No. ___

IN THE

Supreme Court of the United States

CRAIG M. WOOD,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Missouri

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

In this capital case, a Missouri jury found the existence of aggravating factors but deadlocked as to whether to impose the death penalty. Under Missouri's capital sentencing scheme, the entire sentencing decision was taken away from the jury and given to the trial judge, who sentenced petitioner to death.

Petitioner argued that this sentencing scheme violates his right under the Sixth and Eighth Amendments to the Constitution of the United States to have a jury make the key findings necessary to sentence him to death. Acknowledging a split, the Missouri Supreme Court affirmed petitioner's sentence.

The question presented is:

Whether the Constitution requires that a jury, rather than a judge, weigh the aggravating and mitigating circumstances to determine whether a defendant may be sentenced to death.

RELATED PROCEEDINGS

Proceedings directly on review:

State v. Wood, No. SC 96924, 580 S.W.3d 566 (Mo. July 16, 2019)

Related proceedings:

State v. Wood, No. 1431-CR00658-01 (Mo. Cir. Ct. Jan. 11, 2018)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Craig M. Wood respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Missouri.

OPINIONS BELOW

The Missouri Supreme Court's opinion affirming petitioner's conviction and death sentence (Pet. App. 1a-64a) is reported at 580 S.W.3d 566. That court's order denying rehearing (Pet. App. 65a) is not reported. The Circuit Court of Greene County's judgment imposing petitioner's death sentence (Pet. App. 66a-67a) is not reported.

JURISDICTION

The Supreme Court of Missouri rendered its judgment on July 16, 2019. It denied a timely motion for rehearing on September 3, 2019. On November 19, 2019, Justice Gorsuch extended the time for filing a certiorari petition to January 3, 2020. No. 19A570. On December 30, 2019, Justice Gorsuch further extended the time for filing a certiorari petition to January 31, 2020. *Id*.

This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are reproduced in Pet. App. 73a-80a.

INTRODUCTION

State courts of last resort are intractably divided over whether this Court's precedents require a jury, rather than a judge, to determine the balance between aggravating and mitigating circumstances in the penalty phase of a capital trial.

The Sixth Amendment right to trial by jury forbids judges from making findings that "expose 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). In 2002, this Court extended this principle to capital cases. *Ring v. Arizona*, 536 U.S. 584, 589 (2002). More recently, in *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Court held that Florida's death penalty scheme—which required juries to render advisory findings and recommendations to a judge, who then made the ultimate sentencing decision, *id.* at 620—violated the Sixth Amendment because only a jury may make those "critical findings necessary to impose the death penalty," *id.* at 622.

Under these precedents, it is settled that a jury—and not a judge—must find whether a capital offense involves aggravating circumstances. But even though the sentencer is required to also find and weigh mitigating circumstances in the sentencing calculus, courts disagree about whether a jury must perform that step. The highest courts of three states hold that the Sixth Amendment requires that a jury—and not a judge—weigh aggravating and mitigating circumstances before a defendant may be sentenced to death. The highest courts in six states hold the opposite. In the past year, the highest courts of two states have acknowledged this divide. Pet. App. 32a n.12 (declaring that two cases on the other side of the split "are not

binding, and both are wrongly decided."); *State v. Jenkins*, 931 N.W.2d 851, 880 (Neb. 2019) (acknowledging that its "view was not universal"), *petition for cert. pending*, No. 19-514 (filed Oct. 17, 2019).

This case presents a stark illustration of the issue because Missouri's capital sentencing scheme is particularly hostile to jury determinations. In Missouri, when a jury is unable unanimously to agree upon a penalty in a capital case, the entire sentencing decision is taken away from the jury and given to the trial judge—who must perform the same steps as the jury, make his own factual findings, and impose either a life sentence or death. In this case, after the jury deadlocked as to petitioner's sentence, the judge did what the jury could not, and sentenced petitioner to death.

This issue arises frequently. Since 1998, Missouri judges have broken a jury deadlock twelve times and imposed the death penalty in eleven of those situations. *See* Pet. App. 88a-99a.[1] In Nebraska, a state that does not permit juries to weigh aggravating and mitigating factors, judges have sentenced eleven people to death since this Court decided *Ring* in 2002.[2]

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[1] Because some of these defendants were charged and sentenced on multiple counts, the total number of defendants sentenced to death under this procedure since 1998 has been seven. Petitioner knows of at least ten other defendants who were sentenced to death under this procedure prior to 1998, but overall death penalty statistics prior to that date are less reliable because the available records are not comprehensive.

[2] *See Jenkins*, 931 N.W.2d at 863; *State v. Garcia*, No. Cr. 13-17393 (Neb. Dist. Ct. Sept. 14, 2018); *State v. Schroeder*, No. Cr. 17-17 (Neb. Dist. Ct. June 1, 2018); *State v. Torres*, 812 N.W.2d 213, 227-28 (Neb. 2012); *State v. Hessler*, 807 N.W.2d

Parties on both sides of this question have sought this Court's review. Unlike cases in which this Court denied certiorari, petitioner's case presents a pristine vehicle for this Court to answer this question. In his trial and on appeal, petitioner pressed, and the lower courts passed upon, his federal constitutional arguments. There are no independent state grounds for the decision below. And because petitioner is seeking direct review in this Court, retroactivity is not at issue.

Finally, certiorari should be granted because the decision below is wrong. Whether under the Sixth or the Eighth Amendment, the Constitution requires a jury to make the critical findings that permit the State to impose the unique and irreversible punishment of death.

STATEMENT OF THE CASE

A. Legal Background

1. In capital sentencing, the Eighth Amendment dictates *what* a court must decide before a defendant may be sentenced to death, and the Sixth Amendment addresses *who* must decide those questions.

