No. 08-___

IN THE

Supreme Court of the United States

SCOTT A. MCLAUGHLIN
Petitioner,

v.

STATE OF MISSOURI
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

CAPITAL CASE
PETITION FOR A WRIT OF CERTIORARI

DEBORAH B. WAFER
OFFICE OF THE PUBLIC DEFENDER
1000 St. Louis Union Station
Suite 300
St. Louis, MO 63103
(314) 340-7662, ext. 236

CHARLES OGLETREE*
ROBERT J. SMITH
125 Mount Auburn St.
Third Floor
Cambridge, MA 02138
(617) 495-8285

**Counsel of Record for Petitioner*

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

CAPITAL CASE
QUESTION PRESENTED

Missouri law requires the sentencing jury to determine that mitigating evidence weighs less than aggravating evidence *before* a person convicted of first-degree murder can be eligible for a possible death sentence. Nonetheless, in petitioner's case, the Missouri Supreme Court held that the defendant must bear the burden of persuasion at the weighing step. Missouri is the only state in the country that requires the defendant to demonstrate the sufficiency of the mitigating evidence to a unanimous jury. This gives rise to the following two questions:

I. Whether the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum . . . must be submitted to a jury and proved beyond a reasonable doubt," applies to the weighing of aggravating and mitigating evidence at the penalty phase of a capital trial.

II. Whether Missouri law violates the Eighth and Fourteenth Amendments by requiring the defendant to carry the burden of demonstrating to a unanimous jury that mitigating evidence outweighs aggravating evidence.

PARTIES TO THE PROCEEDING

The petitioner is Scott A. McLaughlin, the defendant and defendant-appellant in the courts below. The respondent is the State of Missouri, the plaintiff and plaintiff-respondent in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Scott McLaughlin respectfully petitions for a writ of certiorari to review the judgment of the Missouri Supreme Court in this case.

OPINION BELOW

The opinion of the Missouri Supreme Court is reported at 265 S.W.3d 257 (Mo. Banc 2008), and is reprinted in the Appendix at Pet. App. A. 1a-42a. The denial of rehearing is attached in the Appendix at Pet. App. B. 43a-44a.

JURISDICTION

The opinion of the Missouri Supreme Court was entered on August 26, 2008. That court denied McLaughlin's timely petition for rehearing on September 30, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury[.]

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides:

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

Section 565.030.4 of the Missouri Revised Statutes provides in relevant part:

> 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 mentally retarded; 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.

STATEMENT OF THE CASE

The two questions presented by this case encompass interrelated issues. First, where state law conditions death eligibility upon the outcome of the weighing determination, whether the finding that mitigating evidence weighs less than aggravating evidence must be submitted to a jury, and proved (by the state) beyond a reasonable doubt. Second, regardless of *Apprendi*'s applicability, whether the requirement that the defendant demonstrate to a unanimous jury that mitigating evidence outweighs aggravating evidence is incompatible with the heightened reliability that the Eighth and Fourteenth Amendments demand in capital sentencing proceedings.

In *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), the Court held that the Sixth Amendment right to a jury trial requires all facts "that increase[] the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved [by the state] beyond a reasonable doubt."

Two years later, in *Ring v. Arizona*, 536 U.S. 584 (2002), the Court applied the *Apprendi* rule to Arizona's capital sentencing scheme, and held that a

jury—and not a judge—must determine the existence of any aggravating factor. The *Ring* Court explained that a conviction for first-degree murder does not by itself render a person eligible for death. Instead, a defendant has to be found guilty of murder plus one, meaning the state must secure a first-degree murder conviction and also prove the existence of at least one aggravating factor by proof beyond a reasonable doubt.[1] *Id.* at 609.

Under the Missouri scheme at issue here, a defendant is not eligible for a death sentence until the jury has found him guilty of murder and has made two additional factual findings: that a statutory aggravating circumstance applies beyond a reasonable doubt; and, the mitigating evidence is not stronger than the aggravating evidence.

In *State v. Whitfield*, 107 S.W.3d 253, 261 (Mo. banc 2003), the Missouri Supreme Court held that the outcome of the weighing of aggravating and mitigating evidence, no less than the finding of a statutory aggravating circumstance, is a "prerequisite[] to the trier of fact's determination that a defendant is death-eligible." Accordingly, the court found that a jury—not a judge—must conduct the weighing step. *Id.* at 261-62 (the fact that the judge made the weighing determination "clearly violated the requirement of *Ring* that the jury rather than

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[1] *Ring* did not reach whether a jury must make any capital sentencing determination above the existence of an aggravating factor. *Id.* at fn 4. (noting that petitioner's claim was "tightly delineated" and "contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him.").

the judge determine the facts on which the death penalty is based.").

Though the Missouri Supreme Court ostensibly found the *Apprendi* rule applicable to the weighing determination, in petitioner's case that court held that the defendant—rather than the state—must bear the burden of persuading a unanimous jury that the mitigating evidence outweighs aggravating evidence. *State v. McLaughlin*, 265 S.W.3d 257, 268 (Mo. banc 2008) ("this Court reaffirms its holding in [*State v.*] *Zink* [181 S.W.3d 66 (Mo. banc 2005)] that under section 565.030.4(2), the jury must unanimously decide that the mitigating evidence outweighs the aggravating evidence in order to be required to return a life sentence.") In sum, Missouri applies the jury submission portion of the *Apprendi* rule, but eschews the inseparable requirement that it is the state that must prove against the defendant, beyond a reasonable doubt, the existence of any fact that raises the punishment ceiling.

Fifteen other state courts of last resort and four federal courts of appeal have addressed, and are conflicted over, whether and how the *Apprendi* rule affects the weighing stage of their respective capital sentencing statutes. The division in the lower courts is entrenched and their holdings are outcome-determinative in capital cases.

