STATE OF INDIANA	)	IN THE LAKE SUPERIOR COURT
	)	CRIMINAL DIVISION FOUR
COUNTY OF LAKE	)	CAUSE NO. 45G04-1512-MR-00009
		CAUSE NO. 45G04-1603-MR-00002

STATE OF INDIANA,	)
Plaintiff,	)
	)
Vs.	)
	)
DARREN DEON VANN,	)
Defendant.	)

MOTION TO DECLARE IND. CODE § 35-50-2-9 UNCONSTITUTIONAL

Comes now the Defendant, Darren D. Vann, by and through his respective counsel, Gojko Kasich, Matthew Fech, and Mark Bates, and pursuant to the 5th, 6th, 8th, and 14th Amendments to the United States Constitution and pursuant to Article I, §§ 1, 13, 16, and 19 to the Indiana Constitution, hereby moves this Court to hold Ind. Code § 35-50-2-9 unconstitutional and to dismiss the State's request for the death penalty against the Defendant. Indiana's statutory scheme for the death penalty is unconstitutional because it violates a defendant's right to a fair trial, to the due process of proof beyond a reasonable doubt, and to a jury determination of the facts and the law, pursuant to the United States Supreme Court decisions in *Hurst v. Florida*, ___ U.S. ___ (2016), 136 S.Ct. 616 (2016); *Ring v. Arizona*, 536 U.S. 584 (2002); and *Cage v. Louisiana*, 498 U.S. 39 (1990), because Indiana law does not require a unanimous verdict by a jury of twelve (12) individuals. Pursuant to court rules, a memorandum in support of this motion is attached hereto.

MEMORANDUM IN SUPPORT

STATEMENT OF THE FACTS

1. Defendant Darren D. Vann is presently charged with two (2) capital murders in Cause No. 45G04-1512-MR-00009 and five (5) capital murders in Cause No. 45G04-1603-MR-00002.

2. Indiana's statutory scheme and trial procedure for the imposition of the death penalty is set forth in Ind. Code § 35-50-2-9.

3. Under Indiana's statute, a jury of twelve (12) persons may unanimously "recommend" the death penalty where they have found that the State of Indiana has proven beyond a reasonable doubt that at least one of the aggravating circumstances as set forth in IC 35-50-2-9 exists ***and*** the aggravating circumstance outweighs any mitigation presented by the defense. (Emphasis added).

4. While the State carries the burden to prove beyond a reasonable doubt that an aggravating circumstance exists, the statutory framework does not require the State to prove beyond a reasonable doubt that the aggravating circumstance outweighs the mitigating circumstances.

5. If the unanimous jury finds beyond a reasonable doubt that one of the alleged aggravating circumstances existed but that it did not outweigh the mitigating circumstances, the jury would be required to "recommend" an advisory sentence of a term of years.

6. Under both of those situations, the trial court must follow the jury's recommendation and sentence a defendant accordingly. IC 35-50-2-9 (e). ("If the

jury reaches a sentencing recommendation, the court shall sentence the defendant accordingly.").

7. However, if the jurors determine that the State has proven one aggravating factor, but cannot unanimously determine whether the aggravator outweighs the mitigating factors, the Court is then tasked with the obligation, acting as the trier of fact, to sentence a defendant to a term of years, to a life without parole, or to death. IC 35-50-2-9(f) ("If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.") and IC 35-50-2-9(g) ("If the hearing is to the court alone, except as provided by IC 35-36-9, the court shall: (1) sentence the defendant to death; or (2) impose a term of life imprisonment without parole; only if it makes the findings described in subsection (l).").

8. The provision of the Indiana Code that allows a jury to sentence a defendant to death based upon proof that is less than beyond a reasonable doubt, that the aggravator outweighs the mitigating factors, violates the 5th, 6th, and 14th Amendments to the United States Constitution.

9. The provision of the Indiana Code that allows a judge to sentence a defendant to death is unconstitutional pursuant to the 6th, 8th, and 14th Amendments to the United States Constitution and the decisions in *Hurst, supra*, and *Ring, supra*. In addition, the statutory scheme violates the Indiana Constitution 's requirement "in all criminal cases whatever, the jury shall have the right to determine the law and the facts." Art. I, § 19 of the Indiana Constitution.

