides the .22-caliber rifle was the murder weapon.

Case law has long established that even "logically relevant evidence is excluded if its costs outweigh its benefits." *Anderson, 76 S.W.3d at 276*. *State v. Holbert, 416 S.W.2d 129, 133 (Mo. 1967)*, rejected attempts to justify, in a trial for carrying a concealed weapon, the admission of two other pistols found on or near the defendant to show the "intent" of the defendant to carry a third pistol that was the basis of the charge. Given that intent to conceal is generally found when the person was found concealing a weapon, the Court said admission of an unrelated pistol found under a seat cushion "could have served no possible purpose except prejudice." *Id*.

Further, the principal opinion faults the prejudice analysis in this dissent for relying on cases in which the gun is unrelated to either the defendant or the crime. But that is incorrect. In *Holbert, 416 S.W.2d at 130,* this Court held the admission of a gun found in the defendant's shirt pocket and a gun found in the defendant's car was in error, despite the clear connection to the defendant and the scene of the crime, because those guns were unconnected to the **charge**. In so holding, this Court wrote, "the dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the courts to rigid scrutiny." *Id. at 132*. In *State v. Krebs, 106 S.W.2d 428,*

429 (Mo. 1937), this Court ruled evidence of two guns found on the defendant's person when he was arrested was admitted in error given that the State made no showing the guns were used in the crime for which he was arrested . *Accord Anderson, 76 S.W.3d at 276* (holding a glossy advertisement of semiautomatic weapons lacked legal relevance even though the pamphlet was found in the defendant's home and depicted the type of weapon used in crime, because it caused unfair prejudice, although not reversible when a one-time reference). This is because the question is legal relevance – when the prejudice created by a gun or gun related item outweighs the probative value, then it is legally irrelevant even if the evidence has some factual relationship to the case. Each case cited by this dissent is cited for and reaffirms this proposition.

The imbalance decried in these cases is present here. It would have been within the circuit court's discretion to permit the introduction of evidence Mr. Wood passed up a couple of guns located in or just outside the bedroom. But that some of the guns and gun accessories were relevant simply means the circuit court was not required to exclude all evidence of other guns. The circuit court then had a duty to weigh the probative value of each additional piece of gun evidence against the inherently prejudicial nature of gun evidence. From the record, it appears the circuit court skipped this step and simply admitted evidence *en masse* after finding slight relevance without considering evidence as to a particular gun or accessory to determine whether this additional evidence actually was legally relevant, and how to limit its prejudicial impact. This was error. *Holbert, 416 S.W.2d at 130* (holding that, when weapons unconnected to the crime were admitted, it was "perfectly obvious that their use throughout the trial was prejudicial to the defendant").

This holds true for the evidence of gun accessories such as reloaders as well. There of course could be no suggestion that Mr. Wood could have killed Hailey with a gun accessory, and it is undisputed he did not use a gun accessory to commit the murder. Yet the prosecution did not merely mention Mr. Wood had these accessories; rather, it spent considerable time describing them and their use. For example, although there was no contention a reloader was used in the crime, the prosecution was permitted to introduce photographs of the reloader, a diagram marking where it was found, and extensive witness testimony, which included an explanation of how a speed reloader works, and possible reasons a person might purchase one.

None of this highly prejudicial evidence of reloaders and other accessories is relevant to whether Mr. Wood committed the murder, and the State offers no explanation as to why this extended evidence about a speed reloader is needed to show deliberation through Mr. Wood choosing one gun over another. Nor has it justified evidence of the "reloading station" with boxes of ammunition, reloading supplies, and reloading equipment. A much more likely explanation for the submission of this extensive evidence is to establish a propensity for violence.

Nor is this error harmless. The extended testimony, combined with a diagram and dozens of photographs, highlighted its prejudicial nature. "Admission of the shotgun into evidence by virtue of its inherent prejudicial nature and lack of relevancy, coupled with the state's advert reference to it before the jury to obtain defendant's conviction, dispel any credence to the state's argument that any error associated therewith was harmless …." *Perry, 689 S.W.2d at 126*. This is particularly true here, where despite the horrific facts

of the case, the jury was deadlocked as to punishment. But for this extensive prejudicial evidence, the jury may have assessed the punishment at life imprisonment without parole. For this reason, I would find the introduction of so many guns and gun accessories here is prejudicial error and reverse.

II. THE CIRCUIT COURT PLAINLY ERRED IN OVERRULING MR. WOOD'S OBJECTION TO THE PROSECUTOR'S ARGUMENT IN THE PENALTY PHASE THAT THE JURY SPOKE FOR HAILEY AND HER FAMILY BECAUSE THE LAW SPECIFICALLY PROHIBITS FAMILY MEMBERS' COMMENTS ABOUT PUNISHMENT AND THE PROSECUTOR EXCLUDED EVIDENCE HAILEY'S MOTHER DID NOT WANT A DEATH SENTENCE

The principal opinion declines to find that the prosecutor's comment in closing argument that the jurors would "speak for [Hailey's] family" by sentencing Wood to death was plain error causing manifest injustice. *Slip. Op. at 17-19*. Whether this comment would require reversal in another case, it manifestly should do so when, as here, it was the prosecutor who successfully kept out evidence that Hailey's mother did not in fact want him to receive the death penalty. We have not only a comment by the prosecutor in violation of the rules prohibiting telling the jury the family's wishes as to punishment, therefore, but we also have the prosecutor deliberately misrepresenting those wishes to the jury. As discussed below, courts have often found prejudice when the prosecution requires evidence to be excluded and then takes advantage of that exclusion to misrepresent the evidence to the jury.

Pretrial, Mr. Wood sought to elicit testimony in the penalty phase of Hailey's family's wish that he receive a sentence of life without parole. At the hearing, Hailey's mother testified that, if called in the penalty phase and asked what sentence she wanted

Mr. Wood to receive, she would say life without parole. Upon further questioning from the court, she testified she wanted to avoid a trial and encourage Mr. Wood to plead guilty. When asked, if the State insisted on a trial, "what would you like to see happen to Mr. Wood as a result of him having killed your daughter?" the victim's mother responded that her answer would still be life without parole, even if the trial happened.

The circuit court correctly excluded the mother's evidence, following the United States Supreme Court's opinion in *Bosse v. Oklahoma, 137 S. Ct. 1, 2 (2016)*, and this Court's opinion in *State v. Barnett, 103 S.W.3d 765, 772 (Mo. banc 2003),* expressly holding "[o]pinions of family members as to the appropriate punishment are irrelevant" and "[t]he jury should not be put in the position of carrying out the victim's wishes, whether they are for or against the death penalty." But, during closing argument, the prosecutor then implied he knew the family wanted a death sentence when in arguing for the death penalty he told the jury:

> MR. PATTERSON: With your verdict, sentencing [Mr. Wood] to the ultimate punishment, you speak for Hailey --
> MR. BERRIGAN: We'd object, Judge.
> MR. PATTERSON: **You speak for her family --**

At this point, defense counsel objected again, and argued the prosecutor's argument "improperly attributes the decision regarding life or death to Hailey Owens and her family." The circuit court overruled the objection. The prosecutor then returned to the argument, stating Mr. Wood "not only brutalized Hailey, but he damaged her family, her brother, her school, her entire community, and changed our community, and your verdict will send a message to this defendant."

The principal opinion erroneously concludes all of the statements from the prosecutor in that exchange can properly fall under "send a message" testimony. *Slip. Op. at 18-19*. This Court has indeed held it is permissible for the State to make statements "amount[ing] to a call for action, requesting jurors to send a message of intolerance to the community." *State v. Smith, 944 S.W.2d 901, 919 (Mo. banc 1997)*; *accord State v. McFadden, 391 S.W.3d 408, 425 (Mo. banc 2013)* (explaining the State may argue "the need for strong law enforcement, the prevalence of crime in the community, and that conviction of the defendant is part of the jury's duty to uphold the law and prevent crime" [and] "the protection of the public rests with them" (internal quotations omitted)).

But while this precedent supports a finding no error resulted from the prosecutor's later "send a message" argument, the principal opinion fails to explain how this precedent would permit the prosecutor's preceding, clearly improper argument that, in deciding life or death, the jury would "speak for Hailey" and "for her family." This is more than a statement calling on the jurors to think about their role in protecting the public or their duty to the community. This is the State asking the jury to act **on behalf of the family**.

Contrary to the principal opinion's suggestion that only direct testimony of a family member is prohibited, such comments purporting to ask the jury to represent the family's wishes fall within the scope of comment the United States Supreme Court has held is prejudicial and not to be permitted in *Booth v. Maryland, 482 U.S. 496, 508 (1987). Booth* did not involve direct family testimony. Rather, it considered whether it was error for the prosecutor to read aloud to the jury from a victim impact statement, prepared by the state division of parole and probation, that contained reports of the family members' opinions

about sentencing, including a statement from the victim's daughter that "[s]he doesn't feel that the people who did this could ever be rehabilitated." *Id*. The Supreme Court held "the 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." *Id.* Admission of the evidence required reversal.

While the Supreme Court has since held that victim impact testimony is permitted, *see Payne v. Tennessee, 501 U.S. 808, 827 (1991)*, it has reaffirmed the inadmissibility of evidence of the wishes of the victim's family as to punishment. *Bosse, 137 S. Ct. at 3*, reversed the Oklahoma Court of Criminal Appeals' conclusion that family views about punishment were now admissible, specifically stating that, until it specifically overruled that part of *Booth,* which it said it had not done, the Eighth Amendment creates a "prohibition on characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence."

