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NOTE

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Michael J. Essma[*]

I. INTRODUCTION

On October 6, 2017, Judge Kelly Parker, a St. Charles County circuit judge in Missouri, sentenced Marvin Rice to death for the murder of his girlfriend, Annette Durham.[1] Parker's sentencing came in spite of eleven of twelve jurors voting to sentence Rice to life imprisonment instead.[2] The jury found Rice guilty of first-degree murder for killing Durham and guilty of second-degree murder for killing Durham's boyfriend – Steven Strotkamp.[3] With respect to the first-degree murder charge, the jury did not unanimously decide whether Rice should be sentenced to life without parole or death.[4] The "deadlock" provision of Missouri's death penalty scheme allows a judge to make the ultimate determination of life or death when the jury cannot reach a unanimous decision.[5] Since all twelve members were not able to make a

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1. Robert Patrick, *Judge in St. Charles County Sentences Former Dent County Deputy to Death*, ST. LOUIS POST DISPATCH (Oct. 6, 2017), https://www.stltoday.com/news/local/crime-and-courts/judge-in-st-charles-county-sentences-former-dent-county-deputy/article_2c1dbb19-0bc6-5022-8dc7-2d6540e61951.html [perma.cc/CMD7-UEUM].

2. Christine Byers, *Jury Hung in Sentencing of Former Dent County Deputy Found Guilty of Two Murders*, ST. LOUIS POST DISPATCH (Aug. 13, 2017), https://www.stltoday.com/news/local/crime-and-courts/jury-hung-in-sentencing-of-former-dent-county-deputy-found/article_bf3f30d1-60fb-5a54-8015-4e2148f8159a.html [perma.cc/ARH4-VHNT].

3. *Id.*

4. *Id.*

5. MO. REV. STAT. § 565.030.4 (2018).

determination, the jury deadlocked, and the decision was ultimately made by Judge Parker.[6]

Marvin Rice's case is not unique in Missouri. In 1994, Joseph Whitfield was also sentenced to death by a judge after the jury voted eleven-to-one in favor of life without parole.[7] In fact, a jury has not sentenced anyone to death in Missouri since 2013.[8] Overall, Missouri judges have imposed death sentences after a jury deadlock fifteen times since the provision was created in 1984.[9]

These cases of judicially imposed death sentences are, however, unique in the United States. Only Missouri and Indiana allow a judge to impose a death sentence after the jury deadlocks on the ultimate determination of whether to sentence a defendant to death.[10] These two states authorize judge-imposed death sentences because of U.S. Supreme Court precedent that allows judges to only make sentencing determinations.[11] These cases emanate from the Sixth Amendment protection of a jury trial for criminal defendants.[12] Still, Eighth Amendment restrictions on implementation of the death penalty muddy the distinction between sentencing and findings of fact required to be made by a jury under the Sixth Amendment. Since the consequences of the death penalty are the highest possible, people should be confident that the

6. Patrick, *supra* note 1. Judge Kelly Parker faces re-election every 6 years. *Kelly W. Parker*, BALLOTPEDIA, https://ballotpedia.org/Kelly_W._Parker [perma.cc/3TEQ-24S2] (last visited Nov. 11, 2019). During 2017, he was in the middle of his six-year term, and he did not face re-election until 2020. *Id.* It should also be noted that he ran unopposed in his 2014 election. *Id.*

7. State v. Whitfield, 107 S.W.3d 253, 256 (Mo. 2003) (en banc). However, the Missouri Supreme Court later overturned his death sentence. *Id.* at 272.

8. Joseph C. Welling, *Missouri's Death Penalty Jury Deadlock Provision Is Unconstitutional*, ST. LOUIS POST DISPATCH (Jan. 16, 2019), https://www.stltoday.com/opinion/columnists/missouri-s-death-penalty-jury-deadlock-provision-is-unconstitutional/article_a2b5f34a-4cf3-59a3-880d-f52acfe9ee97.html [perma.cc/BD9B-3RYT]. Greene County Judge Thomas Mountjoy sentenced Craig Wood to death in 2018 for the rape and murder of ten-year-old Hailey Owens after a jury deadlocked on the decision of life without parole or death. Harrison Keegan, *Will Craig Wood's Death Penalty Hold Up?*, SPRINGFIELD NEWS-LEADER (Jan. 11, 2018), https://www.news-leader.com/story/news/crime/2018/01/11/craig-wood-executed-some-experts-have-doubts/1021025001/[perma.cc/T7HB-NU5T]. Multiple other individuals were also sentenced to death by a judge before 2013. *See* McLaughlin v. State, 378 S.W.3d 328, 336 (Mo. 2012) (en banc); State v. Shockley, 410 S.W.3d 179, 182 (Mo. 2013) (en banc).

9. Welling, *supra* note 8.

10. *Missouri Supreme Court Grants New Sentencing Trial to Man Who Was Sentenced to Death Despite 11 Jurors' Votes for Life*, DEATH PENALTY INFO. CTR., https://archive.deathpenaltyinfo.org/category/categories/states/missouri [perma.cc/STA4-2D4W] (last visited Nov. 11, 2019).

11. *See* Ring v. Arizona, 536 U.S. 584 (2002); Hurst v. Florida, 136 S. Ct. 616 (2016).

12. U.S. CONST. amend. VI.

Missouri death penalty scheme provides defendants their constitutional protections. Yet, many people question whether this is true.[13]

This Note evaluates whether the Missouri death penalty scheme meets Sixth Amendment and Due Process Clause requirements. Part II explains the Missouri death penalty scheme, the Missouri Supreme Court's conflicting interpretations of the scheme, and the confusion that has been created by this precedent. Next, Part III dissects the Missouri Supreme Court's recent decision in *State v. Wood*, which found the Missouri death penalty does not violate the Sixth Amendment. Part IV addresses whether the weighing of aggravators and mitigators can ever be a sentencing factor. Then, Part IV considers whether Missouri's death penalty statute makes the weighing of aggravators and mitigators a factual finding, despite no constitutional requirement to do so. Finally, Part IV argues that Missouri can and should fix its death penalty statute to leave no doubt that all constitutional protections are afforded to defendants in death penalty cases.

II. LEGAL BACKGROUND

The Sixth Amendment of the U.S. Constitution guarantees "in all criminal prosecutions . . . a speedy and public trial by an impartial jury . . . ."[14] Further, the Fourteenth Amendment's Due Process Clause requires that a jury find each element of a crime "beyond a reasonable doubt."[15] These two safeguards for criminal defendants appear straightforward, but they become complicated when applied to "bifurcated trials," which are used to impose the death penalty. This Part examines U.S. Supreme Court precedent on the due process rights of defendants in death penalty cases and the Missouri Supreme Court's interpretation of that precedent. Section A will trace the U.S. Supreme Court's precedent by first analyzing its interpretation of the Sixth Amendment. Then, the unique statutory scheme required by the Supreme Court for death penalty statutes will be explained, including the meaning of "bifurcated trial." Finally, Section A will examine the U.S. Supreme Court's application of its Sixth Amendment jurisprudence to its death penalty jurisprudence. Section B will then focus on the Missouri death penalty and the Missouri Supreme Court's application of U.S. Supreme Court precedent.