10. The death penalty scheme is unconstitutional because it can result in the judge, not the jury, making the findings that result in a defendant being put to death under IC 35-50-2-9.

11. Moreover, severing the offending portion of the statute would make the entire statute void; therefore, the Indiana Death Penalty Statute set forth in IC 35-50-2-9 cannot pass constitutional muster and is unconstitutional in its entirety pursuant to the 6th and 8th Amendments to the United States Constitution and pursuant to the holdings of *Hurst* and *Ring*.

LAW AND ARGUMENT

In an uninterrupted series of decisions spanning more than fifteen years, the United States Supreme Court has vigorously and consistently repeated a basic, bright-line rule mandated by the Sixth Amendment: "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." *Hurst v. Florida*, 136 S.Ct. 616, 621 (2016), quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000). In *Hurst*, the Supreme Court recently restated this foundational principle, emphasizing that it applies with equal force to death-penalty sentencing statutes: "The Sixth Amendment requires a jury, not a judge, to find *each fact necessary to impose a sentence of death*." *Id.* at 619 (emphasis added). A jury "finding" only meets constitutional standards if it is made unanimously, based on proof beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 498 (Scalia, J., concurring) (charges against an accused, and the corresponding maximum exposure he faces, must be

determined "*beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens*") (emphasis in original).

The Indiana scheme, which requires a jury to find --before it may "recommend" a sentence of death – that "mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances" is unconstitutional because it permits the judge to make the findings of fact supporting a death sentence where the jury is not unanimous. IC 35-50-2-9 (f) and (l)(2). The statute is also unconstitutional because it does not require the jury to find, beyond a reasonable doubt, that the aggravators outweigh the mitigating circumstances.

Finally, permitting a court to decide that death is the appropriate punishment is contrary to evolving standards of decency and, therefore, violates the Eighth Amendment's prohibition on cruel and unusual punishment. Where a state capital sentencing scheme provides a standard for assessing whether a defendant is eligible for the death penalty, that standard must comply with *Apprendi* – i.e., that "all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

Hurst v. Florida rejects the analysis in *State v. Barker*, 809 N.E.2d 312 (Ind. 2004) and *Ritchie v. State*, 809 N.E.2d 258 (Ind. 2004). In *State v. Barker*, the Court observed: "The State concedes that the procedure set forth in IC 35-50-2-9(f), if it were followed by a trial court in sentencing a defendant to death (or life without

parole), would be in violation of *Ring*." *Barker*, 809 N.E.2d at 316. The Indiana Supreme Court, at that time, "decline[d] to accept that concession." *Id.* The latter decision in *Hurst* – which holds that the determination that aggravators outweigh mitigating circumstances is a factual finding that must be proven to a jury and found beyond a reasonable doubt – makes clear that the State's concession was valid, and that the provision permitting judicial sentencing is unconstitutional. Moreover, the same rationale establishes that the offending provision is not severable from the statute.

Indiana could have promulgated a statute that did not require the jury to find that aggravators outweigh mitigators. Or, like Kansas, the jury could have been required to find beyond a reasonable doubt that aggravators are at least in equipoise with mitigating circumstances. *See Kansas v. Marsh*, 548 U.S. 163, 173 (2006) ("In contrast, the Kansas statute requires the State to bear the burden of proving to the jury, beyond a reasonable doubt, that aggravators are not outweighed by mitigators. . .").

Indeed, in response to *Ring v. Arizona*, a number of states modified their statutes to avoid the error that exists today in Indiana. But what Indiana may not do is "sap and undermine [the right to a trial by jury]" by "introducing new and arbitrary methods of trial." *Jones v. United States*, 526 U.S. 227, 246 (1999) ("however *convenient* these [new trial methods] may appear at first, . . .yet let it again be remembered, that delays, and little inconveniences in the forms of justice,

are the price that all free nations must pay for their liberty in more substantial matters.").[1]

A. The Sixth Amendment guarantees that all facts, supporting an enhanced or increased sentence, including the relative weight of the aggravating and mitigating circumstances, are "elements" of the crime.