The Eighth Amendment's prohibition of cruel and unusual punishment imposes two concurrent demands on capital sentencers. First, in order to "genuinely narrow the class of persons eligible for the death penalty," *Zant v. Stephens*, 462 U.S. 862, 877 (1983), most capital jurisdictions require a sentencer to find

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504, 509 (Neb. 2011); *State v. Ellis,* 799 N.W.2d 267, 280 (Neb. 2011); *State v. Sandoval*, 788 N.W.2d 172, 191 (Neb. 2010); *State v. Vela*, 777 N.W.2d 266, 275 (Neb. 2010); *State v. Galindo*, 774 N.W.2d 190, 208 (Neb. 2009); *State v. Mata*, 745 N.W.2d 229, 240 (Neb. 2008); *State v. Gales*, 694 N.W.2d 124, 140 (Neb. 2005).

at least one aggravating circumstance before it may impose the death penalty, *see Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988).[3] Second, the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Thus, a sentencer must fully consider, *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982), as mitigating evidence any aspect of a defendant's "character, prior record, or the circumstances of his offense," *Lockett v. Ohio*, 438 U.S. 586, 604 n.12 (1978) (plurality opinion), and give a "reasoned moral response," *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (emphasis and quotation marks omitted).

The Sixth Amendment's right to a jury trial commands that only a jury may make "the critical findings necessary to impose the death penalty." *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016). It is now well-established by this Court's precedents that these findings include at least the finding of aggravating circumstances. *See id.* at 621-22; *Ring*, 536 U.S. at 607-08. Although states also *require* sentencers to find and consider mitigating circumstances before a sentence of death may be imposed, this Court's precedents have not explicitly resolved whether the Sixth Amendment requires a jury, as opposed to a judge, to fulfill that requirement.

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[3] In two states, Texas and Louisiana, the aggravating circumstances are incorporated as elements of the offense itself, and so this step is accomplished at the guilt phase.

2. Missouri's capital sentencing statute provides a multi-step process for juries to follow in sentencing defendants convicted of first-degree murder. The defendant may not be executed unless the jury finds at least one of seventeen statutory aggravating factors beyond a reasonable doubt, Mo. Rev. Stat. § 565.030.4. If the jury finds a statutory aggravating circumstance, the jury must weigh the aggravating and mitigating evidence. *See id.* If the jury "unanimously find[s] that there are facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment," Pet. App. 81a, then the defendant cannot be executed. Otherwise, the jury "decides under all of the circumstances" whether to "assess and declare the punishment at death." Mo. Rev. Stat. § 565.030.4.[4] If the jury is "unable to decide or agree upon the punishment," the jury is to fill out a verdict form saying as much. Pet. App. 86a-87a. In that circumstance, the trial judge assumes responsibility for sentencing and "follow[s] the same procedure" as the jury: finding aggravating circumstances, weighing aggravating and mitigating circumstances, and declaring the ultimate penalty as either life in prison or death. Mo. Rev. Stat. § 565.030.4.

Missouri's treatment of jury deadlocks contrasts with that of other states. Twenty-three capital jurisdictions provide that a jury deadlock on the ultimate

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[4] The Missouri statute provides that if the jury finds that a defendant is intellectually disabled by a preponderance of the evidence, the jury must sentence the defendant to life in prison without possibility of parole. Mo. Rev. Stat. § 565.030.4 (at Pet. App. 74a). This provision was not at issue in petitioner's case.

sentence precludes execution.[5] In Missouri, by contrast, a deadlock opens the door for judges to usurp the jury's decision. Far more often than not, this usurpation results in a death sentence. Since 1998, juries have deadlocked as to the death penalty a dozen times. In eleven of those situations (91.6%), Missouri's trial judges have sentenced the defendant to death. Pet. App. 88a-99a. In contrast, when Missouri juries have unanimously agreed on a punishment, they have imposed a death sentence only 68.6% of the time. *See id.*

B. Factual Background

Petitioner—a longtime methamphetamine addict who suffers from chronic depression, Pet. App. 6a—kidnapped, raped, sodomized, and killed a 10-year-old girl, *id.* at 2a-5a. The State of Missouri tried him for first-degree murder. During his trial, petitioner admitted that he killed the victim but disputed that the killing was committed with deliberation. *Id*. at 9a-10a. Tried by a jury of his peers, petitioner was found guilty. *Id*. at 5a.

The trial advanced to the penalty phase, where petitioner presented mitigating evidence. Petitioner's friends told the jury that they were "shocked" because the crime was wholly out of petitioner's character. Pet. App. 6a. One friend spoke to how petitioner had once saved a man from a burning apartment. *Id.* A priest spoke to the jury about petitioner's renewed faith and remorse. *Id.* And the jury heard that petitioner had no

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[5] *See* Death Penalty Info. Ctr., *Life Verdict or Hung Jury? How States Treat Non-Unanimous Jury Votes in Capital Sentencing Proceedings* (Jan. 17, 2018), https://deathpenaltyinfo.org/stories/life-verdict-or-hung-jury-how-states-treat-non-unanimous-jury-votes-in-capital-sentencing-proceedings.

significant criminal history and had been a "model prisoner." *Id.* Petitioner's father testified at length about petitioner's alcohol and drug addiction and his inherited mental illness. *Id.*

After hearing all the evidence presented over the course of the seven-day trial, the jury reached its sentencing verdict—it was "unable to decide or agree upon the punishment." Pet. App. 81a. The jury accordingly filled out and returned a verdict form. The jury listed the aggravating circumstances that it found beyond a reasonable doubt. The jury also indicated that it did not "unanimously find that there are facts and circumstances in mitigation or punishment sufficient to outweigh the facts and circumstances in aggravation of punishment." *Id*. In deadlocking, the jurors refused to sentence their peer to death.

Citing *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst*, 136 S. Ct. 616, the defense challenged the court's ability to "do anything other than impose a life sentence without parole." Tr. 4131, *State v. Wood*, No. 1431-CR00658-01 (Mo. Cir. Ct. Jan. 11, 2018).[6] The judge rejected the defense's argument and proceeded to "follow the same procedure" required of the jury under Mo. Rev. Stat. § 565.030.4. The judge announced that he "accepted [the jury's] verdict as to punishment" and "accept[ed] and agree[d] with the factual findings of the jury." Pet. App. 70a. The judge then went on to make his own factual "find[ings]," including that the State proved aggravating circumstances beyond a reasonable doubt, and that the mitigating circumstances did not outweigh the aggravating circumstances. *Id.* The judge "consider[ed] the totality of the evidence"

[6] All subsequent citations to Tr. reference this transcript.

and "g[ave] very serious consideration" to the ultimate sentence. *Id.* at 70a-71a. Opining that this was "an extreme case," *id.* at 71a, the judge did what petitioners' peers could not do: he sentenced petitioner to death, *id.* at 7a, 66a-67a, 72a.