A. "Endors[ing] the Incoherence"[16]: The U.S. Supreme Court's Confusing Capital Jurisprudence

In his concurrence in *Marsh v. Kansas*, Justice Antonin G. Scalia described the U.S. Supreme Court's capital jurisprudence as "incoherent" and

13. *See* Welling, *supra* note 8 ("Missouri can and must do better."); Keegan *supra* note 8 ("The whole idea of the Sixth Amendment is that a jury of your peers makes that judgment call.") (internal citations omitted).

14. U.S. CONST. amend. VI.

15. *In re* Winship, 397 U.S. 358, 359–60 (1970).

16. Kansas v. Marsh, 548 U.S. 163, 182 (2006) (Scalia, J. concurring).

stated that he did "not endorse that incoherence" before making a decision in accordance with that confusing jurisprudence.[17] The Supreme Court's incoherent capital jurisprudence evolved from a unique intersection between Eighth Amendment protections against cruel and unusual punishment[18] and Fourteenth Amendment Due Process rights.[19] The increased protections for capital defendants under the Eighth Amendment have, in turn, created new due process protections for capital defendants. This Part will explain how the Eighth Amendment has impacted due process protections and analyze the current state of U.S. Supreme Court due process protections in capital cases. This Part will first detail the Supreme Court's due process protections for criminal defendants in non-capital cases. Then, it will lay out the special protections guaranteed by the Eighth Amendment in capital cases. Finally, this Part will explain how the two interact by analyzing the most recent cases.

1. "By a Jury Beyond a Reasonable Doubt"[20]

Along with incorporating the Sixth Amendment right to a jury trial to the states,[21] the Fourteenth Amendment Due Process Clause requires every fact necessary to constitute the crime be found beyond a reasonable doubt.[22] While this requirement seems clear, there persisted – and persists – doubt as to what qualifies as a fact necessary to constitute the crime charged, also referred to as an element. The Court in *Apprendi v. New Jersey* attempted to explain what constituted an element of the crime charged.[23]

In *Apprendi*, the defendant "fired several shots into the home of an African-American family and made a statement – which he later retracted – that he did not want the family in his neighborhood because of their race."[24] The defendant then pleaded guilty to second-degree possession of a firearm for an unlawful purpose under New Jersey law, carrying a sentence of five to ten years.[25] Following the guilty plea, the prosecutor then sought to enhance the sentence based on the state's hate crime statute, which provided for an enhanced sentence if the judge found by a preponderance of the evidence that the defendant committed the crime with a purpose to intimidate the group because of race.[26] The judge found the crime was racially motivated and enhanced the defendant's sentence to twelve years.[27]

17. *Id.*
18. U.S. CONST. amend. VIII.
19. U.S. CONST. amend. XIV.
20. Alleyne v. United States, 570 U.S. 99, 107 (2013).
21. Duncan v. Louisiana, 391 U.S. 145, 146 (1968).
22. *In re* Winship, 397 U.S. 358, 364 (1970).
23. Apprendi v. New Jersey, 530 U.S. 466, 466 (2000).
24. *Id.*
25. *Id.* at 468.
26. *Id.* at 466.
27. *Id.*

On appeal, Apprendi claimed that the Fourteenth Amendment Due Process Clause required the finding that the crime was racially motivated to be proved to a jury beyond a reasonable doubt.[28] New Jersey argued that the state's enhancement for racially motivated crimes was a sentencing factor and not an element of the crime charged.[29] While an element is necessary to prove guilt or innocence, a sentencing factor "help[s] to determine the sentence imposed upon one who has been found guilty."[30] The Court rejected the State's argument, holding, "Other than the fact of a prior conviction, 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."[31]

The Court decided that the New Jersey statute, which enhanced sentences for racially motivated crimes, was an element of the crime and not a sentencing factor because it increased the maximum sentence.[32] Further, the Court noted that the inquiry of the elemental nature is "one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"[33] Therefore, the Court held that the New Jersey sentencing enhancement for racially motivated crimes must be proved to a jury beyond a reasonable doubt because it was an element and not a sentencing factor.[34] This framework for deciding when due process rights of a jury trial requiring proof beyond a reasonable doubt attach seems straightforward until considering the special protections provided in capital punishment cases.

2. Cruel and Unusual Punishment and the Bifurcated Trial

While the U.S. Supreme Court developed its jurisprudence on due process protections for criminal defendants, it also revolutionized its death penalty jurisprudence. First, the Supreme Court held Georgia's death penalty scheme – and by proxy all other death penalty schemes – violated the Eighth Amendment.[35] Justice Stewart ultimately concluded "that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."[36] However, the Supreme Court upheld the Georgia statute four years later when Georgia used a bifurcated trial for death sentences.[37]

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28. *Id.* at 471.
29. *Id.* at 492.
30. *Id.* at 559 (Breyer, J. dissenting).
31. *Id.* at 490.
32. *Id.* at 492.
33. *Id.* at 494.
34. *Id.* at 497.
35. Furman v. Georgia, 408 U.S. 238 (1972).
36. *Id.* at 310 (Stewart, J. concurring).
37. Gregg v. Georgia, 428 U.S. 153 (1976).

Under the bifurcated procedure, the trial had two phases: a guilt phase and a sentencing phase.[38] If the jury found the defendant guilty beyond a reasonable doubt in the guilt phase, then the trial would move to the sentencing phase where the jury was required to consider mitigating and aggravating evidence.[39] Aggravating evidence is evidence that increases the guilt of the crime, and mitigating evidence is evidence that reduces the moral culpability of the person committing the crime.[40] Further, the jury was required to find the existence of at least one aggravating factor – out of ten possible aggravating factors – beyond a reasonable doubt before the jury could sentence the defendant to death.[41] The judge was then bound by the jury's recommended sentence – either death or life without parole.[42] The statute also provided for "special expedited direct review by the Supreme Court of Georgia of the appropriateness of imposing the sentence of death in the particular case."[43] While Georgia laid out a template for death penalty statutes that did not violate the Eighth Amendment, there still remained uncertainty as to what due process rights were required in the sentencing phase.

3. The Supreme Court Puts a *Ring* On It

In *Walton v. Arizona*, the Court held that the Sixth Amendment did not require a jury determination of facts during the sentencing phase because the facts in the sentencing phase – such as the existence of aggravating or mitigating factors – were sentencing considerations and not elements of the crime.[44] After the Court held in *Apprendi* 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,"[45] the Court revisited Arizona's death penalty scheme in *Ring v. Arizona*.[46]

The Arizona death penalty scheme – like the one in *Gregg* – was a bifurcated proceeding with the first stage consisting of a guilt determination and the second stage being a sentencing phase.[47] However, unlike *Gregg*, the sentencing phase was conducted before the court alone, and the judge alone made the factual determinations required to impose a sentence of death, including the determination of the existence of at least one aggravating circumstance.[48] The Court held that "[c]apital defendants, no less than

38. *Id.* at 163–64.

39. *Id.* at 165.

40. *Aggravating Circumstance*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Mitigator*, BLACK'S LAW DICTIONARY (11th ed. 2019).

41. *Gregg*, 428 U.S. at 165–66.

42. *Id.* at 166.