The principal opinion's attempt to distinguish *Booth* and *Bosse* because the family itself did not testify is no distinction at all. The family did not testify in *Booth* either, and the plain language of *Bosse* shows the Supreme Court's disapproval was not as to how the family's wishes came into evidence, but rather was the fact those wishes came into evidence at all. *Id.* Indeed, as this Court stated in *Barnett*, the jury should not be told of the family's wishes, for "[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." *103 S.W.3d at 772. accord State v. Taylor, 944 S.W.2d 925, 938 (Mo. banc 1997)* (explaining a victim's family members should never give an opinion about the appropriateness of a particular sentence).

Here, the jurors were told that, in deciding death, they would "speak for" the family. This can only be understood as a comment about the family members' wishes and opinions. This directly violates governing Supreme Court law.

The principal opinion also contends that, because it was an isolated statement and connected to other, permissible statements, Mr. Wood cannot show manifest injustice. But the Supreme Court has made it clear telling the jury about the victim's wishes is a serious violation – even when the information is accurate. Missouri law agrees. It is well-settled that a prosecutor commits error by "comment[ing] on or refer[ing] to evidence or testimony that the court has excluded." *State v. Williams, 119 S.W.3d 674, 680 (Mo. App. 2003)* (alterations in original).

Equally telling, the information was not accurate. The prosecutor went beyond simply commenting inappropriately about the family's opinions. He deliberately distorted the family's opinions after taking action to ensure the family could not testify about their opinions.

Missouri courts have repeatedly held it is manifest injustice requiring reversal for a prosecutor to intentionally misrepresent evidence to the jury after seeking the exclusion of that same evidence. *Id. at 681*; *State v. Weiss, 24 S.W.3d 198, 204 (Mo. App. 2000)*. Here, the prosecutor was self-evidently well aware that commenting about what the family desires for punishment is not allowed, as he demonstrated in his successful argument to exclude the evidence. To then turn around and deliberately argue something he not only knows is not permissible, but that he also knows to be exactly the opposite of what the mother would actually have said, is inexcusable behavior and is manifestly unjust. *State*

v. Hammonds, 651 S.W.2d 537, 539 (Mo. App. 1983). It requires reversal of the penalty phase verdict.

III. THE JURY DETERMINATION WHETHER THERE IS EVIDENCE IN MITIGATION SUFFICIENT TO OUTWEIGH EVIDENCE IN AGGRAVATION IS A FACTUAL FINDING

In section 565.030.4,[1] the legislature set out four requirements for a jury assessing and declaring punishment in a death case, as follows:

> The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:
>
> (1) If the trier finds by a preponderance of the evidence that the defendant is intellectually disabled; or
>
> (2) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or
>
> (3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or
>
> (4) If the trier decides under all of the circumstances not to assess and declare the punishment at death. If the trier is a jury it shall be so instructed.

Rather than setting out what the jury must find to impose a death sentence, the statute directs the jury it must first make a factual determination whether a defendant is intellectually disabled. If so, the jury is required to impose a life sentence. Second, the jury is told it must determine whether at least one statutory aggravator was proved. If not,

[1] All statutory references are to RSMo 2000.

it must impose a life sentence. Third, the jury is told it must make a determination whether "there is evidence in mitigation of punishment" which outweighs "the evidence in aggravation of punishment." *Id.* If so, again, it must impose a life sentence. Only when the jury has made these findings does it "decide[] under all the circumstances" whether to exercise discretion to impose life in prison as a matter of mercy.

I do not disagree with the majority opinion that, in this case, the record shows the jury made the factual findings required by section 565.030.4(1), (2), and (3) and deadlocked only on the question in section 565.030.4(4) whether they should exercise their discretion to impose a sentence of life. This distinguishes this case from *State v. Whitfield*, *107 S.W.3d 253, 261 (Mo. banc 2003),* in which, because no jury interrogatories were used, this Court was unable to determine whether the jury made the necessary findings under the balancing question. The record revealed only that the jurors were split on punishment, but not at what point the jurors became split. *Id*. The death sentence imposed was "entirely based on the judge's findings that all four steps favored imposition of the death penalty." *Id. at 262-63*. Because of this, *Whitfield* specifically required affirmative, unanimous, jury findings on the questions then required by Missouri law, including that there was a statutory aggravator and that mitigation did not outweigh aggravation. *Id. at 264*.

The kind of unanimous jury findings required by *Whitfield* were returned by the jury here. The jury did not find Mr. Wood intellectually disabled, did find a statutory aggravator, and did not find that the evidence in mitigation outweighed that in aggravation. Had the jury found otherwise on any of these questions, section 565.030.4 would have capped Mr. Wood's sentence at life. On (4), however, the jury deadlocked as to whether

to grant mercy despite its failure to find grounds for limiting the available sanction to life in (1), (2) and (3). The trial judge was tasked under the statute, therefore, to make that ultimate decision. I agree this last question asks the jurors and then the judge to look into their hearts and determine whether to exercise mercy.

The principal opinion errs, however, in conflating this last question of mercy with the third question, in which the jury is asked to balance mitigating and aggravating evidence and decide whether the former outweighs the latter. The principal opinion appears to believe, because the jury already determined there is a statutory aggravator, death is on the table and the third question, therefore, is just an extra opportunity for mercy by the jury. But question order cannot turn a requirement for imposition of a death sentence into a superfluity.

Imagine, for instance, that the instruction reversed the order of the questions (the statute itself prescribes no particular order), and first asked the jury to decide whether there is evidence in mitigation outweighing the evidence in aggravation, and only later asked whether the jury had found a statutory aggravator. Would that make the statutory aggravator question simply one that goes to mercy, one not required for imposition of the death penalty? Of course not. The finding of such an aggravator is required both by the United States Supreme Court under the United States Constitution, and by section 565.030.4(2). It is a factual question that must be answered to impose death.

The same is true when, as here, the instructions have been written to ask the statutory aggravator and intellectual disability questions first, and then the balancing question.[2] Word order does not define importance, for all three questions must be answered in order for either judge or jury to impose a sentence of death. It is only the fourth requirement, at which the jury has made its factual determinations and is tasked with deciding whether, nonetheless, to impose a life sentence, that the judge is permitted to decide on the sentence if the jury deadlocks.

The principal opinion also seems to suggest the third question is not one of fact because it requires the jury to balance the evidence and this somehow is akin to being asked whether to grant mercy. If this were correct, it would make the fourth requirement redundant and superfluous. It is not correct, however. The principal opinion's approach ignores that jurors are asked to balance the evidence in making factual determinations every day.

Indeed, the first two questions in section 565.030.4 also require the jury to balance the evidence – to weigh the evidence of whether defendant is intellectually disabled and whether the evidence shows a statutory aggravator. The only difference in (3) is that the

---

[2] The principal opinion notes that, under current Supreme Court jurisprudence, finding a statutory aggravator is present is all that is required by the Sixth Amendment. *See Kansas v. Marsh, 548 U.S. 163, 175 (2006), quoting, Franklin v. Lynaugh, 487 U.S. 164, 179 (1988)* (holding a statutory scheme must allow for the narrowing of death-eligible offenses and for the fact finder to consider mitigating evidence, but "a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding" is not required (internal quotations omitted)). My argument is not with the principal opinion's Eighth Amendment analysis but with its statutory interpretation. While the constitution may not require that the jury balance this evidence, section 565.030.4 does so require.

statute explicitly tells the jury what evidence it is to consider – the mitigating and aggravating evidence. To do so, the jury must make the same kinds of credibility determinations and weighing and drawing of inferences from the evidence as it does in answering the first two questions.

Such balancing and weighing of evidence to reach a verdict has historically been the province of the jury. "The credibility and **weight** of testimony are for the fact-finder to determine." *State v. Crawford, 68 S.W.3d 406, 408 (Mo. banc 2002)* (emphasis added). It is the jury's task to "determine the credibility of the witnesses, resolve conflicts in testimony, or **weigh the evidence**." *Fowler v. Daniel, 622 S.W.2d 232, 236 (Mo. App. 1981)* (emphasis added). On appellate review, "this Court will not **weigh** the evidence anew since the fact-finder may believe all, some, or none of the testimony of a witness when considered with the facts, circumstances and other testimony in the case." *State v. Freeman, 269 S.W.3d 422, 425 (Mo. banc 2008)* (internal quotations omitted) (emphasis added). In fact, this Court's standard of review often requires a determination whether the evidence on one side so outweighed that on the other that the jury verdict is "against the weight of the evidence." This necessarily recognizes the jury must weigh the evidence to reach its verdict, as it "denotes an appellate test of how much persuasive value evidence has, not just whether sufficient evidence exists that tends to prove a necessary fact." *Ivie v. Smith, 439 S.W.3d 189, 206 (Mo. banc 2014)* (internal quotations omitted); *White v. Dir. of Revenue, 321 S.W.3d 298, 309 (Mo. banc 2010)*.

Because the third question requires a factual finding by the jury, as *Whitfield* held, it cannot be found by the judge if the jury had deadlocked on the third, not the fourth,

question. It is the jurors who must balance the evidence and make the factual determination whether evidence in mitigation outweighs that in aggravation. I believe the interrogatories make it clear the jury here did make such a factual determination that mitigators did not outweigh aggravators. To the extent the principal opinion states such a factual determination is not required, it is incorrect and the cases on which it relies should be overruled on that point. [3] Failure of the jury to make any of the three findings required under subdivisions (1) through (3) of section 565.030.4 precludes imposition of a death sentence because a jury must find every fact necessary for imposition of a death sentence.

IV. CONCLUSION

For the reasons stated above, I dissent.