C. The Appeal

On appeal, petitioner argued that Mo. Rev. Stat. § 565.030.4 violated his constitutional right to a jury trial because it permitted a judge to impose a death sentence following a jury deadlock. Pet. App. 23a. Petitioner argued that *Hurst* prohibits Missouri's capital sentencing scheme because the Sixth Amendment requires juries to weigh aggravating and mitigating circumstances. *See id.* at 24a-25a. Petitioner also contended that the Eighth Amendment demands that a jury, and not a judge, be the one who sentences a defendant to death. Pet. Mo. Sup. Ct. Br. 97-99, 2018 WL 7512995.

The Missouri Supreme Court rejected petitioner's Sixth and Eighth Amendment claims. Abrogating an earlier decision, the court held that "when the jury finds the facts making a defendant eligible for a death sentence," the Sixth Amendment does not prohibit Missouri's deadlock procedure. Pet. App. 25a. Ignoring petitioner's calls to reexamine this principle in light of *Hurst*, the Missouri Supreme Court reasoned that *Hurst* stands only for the "limited" proposition that aggravating, and not mitigating, circumstances are facts that must be found by the jury beyond a reasonable doubt. *Id.* at 29a. In the present case, the trial court had merely "accept[ed]" and "recit[ed]" the six aggravating factors found by the jury. *Id*. at 26a.

Under the Missouri Supreme Court's rule—as the court itself acknowledged, Pet. App. 34a n.14—a judge could sentence a defendant to death even if eleven of the twelve jurors found that the mitigating factors outweighed the aggravating circumstances. Indeed, this occurred during the penalty phase of another Missouri capital trial in 2017. *See State v. Rice*, 573 S.W.3d 53, 62 (Mo. 2019) (reversing sentence on other grounds). Under the Missouri Supreme Court's interpretation of the Federal Constitution, the fact that a jury deadlocked eleven-to-one in favor of life imprisonment is "irrelevant." Pet. App. 34a n.14.

On September 3, 2019, the Missouri Supreme Court overruled petitioner's timely motion for a rehearing. Pet. App. 65a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Certiorari to Resolve a Split Among State Courts of Last Resort.

Ten states have or had capital sentencing statutes that permit judges, as opposed to juries, to determine whether aggravating circumstances outweigh mitigating ones (or vice versa) and impose a sentence of death. Of those ten states, supreme courts in nine of them have decided whether the Sixth Amendment permits this practice.[7] The courts have divided six to three.

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[7] The tenth state (Montana) has not sentenced anybody to death since 1996, and so no opportunity has arisen there. *See* Death Penalty Info. Ctr., *Montana*, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/montana (last visited Jan. 31, 2020).

Only this Court can resolve the disagreement over the scope of the Constitution's protections for capital defendants. As it stands now, the constitutional rights of defendants differ depending on the state in which they are sentenced. The Court should grant certiorari to bring uniformity to this important issue of federal constitutional law.

A. The Supreme Courts of Three States Have Decided that the Constitution Requires a Jury, Not a Judge, to Weigh Aggravating and Mitigating Circumstances.

Looking to this Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 136 S. Ct. 616 (2016), the supreme courts of Delaware, Arizona, and Colorado concluded that the Sixth Amendment requires a jury to find the balance of aggravating and mitigating circumstances before a defendant may be sentenced to death.

1. The Delaware Supreme Court held that a jury—and not a judge—must "find that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist." *Rauf v. State*, 145 A.3d 430, 434 (Del. 2016) (per curiam). In doing so, the court "interpret[ed] not simply the Sixth Amendment itself" but also "the complex body of case law interpreting it," including *Hurst*. *Id*. at 433. Striking down Delaware's statute that instructed a judge to make the weighing finding, the court overruled a pre-*Hurst* decision that limited a jury's Sixth Amendment role to finding aggravating circumstances. *See id.* at 493 (Valihura, J., concurring in part and dissenting in part)

(recognizing overruling of *Brice v. State*, 815 A.2d 314 (Del. 2003)). The majority of the court held: "Absent factual findings that the aggravating factors outweigh the mitigating factors, a defendant must be given a life sentence under the Delaware statute. Thus, these sentencing stage findings are literally 'necessary to impose a death sentence.'" *Id*. at 463 (Strine, C.J., concurring) (quoting *Hurst*, 136 S. Ct. at 619).

In addition to the decision that a jury must weigh aggravating and mitigating circumstances, the Delaware court also declared that "the Sixth Amendment right to a jury includes a right not to be executed unless a jury concludes unanimously that it has no reasonable doubt that is the appropriate sentence." 145 A.3d at 482 (Strine, C.J., concurring). It observed, "[f]rom the inception of our Republic, the unanimity requirement and the beyond a reasonable doubt standard have been integral to the jury's role in ensuring that no defendant should suffer death unless a cross section of the community unanimously determines that should be the case." *Id*. at 437.[8]

In this case, the Missouri Supreme Court expressly disagreed with the Delaware supreme court, describing its decision as "not binding" and "wrongly decided." Pet. App. 32a n.12.[9]

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[8] After the court invalidated Delaware's statute, the legislature did not reinstate the death penalty. However, if the legislature enacted a new statute, it would have to abide by the court's interpretation of the Constitution.