The Supreme Court's analysis of the Sixth Amendment, culminating in *Hurst*, clearly illustrates that the Indiana capital sentencing statute, which permits a jury to make a factual finding that the aggravating factor(s) outweigh the mitigating circumstances in the absence of proof beyond a reasonable doubt, violates the federal constitution. It is now incontrovertible that, under the Sixth Amendment, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" qualifies as an element that "must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Where a factual finding is a necessary precursor to an enhanced or increased sentence, such as a death sentence, any distinction between "elements" of the crime and "sentencing factors" is dissolved. *Apprendi*, 530 U.S. at 494. *Apprendi's* unbending rule has, therefore, invalidated schemes involving sentencing enhancements, 530 U.S. at 490, mandatory sentencing guidelines, *United States v. Booker*, 543 U.S. 220, 226 (2005), and the death penalty. *Ring v. Arizona*, 536 US. 584, 589 (2002).

[1] The historical origins of the "beyond a reasonable doubt standard" are located in the exacting (and ongoing) concern over the application of capital punishment. At the founding of this country, the origin of the reasonable doubt instruction "was related to the increasing resistance of the public – both American and British – to the application of the capital sanction." Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 Am. Crim. L. Rev. 45, 51 (Winter 2005) citing *inter alia* John Langbein, *The Origins of Adversary Criminal Trial*, Oxford University Press, Oxford, England (2003); Larry Laudan, *Is Reasonable Doubt Reasonable?*, 9 Legal Theory 295, 297 (2003); Erik Lillquist, *Recasting Reasonable Doubt: Decision theory and the Virtues of Variability*, 36 U.C. Davis L. Rev. 85, 148-49, n. 206-07 (2002).

Apprendi applies to all findings of fact necessary to the imposition of an increased sentence under state or federal law. This fundamental right is no less protective in death penalty cases. *Ring*, 536 U.S. at 589 ("Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."). In *Hurst*, the Court clearly stated, "The Sixth Amendment requires a jury, not a judge, to find *each fact necessary* to impose a sentence of death." *Hurst v. Florida*, 136 S.Ct. 616, 619 (2016) (emphasis added).

The Supreme Court acknowledged that, under the previous Florida law, the factual findings necessary to authorize a death sentence were not limited to the presence of a single aggravating circumstance but rather extended to findings regarding mitigating circumstances, and the relative weight of each:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). The trial court *alone* must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); *see* [*State v.*] *Steele*, 921 So.2d [538,] 546 [(Fla. 2005)].

Id. at 622 (emphasis in original). Therefore, determining the relative weight of aggravating and mitigating circumstances is also a factual finding encompassed within *Apprendi's* rule.

Justice Rucker made essentially the same analysis in *State v. Barker* observing:

> My primary point of departure however with the majority opinion is its conclusion that "[n]either federal constitutional doctrine

> under *Apprendi* and *Ring* nor Indiana state jurisprudence leads to the requirement that weighing be done under a reasonable doubt standard." Op. at 315 (quoting *Ritchie v. State*, No. 49S00-0011-DP-638, 809 N.E.2d 258, 266, 2004 WL 1153062 (Ind. 2004)). My view is quite the opposite. The maximum punishment for murder is a term of years. In order for a defendant to become death eligible after a guilty verdict of murder, two separate and independent factors must be found: (i) the existence beyond a reasonable doubt of at least one of the statutory aggravating circumstances, and (ii) the aggravating circumstances outweigh the mitigating circumstances. *See* Ind. Code § 35-50-2-9(l); *Brown v. State*, 698 N.E.2d 1132, 1144 (Ind. 1998). Under *Apprendi* 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. 530 U.S. at 490, 120 S.Ct. 2348. To say that the process of weighing is not a fact but a traditional sentencing factor Br. of Appellant at 9, should provide the State no refuge. As *Apprendi* makes clear the relevant inquiry is not one 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? *Id.* at 494, 120 S.Ct. 2348 (emphasis added). *Ring* is more explicit: If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt. 536 U.S. at 602, 122 S.Ct. 2428. I continue to believe that perhaps unlike the capital sentencing schemes in some other jurisdictions, it is the structure of Indiana's capital sentencing statute that pulls it in within the embrace of the *Apprendi* and *Ring* doctrine. *Ritchie*, 809 N.E.2d at 271, 2004 WL 1153062, (Rucker, J., dissenting in part). In my view the plain language of the statute makes death eligibility contingent upon certain findings that must weighed [*sic*] by the jury on proof beyond a reasonable doubt.