43. *Id.*

44. Walton v. Arizona, 497 U.S. 639, 648 (1990).

45. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

46. Ring v. Arizona, 536 U.S. 584 (2002).

47. *Id.* at 592.

48. *Id.* at 592–93.

noncapital defendants . . . [were] entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."[49]

In so holding, the Court invalidated Arizona's death penalty scheme.[50] The Court reasoned that the maximum punishment Ring could have received due to the jury's finding of guilt was life imprisonment.[51] Therefore, the finding of an aggravating factor in the sentencing phase was a fact on which the legislature conditioned an increase in the maximum punishment.[52] Under this scheme, the finding of aggravators acted as elements, and aggravators must be found by a jury beyond a reasonable doubt.[53] The Court further emphasized that *Apprendi* considered the question of whether a finding is a sentencing consideration or an element was "one not of form, but of effect."[54] Therefore, while Arizona tried to construe the finding of an aggravator as a sentencing factor, it was an element because finding an aggravator was necessary to increase the maximum punishment from life without parole to death.[55]

4. Revisiting *Ring*

In 2016, the U.S. Supreme Court revisited *Ring* in *Hurst v. Florida*.[56] In *Hurst*, the Court heard a challenge to Florida's death penalty scheme that required the jury to issue an "advisory verdict," that was ultimately not binding on the trial judge.[57] The Court decided the advisory verdict by the jury was not a necessary factual finding, and therefore, "[a] jury's mere recommendation [wa]s not enough."[58] Writing in broader terms than *Ring*, the Court emphasized that the importance lay on the fact that without the judge's findings, Hurst could not have been sentenced to death.[59]

In so holding, the Court overruled two prior decisions – both before *Ring* – that affirmed Florida's death penalty scheme: *Spaziano v. Florida*[60] and *Hildwin v. Florida.*[61] In *Spaziano*, the trial judge sentenced the defendant to death despite a jury recommended sentence of life without parole.[62] The Court held that the Sixth Amendment did not guarantee a right to a jury

49. *Id.* at 589.
50. *Id.* at 609.
51. *Id.* at 597.
52. *Id.*
53. *Id.* at 599.
54. *Id.* at 602 (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 (2000)).
55. *Id.* at 604–05 (citing *Apprendi*, 530 U.S. at 494).
56. Hurst v. Florida, 136 S. Ct. 616 (2016).
57. *Id.* at 622.
58. *Id.* at 619.
59. *Id.* at 622.
60. 468 U.S. 557 (1984).
61. 490 U.S. 638 (1989).
62. *Spaziano*, 468 U.S. at 458.

determination on whether to impose death or life without parole.[63] In *Hurst*, the Court specifically held that *Spaziano* was "overruled to the extent [it] allow[ed] a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for the imposition of the death penalty."[64] Some believed the Court only required a jury find the existence of an aggravating factor for the Florida death penalty scheme to comply with *Ring*,[65] but others read *Hurst* more broadly to also apply to the weighing of aggravators and mitigators.[66]

B. The Missouri Death Penalty Scheme

Much like other state death penalty schemes, the Missouri death penalty scheme has evolved in light of U.S. Supreme Court Eighth Amendment jurisprudence. This Section will first detail Missouri's current death penalty statute. Then, it will review Missouri Supreme Court interpretations of the death penalty statute and the court's application of *Ring* to it. Further, this Section will point out some of the inconsistencies of the Missouri Supreme Court's decisions.

1. Missouri's Death Penalty Statute

The Missouri death penalty scheme is unique because it phrases the sentencing phase in terms of what is necessary to impose a life sentence.[67] The Missouri statute states:

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

63. *Id.* at 464.

64. *Hurst*, 136 S. Ct. at 624.

65. Maria T. Kolar, *"Finding" a Way to Complete the* Ring *of Capital Jury Sentencing*, 95 DENV. L. REV. 671, 714 (2018).

66. Janet C. Hoeffel, *Death Beyond a Reasonable Doubt*, 70 ARK. L. REV. 267, 294 (2017).

67. MO. REV. STAT. § 565.030.4 (2018).

> 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 of death. If the trier is a jury it shall be so instructed.[68]

Therefore, if a jury decides affirmatively to any of these four questions, the death penalty will not be imposed on the defendant.[69] For example, if a jury answered affirmatively that they did not find beyond a reasonable doubt the existence of at least one aggravating factor, the defendant would receive a life sentence.

There is another provision of the Missouri death penalty statute known as the "deadlock" jury provision.[70] The deadlock jury provision provides that if the jury cannot decide on any of the questions – an inability of the jury to unanimously vote yes or no – then the court will decide to impose life without parole or death.[71] In doing so, the judge follows the same procedure – explained above – as the jury.[72] Clearly – following *Ring* – the judge could not impose a death sentence if the jury deadlocked on the existence of an aggravating factor; however, it is not as clear that the weighing test or decision to impose death must be found by a jury beyond a reasonable doubt. Naturally, these questions have been raised before the Missouri Supreme Court.

2. The Missouri Supreme Court's Conflicting Post-*Ring* Decisions and Its Impact

The questions raised on the constitutionality of Missouri's death penalty statute were not originally met with much clarity. This Part begins by analyzing the Missouri Supreme Court's first attempt to answer concerns about the constitutionality of Missouri's death penalty scheme after *Ring*. Then, it examines the Missouri Supreme Court's curious backpedal on its original determination. Finally, this Part discusses the difficulty the Missouri Supreme Court's post-*Ring* cases provided for the U.S. District Court for the Eastern District of Missouri in reaching conflicting results on similar challenges to the Missouri death penalty statute.

a. *State v. Whitfield*

Less than a year after the U.S. Supreme Court's decision in *Ring*, the Missouri Supreme Court, in *State v. Whitfield*, heard a challenge to the

68. *Id.*
69. *Id.*
70. Welling, *supra* note 8.
71. § 565.030.4.
72. *Id.*

constitutionality of Missouri's death penalty statute based on *Ring*.[73] While the Missouri death penalty had the same scheme as the current statute, there were a few differences in reference to the first two steps.[74] The first step in the statute at issue in *Whitfield* was the same as what Missouri now labels step two – the finding of at least one aggravating factor.[75] The second step required an imposition of life without parole "[i]f the trier does not find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating circumstances listed in subsection 2 of section 565.032, warrants imposing the death sentence."[76]

In *Whitfield*, the jury was split eleven-to-one in favor of life imprisonment.[77] Since the jury could not reach a unanimous decision, the determination was left to the judge, who ultimately imposed the death penalty.[78] Whitfield challenged this procedure as a violation of *Ring*, which requires a "jury determination of any fact on which the legislature conditions an increase in their maximum punishment."[79] The court agreed with Whitfield and decided that the judge had made improper factual determinations in this case.[80] The court held that the first three steps constituted factual findings that fell within the province of the jury.[81] In so holding, the court rejected the State's arguments that steps two and three constituted the jury's "subjective and discretionary opinion."[82] Instead, the court explained that the first three steps were "prerequisites to the trier of fact's determination that a defendant is death-eligible."[83] Therefore, the first three steps were facts necessary to enhance the maximum sentence.[84] Finally, the court noted that only in the fourth step was the jury given discretion to make the ultimate determination of life without parole or death.[85]

Judge Stephen N. Limbaugh, however, disagreed with the majority's application of *Ring* to the Missouri death penalty scheme and dissented.[86] Judge Limbaugh agreed with the majority that steps one and two required factual findings, but he believed that step three did not require factual findings.[87] Judge Limbaugh first noted that step three called for "a wholly

73. State v. Whitfield, 107 S.W.3d 253 (Mo. 2003) (en banc), *abrogated by* State v. Wood, 580 S.W.3d 566 (Mo. 2019) (en banc).