_____

LAURA DENVIR STITH, JUDGE

[3] The principal opinion cites to statements in *State v. Dorsey*, *318 S.W.3d 648, 653 (Mo. banc 2010)*, *State v. Anderson*, *306 S.W.3d 529, 540 (Mo. banc 2010),* and *Zink v. State*, 278 *S.W.3d 170 (Mo. banc 2009)*, to support its position.

APPENDIX B

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

BETSY AUBUCHON
CLERK

TELEPHONE
(573) 751-4144

September 3, 2019

Ms. Rosemay Percival via e-filing system
Suite 500
920 Main Street
Kansas City, MO 64105

In Re: State of Missouri, Respondent, vs. Craig Michael Wood, Appellant.
Missouri Supreme Court No. SC96924

Dear Ms. Percival:

Please be advised the Court issued the following order on this date in the above-entitled cause:

"Appellant's motion for rehearing overruled."

Very truly yours,

BETSY AUBUCHON

cc:
Mr. Daniel McPherson via e-filing system

APPENDIX C

SUPREME COURT OF MISSOURI
APPELLANT'S TRANSCRIPT ON APPEAL
NO. SC96924

* * * * * *

STATE OF MISSOURI, Plaintiff-Respondent, vs. CRAIG MICHAEL WOOD, Defendant-Appellant.	)))))))	In the Circuit Court of Greene County, Missouri Case No. 1431-CR00658-01

* * * * *

JURY TRIAL
BEFORE THE HONORABLE THOMAS E. MOUNTJOY,
Judge of Division IV
Thirty-first Judicial Circuit

* * * * *

VOLUME 21 OF 21

* * * * *

A P P E A R A N C E S

ATTORNEYS FOR THE STATE:
MR. J. DANIEL PATTERSON
Greene County Prosecuting Attorney
MR. T. TODD MYERS
Chief Assistant Prosecuting Attorney
MS. ELIZABETH KIESEWETTER FAX
Assistant Prosecuting Attorney
Greene County Judicial Facility
1010 North Boonville Avenue
Springfield, MO 65802

ATTORNEYS FOR THE DEFENDANT AT TRIAL:
MR. PATRICK J. BERRIGAN
MR. THOMAS JACQUINOT
MR. THOMAS JEFFERSON STEPHENS, IV
Missouri State Public Defenders
Capital Litigation Division, Western District
920 Main Street, Suite 500
Kansas City, MO 64105

FOR THE DEFENDANT ON APPEAL:
MS. ROSEMARY E. PERCIVAL
Missouri State Public Defender
Capital Litigation Division, Western District
920 Main Street, Suite 500
Kansas City, MO 64105

Reporter: Connie McKeen, CCR(333), CSR

(Counsel approached the bench, and discussion was held off the record.)
PROCEEDINGS RETURNED TO OPEN COURT
THE COURT: The verdict is in proper form. The Court accepts the same and does show it as filed.
Ladies and gentlemen, this will complete your verdict -- or your service in this case. And I want to start out by telling you at this time what I told you in the very beginning, and for some of you that was two weeks ago, how much we appreciate your service in this case.
You indeed answered a call of duty in regard to a civic obligation, and you made sacrifices in terms of being away from your families and being out of your employment and place where you live. And we've worked hard in the case and appreciate all your patience and understanding in that regard.
You'll be discharged at this time. And you'll be released also from the Court's instructions about not talking with others about the case, but that is always your personal decision in terms of how you handle that. But you are discharged with the thanks of the Court.

(The jury was excused from the courtroom at 4:39 p.m.)
THE COURT: Ladies and gentlemen, we're going to take a short recess while we determine the timing on matters going forward here, so we'll be in recess for a few moments.
(Break in proceedings.)
THE COURT: We're back on the record. The jury, of course, has been discharged at this point.
First order of business will be to set a date, a due date, for the motion for new trial. I'm assuming, Mr. Berrigan, you want the extension that's allowed?
MR. BERRIGAN: Yes, sir, please.
THE COURT: That will make the motion for new trial due on December the 1st. It's a Friday. I will set a hearing date on the motion for new trial for January 11th at 2:30 p.m. In the event the motion for new trial is overruled, we'll proceed to sentencing that day, as well.
Does your client desire to have a Sentencing Assessment Report?
MR. BERRIGAN: No, Your Honor. We specifically request that we be permitted to

waive the Sentencing Assessment Report in these circumstances.
THE COURT: All right. I'll show that waived. And, again, if the motion for new trial is denied, we'll proceed to sentencing on that date.
Anything else today, then?
MR. PATTERSON: No, sir.
MR. BERRIGAN: Nothing by the Defense.
THE COURT: All right. We're adjourned, then.
(Court stood in adjournment.)
* * * * *

STATE OF MISSOURI vs. CRAIG MICHAEL WOOD
CASE NO. 1431-CR00658-01
THURSDAY, JANUARY 11, 2018
MOTION FOR NEW TRIAL & SENTENCING
* * * * *
(Court in session at 2:36 p.m.)
THE COURT: This is Case Number 1431-CR00658-01, State of Missouri vs. Craig Michael Wood. The State appears by Prosecuting Attorney Dan Patterson, Chief Assistant Prosecuting Attorney Todd Myers, Assistant Prosecuting Attorney Elizabeth Kiesewetter Fax. Mr. Wood appears in person and with his attorneys Patrick Berrigan and Thomas Jacquinot.
The matter comes before the Court today in regard to motions, first of all. As a preliminary matter, the Court would note that there is media present in the courtroom that are seeking to visually and by audio, as well, record the proceedings.
The Court announced back in actually a ruling in October of 2015, granting media coverage for future hearings from that date, subject to objection by parties. I haven't received any objections for today, but I think the record

ought to include an opportunity if there is an objection.

MR. BERRIGAN: I think the basis of our previous objections, Your Honor, have always been the effect on the proceedings for potential jurors and, of course, during the trial on witnesses and again on jurors. None of those reasons are relevant now; so, we do not have objections today, other than general animosity towards the press and the media, none of which has any legal basis. So our previous objection would not apply here.

THE COURT: All right, thank you.

Anything from the State at all?

MR. PATTERSON: No, sir.

THE COURT: All right. Well, then the media is allowed to be present via pool videocamera and a pool still camera and record the proceeding, subject to Administrative Rule 16 and the provisions, which would, importantly, include not capturing any audio from counsel tables or any documents or exhibits on counsel tables.

Just as a preamble for the record, to bring us to where we are today, the record in this case

reflects that the jury trial began in this case on October the 23rd, 2017, with jury selection in Platte County, Missouri. A jury was selected to hear the case. The trial actually commenced on October 30th, 2017, in Greene County.

After trial that week, on November the 2nd, 2017, after deliberation, the jury returned a verdict finding Mr. Wood guilty of murder in the first degree. On November 6, 2017, the jury deliberated as to the sentence and reached a verdict indicating they were unable to decide or agree upon the punishment.

The Court did accept those verdicts, granted Defense counsel the time allowed for filing for a motion for new trial. That motion was timely filed on December 1, 2017, and it is styled as a motion for judgment of acquittal notwithstanding the verdict or, in the alternative, for a new trial. The hearing on that motion was set for this date and time.

Now, prior to the filing of the motion for new trial was actually another motion filed by Defense, and that was on November 30th, 2017, a motion for trial Court imposition of sentence of life without parole.

And then on January 9, 2018, the State filed suggestions in opposition to Defendant's motion for trial Court imposition of a sentence of life without parole.

Those latter motions I would plan to take up after we deal with the motion for new trial that you've filed, since that is a sentencing issue.

So let me hear the Defense, then, at this point on the issue of your motion for judgment of acquittal or, in the alternative, a new trial.

MR. BERRIGAN: May it please the Court.

THE COURT: Mr. Berrigan.

MR. BERRIGAN: Your Honor, I know this motion's been on file now for well over a month. The Court's undoubtedly read it. I'm not going to go through each of the more than two dozen points that are raised in the motion, but I will highlight some areas that we think are particularly egregious and our conclusion that Mr. Wood was deprived of a fair trial.

By not mentioning some of the others, for the benefit of Appellate Courts at least, let there be no suggestion that we waive any arguments not made or that we think the other points are less worthy than those that will be a discussed today.

There was several pages devoted, I think at least eight, to errors we believe were conducted during the course of the voir dire, but none was more egregious than, we believe, the strike of Juror No. 114, Ms. Lanning, because she was qualified, albeit somewhat death-scrupled juror. But I do think that's sufficiently covered in the motion, and I'm going to leave it at that.

There were three errors during the course of the first phase of the trial that we believe deprived Mr. Wood not only of a fair opportunity for results in the first phase, but carried over to affect the deliberations on sentencing in the penalty phase.

The first of those was the Court overruling a motion in limine and subsequent objections at trial to the admission of 18 different guns that were found in Mr. Wood's home, as a result of searches by the FBI and Springfield Police Department, when only one gun, a .22-caliber rifle, was the actual murder weapon, all on the premise argued by the State that this evidence of 17 additional unrelated guns went to the issue of reflection or deliberation, their theory being that the .22 gun -- without any scientific

testing, that the .22 had less noise created when it was discharged.

The Defense argued then, we argue now. I'm hoping, given the passage of time and the Court's ability to more cooly reflect itself without being in the heat of battle of the trial, that that reasoning was suspect at best. There are a lot of different ways that a poor ten-year-old child could have been killed, not the least of which strangling, stabbing, beating, etc., none of which would have created even the noise of a .22 rifle. So this theory is suspect on that reason alone.

But it's also suspect because there was ample evidence of deliberation. The very shot that killed this little girl was to the back of the head, at the base of the skull. There was no need for the State to bring in 17 guns and all the ammunition and all of the associated evidence with these 17 guns, to prove deliberation. So the prejudicial effect of that evidence was far, far outweighed by whatever minimal, if any, value that that had to prove deliberation.