State v. Barker, 809 N.E.2d 312, 319 (Ind. 2014) (Rucker, J., concurring in result).[2]

[2] This author is aware that in *Isom v. State*, 31 N.E.3d 469 (Ind. 2015), Justice Rucker, in responding to a similar challenge to the weighing process, affirmed the trial court and stated, "In *Ritchie*, the author of this opinion dissented in part believing the plain language of the statute makes death eligibility contingent upon certain findings that must be weighed by the jury on proof beyond a reasonable doubt. But the author acknowledges *Ritchie* as *stare decisis* on this issue." *Id*. at 488, n. 9. However, despite the doctrine of *stare* decisis, Justice Rucker's position in *Barker* has been approved and justified by *Hurst v. Florida* and this issue should be revisited.

Justice Sotomayor, dissenting from the denial of certiorari in *Woodward v. Alabama*, 134 S.Ct. 404 (2013), made this exact observation as well. *Woodward* involved a challenge to Alabama's capital punishment scheme, which allows judges to independently find and weigh aggravating and mitigating circumstances and impose death sentences, even where a jury has recommended a sentence of life in prison. *Id.* at 406. Justice Sotomayor acknowledged that

> The very principles that animated our decisions in *Apprendi* and *Ring* call into doubt the validity of Alabama's capital sentencing scheme. Alabama permits a defendant to present mitigating circumstances that weigh against imposition of the death penalty. *See* Ala. Code §§ 13A-5-51, 13A-5-52. Indeed, we have long held that a defendant has a constitutional right to present mitigating evidence in capital cases. *See Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). And a defendant is eligible for the death penalty in Alabama only upon a specific factual finding that any aggravating factors outweigh the mitigating factors he has presented. *See* Ala. Code §§ 13A-5-46€, 13A-4-47€. The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is therefore necessary to impose the death penalty. It is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole. Under *Apprendi* and *Ring*, a finding that has such effect must be made by a jury.

Id. at 410-11.

The U.S. Supreme Court recently granted certiorari in several cases from Alabama, vacated death sentences, and remanded them to the Alabama lower courts for consideration of *Hurst v. Florida*. *See, e.g., Kirksey v. Alabama*, No. 15-7912 (U.S. June 6, 2016); *Wimbley v. Alabama*, No. 15-7939 (U.S. May 31, 2016); *Johnson v. Alabama*, No. 15-7091 (U.S. May 2, 2016). In *Wimbley*, for example, the jury convicted the defendant of murder committed in the course of robbery, which is

a capital offense. *Wimbley v. State*, CR-11-0076 at *1 (Ala. Ct. Crim. App. Dec. 19, 2014). The jury's guilt-phase verdict necessarily determined the existence of an aggravating circumstance beyond a reasonable doubt. *See* Ala. Code § 13A-5-49(4) (setting forth statutory aggravating circumstance that "[t]he capital offense was committed while the defendant was engaged or was an accomplice in the commission of . . . robbery"). Nevertheless, the Supreme Court vacated the sentence. *Wimbley v. Alabama*, *supra*. Given the specific statute under which Wimbley was convicted, the Court's decision to vacate and remand necessarily implies that, when the Alabama trial court made factual findings regarding the relative weight of aggravating and mitigating circumstances, it violated the Sixth Amendment.