[9] The Missouri Supreme Court also criticized, on the same grounds, the Florida Supreme Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (per curiam). That decision was recently

2. After this Court struck down Arizona's sentencing regime in *Ring*, the Arizona legislature enacted a new capital sentencing statute that required juries to both find aggravating circumstances and balance them against mitigating circumstances. *See* Ariz. Rev. Stat. Ann. § 13-752. On remand from this Court's decision to the Arizona Supreme Court, the State argued that defendants who were sentenced under the pre-*Ring* statute (which permitted judicial findings) did not have to be resentenced under the harmless error doctrine as long as at least one aggravating circumstance had survived this Court's holding in *Ring*. In support, the State argued that "nothing" in *Ring* prevents a judge from "finding mitigating factors and balancing them against the aggravator." *State v. Ring*, 65 P.3d 915, 942 (Ariz. 2003) (en banc). The Arizona Supreme Court rejected that argument, declining to adopt a "narrow reading" of this Court's precedent. *See id*. at 942-43. Because "the legislature assigned to the same fact-finder responsibility for considering both aggravating and mitigating factors, as well as for determining whether the mitigating factors, when compared with the aggravators, call for leniency," the Court was unwilling to conclude that the mere existence of aggravating factors rendered the previous constitutional error harmless. *Id.* at 943.

3. After this Court "effectively declare[d]" Colorado's capital sentencing statute unconstitutional in

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abrogated by the Florida Supreme Court (which has undergone a substantial change in its composition). *See infra* pp.18-19.

Ring, 536 U.S. at 620 (O'Connor, J., dissenting),[10] the Colorado Supreme Court considered and struck down the requirement in the state's new statute that judges balance aggravating and mitigating circumstances. *See Woldt v. People*, 64 P.3d 256, 259 (Colo. 2003) (en banc). The court recognized that, when a judge found that the aggravating circumstances outweighed the mitigating circumstances, the defendant became eligible for the death penalty. *See id*. at 265-66. But, the court noted, "*Ring* holds that death penalty eligibility fact-finding belongs solely to the jury under the Sixth Amendment." *Id*. at 266. The court thus found the statute unconstitutional because it "required the judges to make factual findings as a prerequisite to imposition of the death penalty, in violation of defendants' Sixth Amendment right to have a jury make such findings." *Id*. at 259.

4. If petitioner had been sentenced in Delaware, Arizona, or Colorado, the Constitution would have ensured that a jury weigh the aggravating and mitigating circumstances of his case. Indeed, in twenty-eight of the thirty-one death penalty jurisdictions, petitioner could never have been sentenced to death by a judge—in the majority of jurisdictions (twenty-three), he

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[10] This Court also "effectively declare[d]" Idaho's sentencing statute unconstitutional. *Ring*, 536 U.S. at 620 (O'Connor, J., dissenting). In light of *Ring*, the Idaho legislature enacted a new statute, which shifted the responsibility of imposing the death penalty entirely from judges to juries. *See* Idaho Code § 18-4004; *see also* Idaho Legislature, Statement of Purpose, Senate Bill No. 1001, https://legislature.idaho.gov/sessioninfo/2003/legislation/s1001/#sop ("The main purpose of this legislation is to amend Idaho's death penalty statutes to comply with the recent *Ring v. Arizona* decision of the United States Supreme Court.").

would have received a mandatory life sentence; the remaining five would permit the state to try again in front of another jury. *See* Death Penalty Info. Ctr., *Life Verdict or Hung Jury? How States Treat Non-Unanimous Jury Votes in Capital Sentencing Proceedings* (Jan. 17, 2018), https://deathpenaltyinfo.org/stories/life-verdict-or-hung-jury-how-states-treat-non-unanimous-jury-votes-in-capital-sentencing-proceedings. But in Missouri, a judge intervened, determined that mitigating circumstances did not outweigh aggravating circumstances, and sentenced petitioner to death—all without violating the Missouri Supreme Court's conception of the Sixth Amendment.

B. Six State Supreme Courts Have Decided That the Sixth Amendment Permits a Judge to Weigh Aggravating and Mitigating Circumstances.

In contrast with the decisions above, the highest courts in Missouri, Nebraska, Florida, Indiana, Alabama, and Illinois conclude that the Sixth Amendment does not require a jury to weigh aggravating and mitigating circumstances.

1. In the proceedings below, the Missouri Supreme Court read this Court's decision in *Hurst* narrowly, holding that it "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." Pet. App. 29a. According to the Missouri Supreme Court, *Hurst* was irrelevant in this case because "the weighing step is *not* a factual finding that must be found by the jury." *Id.* at 32a-33a. Instead, the court asserted, this weighing "was a discretionary

judgment call that neither the state nor federal constitution entrusts exclusively to the jury." *Id*. at 32a.

By adopting a narrow reading of *Hurst*, the court reaffirmed its prior decisions holding that a judge could constitutionally weigh aggravating and mitigating circumstances. Pet. App. 25a-26a (citing *State v. Shockley*, 410 S.W.3d 179 (Mo. 2013) (en banc), *cert. denied*, 571 U.S. 1206 (2014), and *State v. McLaughlin*, 265 S.W.3d 257 (Mo. 2008) (en banc)). The Missouri Supreme Court also overturned a prior decision, explaining that it had "erroneously suggested weighing the aggravating and mitigating circumstances is also a factual finding reserved for the jury." *Id.* at 32a (overruling *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003) (en banc)).

For the same reasons the Missouri Supreme Court rejected petitioner's Sixth Amendment arguments, it also determined that the statute's "deadlock procedure does not violate the Eighth Amendment." Pet. App. 41a-42a.

The Missouri court acknowledged that its decision created a split with other state supreme courts regarding whether the determination that "the aggravating circumstances outweigh the mitigating circumstances is a factual element the Sixth Amendment requires the jury to find." Pet. App. 32a n.12. Declaring that the conflicting cases were "not binding" and "wrongly decided," the Missouri Supreme Court affirmed the constitutionality of the state's capital sentencing statute. *Id*. The court then denied rehearing. *Id.* at 65a.