Of the states that have concluded that a defendant is not eligible for a death sentence unless the mitigating evidence is insufficient to outweigh the aggravating evidence, Missouri alone requires the defendant to bear the burden of persuasion at the weighing stage. Assignment of the burden of persuasion to the defense at a death-eligibility stage

conflicts with this Court's Sixth, Eighth, and Fourteenth Amendment jurisprudence.

This court should grant review to resolve the conflict below, and to clarify that any sentencing determination that has the effect of increasing the maximum penalty from life imprisonment to a death sentence must be submitted to a jury, and proved by the state beyond a reasonable doubt.[2]

This Court should also grant review to address whether a capital scheme that taxes the defendant with the burden of proving to a unanimous jury that he is not death-eligible is inconsistent with this Court's Eighth and Fourteenth Amendment jurisprudence and the need for heightened reliability in capital sentencing.

1. *Legal Background.* Missouri's capital sentencing statute requires three distinct determinations before the state can impose a death sentence: (1) A statutory aggravating factor must exist, (2) Any mitigating evidence must not outweigh the aggravating evidence, and (3) In any event, death must be the appropriate punishment. *Whitfield*, 107 S.W.3d at 261. The death penalty is not a sentencing option unless the jury decides the first two steps against the defendant. At the weighing step, to obtain a sentence of life imprisonment, the defendant must demonstrate to a unanimous jury that the mitigating evidence outweighs the aggravating evi-

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[2] This case does not implicate *Proffitt v. Florida*, 428 U.S. 242 (1976) or *Harris v. Alabama*, 513 U.S. 504 (1995), both of which permit a judge to make the sentencing determination once a jury makes the findings necessary to render a person death-eligible.

dence. If even a single juror finds the mitigating evidence insufficient, the defendant becomes death-eligible and the jury moves to the final step, where it determines whether death is the appropriate punishment. Again, the burden of persuasion (unanimous) rests with defendant. If the jury deadlocks on the final, selection step (but not before), the circuit court imposes the sentence. *McLaughlin*, 265 S.W.3d at 264.

2. Petitioner's jury found one of the four statutory aggravating factors submitted but did not unanimously determine that the evidence in mitigation outweighed the aggravating evidence. Pet. App. C. 46a. The jury then deadlocked on the separate question of whether death was the appropriate punishment. Though as many as eleven of the twelve jurors may have found that the mitigating evidence outweighed the aggravating evidence (and thus that life was the appropriate sentence), the circuit court judge reconsidered all of the facts and sentenced petitioner to death. *McLaughlin,* 265 S.W.3d at 264 ("The judge below did not err in reconsidering the facts and determining that under all of the circumstances death should be imposed.").

3. *Factual Background.* On the evening of November 22, 2003, St. Charles police officers arrested Mr. McLaughlin as he arrived at a hospital in search of medication to treat his deteriorating mental illness. T. 1052-58, 1061-63. Mr. McLaughlin was charged with the first-degree murder and forcible rape of Beverly Guenther, his on-again, off-again girlfriend. T. 803, 813, 819, 832.

Though Mr. McLaughlin and Ms. Guenther had broken things off before, this latest time

Guenther indicated that she was truly calling it quits. T. 816, 821-22.[3] Nonetheless, Mr. McLaughlin desperately hoped to win her back. Mr. McLaughlin, distraught and sobbing at his grandfather's burial the day before Guenther's death, told his relatives "he didn't know what to do [about Beverly], but he loved her, and that she was messing with his head." T. 1609. Though his family advised him to "leave it alone ... let her go," Mr. McLaughlin felt "he couldn't because he loved her," T. 1032, 1039, and "his life would be over if he couldn't have her." T. 1609.

On the night of November 20, 2003, Mr. McLaughlin waited outside Guenther's place of work in hopes that he could talk to her. State Exhibits 70, 71, 71A. When Guenther rejected his plea, telling him to "get out of here," Mr. McLaughlin lost control. *Id.*

When detectives asked Mr. McLaughlin why he killed Guenther, he said, "I have no idea. I've never done something like this before." *Id.* One detective that interviewed Mr. McLaughlin described how McLaughlin "put his hands to his head and [] was crying, and [] told us that she was dead and that he had dumped her in the river." T. 1185.

Mr. McLaughlin offered his full cooperation to the police—even leading detectives to the place where Guenther's body was located. T. 1185-89. Acknowledging responsibility, and remorseful, Mr.

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[3] Petitioner moved out of Guenther's house, a restraining order was taken out against him, and burglary charges were filed when he was found entering Guenther's house to remove some of the belongings he had left there. T. 927-34, 1645-46.

McLaughlin left the following message on Guenther's employer's answering machine: "Ken and Judi, I just wanted to say I am sorry for what I did, and I am ashamed of it." T. 807-10.

4. *Proceedings Below*. The guilt phase of Mr. McLaughlin's trial began on September 25, 2006. LF. at 15. The jury began deliberating on September 27, 2006, and found Mr. McLaughlin guilty of first-degree murder and rape on September 28, 2006. *Id*. The penalty phase of the trial began that same day. The jury found one of the four statutory aggravators submitted—that the crime involved "depravity of mind." Pet. App. C. 46a-47a.

Mr. McLaughlin introduced extensive mitigating evidence touching upon his poor mental health, impaired intellectual functioning, and the trauma he suffered through his developmental years.

The jury learned that from birth to age three Mr. McLaughlin lived solely with his mother (who was working as a prostitute at the time) because his father, who was an alcoholic, had abandoned him. T. 1545. He bounced between several foster homes and various relatives until his adoptive parents, the McLaughlins, took custody of him at age five. T. 1545-46. His adoptive mother's description of him "as a clingy child who always needed to know where his parents are at all times, especially his mother" indicated "significant insecurity and anxiety" which was corroborated by his inability to fall asleep until his adoptive father returned home each night. T. 1548-49.