The highest courts of several states have likewise acknowledged that the Supreme Court's Sixth Amendment jurisprudence extends to determinations about aggravating and mitigating circumstances, and the relative weight of each. In *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003) (en banc), the Missouri Supreme Court reached a similar conclusion, specifically holding that the Sixth Amendment's scope in death penalty cases was not limited to a jury determination of a single aggravating factor:

> [In *Ring v. Arizona*, t]he Supreme Court held that not just a statutory aggravator, but every fact that the legislator requires be found before death may be imposed must be found by the jury. . . . Because Mr. Ring did not argue that Arizona's sentencing scheme required the jury to make a factual finding as to mitigating factors, the Supreme Court declined to specifically address whether a jury was also required to determine whether mitigating factors were present that called for leniency. *See Ring*, 536 U.S. at 597, n. 4, 122 S.Ct. 2428. Instead, it

> set out the general principle that courts must use in applying *Ring* to determine whether a particular issue must be determined by the jury or can be determined by a judge, stating, "[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589, 122 S.Ct. 2428.

Whitfield, 107 S.W.3d at 257-58.

The Court determined that Missouri's death penalty statute, which permitted the trial judge to make findings of fact and determine whether a death sentence was warranted in cases where the jury was unable to reach a unanimous sentencing decision, violated the Sixth Amendment. *Id.* at 262. In so ruling, the Court specifically held that Missouri's death sentencing process involved three separate factual determinations. *Id.* at 261. Under the Missouri statute, the jury (or the court, if the jury could not agree) was tasked with determining (1) the presence of at least one aggravating factor, (2) whether all of the aggravating factors, taken together, warrant imposition of the death penalty, and (3) whether the evidence in aggravation outweighs the evidence in mitigation. *Id.* at 258-59. Because a defendant was death-eligible only if these three inquiries were answered in the affirmative, the Court concluded each was a factual finding that the Sixth Amendment required a jury to make. *Id.* at 259; *see also Woldt v. People*, 64 P.3d 256, 266 (Colo. 2003) (en banc) (Sixth Amendment required jury to make all factual findings on which death sentence is predicated, including that "(A) At least one aggravating factor has been proved; and (B) There are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved").

The Indiana Supreme Court's holding in *State v. Barker*, 809 N.E.2d 312 (Ind. 2004) and *Ritchie v. State*, 809 N.E.2d 258 (Ind. 2004), that the Sixth Amendment does not apply to the weighing determination, cannot be squared with *Hurst*. Although several other state courts reached similar conclusions in the wake of *Ring*, these decisions reflected the not unique, but now discredited, opinion that "*Ring* does not extend to the weighing phase." *Id.* at 266, citing *Brice v. State*, 815 A.2d 314, 322 (Del. 2003)[3]; s*ee also Nunnery v. State*, 263 P.3d 235, 252 (Nev. 2011); *Commonwealth v. Roney*, 866 A.2d 351, 361 (Pa. 2005); *Oken v. State*, 835 A.2d 1105, 1117 (Md. 2003); *Ex Parte Waldrop*, 859 So.2d 1181, 1189 (Ala. 202). *Hurst* has now made clear that the jury's determination that "any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances," Ind. Code § 35-50-2-9(l), is a factual finding subject to the protections of the Sixth Amendment. 136 S.Ct. at 622.

B. Elements of a crime, including the determination that aggravating factors outweigh the mitigating circumstances, must be proven beyond a reasonable doubt

Where a state legislature identifies specific elements that must be proven prior to imposition of a death sentence, those elements must be proven to a jury beyond a reasonable doubt. The Fifth Amendment's due process guarantee requires that, in all criminal prosecutions, the government establish each element of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). This

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[3] The Delaware Supreme Court declared that state's death penalty statute unconstitutional in light of *Hurst* and overruled its holding in *Brice*. *Rauf v. State*, No. 39, 2016 (Del. S. Ct. August 2, 2016). The full opinion may be found here: http://courts.delaware.gov/Opinions/Download.aspx?id=244410 As a courtesy to the court and opposing counsel, the opinion will be tendered along with the motion.

requirement attaches to any factual finding that is mandated by the Sixth Amendment. As the United States Supreme Court noted in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), "[i]t is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Id.* at 278.