2. The Nebraska Supreme Court twice "rejected an argument that *Hurst* held a jury must find beyond

a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances." *See State v. Jenkins*, 931 N.W.2d 851, 880 (Neb. 2019), *petition for cert. pending*, No. 19-514 (filed Oct. 17, 2019); *State v. Lotter*, 917 N.W.2d 850, 862-63 (Neb. 2018), *cert. denied*, 139 S. Ct. 2716 (2019). Nebraska's sentencing statute requires a panel of judges—and not a jury—to determine whether to impose the death penalty based on whether sufficient mitigating circumstances exist to outweigh aggravating circumstances. *See Jenkins*, 931 N.W.2d at 880. The Nebraska Supreme Court determined that, as long as a jury finds the existence of an aggravating circumstance, the statute would be constitutional. *See id.* In reaching this conclusion, the court looked to this Court's decisions in *Apprendi*, *Ring*, and *Hurst*. The first time it considered the question, the Nebraska court concluded that "[w]e do not read *Hurst* as announcing a new rule of law." *See Lotter*, 917 N.W.2d at 862. In its second decision, a year later, the court again determined that "earlier U.S. Supreme Court precedent—upon which *Hurst* was based—did not require the determination" of balancing to be "undertaken by a jury." *Jenkins*, 931 N.W.2d at 880. In both cases, the court acknowledged that its view on this issue was "not universal." *Id*.; 917 N.W.2d at 863. It nevertheless concluded that "[n]othing in *Hurst* requires a reexamination" of its conclusion. 931 N.W.2d at 880.

3. The Florida Supreme Court recently held that the Sixth Amendment does not require a jury to balance mitigating against aggravating circumstances. *State v. Poole*, -- So. 3d ---, 2020 WL 370302, at *1 (Fla. Jan. 23, 2020) (per curiam). Receding from its prior

precedent,[11] the court held that the balance between mitigating and aggravating circumstances is not a factual question, and further held that it does not fall under *Apprendi* because the balance does not authorize greater punishment, but instead merely guides the sentencing court's discretion within a range of available punishments. *See id.* at *11.

4. The Indiana Supreme Court also found that the Sixth Amendment did not require a jury to balance

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[11] In 2016, the Florida Supreme Court decided in *Hurst*, *supra*, that:

> [B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

202 So. 3d at 57. That case was decided by a full seven-member court, in a 5-2 decision.

Subsequently, the composition of the Florida Supreme Court changed significantly. Four justices, all of whom were in the majority in *Hurst*, were required to retire under the state's mandatory retirement law, and were replaced. Two other recent appointees to the Florida Supreme Court were quickly appointed to the United States Court of Appeals for the Eleventh Circuit, leaving those seats on the state court vacant. The court's recent decision in *Poole*, which receded from *Hurst*, was accordingly decided by a five-member court, in a 4-1 decision (the sole dissenter being the sole member of the *Hurst* majority still on the court). Because of the unusual tectonic shifts in the composition of the Florida court, the new outcome in that court does not suggest that the split will resolve itself without this Court's intervention. On the contrary, it shows that different judges take radically different views of the Sixth Amendment, in a way that underscores the need for this Court's review.

aggravating and mitigating circumstances. The court explained that where "a jury finds that one or more aggravators are proven beyond a reasonable doubt but is unable to reach unanimous agreement on whether any mitigating circumstances are outweighed by the aggravating circumstances, such weighing is not a 'fact' and thus does not require jury determination." *State v. Barker*, 826 N.E.2d 648, 649 (Ind. 2005) (citing *Ritchie v. State*, 809 N.E.2d 258 (Ind. 2004)). In contrast, the court noted, the state's sentencing statute could not be constitutionally applied to permit a judge to sentence a defendant to death when the jury had not found beyond a reasonable doubt the facts underlying the balancing—namely, whether aggravating or mitigating circumstances exist. *See id.*

5. The Alabama and Illinois supreme courts held that the Sixth Amendment permits judges to weigh aggravating and mitigating circumstances and impose a death sentence. *See Ex parte Bohannon*, 222 So. 3d 525, 533 (Ala. 2016); *People v. Davis*, 793 N.E.2d 552, 565 (Ill. 2002). Notably, the Illinois court declined to reconsider its holding even after this Court in *Ring* clarified that *Apprendi* applied to capital sentencing. *See People v. Banks*, 934 N.E.2d 435, 469-70 (Ill. 2010) (declining to reconsider *Davis*). The legislatures of both states subsequently changed their statutes. In Alabama, the legislature enacted a new statute that shifted capital sentencing entirely into the hands of juries. *See* Ala. Code §§ 13A-5-45 to -47. In Illinois, the legislature abolished the death penalty. *See* 725 Ill. Comp. Stat. Ann. 5/119-1. If the legislature were to reinstate the death penalty, however, the state supreme court's interpretation of the Constitution would govern the sentencing regime.

II. The Question Presented Is Important.

The profound divide on this question undermines federal law's uniformity, bars states from treating all capital defendants alike, and casts doubts on the legitimacy of the states' legal systems. "[Multiple] independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed." *The Federalist No. 80*, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Even independent of the split, this question presented is important enough to warrant this Court's review. The issue is frequently recurring. In Missouri alone, judges impose the death penalty in an overwhelming percentage of cases in which the jury deadlocks—at a rate far higher than the jury death penalty rate in the state. Pet. App. 88a-99a; *see supra* p.8. The issue also necessarily arises in every other state that permits judicial sentencing or wishes to do so. In fact, it matters for every state and the federal government that might resort to the death penalty.

The issue is also important in a qualitative sense. This Court has repeatedly intervened to guard "one of the Constitution's most vital protections against arbitrary government"—the right to trial by jury. *United States v. Haymond*, 139 S. Ct. 2369, 2373 (2019). In the past two decades, this Court "has not hesitated to strike down other innovations that fail to respect the jury[]." *Id.* at 2377 (collecting cases). During this period, this Court has safeguarded defendants' right to trial by jury by barring judicial factfinding in sundry contexts. *See, e.g.*, *id.* at 2378 (revocation of supervised release); *S. Union Co. v. United States*, 567 U.S. 343, 360 (2012) (criminal fines); *United States v. Booker*,

543 U.S. 220, 233 (2005) (mandatory federal sentencing guidelines); *Cunningham v. California*, 549 U.S. 270, 288 (2007) (mandatory state sentencing guidelines); *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (same). The issue's importance is only heightened in the death penalty context, as death is "different from all other sanctions in kind," in that it is "unique" and "irreversible." *Woodson v. North Carolina*, 428 U.S. 280, 287, 303-04 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *see also Gardner v. Florida*, 430 U.S. 349, 357 (1977) (opinion of Stevens, J.) (holding that death is distinct for its "severity" and "finality") (citing *Gregg v. Georgia*, 428 U.S. 153 (1976)). That is why this Court intervened in *Hurst* and in *Ring* to establish the need for jury findings in capital cases. *See Hurst*, 136 S. Ct. at 621-22; *Ring*, 536 U.S. at 597-98.