The phone photographs are a similar nature. There were 32 photographs on Hailey Owens' phone

that were recovered forensically. And although arguably none of these things had anything to do with her abduction and subsequent murder, the Court allowed every one of the photographs in.

The State argued that, well, there were some photographs that showed she was wearing the same kind of clothes that were later recovered. That's fair. There were photographs that showed she didn't have injuries in locations where injuries were later discovered. That's fair. We could have used maybe one or two, even three or four, of the photographs for the purpose.

But instead, the Court allowed in photographs of dogs, photographs of other relatives, at least a dozen selfies. By the time this trial was over, there were more than three dozen, at least, photographs of Hailey Owens, many taken by herself, which had no relevance.

All they did was to allow the State to put in victim impact evidence in the first part of the trial, when that evidence is confined appropriately to the second part of the trial. So that's the second error I thought that had a particularly egregious prejudicial effect.

The third thing was, which we litigated at

some length, and I'm not going to go back all through it now, was the admission of the purple folder, the fantasy stories, and the four photographs of unrelated teenagers, had nothing to do with the case.

The State's argument was that this again showed motive, despite the fact that neither of the fantasy stories involved girls who were kidnapped or abducted. But I think the record, certainly the written record and the argument at trial, should be sufficient, and I know the Court remembers those things.

I mention this because this evidence, amongst all the evidence in the first phase of the trial, these stories particularly most prejudiced Mr. Wood, neither of which had anything to do with the murder of Hailey Owens, in our view.

That's why the State went to extraordinary lengths to give each of the jurors a copy, and we could see the visceral reaction of jurors, which I hope we documented during the trial, while they were reading these stories to themselves. That evidence was devastating. Again, it obviously carried into the penalty phase. And maybe it might have been admissible in the penalty phase

but certainly not in the first phase of the trial.

In the penalty phase, I'll mention three issues as well, two of which involve the admission of evidence that never should have been admitted. Ten thousand Springfield citizens showing up at a candlelight vigil for Hailey Owens four days after her death is admirable; it's a terrific reflection of the concern of this community for her and her family, but it has zero to do with the trial and the penalty that Craig Wood should receive for these crimes. None.

I've never seen such evidence in thirty years of practicing in death penalty cases, and I haven't seen any cases in my research that would support its admission. All it did was to show unambiguously to out-of-town jurors, that might not know how the community of Springfield felt -- not only were they supportive of the family but that, given it was presented in the penalty phase for death, that that was the sentiment of the community.

That was only buttressed by the testimony of Pastor Findley, who talked about how the city of Springfield has changed as a result of this

murder, that people are more defensive, more cautious, that it's more like a big city than it had been previously. Now the jurors get this testimony that this case changed an entire city, none of which should have been admissible in this trial at any point for any reason, and yet that testimony came in, over strenuous objection by the Defense.

It added to the atmosphere that was already present as a result of what I call our second complaint, which was the funeral in the courtroom that took place, even though we had warned the Court repeatedly that this type of evidence is not admissible under *Payne*.

The first two witnesses that testified for the State -- Savannah Taylor, Tara Tharp -- were openly crying throughout their testimony. They did that in a courtroom that had at least two or three rows of victim's family members who were also crying, which caused the jurors to start crying, which we -- even the Court acknowledged on the record during the course of the trial. We had four jurors openly crying during this testimony.

When the Defense asked for a recess, we were

denied, the Court leaving that decision to the witness herself, despite our protestations that this was not only prejudicial but far beyond the boundaries in *Payne*. There was a funeral in the courtroom during this trial.

It took place three and a half years after this little girl's death, but it had just as much emotion, I suspect, as the first one, all to the detriment of Mr. Wood and certainly in contravention of the Supreme Court's decision in *Payne v. Tennessee*. I think that evidence undoubtedly affected the sentencing determination here.

This happens while, at the same time, the Court denies the Defense evidence to show that Craig Wood actively supported and encouraged his parents' efforts to help Stacey Barfield, now Stacey Herman, in her efforts to get a law passed called Hailey's Law. The Court recalled we presented testimony; we made an offer of proof on that. Mr. Wood talked about how he and his wife made several trips to Jefferson City.

They had discussed this issue with their son to see if he was supportive of such an idea. Our argument was that this showed contrition; this

showed acknowledgment of responsibility; that this showed a desire to make amends, all of which should have been admitted as mitigation evidence under *Tennard*, which Mr. Jacquinot quoted for the Court. It's a very simple proposition. If the factfinder could deem it to be mitigating, it is mitigating, and yet that evidence was not allowed, while we hear victim's family members openly crying in the courtroom.

Our view is that these errors not only in the aggregate, but certainly in the aggregate, individually deprived Mr. Wood of a fair trial in both phases, frankly, and we ask the Court to grant him a new trial accordingly.

THE COURT: Thank you.

State's reply.

MR. PATTERSON: Just briefly, Your Honor. With regard to voir dire, Ms. Lanning in particular, the Court was very careful to listen to the answers of the witnesses and their equivocation and to note their demeanor and made a record of all of those things in granting the State's strikes, including that of Ms. Lanning, and I'll rely upon that record.

With regard to the gun evidence in the first

phase, our theory about deliberation is a valid theory, and you saw it when you saw how the guns were positioned, how easily they would have been to use a higher caliber weapon, yet he chose the weapon that would not make as much noise or draw as much attention to the crime he was committing.

And the Defense characterizations of why the State introduced this evidence, there was no argument of any kind regarding the things that they alleged, that we tried to paint him as militaristic or dangerous or unstable because he possessed guns. There was no argument or implication of that whatsoever in any of the evidence.

With regard to pictures from Hailey's phone, they did, as Mr. Berrigan says, establish her lack of injuries. That was used with the Medical Examiner's testimony, as well as what she was wearing at the time of the abduction, as well as her location.

Both the timeline and location evidence from the phone went together because it shows she would have been walking down the very street that he's driving up and down prior to his abduction of her. And then, eerily, she also had that one

photo of the location where her phone is ultimately tossed by the defendant after she's taken. But that series of photos also shows that she took photos after she left that location. So she didn't just drop it there or leave it there.

We've litigated the purple folder by motion both in the Associate Circuit Court and here, so I'll rely on the record. I believe that evidence was relevant and admissible with regard to motive and intent and not unduly prejudicial.

With regard to the victim impact evidence, I believe that was within the constraints of *Payne*. *Payne* talks in terms of the importance of the jury being able to understand the specific harm the defendant caused, when they're also hearing evidence in mitigation, so that they know what harm was caused. I believe our evidence went to that, the harm caused to those who knew Hailey and to our community.

In *Storey*, *State v. Storey*, 40 S.W.3d 898, in that case there were a number of exhibits properly admitted. The photographs of the victim with her class, a balloon release, a memorial garden illustrating her value to the community and impact of her death upon her friends and

coworkers, helping the jury to see the victim as something other than a faceless stranger. The evidence in our case is very similar to the evidence in *Storey* and, again, demonstrated the specific harm caused by the defendant in this case.

With regard to the mitigation evidence of the defendant, that evidence would have been relevant if Jim Wood were on trial. Those were not efforts -- they didn't have anything to do with the character of Craig Wood. You heard the proffer that was made and considered that evidence. It simply was not relevant to the character of Craig Wood or this crime, and I believe you properly excluded it.

THE COURT: Thank you.

Your motion, Mr. Berrigan. Anything you want to --

MR. BERRIGAN: Nothing further, Judge.

THE COURT: All right. I did have occasion to read very carefully through the Defendant's motion and reflected upon the evidence at trial and the rulings at trial.

I think everything that's raised there was well argued, and a record was made at the time

during the trial the Court made rulings. I have no inclination to change any of those rulings; so, the Defendant's motion for judgment of acquittal notwithstanding the verdict or, in the alternative, for new trial is denied.

The Court announced when the hearing for the motion for new trial was set that if the motion was denied, the Court intended to proceed to sentencing on the same date, which is today. In that regard, Mr. Wood waived his right to a Sentencing Assessment Report.

I think this would be the appropriate time to take up the other Defense motion, which in essence, as I take the motion, challenges on legal basis the ability of the Court to at this time do anything other than impose a life sentence without parole. That is the motion for trial Court imposition of a sentence of life without parole.

Mr. Jacquinot, are you going to address that, sir?

MR. JACQUINOT: I am, Your Honor.

THE COURT: You may do so.

MR. JACQUINOT: Just for the record, the motion was filed on the date the Court noted. We

just received the State's response less than 48 hours ago, so much of what I need to say really sort of incorporates the State's response. It's a fairly complicated legal motion.

The State is asking you to do something that in any other jurisdiction in the United States right now you would not be able to do, or at least judges are not actively doing. I'll touch on that. Because of sort of the breadth of the motion, I'll just give the Court a brief roadmap. I may not touch on all of these points in detail, but I'll just list them sort of in order here.

One of them is just sort of -- the State's response to our motion focuses mostly on a sort of a side-by-side comparison of the Missouri statute to the Florida statute, which was invalidated in the *Hurst* case in 2016. That needs to be put in an appropriate context because that really completely sort of misstates the legal background that underlies this claim.

Again, as I noticed another point here is that, you know, Missouri could be referred to as an outlier in regard to judge sentencing in the event of a jury deadlock, but the reality is it's beyond that. Missouri stands on an island; it

stands there alone. The public needs to know that. The Court needs to know that. One of the concepts that was referred to in the State's motion is: Did *Hurst* expand *Ring v. Arizona* that was decided in 2002? We'll touch on that.