Because the jury's factual findings are elements of capital murder, this rule must apply with equal force to factual findings concerning the determination that the aggravating factors outweigh the mitigating circumstances. Therefore, the Indiana statutory scheme, which permits a jury finding based on less proof than beyond a reasonable doubt, violates the Fifth and Sixth Amendments to the United States Constitution. *See Apprendi*, 530 U.S. at 490.

C. Because it permits a judge rather than a jury to make factual determinations and impose a death sentence, the Indiana capital sentencing statute violates the Sixth and Eighth Amendments to the United States Constitution

The Indiana capital punishment scheme contains yet another substantial constitutional deficiency. If the jury is unable to reach a unanimous verdict in the sentencing phase of a capital proceeding, the statute permits the court alone to make factual findings that an aggravating circumstance exists and that the aggravating circumstances outweigh the mitigating circumstances. Ind. Code § 35-

50-2-9(f), (g), (l). If the court does so, it may impose a sentence of death, in the absence of any jury fact-finding or authorization. *Id.* This provision of the statute violates both the Sixth and Eighth Amendments to the United States Constitution.

As discussed in detail above, "[t]he Sixth Amendment requires a jury, ***not a judge***, to find each fact necessary to impose a sentence of death." *Hurst*, 136 S.Ct. at 619. (emphasis added). As with the Florida statute that was challenged in *Hurst*, the factual findings incorporated in the Indiana statute include the determinations that "[t]hat . . . aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *Id.* at 622; *see also* Ind. Code § 35-50-2-9 (l). As the Supreme Court made abundantly clear, the Sixth Amendment prohibits a judge from making either of these factual findings. *Id.* at 619. Therefore, section (f) of Ind. Code 35-50-2-9, which permits judicial fact-finding in death cases where a sentencing jury is not unanimous in its fact-finding, is clearly unconstitutional.[4]

D. Because they are contrary to evolving standards of decency and undermine the only purpose for the extremely severe penal punishment of death, court-imposed death sentences violate the Eighth Amendment

The Eighth Amendment prohibits "cruel and unusual punishments." U.S. Const., Amend. VIII. The "standard of extreme cruelty" has remained stable over

[4] Florida attempted to "fix" its death penalty statute by allowing for a "supermajority jury verdict" which would then allow the judge to impose a death sentence upon a non-unanimous verdict. In finding that this statutory amendment was unconstitutional, Judge Hirsch stated "[w] will take no Floridian's liberty upon a less-than-unanimous verdict, although the liberty taken today can be restored tomorrow. We dare take no Floridian's life upon less-than-unanimous verdict. The life taken today can never be restored." State of Florida v. Karon Gaiter, Case No. F01-128535 (May 9, 2016), p. 16. The full order by Judge Hirsch may be found at the following link: https://www.themarshallproject.org/documents/2827708-Florida-v-Gaiter-order#.u87B4Gj2z A copy of the order is also tendered along with this motion.

time; yet, "its applicability must change as the basic mores of society change." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008), quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting). In order to gauge whether a punishment practice has fallen outside these evolving standards, the Court looks to objective indicia of societal consensus. *See Atkins v. Virginia*, 536 U.S. 304, 312 (2002); *Furman*, 408 U.S. at 239.

Employing this analysis, the Court first examines objective indicators, such as state legislation, death sentences, and executions, to determine whether the punishment or practice is consistent with contemporary standards of decency. *See Atkins*, 536 U.S. at 312. In doing so, the Court gives particular weight to legislation "the clearest and most reliable objection evidence of contemporary values." *Id.*, 536 U.S. at 312 (quoting *Penry v. Lynaugh*, 492 U.S. 302 (1992).