As it has done in the past, this Court must once again step in to resolve a question of great importance regarding the right to a jury trial.

III. This Case Presents an Excellent Vehicle for Addressing This Issue.

1. This case is a strong vehicle to address the question presented. In the trial court and on appeal, petitioner argued that Missouri's death penalty procedure violates the Constitution. First, petitioner raised, Pet. Mo. Sup. Ct. Br. 78, 2018 WL 7512995, and received a ruling on the merits concerning whether the Sixth Amendment was violated when the judge balanced aggravating and mitigating circumstances before sentencing him to death, Pet. App. 38a-39a. Second, petitioner raised, Pet. Mo. Sup. Ct. Br. 95, 2018 WL 7512995, and received a ruling on the merits concerning whether the Eighth Amendment was violated

when the judge sentenced him to death after a jury declined to do so, Pet. App. 41a-42a. The Missouri Supreme Court rejected both constitutional claims, holding that a judge may constitutionally balance aggravating and mitigating circumstances and sentence a defendant to death. Thus, the issues were properly presented in the courts below, and this case presents no potential waiver issues.

2. The question presented in this case has been posed in prior petitions. That fact speaks to the question's importance and the frequency with which it arises. The prior petitions, though denied, involved serious vehicle problems that are not present here.

Two years ago, a petition for a writ of certiorari was filed in *Shockley v. Griffith*, No. 17-8599, *cert. denied*, 139 S. Ct. 68 (2018), supported by a strong amicus brief from a collection of former Missouri judges, *see* 2018 WL 2412134. However, the lower court had resolved the case on independent and adequate state law grounds. Under Missouri law, a habeas petition is barred when it raises claims already rejected in earlier proceedings, *see State ex rel. Strong v. Griffith*, 462 S.W.3d 732, 733-34 (Mo. 2015) (en banc), and the defendant previously raised and received a decision on his claims.

Similarly, in *Hurst v. State*, 202 So. 3d 40, 57 (Fla. 2016) (per curiam), *cert. denied*, 137 S. Ct. 2161 (2017), the lower court's decision rested on independent and adequate state law grounds, precluding this Court's review of Florida's petition for a writ of certiorari. *See Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983). Here, there is no such problem.

This Court denied a petition for certiorari in *Lotter*, *supra*. Lotter sought *Hurst*'s retroactive application on collateral review. *See* 917 N.W.2d at 864. The Nebraska Supreme Court ruled that *Hurst* did not apply retroactively and that Lotter's claim was time-barred. *See id*. at 864-65. In contrast to *Lotter*, this case is on direct appeal and thus poses no retroactivity problems. *See Teague v. Lane*, 489 U.S. 288, 304 (1989) (citing *Griffith v. Kentucky*, 479 U.S. 314 (1987)).

This Court also denied a petition for certiorari in *Ex parte Bohannon*, *supra*. *Bohannan* presented two interdependent constitutional issues. *See* 222 So. 3d at 527. If the Court had granted certiorari and only ruled on the issue that is also presented in this case, the *Bohannan* petitioner would not have received relief. Here, relief for petitioner is not contingent on this Court reaching another issue.

Finally, other petitions on this question were filed before there was a mature split among state courts of last resort. *See Davis*, 793 N.E.2d 552, *cert. denied*, 537 U.S. 896 (2002); *Woldt*, 64 P.3d 256, *cert. denied*, 540 U.S. 938 (2003); *Barker*, 826 N.E.2d 648, *cert. denied*, 546 U.S. 1022 (2005). Now, all active death penalty states with judicial balancing provisions have ruled on whether the provisions are unconstitutional.

Unlike the petitions that this Court has previously denied, this petition does not present any substantive or procedural problems. This Court should grant certiorari.

3. At least one other pending petition asks this Court to clarify the scope of its holding in *Hurst*. *See* Pet., *Jenkins v. Nebraska*, No. 19-514 (filed Oct. 17, 2019). *Jenkins* concerns Nebraska's capital sentencing

statute, which requires a panel of judges—and not a jury—to weigh aggravating and mitigating circumstances before sentencing a defendant to death. The petition challenges the Nebraska Supreme Court's decision that the statute does not violate the Sixth Amendment. *Id.* at 35.

Jenkins also presents a good vehicle to address this question. Although the State in *Jenkins* attempts to argue waiver, its contention is unpersuasive: at all stages of that case, the defendant preserved his argument that Nebraska's capital sentencing scheme violates the Constitution; it should not matter that he permitted a judge to find the existence of aggravating factors (the only issue reserved for a jury in that State). If the Court grants review in *Jenkins*, its decision will likely affect this case. Both petitioners ask this Court to rule on whether the Constitution requires a jury, and not a judge, to weigh aggravating and mitigating circumstances before imposing the death penalty. Thus, if this Court grants certiorari in *Jenkins*, the Court should hold this petition and should, following its decision on the merits, grant this petition, vacate the decision below, and remand the case for further consideration. On the other hand, if this Court finds that *Jenkins* is an inferior vehicle to consider the question, it should grant certiorari in this case.

IV. The Missouri Supreme Court's Decision Is Wrong.

The Missouri Supreme Court's decision violates the Sixth Amendment because it permits a judge to make a finding necessary to impose the death penalty. The court's decision further violates a fundamental

Eighth Amendment procedural safeguard by undermining the jury's role in speaking for the conscience of the community.