74. *Id.* at 258 (quoting MO REV. STAT. § 565.030.4 (2000)).

75. *Id.*

76. *Id.*

77. *Id.* at 261.

78. *Id.*

79. *Id.* (quoting Ring v. Arizona 536 U.S. 584, 589 (2002)).

80. *Id.* at 261–62.

81. *Id.* at 261.

82. *Id.* at 259.

83. *Id.* at 261.

84. *Id.*

85. *Id.*

86. *Id.* at 275 (Limbaugh, J. dissenting).

87. *Id.* at 277 (Limbaugh, J. dissenting).

subjective and discretionary analysis,"[88] and then added that while steps one and two called for findings, step three required the jurors to come to a conclusion.[89] He thought this distinction in wording made step three an exercise in judgment and not a factual finding.[90] Additionally, Judge Limbaugh noticed that a finding in favor of the defendant on step three acted "only to decrease the punishment, subjecting an otherwise death-eligible defendant to life imprisonment."[91] Finally, Judge Limbaugh would have upheld the death sentence because the jury form provided that failure to make a unanimous decision in steps one and two resulted in life imprisonment.[92] Therefore, the jury made the necessary factual determinations in steps one and two, and the judge was allowed to make the discretionary sentencing decisions of steps three and four.[93]

b. The Backpedal

While the Missouri Supreme Court's ruling in *Whitfield* made a clear determination that the first three steps constituted fact finding, the court later chipped away at its own holding in *State v. Glass*[94] and *State v. Zink*.[95] In *Glass*, the court held that "[n]othing in *Whitfield* or in section 560.030.4 requires the jury to make the findings in the last two steps beyond a reasonable doubt."[96] The court noted that *Whitfield* just required a jury determination for steps two and three, not a finding beyond a reasonable doubt.[97] In *Zink*, the court went even further, stating that neither of the last two steps "require[d] a finding of a fact that may increase Mr. Zink's penalty."[98] The court decided that the last two steps do not need to be found by a jury beyond a reasonable doubt.[99]

The Missouri Supreme Court's backpedal in *Glass* and *Zink* has led to curious results. In fact, two judges on the U.S. District Court for the Eastern District of Missouri dealt with challenges to the constitutionality of Missouri's statute on habeas review, and they reached seemingly conflicting results.[100]

88. *Id.* (Limbaugh, J. dissenting) (citing State v. Smith, 649 S.W.2d 417, 430 (Mo. 1983)).

89. *Id.* at 278 (Limbaugh, J. dissenting).

90. *Id.* (Limbaugh, J. dissenting).

91. *Id.* at 279 (Limbaugh, J. dissenting).

92. *Id.* at 279 (Limbaugh, J. dissenting).

93. *Id.* (Limbaugh, J. dissenting).

94. State v. Glass, 136 S.W.3d 496 (Mo. 2004) (en banc).

95. State v. Zink, 278 S.W.3d 170 (Mo. 2009) (en banc).

96. *Glass*, 136 S.W.3d at 521.

97. *Id.*

98. *Zink*, 278 S.W.3d at 193.

99. *Id.*

100. *See, e.g.*, McLaughlin v. Steele, 173 F. Supp. 3d 855, 891 (E.D. Mo. 2016); Johnson v. Steele, No. 4:13-CV-2046, 2018 WL3008307, at *22 (E.D. Mo. June 15, 2018).

c. Pick Your Precedent: The Federal Eastern District of Missouri Split

The limited scope of review on habeas corpus proved particularly challenging for federal district courts when they recently reviewed the Missouri death penalty scheme in *McLaughlin v. Steele*[101] and *Johnson v. Steele*.[102] Both opinions reflect the difficulty in determining the nature of the weighing test in Missouri's death penalty scheme, given inconsistent Missouri Supreme Court precedent.

In *McLaughlin*, Judge Catherine D. Perry overturned McLaughlin's death sentence – which was imposed by a judge after the jury deadlocked – on habeas review.[103] Judge Perry first noted that the Missouri Supreme Court decided in *Whitfield* that the weighing of aggravators and mitigators was a factual finding and that, as a federal court reviewing a state court's decision, she was bound by the state court's interpretation of state law.[104] Further, since the weighing was a factual finding, the jury had to unanimously find that the mitigators did not outweigh the aggravators.[105]

Judge Perry concluded that it could not be determined whether the jury deadlocked on the weighing step because the question on the jury form asked only if the jury unanimously did *not* find that the mitigators outweighed the aggravators.[106] In other words, there was no way of knowing what the jury found, only what the jury did not find.[107] This means that it was not certain if some jurors found the mitigators outweighed the aggravators while others did not.[108] All that was clear was that not all of the jurors found the mitigators outweighed the aggravators.[109] Judge Perry concluded that in order for the judge to impose the death penalty under *Ring*, the jury had to unanimously find that the mitigators did not outweigh the aggravators.[110] Since this could not be determined, *Ring* prohibited the judge from imposing the death sentence in *McLaughlin*.[111]

While Judge Perry required a unanimous jury finding on the weighing step, Judge Limbaugh rejected the argument that the weighing step needed to be found beyond a reasonable doubt in *Johnson v. Steele.*[112] In *Johnson*, the jury sentenced the defendant to death.[113] Therefore, it was clear the jury had

101. 173 F. Supp. 3d 855 (E.D. Mo. 2016).
102. No. 4:13-CV-2046, 2018 WL3008307 (E.D. Mo. June 15, 2018).
103. *McLaughlin*, 173 F. Supp. 3d at 891.
104. *Id.* at 893.
105. *Id.* at 894.
106. *Id.* at 896.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Johnson*, 2018 WL3008307 at *23.
113. *Id.* at *21.

unanimously found the mitigators did not outweigh the aggravators;[114] however, Johnson argued that the jury needed to make that finding beyond a reasonable doubt.[115] Judge Limbaugh rejected this argument because the U.S. Supreme Court's decision in *Marsh* allowed states to set up the weighing of aggravators and mitigators test however they wanted, including shifting the burden to the defendant to prove that mitigators outweighed aggravators.[116]

Further, Judge Limbaugh rejected Johnson's argument that the weighing test was an element of the offense of capital murder that *Ring* required be found by a jury beyond a reasonable doubt.[117] Judge Limbaugh reasoned that the Missouri Supreme Court did not interpret the weighing test as an element of the crime because it did not require it be found beyond a reasonable doubt in *Glass*.[118] The lone dissenter in *Whitfield*, Judge Limbaugh, acknowledged that the Missouri Supreme Court's holding – that the weighing test was an element – conflicted with the holdings in *Glass* and *Zink*.[119] Ultimately, Judge Limbaugh decided it was "clear that *Whitfield* d[id] not stand for the proposition that the weighing 'fact' at step three [wa]s a fact necessary to increase the range of punishment" because the Missouri Supreme Court did not require the weighing test to be found beyond a reasonable doubt in *Zink* and *Glass*.[120] Therefore, because states have discretion to shift the burden of proof of the weighing test to defendants and Missouri interpreted its statute to say the weighing test was not an element, Judge Limbaugh found that the Missouri Supreme Court's decision was not contrary to or an unreasonable application of clearly established federal law.[121]

III. RECENT DEVELOPMENTS

In 2019, the Missouri Supreme Court revisited *Whitfield* and the subsequent conflicting opinions.[122] In *State v. Wood*, the court finally took the opportunity to formally overrule *Whitfield*'s determination that the weighing step was a factual finding.[123] Three judges, however, dissented from the majority's decision that the weighing step was not a factual finding.[124] This Part will discuss the majority's decision and then explain the dissent.