The other thing is the reality of a judge-imposed death sentence under the circumstances we now face is that it does involve a substantial factfinding component. Anything -- any assertion to the contrary would be completely inaccurate. There is a misplaced reliance in the State's motion on the cases of *Zink*, *Glass*, and *Gill*. They do not -- they don't apply here.

There is one miscategorization of the jury's findings in this case at the beginning of the motion, although they do correct that at the end. And then there's this notion that the *Steele v. McLaughlin* case is an outlier, that it's the State's motion -- and, of course, under *Steele*, if that were a precedent, the Court -- we wouldn't be having this discussion. It would be automatic; the Court would have no authority to impose death under these circumstances.

The State's motion sort of mirrors the Attorney General's response in the *Rice* case,

that this case will somehow go away. That at least needs to be touched on, and then there's one other brief renewal at the end.

So when you look at *Hurst* -- and I know that that is decided -- it's quoted by both parties, and the Court's read the motions. The State's response is, well, wow, that statute is much different than Missouri's. Well, the truth is Florida has one statute, and Missouri, for purposes of analysis, really has two statutes. So what does that mean?

In about 75 percent of the capital cases that I've had go to a jury, the jury made the sentencing assessment. And under that model or that aspect of Missouri statute, it is much different than Florida, because in every case I've had, whether it was life or death, once the jury made the assessment, the Court's imposition was basically a formality. The jury had, for all practical purposes, issued the sentence.

That's not what we're dealing with here, though. We're dealing with a jury deadlock situation. The jury has not assessed a sentence. So the Court's function is expanded, and it's only in that context that we can compare and

discuss the two statutes, because the Court now necessarily will both make the assessment component of the sentencing process as well as the final imposition. So it's much different.

To talk about Missouri having a non-judge-centric statute in a case where a jury makes a sentencing assessment is one thing, but to say that we can somehow sort of transpose that type of analysis on a situation where the jury is deadlocked, it's simply wrong.

So what did *Hurst* decide? Did *Hurst* expand *Ring*? No, *Hurst* did not necessarily expand *Ring*, but what they did in an eight-to-one decision, when you tally up all the votes, is that they, without any equivocation whatsoever, repeated a blanket prohibition upon judicial factfinding in the capital sentencing process.

So when we look at what happened in that case and specifically focus on one of the arguments that was made by the Florida Attorney General's Office, what we see here is basically their argument completely mirrored what the Missouri Supreme Court said in *McLaughlin*, and to understand what that means is we have to sort of go back to *Ring* and how the Missouri Supreme

Court responded to *Ring*.

Following *Ring*, the statute that you now have it's invalid. I mean, on its face, it is invalid in this context where the jury deadlocks, because what that statute tells you to do is to go back and start all over. It literally says that, and the Missouri Supreme Court acknowledged as early as the *Whitfield* decision that that was wrong, and it started on this process where it would somehow -- the best way I can describe it is authorize a system that would create sort of harmless error in perpetuity unless the Missouri Legislature cleaned up the statute post *Ring*. We know the cleanup has never happened; so, we're here.

When we look at *Hurst v. Florida*, we did not have a jury deadlock or jury nondecision. The jury considered all of the -- all of the evidence and punishment; the aggravating evidence, the mitigating evidence. The jury in *Hurst v. Florida* actually recommended a death sentence based upon its own factual analysis and the hearing of the evidence.

When the Florida case went to the United States Supreme Court, Florida, you know, Attorney

General's Office said, well, how -- how can that judge be playing an independent factfinding role when, in reality, all he is doing is simply following a recommendation that the jury had made after considering all the facts? It was not a jury deadlock. It was not a jury nondecision.

And the answer of the United States Supreme Court was basically jury factfinding is jury factfinding, and an overwhelming majority of the Supreme Court said that's just -- that can't happen, and they sent it back, and we know what happened after that. Florida basically got rid of that sentencing scheme.

The State cites *Zink, Glass*, and *Gill*, and the proposition that they cite it in is that although the Missouri Supreme Court, when it decided *Whitfield* said that the weighing process regarding mitigating and aggravating evidence is, per *Ring*, a factual process. It suggested somehow to the Missouri Supreme Court that that's no longer the doctrine, that these cases somehow overruled it.

Well, one, that didn't happen. Two, I think the best context for that is -- and those all eventually became my cases at final disposition.

But every time those cases were tried, there was a jury assessment. Travis Glass, the jury assessed death; the Judge assessed -- the Judge imposed death. David Zink, same thing. Mark *Gill*, first trial jury goes death, Judge goes death; second trial, jury goes life, and so forth and so forth.

None of those cases can be viewed as overruling a case that decided a completely different issue, and the Supreme Court has never said that. They have continually sort of danced in this area where somehow we can have a statute that requires judicial factfinding in the event of jury deadlock, but we're not really having judicial factfinding.

It's hard to argue that or to explain what that means, but, I mean, what it led to was, of course, *McLaughlin v. Steel*, where in *McLaughlin* in 2008 the Missouri Supreme Court -- *McLaughlin* was a case where the jury deadlocked. It was in that case that the Missouri Supreme Court said it's okay for judges to continue to impose death sentences, that they are really not engaging in factfinding. They're just sort of -- they sort of hint that it's just a reviewing

process. It's important to note that it's that type of logic, that reviewing process logic, that was expressly rejected in *Hurst v. Florida* without equivocation.

I think it's important that the Court sort of understand the timeline that we're looking at here, because *Ring* starts in 2002 and continues on to 2016 before we have sort of *Hurst*, where they really say, yeah, that's what we meant. If you understand, in the interim there was always a majority of states that went life without or non-death, but there were -- there were basically two other types of things that could happen post *Ring*.

There were these statutes, like Florida, like Alabama, like Delaware, Nebraska, and Montana that were very judge-centric. And arguably you could look at the time *McLaughlin* was decided and say, yeah, this looks maybe a little bit like judicial factfinding, but look at what these other states are doing. It's even more judge-centric than what we're doing here in Missouri; so, that's probably okay.

Well, what happened in *McLaughlin*, those five states basically, in one fell swoop, had their

statutes wide out. Florida explicitly. Delaware Supreme Court took its own statute out. Alabama Supreme Court, we did acknowledge, continued to validate its statute, but its legislature took the statute off the book. So those three states were off the book.

The only other two states that had that really highly judge-centric death sentencing model are Montana, that's last death sentence goes back to 1997, and Nebraska that, again, has not had an active death penalty.

The only state that I know of that has ever had a statute that is similar to what we have here in Missouri is the state of Indiana. And if you look at my motion closely, I looked at every Supreme Court case I could find from Indiana post *Ring* to see if they'd ever used that death sentencing model, and they haven't.

So basically what we have -- that's why I say Missouri is on an island. There are lingering traces of judge death sentencing in the post deadlock or judge centered, but they're not being used. Missouri has used it as early as -- as late as 2017 in *Rice*. They used it in *Shockley*, they used it in *McLaughlin*. But this is the only

place that I know of, after a fairly intensive national search, where this can even happen, where it's even on the table as a possibility.

So that sort of, you know, leads me to this response that's come from the Attorney General's Office on this issue as well as in Mr. Patterson's response, is that this judge from the Eastern District of Missouri, the federal judge that invalidated McLaughlin's death sentence, judge-imposed death sentence, is sort of an outlier.

Well, the first thing is we had to realize this, is if -- if you looked at it only from the standpoint of Missouri and Missouri state court judges, that might get some traction, but the reality is just the opposite. Calling this judge an outlier by the State of Missouri is sort of like the pot calling the kettle black. Missouri is on this island in terms of judge death-sentencing in the event of jury deadlock when you look at the whole nation and the way we interpret the Constitution, not this judge.

It's completely -- it's a backwards argument. They say, well, this lone-standing judge in the Eastern District is somehow going to get

reversed, so what was said in that opinion doesn't matter. Where is she going to get reversed? The Eighth Circuit? Maybe. United States Supreme Court, there are absolutely four votes that would unhesitatingly support that decision. And even the conservative justices of the United States have consistently -- several of them have expressed a disdain for judge death sentencing. They don't like the idea that one public official's point of view, in the absence of a waiver of the right to a jury trial, can be substituted for the conscience of a community. So in that context, that judge is not an outlier at all.

In order to get that issue to that judge, after all of Mr. McLaughlin's state remedies have been exhausted, required first and foremost overcoming basically what we refer to in the industry as a minefield of potential procedural default. And then when you get the substance of your issue before a federal judge, it's not an abuse of discretion standard. It's even a higher standard.

The standard that the judge employes is: Is the state court's interpretation of federal law

unreasonably nonobjective in light of firmly established United States Supreme Court precedent? You'll notice in that decision the judge rejected nearly all of McLaughlin's claims, and those she rejected, she went one step further and said they're not even worthy of an appeal and denied a certificate of appealability.

But what was determined there is that this notion that somehow you can have a statute that says post jury deadlock, the judge goes back and starts again anew is somehow not contrary to *Ring*. And she said it's contrary to *Ring* and to *Mills v. Maryland*. I'll touch on that for just a moment. One point that Mr. Patterson raises is why didn't that judge focus on *Hurst*?

I think procedurally the Court needs to understand that for that writ of habeas corpus to survive, analytically it almost, as I understand it, it has to be based upon Supreme Court precedent that is in place at the time the State Supreme Court makes its decision.

So you can't -- if the decision in *McLaughlin* in 2008, for it to be objectively unreasonable, the Missouri Supreme Court had to somehow predict what the Supreme Court was going to do in 2016.

That would not cut it under the substantive standard. So although McLaughlin's lawyers in that proceeding referenced *Hurst*, the judge basically decided it on two grounds. It violates *Ring*, it's got judicial factfinding all over it. And it violates *Mills* because it allows -- it allows a death verdict in a situation where eleven jurors could be pro mitigation, pro life mitigation, but one holdout could force the issue and take it to the judge.