In capital cases, weighing aggravating and mitigating circumstances inherently requires juries to determine underlying factual questions. Moreover, the act of weighing poses the type of mixed question of fact and law that juries alone may answer. Juries must make these determinations as guardians of life and liberty against state power. And as the conscience of the community, only juries can ensure that imposing the ultimate sentence conforms with community values.

1. The Sixth Amendment requires a jury—not a judge—to make all findings necessary to sentence a defendant to death. In *Apprendi*, this Court held that a jury must make all findings necessary to increase the penalty for a crime.[12] 530 U.S. at 490. That right extends to capital defendants, *Ring*, 536 U.S. at 589, and requires that a jury make "the critical findings necessary to impose the death penalty," *Hurst*, 136 S. Ct. at 622.

To comply with these requirements, Missouri—at least initially—sends to the jury each finding necessary to impose a death sentence. Mo. Rev. Stat. § 565.030.4. Under Missouri's sentencing regime, the jury must find at least one aggravating circumstance, find whether mitigating circumstances outweigh aggravating circumstances, and determine whether "under all of the circumstances" the defendant is entitled

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[12] The two exceptions to this rule, relating to prior convictions, *see Apprendi*, 530 U.S. at 490, and consecutive sentences, *see Oregon v. Ice*, 555 U.S. 160, 172 (2009), do not apply here.

to mercy. *Id*. Absent these findings a defendant may not be sentenced to death. *See id.* When the jury reaches a decision on each of those questions, Missouri law abides by *Ring* and *Hurst*.

But when the jury cannot agree on a penalty and the judge "follow[s] the same procedure," Mo. Rev. Stat. § 565.030.4, Missouri law violates the Sixth Amendment. Following deadlock, the trial judge alone makes the critical findings that the Missouri sentencing statute requires. *See id.* In petitioner's penalty phase, the trial judge "accept[ed] and agree[d] with the factual findings of the jury" on the existence of aggravating circumstances. Pet. App. 70a. Notwithstanding the jury's verdict—that it could not "unanimously find that there are facts and circumstances . . . in mitigation of punishment sufficient to outweigh facts and circumstances in aggravation of punishment," *id.* at 81a—the judge conducted his own weighing analysis. He "f[ound] the facts and circumstances in mitigation of punishment were not sufficient to outweigh facts and circumstances in aggravation of punishment." *Id.* at 70a. As the Missouri Supreme Court acknowledged, the judge made critical "determinations" required to impose a death sentence. *Id.* at 39a.

The Missouri sentencing scheme is similar to the advisory scheme that this Court found unconstitutional in *Hurst*. In *Hurst*, this Court rejected Florida's sentencing procedure, under which juries advised judges on the sentence and judges exercised "independent judgment about the existence of aggravating and mitigating factors." *Hurst*, 136 S. Ct. at 620 (quoting *Blackwelder v. State*, 851 So. 2d 650, 653 (Fla. 2003) (per curiam)). In cases of jury deadlock, the Mis-

souri statute reduces the jury's findings to mere advice. As the Missouri Supreme Court acknowledged, the jury's findings regarding mitigating circumstances are "irrelevant" as soon as the sentencing decision has been passed to the judge. Pet. App. 34a n.14.[13] Just as Florida's advisory sentencing statute was unconstitutional, so too is Missouri's.

The court below tried to square the Missouri regime with *Ring* and *Hurst* by rejecting the idea that weighing mitigating and aggravating circumstances involves factual determinations. Pet. App. 30a-32a. That conclusion is wrong. Weighing mitigating and aggravating circumstances inherently involves factual determinations. As this Court acknowledged in *Kansas v. Carr*, weighing mitigating circumstances requires finding "*the facts establishing* mitigating circumstances." 136 S. Ct. 633, 642 (2016).[14] Wood's mitigating evidence included past selfless acts and reputation, post-arrest remorse and renewed faith, and community impact. Pet. App. 6a. Each of those mitigating elements relies on evidence that it in fact occurred and requires a factfinder to determine the credibility of the underlying evidence. Absent those findings of fact, a sentencer cannot weigh mitigating circumstances against aggravating circumstances and therefore cannot sentence the defendant to death. Under the Sixth Amendment, then, only a jury may find

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[13] Indeed, the same is true of the jury's findings regarding aggravating circumstances, even though judges frequently claim to rely on them.

[14] In *Carr*, this Court rejected a state supreme court's determination that the Eighth Amendment required a jury to be instructed on a standard of proof for mitigating circumstances. 136 S. Ct. at 642. It did not consider any Sixth Amendment questions.

the facts underlying a determination that mitigating evidence outweighs aggravating evidence.

2. Beyond those underlying factual questions, weighing mitigating and aggravating circumstances poses a mixed question of fact and law, which a jury must decide.

The Sixth Amendment requires that juries decide mixed questions of fact and law when the questions go to elements of the offense or increase potential penalties. *See Blakely*, 542 U.S. at 301-03 (penalties); *United States v. Gaudin*, 515 U.S. 506, 512-14 (1995) (elements). When a factual question cannot be disentangled from a legal one, a properly instructed jury must answer that mixed question. No one would suggest that a judge could make a negligence determination in a negligent homicide case; that question is for the jury. *Cf. Wynkoop v. State*, 14 So. 3d 1166, 1171 (Fla. Dist. Ct. App. 2009) (finding Sixth Amendment violated when defendant prevented from presenting evidence of negligence to jury). Similarly, to find that a defendant acted recklessly requires determining whether a risk is "unjustifiable," what "standard of conduct that a law-abiding person would observe in the [same] situation," and how far the defendant deviated from that standard. Model Penal Code § 2.02; *see also* Joshua Dressler, *Rethinking Criminal Homicide Statutes: Giving Juries More Discretion*, 47 Tex. Tech L. Rev. 89, 95-96 (2014). A jury must make that recklessness determination. *See United States v. Nash*, 482 F.3d 1209, 1220-21 (10th Cir. 2007).