114. *Id.* at *23.
115. *Id.* at *21.
116. *Id.* (citing Kansas v. Marsh, 548 U.S. 163, 170–71 (2006)).
117. *Id.* at *22.
118. *Id.* (citing State v. Glass, 136 S.W.3d 496, 521 (Mo. 2004) (en banc)).
119. *Id.* at *23.
120. *Id.* at *22.
121. *Id.* at *23.
122. State v. Wood, 580 S.W.3d 566, 581–90 (Mo. 2019) (en banc).
123. *Id.* at 586.
124. *Id.* at 596–599 (Stith, J. dissenting).

A. State v. Wood

In 2017, a jury found Craig Wood guilty of murdering ten-year-old Hailey Owens.[125] The jury then unanimously determined beyond a reasonable doubt that six aggravating factors existed but deadlocked on the weighing step.[126] Judge Thomas Mountjoy found the aggravating factors outweighed the mitigating factors and sentenced Wood to death.[127] Wood appealed and argued that his Sixth Amendment rights had been violated because the weighing step was a factual finding reserved for the jury, not the judge.[128]

Writing for the majority, Judge Zel M. Fischer found that the weighing step in the Missouri death penalty statute was not a factual finding required to be made by a jury beyond a reasonable doubt.[129] First, Judge Fischer explained that *Ring* established the existence of aggravating factors to be a factual finding that must be made by the jury beyond a reasonable doubt.[130] Further, *Hurst* was merely a straightforward application of *Ring*, "stand[ing] 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."[131] Therefore, *Hurst* did not expand the U.S. Supreme Court's holding in *Ring* to also include the weighing of aggravating and mitigating factors.[132]

Additionally, Judge Fischer reasoned that the weighing of aggravating and mitigating factors is a discretionary decision that is a "question of mercy."[133] While the jury could provide a "factually verifiable answer" regarding the existence of aggravating factors, "[n]either a jury nor a judge can prove or disprove a conclusion the evidence on one side outweighs the evidence on the other."[134] Therefore, the decision that the brutality of Wood's crime outweighed his personal circumstances was discretionary and not required to be found by a jury.[135]

Finally, the majority acknowledged that *Whitfield* "suggested" the weighing step was a factual finding, but they overruled *Whitfield* "[t]o the extent that [it] presume[d] the weighing step [was] a factual finding constitutionally reserved for the jury."[136] In doing so, he noted that the

125. *Id.* at 571–73.

126. *Id.* at 582–83.

127. Harrison Keegan & Giacomo Bologna, *Craig Wood Sentenced to Death Penalty for Killing Hailey Owens*, SPRINGFIELD NEWS-LEADER (Jan. 11, 2018), https://www.news-leader.com/story/news/crime/2018/01/11/craig-wood-sentenced-death-penalty-killing-hailey-owens/1020415001/ [perma.cc/MM5J-7TJB].

128. *Wood*, 580 S.W.3d at 582.

129. *Id.* at 585.

130. *Id.* at 583.

131. *Id.* at 584.

132. *Id.*

133. *Id.* at 584 (citing Kansas v. Carr, 136 S. Ct. 633, 642 (2016)).

134. *Id.* at 585.

135. *Id.*

136. *Id.* at 586–87.

Missouri Supreme Court's most recent decisions found the weighing step was not a factual finding.[137] Indeed, the court's decisions in *Zink*, *Anderson*, *Dorsey*, and *Nunley* all contradict *Whitfield*, although not explicitly. In conclusion, Judge Fischer held that neither Missouri's statute nor the U.S. Constitution made the weighing step a factual finding required to be found by the jury.[138]

B. The Dissent

In her dissent, Judge Laura Denvir Stith agreed with the majority that the fourth step was not a factual finding, and she did not disagree with the majority's decision that the U.S. Constitution did not always require the weighing of aggravating and mitigating factors to be found by a jury beyond a reasonable doubt.[139] Instead, Judge Stith believed the Missouri statute made the weighing of aggravating and mitigating factors at the third step a factual finding.[140] Judge Stith recognized the majority opinion's interpretation of the third step would leave the fourth step superfluous.[141] Indeed, the majority's declaration that the third step is a "question of mercy" would make the fourth step, which actually allows the jury to grant mercy considering all of the circumstances, redundant.[142] While both steps allow the jury to balance evidence, the third step narrows the evidence the jury may consider, making it a factual finding as opposed to a solely discretionary decision.[143] Furthermore, unlike the majority, Judge Stith believed that asking a jury to balance evidence could be a factual finding because courts frequently ask the jury to balance evidence.[144] For example, one of the court's standards of review asks whether the jury verdict is "against the weight of evidence."[145] This standard of review acknowledges that juries are constantly asked to weigh evidence, and they may factually err in the weight they assign the evidence.[146] Therefore, the statute can and does require the jury to make a factual determination on the weighing of aggravating and mitigating evidence.[147]

137. *Id.* at 585–87.
138. *Id.* at 588.
139. *Id.* at 598 (Stith, J. dissenting).
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 599.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*

IV. DISCUSSION

As has often been repeated, "[D]eath is different . . . ."[148] Thus far, this Note has outlined how Eighth Amendment concerns with the implementation of the death penalty essentially created Sixth and Fourteenth Amendment rights for death penalty defendants. This led to the "incoherence" of determining what constitutional requirements are necessary to carry out the death penalty. Missouri represents a perfect example of the difficulty states face in interpreting the U.S. Supreme Court's tricky jurisprudence. This Part begins by reviewing the Missouri Supreme Court's decision that the Sixth Amendment does not require the third step of the Missouri death penalty statute to be found by a jury beyond a reasonable doubt. To do that, it will first evaluate whether the Sixth Amendment mandates the weighing of aggravating and mitigating factors always be a factual finding. Then, this Part will address Judge Stith's contention that the form of the statute – not the Sixth Amendment – makes the weighing step in Missouri's statute a factual finding. Finally, this Part takes a policy-oriented view and suggests that Missouri should end judicial death sentences altogether.