It was those two precedents that had been well in effect in 2008. *Ring* was 2002; *Mills v. Maryland* was around 1988, that led to that decision. So the idea that that's a decision that goes exactly contrary to what the State is asking you is an outlier that is going to be reversed some day is not a very strong argument.

The final thing that I'll touch on just once again and make one quick renewal is this idea that a judge, that you or any other judge, could sit in a situation and not engage in factfinding. We know the only facts that we really know is that the jury found the aggravating circumstances. We don't know what mitigating circumstances they found.

I mean, this Court cannot go forward in this process without independently assessing what mitigating circumstances it found from hearing the evidence in this case and independently engaging in some sort of weighing process. If not, then the whole -- the whole ball of wax sort of falls apart.

I mean, are you -- I mean, are you really going to decide whether Craig lives or dies without independently coming to some factual conclusions on what mitigating circumstances exist and how they relate to the aggravating circumstances? It's incomprehensible, it's illogical, and it's the reason that we have *McLaughlin v. Steele*. It just defies common sense.

We're faced with a statute that tells you to start over and to independently make findings of fact in accordance with statute. And as a state, we're trying to coexist with a statute that says judges must do that, but the United States Supreme Court, that has even more firmly and more adamantly and with strong numbers taking the position that judicial factfinding in the capital sentencing process violates the Constitution.

Seven judges believe that it violates the Sixth Amendment, as incorporated by the Fourteenth. Justice Breyer believes that any judge death sentence violates the Eighth Amendment. I would touch on that a little bit more because one of the key components of that Eighth Amendment jurisprudence is the fact that it's a prohibition against cruel and unusual punishment. And one component that is often utilized by the United States Supreme Court, in addition to the element of cruelty, is that concept of unusual.

That simply refers back to how, as we sit here in 2018, how unusual it is that a judge will impose death post jury deadlock. There's only one state that allows it or that does it. There's other states that theoretically allow it, but in practice I have not seen it happen anywhere outside of Missouri. And certainly it's not something that a fair and accurate survey of the law would suggest would happen anywhere other than Missouri post *Hurst*.

The final point that I'll make again is that there is -- and I think this is touched upon in our other motions. There is just a renewal of

this concept that any death sentence imposed in the absence of unanimous decision by the jury violates the Sixth Amendment right to a trial by jury is incorporated via the Fourteenth Amendment as well as the Eighth Amendment's prohibition of cruel and unusual punishment, as incorporated by the Fourteenth Amendment, and it is also contrary to the corollary provisions of the Missouri Constitution. I believe that's Article I, Section 22(a).

Unless there's further questions by the Court, that would conclude my argument.

THE COURT: I think you've well covered it, Mr. Jacquinot.

Mr. Patterson.

MR. PATTERSON: Thank you, Your Honor.

We did file suggestions in opposition to the Defendant's motion, and the Court's had an opportunity to read those, and I won't read all those. I'll just hit some high points.

THE COURT: Yes, sir.

MR. PATTERSON: First I'd point out that essentially the same motion was taken up in *State v. Marvin Rice* just this past year, in October, and Judge Parker rejected this motion in that

that case as well. The defendant was ultimately sentenced to death.

I would also point out that in *State v. Shockley*, which involved the killing of a highway patrolman, you have the situation we have here where the jurors found an aggravating circumstance beyond a reasonable doubt and then did not find that the mitigating circumstances outweighed the aggravating circumstances, and then the decision was passed to the Judge.

In *Shockley*, we also -- our office, as special prosecutors, handled the PCR in *Shockley* recently, which was recently denied also by Judge Parker. That happened this year. And then in September of this year, Rosemary Percival, who is the Appellate Public Defender, who was at our trial and works with these defense attorneys, filed a writ with the Missouri Supreme Court seeking to have them overturn the death sentence based on *Hurst*. And we just looked that up. In November of 2017 the Missouri Supreme Court denied that writ without opinion.

But in the appellate decision in *Shockley*, which was issued in 2013 after *Whitfield*, the defendant, Shockley, he argued that the weighing

process of the aggravators and mitigators was improper that the judge would do that. The Court held, no, you misread the statute. There is not any improper judge factfinding.

And the Court said: Permitting a Judge to consider the presence of statutory aggravators and to weigh mitigating evidence against that in aggravation, in deciding whether to impose a sentence of death, when the jury did not unanimously agree on punishment, does not negate the fact that the jury already had made the required findings that the State prove one or more statutory aggravators beyond a reasonable doubt and it did not unanimously find the factors in mitigation outweighed those in aggravation. Rather, the statute provides an extra layer of findings that must occur before the Court may impose the death sentence. Mr. Shockley's argument is without merit.

That's the same argument being made here, and then in a footnote they address *Ring* and explain why that is okay under *Ring*. As Mr. Jacquinot sort of admitted during his argument, *Hurst* is not an extension of *Ring*. There was a very straightforward application of *Ring* and *Apprendi*

to the Florida statute and finding, because the jury did not make a finding beyond a reasonable doubt of an aggravating circumstance, that that's required to make the defendant death eligible, that statute was unconstitutional.

Here our statute is constitutional. We're not an outlier with regard to the fact that this weighing is not a factfinding issue under *Ring*. If you look at *State v. Nunley*, 341 S.W.3d 611, that's a guilty plea case. But the defendant was challenging the fact -- he said he still thought he was entitled to a jury finding with regard to whether the evidence in mitigation was sufficient to outweigh the evidence in aggravation. That's how he challenged his death sentence under his guilty plea.

In a footnote to that opinion, the Court, the Missouri Supreme Court, cited a number of Circuit Court, Federal Circuit Courts of Appeals opinions that the weighing process is a process and not a fact to be found. For example, *United States v. Sampson*, *United States v. Purkey*, Eighth Circuit, the Court characterized the weighing process as the lens through which the jury must focus the facts it has found to reach its individualized

determination.

And then the footnote goes on to cite several other decisions for that same proposition that the weighing of evidence, aggravators versus mitigators, is a function distinct from factfinding, and *Apprendi* and *Ring* do not apply here.

For those reasons, I would ask you to deny the motion and follow the Missouri Supreme Court precedent, that our procedure is constitutional.

THE COURT: Any final word, Mr. Jacquinot?

MR. JACQUINOT: Just, Your Honor, I mean, the *Shockley* case, basically it's just a reiteration of what the Missouri Supreme Court said in *McLaughlin*. It was countered in *McLaughlin v. Steel*. I think it's important, when we talk about the idea that *Hurst* didn't expand upon *Ring*, but decisions are made by Supreme Courts both in the state and the federal level.

The question arises: How strictly are they going to impose -- are they going to follow that doctrine and that holding as the years go by? What *Hurst* says is they are very strict. The

numbers are very strong; they are eight to one. There was a repudiation of independent judicial factfinding, not simply upon finding aggravating circumstances or the absence thereof.

Even if what Mr. Patterson said were accurate, that somehow weighing aggravators against mitigators is not factfinding, what seems to defy common sense is the Court cannot do that without independently finding which mitigating circumstances exist in this case or any other case. Also, what they didn't address at all was the *Mills* argument that says, you know, we can have an eleven-one life on mitigation and yet put this to the Judge for an independent reassessment.

Again, *Nunley* is a plea case. He waived his right to a trial by jury. That's the holding. I would say any footnote there, especially given the timing of that decision, is of limited precedential value. The fact of the matter is that the Missouri Supreme Court has been somewhat avoidant of this issue post *Hurst* and post *McLaughlin v. Steel*, but that doesn't, you know, cause the reality to evaporate.

There is an overwhelming and strong national

consensus against what the State is suggesting here, is that we can simply have the Judge make the call, without a new penalty phase, post jury deadlock.

THE COURT: Thank you. Well, I've fully considered the Defense motion as well as the State's reply and the argument here, which has been comprehensive.

Island or not, I would intend to follow what the law in Missouri is, as I now understand it, on this issue, that being statutorily as well as Missouri Supreme Court. That means to me that the Court is in a position and, as circumstances are at this time, should consider both options in terms of life, without parole, as well as death.

So the Defense motion for trial Court imposition of a sentence of life without parole is denied. Again, to be clear, that's as a matter of law.

We're still -- I'm still intending to hear argument on the appropriateness of the sentence moving forward. So I'll go to the State in that regard, if you're ready, Mr. Patterson.

MR. PATTERSON: Yes, sir.

Your Honor, you've lived with this case as

much as the parties have. You sat through all of the evidence, and so I won't recount all of the evidence or recount the argument I made to the jury on punishment, but I will highlight some things for you.

The harm caused by this defendant's crime was immense. Hailey Owens was doing what any ten-year-old girl ought to be able to do; walking home in her own neighborhood, after visiting a friend. But her day went drastically different because of this defendant's actions. As he ripped her from the street, threw her across his lap into his pickup truck, then drives her twelve minutes across town, what must have seemed to her like an eternity.

Then when they get to his house, he takes her into an unfamiliar house, this large man and this ten-year-old girl, where he rapes and sodomizes her, at some point during this process binding her, and she's struggling against the bindings to get free, and then taken to his unfinished basement, which to her had to appear like a dungeon, where then ultimately he places the barrel of that .22 rifle to her head and kills her, and then treats her body and clothes and

effects like so much trash. The terror experienced by Hailey Owens simply cannot be expressed in words.

And you heard the evidence in mitigation. And they don't like me using the word "excuse," but the fact is I can use the word "excuse." That's what it was. There wasn't -- there was no true remorse you heard in this case. Instead, what you have is a defendant who is an educator, was put in a place of trust by the schools, by parents, by students, and he violated that trust.