Petitioner's behavioral problems skyrocketed. When petitioner was in third grade, his elementary

school counselor documented the severity of his psychological state:

> I would evaluate Scott's psychological problems as being extremely serious. I have worked as an elementary school counselor for nine years in three different schools and had to deal with some very serious cases. Scott's is the most serious of all.

T. 1730.

Mr. McLaughlin's traumatic home-life exacerbated his mental decline. The McLaughlin house was known as the "House of Horrors." T. 1615-16, 1618. The children had to sit in chairs until Harlan, their adoptive father, got home from work and paddled them with a homemade "board of education." T. 1913-14. Harlan was a police officer and, as Scott got older, sometimes used his taser and nightstick on him. T. 1913, 1920. The McLaughlins locked the refrigerator and cabinets to keep the children from getting to the food. T. 1916. If the cats gave birth to kittens, Louise, petitioner's adoptive mother, made the children drown them. T. 1916-17.

When Mr. McLaughlin was nine years old, Psychologist Anthony Udziela and Dr. Pasquale Accardo, a physician specializing in developmental pediatrics, evaluated Mr. McLaughlin at Knights of Columbus Developmental Center (KCDC) at Cardinal Glennon Children's Hospital in St. Louis because of concerns that "he might have neurological issues." T. 1541. The KCDC medical team diagnosed Mr. McLaughlin with neurological brain damage, a "striking" attention deficit disorder with hyperactiv-

ity, a specific learning disability with a developmental disorder of expressive language, and "significant issues with attachment and basic trust and mistrust that were associated with the very significant neglect and erratic first five years of his life" which "markedly affected his development and had a major impact on him resulting in an adjustment disorder with depressed features." T. 1554.[4] McLaughlin's verbal IQ score of 74 on the revised Wechsler Intelligence Scale for Children fell in the borderline retarded range. T. 1552.[5]

In response to a doctor's question of what he wanted to do when he grew up, then nine-year old petitioner gave "[p]robably one of the most bizarre answers" the doctor had ever heard: "he wanted to be dead." Def.Ex.E, 33. This "strikingly unguarded... response... support[ed] a diagnosis of a depressive syndrome." Def.Ex.E, 34-35.

Mr. McLaughlin's early-diagnosed mental illness would continue to haunt him during his adult life—requiring expensive medication that he often

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[4] Subsequent testing by Dr. Pasquale Accardo confirmed brain impairment. Def.Ex.E, 21-23. On the "Rey-Osterreith" complex figure-drawing test, used to assess brain damage, Mr. McLaughlin's score was below the lowest possible chronological adjustment score of five years old. Def.Ex.E, 25-26. On the Visual Auditory Digit Span test, his ability to repeat numbers spoken or said to him was at the level of a six-year-old. Def.Ex.E, 28-29. His ability to repeat them backwards was at the seven-year level. *Id.*

[5] His full scale IQ of 82 placed him in the low average range. T. 1552. Subsequent testing between the ages 9 and 17 revealed IQ scores of 73, 79, 75, and 77 that were "clearly deficient in nature" and "bumping right up against the mentally retarded range." *Id.*

could not afford and causing at least one week-long stay at a mental hospital. T. 1639, 1657-60.

The twelve jurors did not unanimously conclude that the mitigating evidence outweighed the evidence in aggravation. Pet. App. C. 46a. Roughly five and one-half hours after beginning sentencing deliberations, the jury returned with a verdict of "unable to decide or agree upon the punishment." T. 1998-2000. The trial judge imposed a sentence of death.

The trial court judge overruled Mr. McLaughlin's timely motion for new trial, as well as his motion for imposition of a sentence of life imprisonment without probation or parole. T. 2005-06.

5. Mr. McLaughlin appealed his conviction and death sentence to the Missouri Supreme Court. Among his allegations of error, Mr. McLaughlin contended the Missouri sentencing scheme contravened this Court's holdings in *Ring* and *Apprendi*. App.Br. 50-56. Specifically, Mr. McLaughlin alleged that if the weighing step of the state sentencing statute constituted a factual determination, as the state court had previously held, then it was error to place the burden of persuasion on petitioner rather than on the state. App.Br. 50-60. Petitioner also alleged as error Missouri's failure to apply the beyond a reasonable doubt standard to the weighing step of the sentencing statute. App.Br. 51. Petitioner rested the argument that his death sentence should be vacated on Sixth, Eighth, and Fourteenth Amendment grounds, as well as on the need for reliability in capital sentencing. *Id.*

On August 26, 2008, the Missouri Supreme Court affirmed petitioner's death sentence. The Court held that "under section 565.030.4(3) [of the state capital sentencing statute] the jury must unanimously decide that the mitigating evidence outweighs the aggravating evidence in order to be required to return a life sentence." *McLaughlin*, 265 S.W.3d at 268. The Missouri Supreme Court further found the state scheme's requirement – that to impose a life sentence, the jury must unanimously decide the mitigating evidence outweighs the aggravating evidence – satisfied the *Apprendi* fact-finding requirement. *Id.* at 264.

The Missouri Supreme Court states clearly that *Apprendi* and *Ring* apply to the weighing stage, but does not appear to have contemplated that the allocation of the burden of persuasion to the defense—by a unanimous margin, no less—facially conflicts with the *Apprendi* mandate that every factual determination that has the effect of increasing the maximum possible punishment be submitted to a jury, and proven by the state beyond a reasonable doubt.

After rejecting Mr. McLaughlin's Sixth and Eighth Amendment claims, the Missouri Supreme Court affirmed his conviction and death sentence. Pet. App. A. 42a.