A. Can the Weighing Test Be A Sentencing Factor?

As previously mentioned, *Ring* and *Hurst* expressly prohibit the judge in a jury trial from imposing death based on his or her findings on the existence of aggravating factors.[149] Neither case, however, directly addresses whether the balancing of aggravators and mitigators is always a factual finding or if it can be a sentencing factor. While the Missouri Supreme Court found that the Sixth Amendment allowed the weighing of aggravators and mitigators to be a sentencing factor, different courts and scholars believe that U.S. Supreme Court precedent suggests weighing tests must be factual findings.[150] Courts and scholars arrived at that interpretation through different means. Some believe that *Hurst* extended the Supreme Court's holding in *Ring* to cover more than just the existence of aggravators. Others use older cases to argue that the U.S. Supreme Court has de facto made the weighing of aggravators and mitigators necessary to impose the death penalty, effectively making weighing tests factual findings. This Section will address both arguments by first determining whether *Hurst* expanded, or just narrowly affirmed, *Ring*. Then, this Section will evaluate other interpretations, specifically looking at a 2016 decision from the Supreme Court of Delaware.

148. Gregg v. Georgia, 428 U.S. 153, 188 (1976).

149. *See supra* Parts II.A.3–4.

150. *Ex parte* Bohannon, 222 So.3d 525, 529–30 (Al. 2016) (holding that weighing aggravators and mitigators is not a fact finding required to be made by a jury because once an aggravating factor was found the defendant was death-eligible, requiring no other findings to be sentenced to death).

1. *Hurst*: The Same Old Thing

While the Missouri Supreme Court in *Wood* believed *Hurst* was merely a straightforward application of *Ring*,[151] some courts and commentators have opined that *Hurst*'s broad language suggests an expansion of *Ring*.[152] Indeed, the Court's phrasing of the central holdings in *Ring* and *Hurst* differed subtly. First, *Ring* held that a jury, not a judge, must be the one "to find an aggravating circumstance necessary for imposition of the death penalty."[153] This holding made it clear that the Sixth Amendment applied to finding aggravators. However, the Court in *Hurst* held, "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a death sentence."[154] Professor Hessick from the North Carolina School of Law and Professor Berry from the Mississippi School of Law believe *Hurst*'s broader phrasing actually expanded *Ring*'s holding.[155] Essentially, they argue that the holding in *Ring* limited the Sixth Amendment's jury requirement to findings in the narrowing stage.[156]

As explained by Justice Stephen G. Breyer, Supreme Court precedent on death penalty decision-making can be broken down into two requirements: the narrowing requirement and the selection decision.[157] The narrowing requirement refers to the requirement that the death penalty scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[158] The narrowing requirement may be met by the finding of aggravators. A defendant is not constitutionally eligible to receive the death penalty until aggravators are found. Therefore, *Ring* stood for the proposition that the jury had to find the facts necessary to make the defendant death-eligible but said nothing about the selection decision.

The selection decision "determines whether a death-eligible defendant should actually receive the death penalty."[159] This decision requires mitigating evidence to be considered to allow for an individualized

151. *Wood*, 580 S.W.3d at 584.

152. *See e.g.*, Rauf v. State, 145 A.3d 430, 436 (Del. 2016) (Strine, J., concurring) (finding *Hurst*'s mandate that a jury must make all of the factual findings necessary to impose death includes a jury's role in selecting the death penalty as well as the determination of death eligibility); *see also* Carissa Byrne Hessick & William W. Berry III, *Sixth Amendment Sentencing After Hurst*, 66 UCLA L. REV. 448, 464–76 (2019).

153. Ring v. Arizona, 536 U.S. 584, 609 (2002).

154. Hurst v. Florida, 136 S. Ct. 616, 619 (2016).

155. Hessick & Berry III, *supra* note 152, at 464–75.

156. *Id.*

157. Hidalgo v. Arizona, 138 S. Ct. 1054, 1054 (2018).

158. *Id.* (internal citations omitted).

159. *Id.*

determination.[160] Thus, to Professors Hessick and Berry, *Hurst*'s broad language encompasses the selection decision because death penalty statutes necessarily require consideration of mitigators – like Missouri's weighing step – before imposition of the death penalty.[161] This makes the weighing step a fact necessary to increase punishment. Under this reading of *Hurst*, every step of the Missouri death penalty statute would have to be found by a jury because they are all required to impose the death penalty. Indeed, Professors Hessick and Berry confirm this with a cursory analysis of the Missouri statute.[162]

However, this reading of *Hurst* overlooks key aspects of the decision. First, the Florida statute struck down in *Hurst* made *all* the jury's findings mere recommendations.[163] This included the jury's findings on aggravators, giving the judge sole discretion on finding of aggravators.[164] Therefore, a straightforward interpretation of *Ring* would have struck down the Florida death penalty statute. In other words, the Court did not need to expand *Ring* to reach the same outcome. Furthermore, as explained by the Missouri Supreme Court, the U.S. Supreme Court in *Hurst* overruled prior decisions upholding the Florida death penalty statute "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty."[165] In sum, the central holding of *Hurst* was written broadly, but the Court clearly limited the extent to which it overruled past cases and never suggested that the selection decision required a jury determination. Still, Chief Justice Leo E. Strine of the Delaware Supreme Court articulated the same reading in his concurrence in *Rauf v. State*, but he expanded on the implications of the interaction between the Sixth and Eighth Amendments.[166]

2. "[V]oila, a Sixth Amendment [R]ight [I]s [C]reated"[167]

Chief Justice Strine's concurring opinion emphasized the necessity of both the narrowing requirement and the selection decision in imposing the death sentence.[168] Essentially, Chief Justice Strine explained that the U.S. Supreme Court placed requirements on death penalty schemes in order to comply with the Eighth Amendment.[169] For example, the Court's precedent requires death penalty schemes to narrow the class of death-eligible defendants, often done with the jury finding aggravators and mitigators.[170]

160. *Id.* at 1054–55.
161. Hessick & Berry III, *supra* note 152, at 502.
162. *Id.* at 480.
163. *Id.* at 460–61.
164. *Id.* at 461.
165. Hurst v. Florida, 136 S. Ct. 616, 624 (2016).
166. Rauf v. State, 145 A.3d 430, 436 (Del. 2016) (Strine, C.J., concurring).
167. *Id.* at 476 (Strine, C.J., concurring).
168. *Id.* at 475–76.
169. *Id.* at 478–79.
170. *Id.* at 475–76.

This Eighth Amendment right created a Sixth Amendment right to have a jury find the aggravators because a defendant was not death-eligible without the finding of the existence of aggravators.[171] As Chief Justice Strine put it, "By considering this a 'fact finding' essential to the imposition of a death sentence, voila, a Sixth Amendment right is created."[172]

Chief Justice Strine opined that this same reasoning extended to the selection decision.[173] He explained that the Court, in a series of cases, required mitigators to be considered in order for death penalty schemes to comply with the Eighth Amendment.[174] Therefore, "fact-findings beyond death-eligibility are not optional."[175] Since considering mitigators – which the Missouri death penalty accomplishes in its weighing step – is not optional, it is a fact necessary to impose the death penalty and the Sixth Amendment right to a jury determination should apply.[176]

In reaching his decision, Chief Justice Strine overlooked the U.S. Supreme Court's distinction between the narrowing requirement and the selection decision. To begin, the Court has often classified the selection decision as "individualized sentencing."[177] Furthermore, the Court has granted states significant discretion in how they allow the sentencer to consider mitigating evidence.[178] From *Apprendi* to *Hurst*, the Court's Sixth Amendment jurisprudence has been concerned with distinguishing elements of a crime from sentencing factors.[179] The Court has plainly accepted that the narrowing requirement involves an element of the crime of capital murder, but the selection decision does not have to be an element of the crime and could just be sentencing.