However, this review of societal consensus, though significant, does not "wholly determine" the constitutional permissibility of capital punishment. *Coker v. Georgia*, 433 U.S. 584, 597 (1977). Rather, "the Constitution contemplates that in the end [the Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Id.*

The Court has used this analysis to evaluate the constitutionality of a category of sentences. *See, e.g., Roper v. Simmons*, 543 U.S. 551 (2005) (prohibiting the execution of juveniles); *Atkins, supra* (barring execution of the intellectually disabled); *Coker, supra* (prohibiting the death penalty as punishment for rape), as well as the adequacy of the procedures used to implement the Eighth Amendment

principles contained in its precedent. *See Hall v. Florida*, 134 S.Ct. 1986, 1996-2000 (2014) (discussion of states' determination of IQ levels, as well as discussions of states who abolished the death penalty).

In *Hall*, the Court examined Florida's procedure for determining whether a capital defendant is intellectually disabled. In Florida, a defendant was first required to show that he had an IQ score of 70 or below. *Id.* at 1992. Only if IQ testing produced such a score would he be entitled to present additional evidence of intellectual disability. *Id.* This IQ score cut-off was strict, and prohibited defendants whose IQ score was above 70 but still within the test's margin of error, from pursuing a claim of intellectual disability. *Id.* Because Hall's lowest admissible IQ score was a 71, the Florida Supreme Court affirmed his death sentence, finding that the testing had conclusively established Hall was not intellectually disabled. *Id.*

The Supreme Court reversed, holding that Florida's bright line IQ cutoff posed a procedural hurdle to establishing intellectual disability that violated the Eighth Amendment. *Id.* at 2001. As with its substantive Eighth Amendment jurisprudence, the Court looked to the national consensus by examining the means through which most states implemented the protections of *Atkins*. *Id.* at 1996. Because only two other states, in addition to Florida, had adopted a fixed score cutoff that failed to incorporate the standard error of measurement in IQ testing, the Court found that there was "strong evidence of consensus that our society does not regard this strict cutoff as proper or humane." *Id.* at 1998. The Court's

independent judgment supported the same conclusion, finding that, "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 2001. The reasoning in *Hall* demonstrates that, where a state has adopted a procedure that fails to adequately protect a defendant's substantive Eighth Amendment rights, that "rule is invalid under the Constitution's Cruel and Unusual Punishments Clause." *Id.* at 2001.

Application of *Hall's* analysis to judicial sentencing in a capital case demonstrates that it cannot withstand constitutional scrutiny. There is a strong national consensus against judicial determination of sentences in death penalty cases. In addition, by taking the sentencing determination out of the jury's hands, the likelihood that it will "express the 'conscience of the community' on the ultimate question of life or death," *Ring*, 536 U.S. at 615-16 (Breyer, J., concurring in judgment) (citation omitted), is unconstitutionally diminished.

1. There is a nationwide consensus in favor of jury rather than judicial sentencing in death penalty cases

There is a nationwide consensus against judicial sentencing in capital cases. Of the 33 jurisdictions that permit capital punishment, only four besides Indiana permit the capital sentencing decision to be made by a judge. Those states are Alabama, Ala. Code § 13A-5-47; Delaware, 11 Del. C. § 4209;[5] Nebraska, Neb. Rev.

[5] But as of August 2, 2016, the Delaware Court declared the state's death penalty scheme to be unconstitutional because it allowed, in part, the judge to impose a sentence of death. *See Rauf*, fn 3.

Stat. § 29-2521; and Montana, Mont. Code Ann. 46-18-301. Indiana should take no comfort in this company. As discussed above, several U.S. Supreme Court orders have cast substantial doubt on the constitutionality of Alabama's capital punishment scheme. In Delaware, the death penalty statute has been declared unconstitutional in light of *Hurst*. *Rauf v.* State, No. 39, 2016 (Del. S. Ct. August 2, 2016). The Nebraska legislature repealed its death penalty in 2015, though that repeal is suspended pending a voter referendum scheduled for November of 2016. The only remaining state, Montana, has had no occasion to evaluate the constitutionality of its death penalty post-*Ring*, since no death sentence has been imposed there in the past twenty years.