6. In his timely application for rehearing, Petitioner reiterated that the burden of persuasion at the weighing step must rest with the state, beyond a reasonable doubt, if, as the Missouri Supreme Court held in *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003), that step constitutes a factual finding prerequisite to death eligibility:

> Even if this Court had never issued *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003), as a matter of constitutional due process, the death-eligibility steps of Section 565.030.4(2) and (3), RSMo. (Supp. 2007), would still have to be proved by the state, against the defendant, to establish the defendant's eligibility for the sentence of death. This Court has said that §565.030.4(3) is a death-eligibility step. *Whitfield*, *supra*. The state, then, must prove this death-eligibility fact against the defendant.
>
> Requiring the defendant to bear the burden of establishing to a unanimous jury that the mitigating circumstances outweigh the aggravating circumstances stands *Ring* on its head. Because the Missouri legislature, as this Court recognized in *Whitfield*, has established two factual findings that must be made to enhance the defendant's sentence from life to death, it follows that the state must bear the burden as to those steps.

Rehr'g.Mot. at 8-11 (internal citations omitted).

The Missouri Supreme Court denied the application for rehearing on September 30, 2008. Pet. App. B. 43a. This petition ensues.

REASONS FOR GRANTING THE WRIT

The Missouri Supreme Court ruling in this case reflects the persistent confusion in the lower courts over whether and how the *Apprendi* rule applies to the weighing of aggravating and mitigating evidence. *See, e.g.*, Bryan A. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 Ala. L. Rev. 1091, 1121 (2003) ("In the wake of *Ring*, the inevitable next questions for resolution are whether the *Ring* rationale requires a jury also to make the . . . assessment whether aggravating circumstances outweigh mitigating circumstances."); *Duest v. State*, 855 So. 2d 33, 50 (Fla. 2003) (Pariente, J., specially concurring) ("those cases [addressing the applicability of *Ring* to the weighing determination] . . . illustrate that *Ring* has raised at least as many questions in the state courts as it has answered.").

This Court should use this case to resolve the issue. By finding that the *Apprendi* rule applies to the weighing step of Missouri's capital sentencing scheme, but nonetheless holding that it is the defendant who (at this step) must persuade the jury that he is not death-eligible, the Missouri Supreme Court seriously clouds the bright-line *Apprendi* rule. Moreover, the Missouri Supreme Court's reading of *Apprendi* and *Ring* has grave practical implications for capital defendants. A lone juror who deems the mitigating evidence to be insufficient renders the defendant death-eligible. If the same juror (again acting alone) also finds death to be the appropriate pun-

ishment, she bestows the presiding judge with the power to impose a death sentence.[6]

The opinion below (and thus the rule applicable to all Missouri capital trials) cannot be reconciled with the Sixth Amendment regardless of the angle from which one views it—either *Apprendi* applies to the weighing stage, and the state court improperly placed the burden of persuasion on the defense, or the decision below incorrectly applied *Apprendi* to the weighing determination. In either event, this case warrants plenary review.[7]

States and federal courts have had ample time to address whether the Sixth Amendment applies to the weighing determination at the sentencing phase of a capital trial, and those that have are deeply and openly divided over whether, how, and why *Apprendi* is applicable. The answer to this question is of fundamental importance to the administration of capital punishment throughout the country. The courts below have framed the issue and it is exceedingly improbable that further percolation will do anything to ease the tension. This Court should step-in to settle the conflict.

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[6] *Cf. McKoy v. North Carolina*, 494 U.S. 433, 440 (1990) ("[W]e held [in *Mills v. Maryland*, 486 U.S. 367 (1988)] that it would be the 'height of arbitrariness' to allow or require the imposition of the death penalty where 1 juror was able to prevent the other 11 from giving effect to mitigating evidence.").

[7] *See Kansas v. Marsh*, 548 U.S. 163, 183 (2006)(Scalia, J., concurring) ("Our principal responsibility under current practice, however, and a primary basis for the Constitution's allowing us to be accorded jurisdiction to review state-court decisions, see Art. III, §2, cls. 1 and 2, is to ensure the integrity and uniformity of federal law.").

I. THE STATE AND FEDERAL COURTS ARE IRRECONCILABLY CONFLICTED.

A. Four State Courts of Last Resort Find *Apprendi* Applicable to the Weighing of Aggravating and Mitigating Evidence.

On remand from this Court's decision in *Ring v. Arizona*, the Arizona Supreme Court rejected the state's contention that the *Apprendi* rule did not apply to the weighing stage of the state sentencing statute. As the court explained,

> In both the superseded and current capital sentencing schemes, 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. Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency.

State v. Ring, 204 Ariz. 534 (Ariz. 2003)(*Ring II*).

The Nevada Supreme Court, in *Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002), held the *Apprendi* rule applicable to the weighing step of its capital sentencing scheme. The court explained the "finding [that there are no mitigating circumstances that outweigh the aggravating circumstances] is

necessary to authorize the death penalty in Nevada, and [concluded] that it is in part a factual determination, not merely discretionary weighing." *Id.* "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact," the Nevada Supreme Court continued, "that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Id.* (internal quotations omitted).

In *Woldt v. People*, 64 P.3d 256, 265 (Colo. 2003) (en banc), the Colorado Supreme Court found "unconstitutional on its face under *Ring*" the portion of the state sentencing scheme whereby a "three-judge panel decided whether the mitigating factors outweighed the aggravating factors . . ." *Id.* The Colorado Supreme Court held that a unanimous jury – and not a three-judge panel – must "be convinced beyond a reasonable doubt that any mitigating factors did not outweigh the proven statutory aggravating factors." *Id.* at 265.

The Missouri Supreme Court, in *State v. Whitfield*, held that *Ring* applies to the weighing stage of the state's capital sentencing scheme. 107 S.W.3d at 261. In *Whitfield*, the defendant's death sentence was reversed because the "trial judge erred in himself making the factual determination [that the evidence in mitigation did not outweigh the aggravating evidence] that [is] predicate to imposition of Missouri's death penalty." *Id.* at 261.