Any remorse he shows, I would argue, is the sorrow and regret he feels for the position he's placed himself, his friends, and his family in, and I don't believe it deserves any weight.

You know, sometimes we talk about crimes like throwing a pebble in a pond, and the ripples and how it affects more than just the victim. Well, in this case it was so much more than that, much more like the result of an earthquake, where you don't get ripples, but you get a tsunami that changes people's lives forever, not just Hailey's and that terror that she experienced.

You heard the victim impact evidence, which was not like a funeral but was evidence tailored

to let the jurors and the Court know who Hailey was and the specific harm that this defendant caused, not just to Hailey but to her family, her brother, her teachers, other students in her class, and our community. They may want to belittle it, but this crime did, in fact, change Springfield, Missouri, as Pastor Findley so poignantly talked about.

You know, the Supreme Court spoke about retribution, and they talk about how it's part of the nature of man, and channeling that instinct in the administration of the criminal justice system serves an important purpose to promote the stability of society, governed by law, because when people believe that an organized society is unwilling or unable to impose upon criminal offenders the punishment they deserve, thy will be sowing the seeds of anarchy, of self-help, vigilante justice, and lynch law.

The Court has also recognized that capital punishment is an appropriate sanction in extreme cases, extreme cases such as this. We heard through jury selection throughout the trial that the death penalty ought to be reserved for the worst of the worst. I submit to you this one of

the worst of the worst and that capital punishment is an expression of the community's belief that certain crimes themselves are so grievous and such an affront to humanity that the only adequate response is the death penalty, and I believe that that is this case.

I'd also like to talk a little bit about the other charges in the case that weren't tried and aggravating, because Missouri law doesn't let them try us, and the aggravating factors that the jury found. So Count I and II were the murder and the armed criminal action that went with it.

Count II is child kidnapping, an A felony, carrying between ten to thirty years or life.

Count III, rape in the first degree of a child under twelve, which carries life without the possibility of parole, until thirty years have been served or, arguably, in this case straight life without the possibility of parole because the crime was outrageously, wantonly vile, horrible, and inhuman, reminding ourselves that the jury found the aggravating circumstance of her being randomly chosen and bound.

Count IV is statutory sodomy in the first degree of a child under twelve, also a crime

carrying a minimum punishment of life, without the possibility of parole, until thirty years have been served and again arguably carrying straight life, without the possibility of parole, because of the nature of the crime.

The jury, in its aggravating circumstances, found that this murder was committed in the course of a rape, "rape" defined as rape in the first degree for them in the jury instructions, and sodomy, "sodomy" being defined for them in the jury instructions as sodomy in the first degree.

The other interesting thing under Missouri law is that when you have two sex offenses like that that are committed by a defendant, by law, those sentences must be run consecutively. So even if he had gotten the life without variety, where a minimum of thirty must be served, he would in effect get a true life, without the possibility of parole, sentence. That's if he hadn't killed her, but he did.

And the law contemplates that when you have multiple heinous acts committed, that each act will be punished. I don't know that I can accurately talk about how awful this crime must

have been for Hailey or really characterize how awful it is for our community. It is true the death penalty should be reserved for the worst of the worst. This is that case. Thank you.

THE COURT: Defense argument.

MR. BERRIGAN: I think back to the week of October the 23rd. It's a date easy to remember for me, Judge; that's my birthday. We had at least a dozen panels, I'd say, during that week. And I heard Mr. Patterson say, as the Defense reiterated over and over again, that this is the process that jurors have to follow for Mr. Wood even to be eligible for the death penalty.

And I know you know it, but a lot of these folks don't; that not only does the State have to prove the case of murder beyond a reasonable doubt, but they have to show aggravating circumstances, one or more, beyond a reasonable doubt; that the jurors then consider the mitigation evidence, that they weigh it.

And before Mr. Wood would even be eligible for the death penalty, even eligible, all twelve jurors, with their individual scales -- you'll remember that well -- have to come to the same

individual conclusion that the aggravating evidence outweighed the mitigating evidence. All twelve. And then even then, they could reach contrary decisions about the appropriate punishment, because in Missouri you're never required to vote for death.

That was the summary of the scheme the Court heard over and over and over again, and so did those jurors. They heard it not just in voir dire, but in trial and closing argument and in the instructions. Yet, here we are and you're in this position of having to decide whether Craig Wood lives or dies, and you don't know how that turned out. You don't know that because that's not among the questions we asked them.

All we asked them is: Is Mr. Wood automatically going to get life? Did you find an aggravating circumstance? If the answer to that was "no," it's life. They said, yes, we found an aggravating circumstance, Your Honor.

Then we asked them this question: Did you unanimously find that the mitigating factors outweighed the aggravating factors that were found to exist? Do you remember, that's Question 2B. The answer to that simply was "no." If the

answer had been "yes," again he goes, life, we're done. But that's all they said, "no."

The question that then needed to be asked, the third question, the one that's missing, the one you don't know the answer to as you sit here and have to decide whether this man lives or dies, is: Did you unanimously, jurors, each one of you in your individual scales, decide that the aggravating circumstances outweigh the mitigating circumstances? Because if you did not, you can't render a sentence of death.

And yet you sit here, not knowing the answer to that, and you're asked to render a sentence of death. How does that work? How does that work? They couldn't do it. They wouldn't have been able to do it.

You know, we make the legal arguments regarding why this should be life without parole, but the most imperative argument, I believe, is a moral one. It's a moral argument. It's based on this very simple premise that life is too important, it's too valuable, it's too sacred that it ever should fall to one man, however noble or worthy his character, to decide between life or death.

You know, that's been a governing principle for jury trials in the United States for 242 years and for centuries of English common law before then. We have jury trials because freedom, our liberty, our freedom is too valuable to us to be taken by one person, absent a vote of twelve that you're guilty. That's what's been required.

That's why the federal government, in all but two of the states, us and Indiana, say, look, if you don't have twelve people that say death, it's not death; it's either life without parole, or we're going to start all over again. One or the other. And here we are, one amongst two.

I don't think that these other states have made that assessment based on a concern about their judges, whether or not they're not the men of character or they're going to reach arbitrary decisions. I think it's a moral principle, that if we're going to talk about death, we have to be absolutely unequivocally sure.

We have to be positive because it's irrevocable. There's no changing this. Death is the ultimate finality. Talk about deprivation of liberty, deprivation of freedom. Death is the

ultimate deprivation of freedom and liberty. It's the ultimate one.

So all of these states have said you have to have twelve people that come in with different backgrounds, different experiences, different opinions, different beliefs, and they have to agree. They have to agree that death is the appropriate punishment, and if that's not the result, they don't all agree, then it's life. That's a moral determination states have made, not a legal one.

This Court's spent its professional life either in the pursuit of justice or upholding the rights of citizens, not just their constitutional rights but their unalienable rights, and what we're asking the Court to do today is just acknowledge what we all know to be true, that life in this country is a precious commodity, precious, and that it should take twelve people agreeing to deprive one of his life.

Mr. Patterson made these same arguments to those jurors. They didn't agree. The jurors were told unequivocally that they had the decision to make: Is Craig Wood going to die in God's time or man's? And they couldn't agree.

It should be God's time; that should be sufficient. He's going to die in prison.

THE COURT: Thank you.

Anything else, Mr. Patterson?

MR. PATTERSON: No, sir.

THE COURT: All right. I want to make a little bit further record and have a couple of remarks before I grant allocution and we proceed.

Just again so the record's clear here, November 2nd, 2017, as I indicated earlier, the jury in this case returned its verdict finding the defendant guilty of murder in the first degree of Hailey Owens. The Court accepted that verdict.

On November 6, 2017, the jury returned its verdict advising the Court the jury was unable to decide or agree upon the punishment for murder in the first degree. In its verdict for murder in the first degree, the jury unanimously found beyond a reasonable doubt that the State had proven six statutory aggravating circumstances.

Specifically the jury found that, first, the murder of Hailey Owens involved torture and depravity of mind, and, as a result thereof, the murder was outrageously and wantonly vile,

horrible, and inhuman in that, one, the defendant killed Hailey Owens after she was bound or otherwise rendered helpless by defendant, and that the defendant thereby exhibited a callous disregard for the sanctity of all human life; two, that the defendant's selection of the person he killed was random and without regard to the victim's identity and that defendant's killing of Hailey Owens thereby exhibited a callous disregard for the sanctity of human life.

The jury found, as the number two aggravating circumstance, that the murder of Hailey Owens was committed for the purpose of avoiding arrest.

Third, the murder of Hailey Owens was committed while the defendant was engaged in rape.

Four, the murder of Hailey Owens was committed while the defendant was engaged in sodomy.

Five, the murder of Hailey Owens was committed while the defendant was engaged in kidnapping.

And, six, that Hailey Owens was a witness or potential witness of a pending investigation of the kidnapping of Hailey Owens.

The jury further advised the Court, in its verdict for murder in the first degree, that the jury did not unanimously agree that the facts and circumstances in mitigation of punishment were sufficient to outweigh facts and circumstances in aggravation of punishment. Again the Court accepted the verdict as to punishment.

For the offense of murder in the first degree of Hailey Owens, this Court does accept and agrees with the factual findings of the jury as set forth in its verdict as to punishment. Specifically, this Court finds beyond a reasonable doubt the State did prove six statutory aggravating circumstances, and this Court finds beyond a reasonable doubt that the State proved each of the six, as I've just recited into the record.

The Court further finds the facts and circumstances in mitigation of punishment were not sufficient to outweigh facts and circumstances in aggravation of punishment. Therefore, this Court finds that, based upon factual findings of the jury, that the jury was required to consider both life imprisonment, without the possibility of probation or parole,

and death as possible punishments for the defendant.