Once a defendant is found death-eligible, presumably by a jury determination that one or more aggravators exist, the Constitution does not require any more factual findings to impose the death sentence. Because the defendant is death-eligible, additional findings do not increase the range of punishment. The consideration of mitigators reflects a constitutional requirement for conducting the sentencing once it has been determined that the defendant can receive the death penalty. Based on this, a death penalty scheme could end the jury's role once the jury found the existence of

171. *Id.* at 476.

172. *Id.*

173. *Id.*

174. *Id.* at 477.

175. *Id.*

176. *Id.*

177. Tuilaepa v. California, 512 U.S. 967, 973 (1994); *see also*, Kansas v. Marsh, 548 U.S. 163, 174 (2006) ("The use of mitigation evidence is a product of the requirement of individualized sentencing.").

178. Zant v. Stephens, 462 U.S. 862, 875 n.13 (1983) ("[S]pecific standards for balancing aggravating against mitigating circumstances are not constitutionally required."); *see also Marsh*, 548 U.S. 164–65 (finding that Kansas could impose the death penalty when the jury found the mitigators and aggravators were in "equipoise").

179. Apprendi v. New Jersey, 530 U.S. 466, 492 (2000).

aggravators. However, some may want a death penalty scheme that provides more protection than the Sixth Amendment by making the consideration of mitigators a factual finding.

B. Does the Missouri Statute Make the Weighing Step a Factual Finding?

While U.S. Supreme Court precedent allows states to structure their death penalty statute so that the balancing of aggravators and mitigators is a sentencing factor, many contend that states can design their death penalty statute so the weighing of aggravators and mitigators is a factual finding. States may, in fact, want to do this to provide defendants more protection of their right to a trial by jury than the Sixth Amendment. Indeed, Judge Stith argued in her dissent in *Wood* that the Missouri statute did just that. Still, the majority in *Wood* seemed to suggest the weighing of aggravators and mitigators could likely never be a factual finding because it is essentially a discretionary decision without a factually verifiable answer. This Section analyzes both arguments by first deciding that states can structure weighing tests to be factual findings and then by evaluating whether Missouri structured its death penalty statute to provide criminal defendants these extra protections.

1. Factual Discretion

Judge Fischer's majority opinion – and to an extent, Judge Limbaugh's dissent in *Whitfield*[180] – suggested that the weighing of aggravators and mitigators may never be a factual finding.[181] Citing to several U.S. Supreme Court cases, Judge Fischer explained that "the selection decision is a discretionary judgment."[182] Furthermore, Judge Fischer believed that the weighing of aggravators and mitigators could not be a factual finding because there was no "factually verifiable answer" to whether the mitigators outweighed the aggravators.[183]

However, Judge Stith correctly explained that juries are often tasked with balancing and weighing evidence, such as determining the credibility of witnesses and resolving conflicts in testimony.[184] Indeed, trademark law provides an excellent example of the trust placed in juries to weigh evidence to make a factual finding on an issue that may not have a "factually verifiable answer." To sue for trademark infringement, plaintiffs need to show a

180. State v. Whitfield, 107 S.W.3d 253, 277 (Mo. 2003) (en banc) (Limbaugh, J. dissenting).

181. State v. Wood, 580 S.W.3d 566, 584 (Mo. 2019) (en banc).

182. *Id.*

183. *Id.* at 585.

184. *Id.* at 598 (Stith, J. dissenting).

likelihood of confusion.[185] The likelihood of confusion inquiry requires an evaluation of several factors, ranging from six to eight depending on the federal circuit.[186] Those factors are then weighed against each other without any single factor being determinative.[187] Most federal circuits consider both the finding of the factors and the weighing of the factors as questions of fact to be decided by the fact-finder, which can be a jury.[188] There is no factually verifiable answer as to whether factors in any given case weigh in favor of likelihood of confusion, yet jurors may be trusted with making that determination. A further example of difficult questions with no factually verifiable answers entrusted to juries is calculating damages for pain and suffering or wrongful death.[189]

In sum, the U.S. legal system often trusts juries with tough determinations. This may be a necessary result of the importance the U.S. Constitution places on the jury trial. While there may not be a factually verifiable answer as to whether mitigators outweigh aggravators, several examples prove that there does not need to be a factually verifiable answer to make something a factual finding or element. Therefore, a legislature could write a statute to make the weighing of mitigators and aggravators a factual finding.

2. Lost in Interpretation

While it seems that states can make the weighing of aggravators and mitigators factual findings, the Missouri Supreme Court decided that the weighing step in Missouri's statute is not a factual finding.[190] However, in so holding, the court failed to adequately address Missouri's statute in particular. Instead, the court relied on its post-*Whitfield* decisions that backpedaled from its interpretation of the weighing step as a factual finding.[191] Those decisions clearly regarded the weighing step as a sentencing factor, but they too failed to analyze the Missouri statute in any great detail.[192] Indeed, their failure to

185. JANE C. GINSBURG, JESSICA LITMAN & MARY KEVLIN, TRADEMARK AND UNFAIR COMPETITION LAW: CASES AND MATERIALS, 366–70. (LexisNexis 5th ed. 2013).

186. *Id.*

187. *Id.*

188. *Id.* at 389–90. The Second and Sixth Circuits consider the findings as to the factors to be questions of fact but consider the ultimate balancing of the factors to be a question of law. *Id.* The Federal Circuit considers both to be questions of law. *Id.*

189. *See, e.g.*, Chicago & N.W. Ry. Co. v. Candler, 283 F. 881, 884 (8th Cir. 1922).

190. State v. Wood, 580 S.W.3d 566, 585 (Mo. 2019) (en banc).

191. *Id.*

192. The majority relied on: Zink v. State, 278 S.W.3d 170, 192–93 (Mo. 2009) (en banc); State v. Anderson, 306 S.W.3d 529, 540 (Mo. 2010) (en banc); State v. Dorsey, 318 S.W.3d 648, 653 (Mo. 2010) (en banc); and State v. Nunley 341 S.W.3d 611, 626 n.3 (Mo. 2011) (en banc). The court correctly explained that all of those

address the evolving interpretation of the Missouri statute since *Whitfield* forced Judge Fischer to expressly overrule *Whitfield* in *Wood*. Had the issue been expressly resolved before *Wood*, Judge Fischer would not have conducted as thorough a Sixth Amendment analysis.

Furthermore, Judge Stith's dissent strongly contested the majority's interpretation of the Missouri death penalty statute.[193] Judge Stith primarily argued that understanding the third step as solely discretionary – as the majority did – made the fourth step superfluous.[194] Indeed, the fourth step – which asks the jury to consider all evidence – calls for a discretionary decision by the jury, and a well-established rule of statutory interpretation is to not render parts of the statute superfluous. In other words, there was no reason to include the fourth step after giving the jury the chance to exercise its discretion in the third step. This approach, however, forgets the purpose behind the third step.