The Connecticut and Wyoming Supreme Courts interpret their state statutes so as to comply with *Apprendi* and *Ring*. *See State v. Rizzo*, 266 Conn. 171, 242 (2003) (finding "the jury must be instructed that its level of certitude be beyond a rea-

sonable doubt when determining that the aggravating factors outweigh the mitigating factors . . ."); *Olsen v. State*, 2003 WY 46, 67 (Wyo. 2003) ("If the jury is to be instructed to "weigh" . . . *the burden of negating this mitigating evidence by proof beyond a reasonable doubt remains with the State.*" (emphasis supplied)). An additional seven state schemes legislatively impute the *Apprendi* rule into their sentencing determinations. *See, e.g., State v. Lovelace*, 90 P.3d 298, 301 (Idaho 2004) ("Subsequent to the *Ring* decision, the legislature revised Idaho's capital sentencing statutes, requiring that a jury find and consider the effect of aggravating and mitigating circumstances in order to decide whether a defendant should receive a death sentence").[8]

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[8] *See also* Ohio Rev. Code 2929.03(D) (jury [must] unanimously find[], by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors; AR ST § 5-4-603 (Arkansas) (jury [must] unanimously returns written findings that . . . aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist . . . Aggravating circumstances justify a sentence of death beyond a reasonable doubt.); Tenn. Code Ann. 39-13-204 (g) (1) (B) (If the jury unanimously determines that a statutory aggravating circumstance [exists], but that such circumstance or circumstances have not been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt, the jury shall. . . sentence the defendant... to. . . life.); Utah Code Ann. 76-3-207 (5) (b) (death penalty shall only be imposed if. . . the jury is persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation); RCW 10.95.060 (Washington) (jury must be convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency); K.S.A. § 21-4624 (2006) (Kansas) (death penalty not imposed unless "by unanimous vote, the jury finds beyond a reasonable doubt . . . that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist . . .").

B. In Direct Contrast, the Majority of State and Federal Courts Find *Apprendi* Inapplicable to the Weighing of Aggravating and Mitigating Evidence.

Six state courts of last resort hold that the *Apprendi* rule does not apply because the weighing process is not a factual determination. The Illinois Supreme Court, in *People v. Ballard*, 206 Ill. 2d 151 (2002), addressed whether it was "inaccurate to conclude that the death penalty is authorized by the facts found by the jury after the first stage of death penalty proceedings, because this second finding must still be made, unanimously, before that penalty can be imposed." *Id.* at 203. The Court noted that defendant's argument "appears to find some support in *Ring*," and that it was not "beyond question" that the weighing of aggravating and mitigating evidence constituted a "factual" determination. *Id.* at 204. Ultimately, however, the Court distinguished *Ring* because Ballard's "complaint concerns mitigating, not aggravating, factors." *Id.* The Court concluded that though it was bound by this Court's precedents, it was "not bound to extend the decisions." *Id.*; *see also Ex parte Waldrop*, 859 So.2d 1181, 1189 (Ala. 2002) ("weighing process is not a factual determination," but instead "a moral or legal judgment that takes into account a theoretically limitless set of facts and that cannot be reduced to a scientific formula or the discovery of a discrete, observable datum"); *accord People v. Lewis*, 43 Cal. 4th 415 (2008) ("[t]here is no federal constitutional requirement that a jury [] conduct the weighing of aggravating and mitigating circumstances . . ."); *Oken v. State*, 835 A.2d 1105, 1151-52 (Md. 2003) ("the weighing process is not a

fact-finding one based on evidence.")[9]; *Commonwealth v. Roney*, 866 A.2d 351, 360 (Pa. 2005) ("[b]ecause the weighing of the evidence is a function distinct from fact-finding, *Apprendi* does not apply here."); *State v. Fry*, 126 P.3d 516, 531-36 (N.M. 2005) ("balancing process is not a fact necessary to constitute the crime with which [the defendant] is charged such that it would invoke the constitutional requirement of proof beyond a reasonable doubt . . .").

Five state courts of last resort hold that *Ring* is inapplicable because the weighing function does not increase the maximum punishment. *See Ritchie v. State*, 809 N.E.2d 258, 268 (Ind. 2004) ("The outcome of weighing does not increase eligibility . . . [and] is therefore not required to be found by a jury under a reasonable doubt standard.")[10]; *accord Brice v. State*, 815 A.2d 314, 322 (Del. 2003) ("the weighing . . . does not increase the punishment [but] ensures that the punishment imposed is appropriate and proportional."); *Nebraska v. Gales*, 265 Neb. 598, 627-628 (2003) ("These [weighing] determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibil-

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[9] *But see Evans v. State*, 886 A.2d 562, 580 (Md. 2005) (Raker, J., dissenting, joined by Bell, C.J., Greene, J.) ("The balancing of the aggravating and mitigating factors, however, is a factual finding of the sort *Ring* and *Apprendi* require to be proved beyond a reasonable doubt.").

[10] *But see Ritchie*, 809 N.E. 2d at 273 (Rucker, J., dissenting in part, concurring in part) ("The plain language of Indiana's capital sentencing scheme makes death eligibility contingent upon certain findings that must be weighed by the jury . . . they are at a minimum the type of findings anticipated by *Apprendi* and *Ring* and thus require proof beyond a reasonable doubt.").

ity determination.); *Torres v. State*, 58 P.3d 214, 216 (Ok. Crim. 2002) (It is [the aggravating factor] finding, not the weighing of aggravating and mitigating circumstances, that authorizes jurors to consider imposing a sentence of death."); *State v. Anderson*, 2008 La. LEXIS 1744, pp. 102-103 (La. 2008) (rejecting defendant's claim that a determination of death-worthiness requires proof beyond a reasonable doubt, and finding that *Ring* applied to "predicate facts" and not the "ultimate sentence.").