So too here. The determination that the weight of mitigating circumstances falls short of the weight of aggravating circumstances is precisely the sort of mixed question that has been entrusted to juries in

criminal cases. *See* Sam Kamin & Justin Marceau, *The Facts About* Ring v. Arizona *and the Jury's Role in Capital Sentencing*, 13 U. Pa. J. Const. L. 529, 562 (2011); *see also Carr*, 136 S. Ct. at 642. Indeed, in *Kansas v. Marsh*, this Court acknowledged that weighing aggravating and mitigating factors is part of a jury's constitutional task: "a jury's conclusion that aggravating evidence and mitigating evidence are in equipoise is a decision for death and is indicative of the type of measured, normative process in which a jury is constitutionally tasked to engage when deciding the appropriate sentence for a capital defendant." 548 U.S. 163, 180 (2006) (emphasis omitted).

The task demands that the jury find facts underlying mitigating factors and then decide their legal significance. For example, to weigh aggravating and mitigating circumstances here, the jury would be required to find whether petitioner was a drug addict and then decide whether that circumstance outweighs the aggravating circumstances. Those types of findings are inherently for the jury in all criminal cases.

3. In finding whether mitigating circumstances existed in place of the jury, the trial judge usurped the jury's constitutional role. That role—supervising judges to protect individual liberty—serves as a bulwark of our democratic system. "The Constitution seeks to safeguard the people's control over the business of judicial punishments by ensuring that any accusation triggering a new and additional punishment is proven to the satisfaction of a jury beyond a reasonable doubt." *Haymond*, 139 S. Ct. at 2380. When juries make the findings prerequisite to a death sentence, they "exercise supervisory authority over the judicial function by limiting the judge's power to punish." *Id.*

at 2376. When judges instead supervise juries, they subvert the Sixth Amendment's right to jury trial. Moreover, juries safeguard life and liberty by injecting "the voice of the people" into the decision to "condemn[]" a defendant's life. 2 *The Works of John Adams* 253 (Charles Francis Adams ed., 1850). In reflecting the "conscience of the community," *Jones v. United States*, 527 U.S. 373, 382 (1999) (citation omitted), juries stand as "the grand bulwark of [a citizen's] liberties," 4 William Blackstone, *Commentaries* *349. Transferring ultimate authority over life and death from jury to judge "sap[s] and undermine[s]" the jury's authority in the name of "convenien[ce]." *Id.* at *350 (emphasis omitted). But "delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters." *Id.*

4. The Eighth Amendment independently bolsters the Sixth Amendment's demand that juries weigh mitigating and aggravating factors. Under the aegis of the Eighth Amendment, this Court has required states to institute adequate procedural safeguards to prevent death sentences from being meted out in an impermissibly arbitrary fashion. *See Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring); *see also Gregg*, 428 U.S. at 192-93 (opinion of Stewart, Powell, and Stevens, JJ.). This Court has also barred punishments that are either "barbarous" or "excessive" in relation to the crime committed. *Trop v. Dulles*, 356 U.S. 86, 99 (1958) (plurality opinion); *Weems v. United States*, 217 U.S. 349, 368 (1910). In assessing the excessiveness of the death penalty in a particular circumstance, this Court has invoked the

"attitude" of "sentencing juries" concerning "the acceptability of [such a] penalty." *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion).

The Eighth Amendment's procedural safeguards must include the requirement that a jury, not a judge, assess the appropriateness of capital punishment in a particular case and impose any death sentence. *See Ring*, 536 U.S. at 614 (Breyer, J., concurring in the judgment). Juries are uniquely positioned to determine whether the death penalty is appropriate in a specific instance. No judge should supersede a jury that "express[es] the conscience of the community on the ultimate question of life or death," *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). Juries are uniquely in tune with community sensibilities and are, therefore, especially able to determine whether an individual defendant's crime merits a death sentence. *Gregg*, 428 U.S. at 181 (opinion of Stewart, Powell, and Stevens, JJ.) ("The jury also is a significant and reliable objective index of contemporary values because it is so directly involved."). Thus, the jury is the only institution that can meet the Eighth Amendment's demands that a capital statute must allow a sentencer to fully consider, *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982), as mitigating evidence any aspect of a defendant's "character, prior record, or the circumstances of his offense," *Lockett v. Ohio*, 438 U.S. 586, 604 n.12 (1978) (plurality opinion), and give a "reasoned moral response," *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)) (emphasis omitted).

Concerns about the Eighth Amendment are heightened in the context of Missouri's pro-death sentencing scheme. Unlike many other states, Missouri's

scheme provides that once any aggravating circumstance is found (and the list is broad), a defendant must convince a jury unanimously to hold that the mitigating circumstances outweigh the aggravating ones, or to otherwise unanimously decline to sentence the defendant to death. Mo. Rev. Stat. § 565.030.4. This burden-shifting framework makes jury deadlocks likely—and the data show beyond question that jury deadlocks lead to death sentences. Thus, Missouri's system is effectively designed to promote judicial death sentences.

In supplanting the jury's refusal to sentence petitioner to death, the trial court eroded the constitutional guarantees of the Eighth Amendment. The jury was cognizant of its grave responsibility in considering whether a member of its community deserved the ultimate sentence. The murder drew a "tremendous amount of media attention," Tr. 3934, and the courtroom was chock full of television cameras and newspaper reporters, *id*.; *see also* Tr. 3694 ("[Y]ou can't imagine the publicity that this case has gotten, and the stigma to be associated with Craig Wood has been unbelievable."). A jury of twelve of petitioner's peers considered unassailable evidence of petitioner's crime. When it came down to whether petitioner deserved to die, the jury carefully considered how it would express the community's conscience. The jury ultimately deadlocked, unable to affirmatively sentence petitioner to death. But the trial judge intervened, independently weighed the aggravating and mitigating factors, and imposed the ultimate sentence. Petitioner was the second defendant sentenced to death by a Missouri judge breaking a jury deadlock since 2017. Pet. App. 99a. Missouri's ongoing violation of the right of trial by jury

infringed upon petitioner's right to be free from cruel and unusual punishment and deserves this Court's consideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 31, 2020