As previously explained, the Eighth Amendment requires sentencers to have the opportunity to consider mitigating factors.[195] The third step of Missouri's statute merely complies with this Eighth Amendment mandate. In complying with this mandate, the third step provides *guided* discretion in sentencing because it gives the sentencer specific factors to consider – the aggravators already found and the statutorily designated mitigators – but allows the sentencer discretion in decision-making. This type of guided discretion was exactly what the U.S. Supreme Court envisioned would be necessary to comply with its limitations on the selection decision. The fourth step, on the other hand, provides the sentencer an opportunity to exercise *absolute* discretion by requiring the jury to make a decision "under all of the circumstances."[196] The statute does not limit the sentencer in making the ultimate decision.

Therefore, the third step is necessary to comply with the Eighth Amendment, but the question still remains: why allow the sentencer an opportunity for absolute discretion in the fourth step? Perhaps, the Missouri General Assembly wanted to allow the sentencer to exercise residual doubt. Residual doubt is "any remaining or lingering doubt a jury has concerning the defendant's guilt despite having been satisfied 'beyond a reasonable doubt.'"[197] Indeed, Missouri capital defense attorneys have seen the value of exploiting residual doubt to avoid the death penalty for their clients.[198]

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decisions considered the third step a factual finding, but those decisions failed to explain why they did so. *Wood*, 580 S.W.3d at 585–86.

193. *Wood*, 580 S.W.3d at 598 (Stith, J. dissenting).

194. *Id.*

195. Gregg v. Georgia, 428 U.S. 153, 196–97 (1976).

196. MO. REV. STAT. § 565.030.4 (2018).

197. Jennifer R. Treadway, *'Residual Doubt' in Capital Sentencing: No Doubt It Is An Appropriate Mitigating Factor*, 43 CASE W. RES. L. REV. 215 (1992).

198. *See, e.g.*, Barton v. State, 432 S.W.3d 741, 757 (Mo. 2014) (en banc) ("At the motion hearing, defense counsel testified that their main strategy in the penalty phase was to focus on residual doubt concerning whether Barton was guilty of the crime.

Furthermore, residual doubt is not a mitigating factor in Missouri's statute,[199] and the U.S. Supreme Court does not require the jury to be instructed on residual doubt at the penalty phase.[200] This may reflect the Missouri General Assembly's desire to allow sentencers to consider residual doubt in close cases while not explicitly directing the sentencer to consider residual doubt where it may not be applicable. Therefore, because the Eighth Amendment requires consideration of mitigators and the Missouri General Assembly may want to allow jurors to consider residual doubt, the third step does not render the fourth step superfluous or vice-versa.

Finally, the majority in *Wood* did not engage in statutory interpretation, but Judge Limbaugh's dissent in *Whitfield* did. Judge Limbaugh argued that the language of the statute indicated the weighing step asked the sentencer to exercise his or her judgment while the first two steps asked the jury to make a factual finding.[201] The first two steps called for "findings," whereas the third step called for a "conclusion."[202] This wording suggests that the third step asks something fundamentally different from the first two steps.[203] Accordingly, the language of the statute provides a convincing argument that the third step is not a factual finding like the first two.

C. Ending Judge-Imposed Death Sentences

Thus far, this Note has questioned the constitutionality of allowing a judge to weigh aggravators and mitigators. This of course is based on the U.S. Supreme Court drawing a distinction between elements of the crime and sentencing factors – a line that becomes especially muddled in death penalty cases. Given what is at stake in death penalty cases, it is imperative that there be no doubt all constitutional protections are met. An easy way to assure this is to require a jury to sentence a defendant to death and leave open no avenue for a judge to impose a death sentence on his or her own. This approach is not without historical support.

Counsel testified that it was their desire to avoid presenting witnesses whose testimony would have made it more likely that Barton committed the crime."); *see also* Williams v. State, 168 S.W.3d 433, 443 (Mo. 2005) (en banc).

199. MO. REV. STAT. § 565.032 (2018).

200. Franklin v. Lynaugh, 487 U.S. 164, 173–77 (1988).

201. State v. Whitfield, 107 S.W.3d 253, 277 (Mo. 2003) (en banc) (Limbaugh, J. dissenting).

202. *Id.* at 278.

203. It should be noted that the Missouri statute did not always refer to the third step as a conclusion. In fact, the Missouri statute originally called for a "finding" at step three as well as steps one and two. MO. REV. STAT. § 565.030 (1992) (amended 1993). However, the General Assembly revised the statute in 1993 to refer to the third step as a conclusion. MO. REV. STAT. § 565.030 (1993). It is not clear what brought about this change (this was still before *Ring*). It is also not clear whether the third step would have been a factual finding under the 1992 statute, but Judge Limbaugh's argument for it not being a factual finding would be significantly impaired.

Indeed, Professor John G. Douglass from the University of Richmond School of Law noted, "Read in light of history, the constitutional text suggests that all of the rights we now associate with trial were intended to govern all of the proceedings that lead to a death sentence."[204] Professor Douglass arrived at this conclusion based on the unified nature of capital trials during and after the creation of the Sixth Amendment, where the jury made all determinations.[205] Further, Professor Douglass noted the jury's special role "as a form of popular resistance to unpopular laws."[206] Nowhere is this role for the jury more important than in capital cases, where support for the death penalty is anything but conclusive.[207] Ultimately, an interpretation of the Sixth Amendment requiring a jury make the determination of life or death is the most practical solution and is backed by significant historical support.

Still, Missouri may choose to act on its own and revise its death penalty to only allow a jury to make the ultimate determination of life or death. In fact, Missouri's death penalty statute – as well as thirty-eight other states' death penalty statutes – featured this requirement before *Furman*.[208] Restoring the power to the jury – and only the jury – to make the ultimate determination of life or death would avoid the appearance of impropriety left by a judge imposing death despite a jury voting eleven-to-one in favor of life without parole. If Missouri legislators are concerned with the inevitable decrease in death sentences that such change may bring about, then they need only remember the role of the jury "as a form of popular resistance to unpopular laws."[209]

V. CONCLUSION

The Missouri death penalty statute's weighing step occupies a gray area between sentencing factor and factual finding. The unique interaction between the Sixth and Eighth Amendments enhances this complexity. Despite interpreting the weighing step to be a factual finding in *Whitfield*, the Missouri Supreme Court recently overruled this holding in *Wood*. However, the *Wood* decision lacks the necessary statutory interpretation to satisfactorily end the debate over the Missouri statute. Given the importance of making the

204. *See* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 2023 (2005).

205. *See id.* at 2022–23.

206. *Id.* at 2022.

207. J. Baxter Oliphant, *Public Support for the Death Penalty Ticks Up*, PEW RESEARCH CENTER (June 11, 2018), http://www.pewresearch.org/fact-tank/2018/06/11/us-support-for-death-penalty-ticks-up-2018/ [perma.cc/S3Z6-EP8R] (noting that in 2016 only 49% of Americans favored the death penalty and now only 54% favor it).

208. Andres v. United States, 333 U.S. 740, 758 (1948) (Frankfurter, J. concurring).

209. *See* Douglass, *supra* note 204, at 2022.

correct decision in a death penalty case, legislators would be wise to end judges' ability to overturn eleven-to-one jury decisions in favor of life.