Four federal courts of appeal similarly refuse to apply *Apprendi* to the weighing of aggravating and mitigating evidence. In *United States v. Mitchell*, 502 F.3d 931, 993 (9th Cir. 2007),[11] the Ninth Circuit held, over the dissent of Judge Reinhardt, that the beyond a reasonable doubt standard does not apply at the weighing stage because "the jury's task is no longer to find whether factors exist; rather, each juror is to "consider" the factors already found and to make an individualized judgment whether a death sentence is justified." The Court further explained "the weighing step is an equation that merely channels a jury's discretion by providing it with criteria by which it may determine whether a sentence of life or death is appropriate." *Id.*; *see also United States v. Sampson*, 486 F.3d 13, 31 (1st Cir. 2007) ("the requisite weighing [provision of the Federal Death Penalty Act] constitutes a proc-

[11] In dissent, Judge Reinhardt underscored that "[t]here is no doubt that the finding that aggravating factors outweigh mitigating factors increased Mitchell's maximum punishment [under the Federal Death Penalty Act]." *Mitchell*, 502 F.3d at 1011. "Absent this finding," Judge Reinhardt reasoned, "the maximum sentence the court could have imposed would have been life imprisonment without the possibility of release." *Id.* at 1012.

ess, not a fact to be found . . . Hence, the weighing of aggravators and mitigators does not need to be "found."); *United States v. Fields*, 483 F.3d 313, 346 (5th Cir. 2007) ("the jury's decision that the aggravating factors outweigh the mitigating factors is not a finding of fact [but rather] it is a 'highly subjective,' 'largely moral judgment' 'regarding the punishment that a particular person deserves." (internal quotations omitted)); *accord United States v. Barrett*, 496 F.3d 1079, 1107-08 (10th Cir. 2007) (same).

C. The Opinion Below Cannot Be Reconciled with this Court's Sixth Amendment Jurisprudence or the Decision of any other Court that has Addressed this Issue.

The Missouri Supreme Court's holding that, though the *Apprendi* rule applies, the state sentencing scheme properly places the burden of persuasion on the defendant at the weighing stage cannot be reconciled with this Court's *Apprendi* decision. The *Apprendi* rule consists of at least three separate and indispensable elements: (1) The state must submit any fact that increases the sentencing ceiling, (2) to a jury, (3) and prove that fact beyond a reasonable doubt. The effect of the Missouri Supreme Court's opinion is to treat submission to the jury as the entirety of the *Apprendi* rule, dispensing with the requirements that the burden of persuasion be placed on the state and that the fact be proved beyond a reasonable doubt. This is incorrect. Either *Apprendi* does not apply, and the burden of persuasion can be placed on the defendant; or *Apprendi* applies, and the burden must fall on the state. This Court's jurisprudence cannot stand for both propositions.

Nor can the opinion below be reconciled with the decision of any state or federal court to address whether *Apprendi* applies to the weighing step of a capital sentencing scheme. The conflict is apparent between the Missouri Supreme Court's holding that *Apprendi* applies and the holdings of courts that find *Apprendi* inapplicable. Among the states that apply the *Apprendi* rule to the weighing of aggravating and mitigating evidence, only Missouri dispenses with the requirement that the state bear the burden of proving this step beyond a reasonable doubt.

II. Placing the Burden of Persuasion on the Prosecution at the Weighing Step Comports with this Court's Sixth Amendment Jurisprudence.

1. *Apprendi* announced that all facts "that increase[] the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* The *Apprendi* majority specifically excluded capital sentencing schemes from the newly enunciated rule – thereby affirming *Walton v. Arizona* – by characterizing the choice between life and death as one between sentences within a range of punishment preauthorized by the guilty verdict.

In dissent, Justice O'Conner painted the majority's pre-authorization reasoning as "demonstrably untrue." *Apprendi*, 530 U.S. at 484 (O'Connor, J., dissenting). Justice O'Connor explained that, "under Arizona law, a defendant convicted of first-degree murder can be sentenced to death *only if* the judge finds the existence of a statutory aggravating factor." *Id.* at 483 (emphasis in original).

In *Ring*, the Court obliterated the distinction between guilt and sentencing phase determinations: "Capital defendants, no less than non-capital defendants, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589. Because life imprisonment is the maximum punishment a defendant could receive on a guilty verdict alone, the *Ring* Court concluded that the existence of an aggravating factor – a fact prerequisite to imposition of a death sentence – must be determined by a jury on proof beyond a reasonable doubt. *Id.*

2. The weighing of aggravating and mitigating evidence serves a similar function to the finding of an aggravating factor: both determinations are prerequisites to the imposition of a death sentence. The trier of fact is not authorized to impose a death sentence in any state that uses the weighing step unless and until a determination has been made that mitigating evidence does not outweigh the evidence in aggravation. *See Blakely v. Washington*, 542 U.S. 303-304 (2004) (the "statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.").

The Missouri scheme at issue here highlights the point. If the trier of fact determines that mitigating evidence weighs more than aggravating evidence, then the defendant is automatically sentenced to life. However, if the aggravating evidence outweighs mitigating evidence, the defendant does not automatically receive a death sentence. Instead, the trier of fact moves to the final sentencing step where it can (again unanimously) "decide[] under all of the circumstances not to assess and declare the punish-

ment at death." 565.030.4(4). As the Missouri Supreme Court explained:

> As under Colorado's statute, it is not until this fourth step that the trier of fact is given discretion to make the final determination whether to give a life sentence even if he or she has already found that the aggravators and mitigators would qualify defendant for imposition of the death penalty. As in Colorado, Missouri is considered a non-weighing state because of the discretion given to the jury at this point to impose a life sentence without regard to the weight it gave to aggravators and mitigators it found.

Whitfield, 107 S.W.3d at 261 Thus, the weighing determination is prerequisite to, but not coterminous with, the ultimate question of whether to impose a death sentence. Because a death sentence cannot be imposed without the additional finding that mitigating evidence is not sufficient to outweigh aggravating evidence, life imprisonment is the maximum sentence that can be imposed after the finding of at least one aggravating factor.