The Court further finds that since the jury was unable to agree upon which punishment to impose, this Court, based upon the factual findings of the jury and after the Court, having followed the same procedure required of the jury, is required to consider both life imprisonment, without the possibility of probation or parole, and death as possible punishments for the defendant.

This Court, after considering the totality of the evidence presented in both the guilt and penalty phases of the trial, the factual findings of the jury, and following the procedures set out in Missouri statute, has given very serious consideration to both life imprisonment, without the possibility of probation or parole, and death.

This Court has also considered the issues raised in the Defendant's motion for trial Court imposition of a sentence of life without parole, as well as all of the cases that have been outlined by the Defendant in that regard.

So the Court has taken all of those into

account. I'm not going to recite or repeat any of the facts that both sides have dealt with here and particularly those the prosecutor did a few minutes ago. We sat through the trial process and many, many processes and hearings before that over several years, and I think the community, as well as all of us, are familiar with the facts in great detail.

I would have to say there was, I think, 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.

But the words of the jury and what the Court has just read as far as those aggravating circumstances are not just words or hoops to be jumped through. They are, in fact, what happened in this case and what happened to this little girl. It is an exceptional case, an extreme case, I think, in all regards.

Mr. Wood, if you'd please stand for allocution at this time.

By way of allocution, is there any legal reason the Court should not proceed to judgment and sentence in this case, Mr. Patterson?

MR. PATTERSON: No, sir.

THE COURT: By way of allocution, any legal reason the Court should not proceed to judgment and sentence in this case, Mr. Berrigan?

MR. BERRIGAN: None that haven't already been raised, Your Honor.

THE COURT: And, Mr. Wood, by way of allocution, is there any legal reason the Court should not sentence you at this time, sir?

If he wishes to make a statement, he may. I'm not attempting to exclude that in the least. I've just not heard that issue raised.

MR. BERRIGAN: No.

THE DEFENDANT: No, sir.

THE COURT: All right. And is the answer, then, "no" as far as any legal reason, sir?

THE DEFENDANT: Yes, sir.

THE COURT: All right. For the offense of murder in the first degree, this Court assesses and declares punishment to be death for the murder of Hailey Owens.

It is the judgment and sentence of this Court that the defendant, Craig Michael Wood, is hereby sentenced to death for the murder of Hailey Owens. Court costs and $68 civil judgment for Crime Victim Compensation is assessed.

Now, Mr. Wood, there are some rights that I need to go over with you in regard to the case at this point that come into play. I'm going to take those rather carefully a section at a time. You have the opportunity at any time to talk to your attorneys before you answer any question, anything of that nature.

Most of this is just simply trying to make sure that you're informed of what your rights are. I'm required to do that. I want you to know what they are. Your attorneys can certainly deal with those, as well.

First of all, because you were convicted through the trial process, you do have a right to appeal in this case, sir, and there is a time limit in regard to that appeal. That is ten days from the entry of the final judgment. Today in the sentencing is the final judgment in the case. So you do have to get your notice of appeal filed within that time.

Now, Mr. Berrigan, do you intend to perfect Mr. Wood's appeal for him, sir?

MR. BERRIGAN: We do, sir, yes.

THE COURT: All right. And in connection with that, if you would submit to the Court the appropriate paperwork in regard to proceedings in forma pauperis --

MR. BERRIGAN: Yes, sir.

THE COURT: -- then I'll be happy to sign that, and we can proceed.

What that means, Mr. Wood, is that you do not have funds to employ an attorney or to handle the other costs in connection with an appeal. And so you won't have to pay those, meaning that you do have a right to have an attorney represent you on appeal. You'll have a right to a trial transcript for that purpose, as well. So do you understand those rights, sir?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Then also, separate from that appeal process is another process that is under Supreme Court Rule, which is 29.15. I need to explain that to you briefly, as well. Now, under the rule that's now in effect as of this year, I'm going to give

Mr. Wood a copy -- there's actually two copies here -- where he could have one, if you want him to, and there's also copies for counsel if you want to be able to read along. And there's a copy of the rule itself.

MR. BERRIGAN: Thank you, Your Honor.

THE COURT: You're welcome. Now, the document that's entitled, "Advice Of Rights Upon Conviction, Pursuant To Rule 29.07(b)(4)," this is just the process whereby I'm going to make sure you understand what Supreme Court Rule 29.15 provides. It's my duty to advise you of that at this time.

Now, separate and apart, as I said, from the appeals process, you have the right to seek relief if you believe the conviction or sentence in this court violates the constitution or laws of this state or the Constitution of the United States; that this Court, when imposing the sentence, was without jurisdiction to do so; or the sentence imposed was in excess of the maximum sentence authorized by law.

Now, as it says, Rule 29.15 provides the only way by which you seek relief for the above claims. It says here I'm now providing you a

copy of the rule, which I've done, so you have a copy of Supreme Court Rule 29.15.

There's also a procedure form, and that is Form 40. You'll be provided that at no cost when you arrive at Department of Corrections. That's the actual form that you would file in regard to this process. Now, there's some time limits involved that are very important, which is one of the main points to make sure you understand today, that you must understand that any motion to vacate, set aside, or correct the judgment and sentence under this rule must, number one, be filed with this court within 180 days of today's date if you do not appeal this Court's judgment and sentence, or, if an appeal is taken -- which it will be, as I've heard -- it must be filed with this court within 90 days after the date of the mandate of the Missouri Supreme Court. It's said that way because this case will go to the Missouri Supreme Court. If they issue a mandate affirming the judgment and sentence, then you'd have that time limit to file it.

Now, it says also if you file this motion, you shall include every ground known to you for vacating, setting aside, or correcting the

judgment or sentence. Also failure to file the motion within these time limits constitutes a complete waiver of any right you may have to seek relief under Rule 29.15 in this court.

There's no cost deposit required for you to file the motion, meaning you don't have to pay any money to pursue this. If you're indigent and file your own motion, an attorney will be appointed for you. So that's a separate attorney appointed should this process come into play.

Now, I have signed this and dated it. I would ask that you do the same. It is simply for purposes of putting in the record that I've, in fact, notified you of all these things and for no other purpose.

Are you signing it on his behalf?

MR. BERRIGAN: I am, Judge.

THE COURT: That's fine.

MR. BERRIGAN: As you will recall, there were issues during the trial regarding Mr. Wood's handwriting. I don't think, frankly, he's required to sign anything --

THE COURT: He's not.

MR. BERRIGAN: -- but I'm happy to do it.

THE COURT: I was going to cover that point, but I'm happy to have you do it. That's fine. The record is just reflecting that, in fact, it's been gone over with him, is all. That completes that.

Now, do you understand all of those rights, Mr. Wood?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Thank you, sir. Thank you, Mr. Berrigan.

MR. BERRIGAN: Yes, sir.

THE COURT: Now, one final area I'm required to cover, and that is inquiry as to representation by your counsel in this matter. And I want to tell you, first of all, that if you desire to have your counsel not be in the courtroom during this process, I can ask them to step out. That's your choice. What would be your choice in that regard?

THE DEFENDANT: That's not necessary.

THE COURT: All right, that's fine.

It's also not required that you answer any of these questions, as I'm sure Mr. Berrigan was about to point out to me; that any of these questions -- you don't waive any rights by not

doing so in regard to it.

I'm going to put him under oath, and if this is as far as we get, then it is.

If you would, raise your right hand.

(Defendant, Craig Michael Wood, was duly sworn by the Court.)

THE COURT: All right. You can put your hand down. Would you state your full name for the record, please.

THE DEFENDANT: Craig Michael Wood.

THE COURT: All right. And then can you tell me -- well, how long have Mr. Berrigan and Mr. Jacquinot represented you in this case?

THE DEFENDANT: I'm not a lawyer, and I cannot effectively represent my own interests without the assistance of counsel at this time. I do not wish to waive any complaints or rights that I have. Therefore, respectfully, I will not be answering any questions from the Court at this time.

THE COURT: All right. So just let me ask you, Mr. Wood: Any other questions I would ask you along this same line, covering the same inquiry as to representation by your attorney, would you answer that the same way you just have?

THE DEFENDANT: Yes, sir.

THE COURT: All right, okay. The Court finds, based upon the record at this point, no probable cause to believe there's been ineffective assistance of counsel.

Mr. Wood is remanded to the custody of the Sheriff of Greene County for transportation to the director of the State Department of Corrections.

I am going to ask that everyone keep their seat in the audience until Mr. Wood is back on the other side of the door, please.

He can be taken at this time, as soon as you all are done there.

MR. JACQUINOT: So we'll have a chance to talk to him back there, Your Honor?

THE COURT: Yes, sir. Oh, absolutely.

(Pause in proceedings.)

THE COURT: We're adjourned.

(Court stood in adjournment at 4:00 p.m.)

* * * * *

CERTIFICATE OF COURT REPORTER

I, Connie McKeen, the undersigned, hereby certify that I was the Official Court Reporter of Division IV of the Circuit Court of Greene County, State of Missouri, at the time the above cause was tried; that the foregoing pages contain a true and accurate reproduction of my Stenograph shorthand notes of said proceedings. Should any portion of this transcript be altered or redacted for any purpose, this certificate is null and void regarding a true and accurate reproduction of the Stenograph shorthand notes made of the proceedings.

This transcript was prepared pursuant to the Court's order of January 16, 2018, and the fees shall be paid by the State, upon a voucher approved by the Court and taxed against the State in accordance with Section 488.2250, RSMo.

Transcript completed and electronically signed this 30th day of July, 2018.

Connie McKeen, CCR(333), CSR
Official Court Reporter