The Court's opinion in *Sattazahn v. Pennsylvania,* further illustrates why the *Apprendi* rule should apply to the weighing of aggravating and mitigating evidence. Sattazahn's jury deadlocked "without reaching a decision on death or life, and without making any findings regarding aggravating or mitigating circumstances." 537 U.S. 101, 112 (2003). Pursuant to the state statutory scheme, a default sentence of life-imprisonment was entered. On

retrial, the jury sentenced Sattazahn to death. This Court held that a hung jury at the sentencing phase did not trigger double jeopardy protections. Justice Scalia, writing for the majority, explained that if the jury had made a finding that no aggravating factor existed, then "double-jeopardy protections [would have] attach[ed] to that 'acquittal' on the offense of 'murder plus aggravating circumstance(s).'" *Id.* If *Apprendi* does not apply to the weighing step, then a jury's finding that the mitigating evidence outweighed the aggravating evidence – and the corresponding life sentence that would be imposed upon that determination – would not be subject to double jeopardy protection. *See Id.* at 111 ("We can think of no principled reason to distinguish, in this context, between what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes an "offence" for purposes of the Fifth Amendment's Double Jeopardy Clause."). The inequity in such a result is apparent.

3. Several state courts of last resort frame the weighing step as a process – rather than a factual determination – and thus refuse to apply the *Apprendi* rule. While the balancing itself is a "process," the outcome of that process is the relevant factual finding that renders a person eligible (or not) for a death sentence. Whether a state wants to call the weighing stage a factual-finding, a moral determination, or "Mary Jane," the simple fact is a state's ability to impose a death sentence *depends* on the outcome of the weighing process. *Ring*, 536 U.S. at 610 (Scalia, J., concurring) (" . . . all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary

Jane—must be found by the jury beyond a reasonable doubt.").

Nor does categorizing the weighing determination as a moral rather than factual finding save it from *Apprendi*'s grasp. First, the fact that many states assign an evidentiary value to the weighing determination suggests that it is a factual finding. *See, e.g.*, *Evans*, 886 A.2d 580 (Raker, J., dissenting) ("[T]he General Assembly has provided for a burden of proof in the weighing process. Such standards of proof are reserved customarily for factual findings."); *cf. Olsen*, 2003 WY 46 at 67 ("that aggravating circumstances be proved beyond a reasonable doubt and mitigating circumstances be proved by a preponderance of the evidence references burdens assigned to factual issues.").

Moreover, this distinction disintegrates because the intrinsically moral determination of whether petitioner's offense was "heinous, atrocious, or cruel" marked the sole aggravating factor relied on by the judge to sentence petitioner to death. *See also Schriro v. Summerlin*, 542 U.S. 348, 361 (2004) (Breyer, J., dissenting) ("The leading single aggravator charged in Arizona [] requires the factfinder to decide whether the crime was committed in an 'especially heinous, cruel, or depraved manner.'").[12]

Finally, morality based fact-finding serves to narrow the universe of offenders for whom the death penalty is appropriate, and thus performs an inte-

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[12] *Id.* ("Words like "especially heinous," "cruel," or "depraved"--particularly when asked in the context of a death sentence proceeding--require reference to community-based standards, standards that incorporate values.").

gral function under this Court's Eighth Amendment jurisprudence. *See California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (rendering of a death sentence must be "directly related to the personal culpability of the criminal defendant," and "reflect a reasoned moral response to the defendant's background, character, and crime."). Though the penalty phase of a capital trial did not exist at the time of the founding, this Court's heightened requirements under the Eighth Amendment have had the effect of altering the jury trial landscape.[13] A defendant's Sixth Amendment right to a jury trial cannot be diluted on the theory that these newly required sentencing proceedings did not exist at the time of the founding.[14] If this Court chooses to compile additional requirements for the imposition of the death penalty, the Sixth Amendment right to a jury trial must be extended to correspond with all adversarial findings – including the weighing determination at issue here – that function in the same manner as a finding at the guilt phase.

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[13] *See Ring*, 536 U.S. at 611 (Scalia, J., concurring) ("[I]t is impossible to identify with certainty those aggravating factors whose adoption has been wrongfully coerced by *Furman*, as opposed to those that the State would have adopted in any event.").

[14] *See Apprendi*, 530 U.S. at 484 (O'Connor, J., dissenting) (the idea "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence.").

III. The Eighth and Fourteenth Amendments Limit Imposition of Capital Punishment to Instances Where the State Demonstrates that Mitigating Evidence is Insufficient to Warrant Life Imprisonment.

1. Missouri has chosen to require the sentencing jury to conclude that mitigating evidence does not outweigh aggravating evidence *before* a person is eligible to receive a death sentence. *Whitfield*, 107 S.W.3d at 261. Because persons with sufficient mitigating evidence are "less blameworthy, [and] are subject to [a] substantially less severe penalt[y]," the state must bear the burden of persuasion at the weighing step. *Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975)("[W]here one party has at stake an interest of transcending value . . . the margin of error is reduced as to him by the process of placing on the prosecution the burden of persuading the factfinder . . .")(internal quotation omitted).[15]

2. Two terms ago, in *Kansas v. Marsh*, this Court upheld as consistent with the Eighth Amendment a state statute that requires a death sentence when aggravating and mitigating evidence are in equipoise. In that opinion, however, the Court cautioned:

> Significantly, although the defendant appropriately bears the burden of proffering mitigating circumstances—a

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[15] *See also, Id.* ("By drawing this distinction [between those who kill in the heat of passion and those who do not], while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in Winship.").

> burden of production—he never bears the burden of demonstrating that mitigating circumstances outweigh aggravating circumstances. Instead, the State always has the burden of demonstrating that mitigating evidence does not outweigh aggravating evidence.

Marsh, 548 U.S. at 178-79.

Like the Kansas statute at issue in *Marsh*, Missouri law requires the defendant to bear the burden of proffering a quantum of mitigating evidence greater than the amount of aggravating evidence proved by the state.[16] Unlike the Kansas statute, the Missouri scheme also requires the defendant to bear the burden of persuading all twelve jurors that mitigating evidence outweighs aggravating evidence.[17] The practical effect of where the burden of persuasion is assigned is that in Kansas a single juror's belief that mitigating evidence outweighs aggravating evidence results in a life sentence, whereas in Missouri, all twelve jurors must agree before the jury can return a life verdict.

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[16] *Walton v. Arizona*, 497 U.S. 639 (1990) permits states to place on the defendant the burden of producing enough mitigating evidence to outweigh aggravating evidence. *Walton* is inapposite to the question of whether a state can require the defendant to demonstrate to a unanimous jury that mitigating evidence outweighs aggravating evidence.

[17] *See McLaughlin*, 265 S.W.3d at 268 ("this Court reaffirms its holding in *Zink* that under section 565.030.4(2), the jury must unanimously decide that the mitigating evidence outweighs the aggravating evidence in order to be required to return a life sentence.").

1. The Eighth Amendment requires that the administration of capital punishment be based on individualized, accurate, and consistent considerations of which few offenders among the already narrow category of murderers deserve to be sentenced to death. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (the "risk that the death penalty will be imposed in spite of factors that may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"); *Id.* at 604 ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."). The Missouri statutory law at issue disregards these fundamental commands by placing the burden of persuasion on the defendant at the weighing stage thereby holding the jury's power to return a life sentence hostage to the veto power of a single juror. This arrangement reduces the likelihood that only the worst of the worst murderers will receive the death penalty, and increases the odds that capital punishment will be administered in an arbitrary and capricious manner.[18]

Given the Eighth Amendment's command that capital sentencing determinations provide assurances of heightened accuracy and consistency, the state should have to bear the risk of non-persuasion at the weighing stage. *Summerlin*, 542

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[18] *See Kennedy v. Louisiana*, 554 U.S. __, 128 S.Ct. 2641 2659-65 (2008)("resort to the [death] penalty must be reserved for the worst of crimes and limited in its instances of application"); *Gregg v. Georgia*, 428 U. S. 153, 188 (1976) (sentencing procedures must not generate "a substantial risk that the death penalty [will] be inflicted in an arbitrary and capricious manner.").

U.S. at 362 (Breyer, J., dissenting) (the law "requires a correspondingly greater degree of scrutiny of the capital sentencing determination than of other criminal judgments")[19]; *cf. Wilbur*, 421 U.S. at 701 ("The result, in a case such as this one where the defendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erroneous [determination].").

2. This Court's Eighth Amendment jurisprudence turns on the "evolving standards of human decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) To gauge society's evolving standards, this Court references "objective indicators" such as jury determinations and legislative enactment. *See, e.g., Coker v. Georgia*, 433 U.S. 584, 592 (1977).

Missouri is the only state in the country that requires a defendant to persuade a unanimous jury that the mitigating evidence warrants a life sentence. Fourteen states, as well as the District of

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[19] *See also, Id.* ("This Court has made clear that in a capital case the Eighth Amendment requires a greater degree of accuracy . . . than would be true in a noncapital case. Hence, the risk of error that the law can tolerate is correspondingly diminished"); *Baze v. Rees*, 128 S. Ct. 1520, 1550 (2008) (Stevens, J., concurring) ("[G]iven the real risk of error in this class of cases, the irrevocable nature of the consequences is of decisive importance to me"); *Id.* ("Whether or not any innocent defendants have actually been executed, abundant evidence accumulated in recent years has resulted in the exoneration of an unacceptable number of defendants found guilty of capital offenses.").

Columbia, ban capital punishment.[20] In twenty-eight out of the thirty-five other states with valid capital punishment schemes, the state—and not the defense—must demonstrate to a unanimous jury that mitigating evidence is insufficient to warrant a life sentence.[21] In five of the six remaining states, the prosecution bears the burden of persuasion at the weighing stage.[22] In Montana, a single judge—and not the jury—determines the appropriate punishment (without reference to any particular standard).

Measuring the frequency with which capital juries actually impose a sentence of death in a particular circumstance provides a valuable on-the-ground indicator of whether a particular punishment has become cruel and unusual. *See Roper v. Simmons*, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting) (" . . . we have, in our determination of society's moral standards, consulted the practices of sentencing juries: Juries maintain a link between contemporary community values and the penal system.").[23]

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[20] See Death Penalty Information Center, Death Penalty Policy By State, available at http://www.deathpenaltyinfo.org/death-penalty-policy-state (last visited December 10, 2008).

[21] Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Tennessee, Utah, Virginia, Washington, and Wyoming

[22] Alabama, Delaware, Indiana, Maryland, Kentucky.

[23] *See also Baze v. Rees*, 128 S. Ct. 1520, 1550 (2008) (Stevens, J., concurring) ("The prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive").

Yet, it can hardly be said that the belief of a single juror that life imprisonment is not warranted (especially when eleven jurors have reached the opposite conclusion) provides an accurate temperature of the "evolving standards of decency" as measured by the decisions of petit criminal juries. As a result, when appellate courts review the frequency with which Missouri juries impose a death sentence, that measure is necessarily an inaccurate thermometer for determining how much a society has chilled to the idea of executing a certain class of offenders.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DEBORAH B. WAFER
OFFICE OF THE PUBLIC DEFENDER
1000 St. Louis Union Station
Suite 300
St. Louis, MO 63103
(314) 340-7662, ext. 236

CHARLES OGLETREE*
ROBERT J. SMITH
125 Mount Auburn St.
Third Floor
Cambridge, MA 02138
(617) 495-8285

**Counsel of Record for Petitioner*