Even assuming the validity of these statutes, that only five out of thirty-three jurisdictions permit judicial sentencing in capital cases weighs heavily against its constitutionality. As in *Hall*, the scarcity of state laws permitting non-unanimous capital sentencing is "strong evidence of consensus that our society does not regard this [procedure] as proper or humane." 134 S.Ct. at 1998; *see also Coker v. Georgia*, 433 U.S. 584, 596 (1977) (death penalty for rape of an adult woman held unconstitutional, in part, because Georgia was the only state in the country that authorized such a punishment and therefore the nation's collective judgment on the penalty "obviously weigh[ed] very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman.").

2. **Judge-imposed death sentences, which fail to accurately express the community's conscience, undermine the only penal purpose of capital punishment**

In addition to evaluating consensus, the Court must also exercise its "own judgment . . . on the question of the acceptability of the death penalty under the Eighth Amendment. "Hall, 134 S.Ct. at 2000, quoting *Coker*, 433 U.S. at 597. Judge-imposed sentences in capital cases fail in this respect as well.

While the social purposes purportedly served by the death penalty are "retribution and deterrence of capital crimes by prospective offenders," *Gregg v. Georgia*, 428 U.S. 153, 183 (1976), the primary justification for the death penalty is retribution. *See Baze v. Rees*, 553 U.S. 35, 79 (2008) (Stevens, J., concurring in judgment) ("The legitimacy of deterrence as an acceptable justification for the death penalty is also questionable, at best. Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders. In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment." (footnote omitted); *Ring v. Arizona*, 536 U.S. 584, 614-15 (2002) (Breyer, J., concurring in judgment) (citing studies to demonstrate "the continued difficulty of justifying capital punishment in terms of its ability to deter crime [or] incapacitate offenders").

"[C]apital punishment is an expression of society's moral outrage at particularly offensive conduct," *Gregg*, 428 U.S. at 183, and a sentence of death thus "expresses the community's judgment that no lesser sanction will provide an

adequate response to the defendant's outrageous affront to humanity." *Harris v. Alabama*, 513 U.S. 504, 518 (1995) (Stevens, J., dissenting and citing *Gregg*, 428 U.S. at 184). Because retribution's goal is to reflect "society's and the victim's interest in seeing that the offender is repaid for the hurt he cause, *Kennedy v. Louisiana*, 554 U.S. 407, 442 (2008) (citations omitted), twelve representatives of the "community as a whole," *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007), must be charged with determining whether retribution demands imposition of the death penalty. As Justice Breyer noted in his concurrence in *Ring*, jurors "possess an important comparative advantage over judges . . . [because] they are more likely to express the 'conscience of the community' on the ultimate question of life or death." *Ring*, 536 U.S. at 615-16 (Breyer, J., concurring in judgment) (citation omitted).[6]

Because the jury is "uniquely capable of determining whether, given the community's views, capital punishment is appropriate in the particular case at hand," *Ring*, 536 U.S. at 616 (Breyer, J., concurring in judgment), taking this critical decision from the jury undermines the death penalty's ability to serve any retributive goal superior to life imprisonment. When the infliction of capital punishment no longer serves a penological purpose, its imposition represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." *Furman*, 408 U.S. at 312. The Court has repeatedly acknowledged that a punishment without penological purpose is necessarily cruel and unusual. *Kennedy*, 554 U.S. at 441, citing *Gregg*, 428 U.S. at

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[6] For an excellent discussion about the jury's historic role as the appropriate entity to impose the death sentence, this court's attention is directed to the concurring opinion by Chief Justice Strine in *Rauf* at pp. 7-19.

173, 183, 187; *Atkins*, 536 U.S. at 319; *Edmund v. Florida*, 458 U.S. 782, 798 (1982). Therefore, to ensure a death sentence serves a retributive function, and is therefore constitutional, the sentence must be determined by a jury.

E. The Severability Doctrine cannot save this statute because the sections of the statute concerning the sentence are both unconstitutional as they are now drafted and the legislative intent was to enact the statute as a whole.

Because both sections of the statute, dealing with jury sentencing and judge sentencing, are unconstitutional, the severability doctrine is not applicable in this case. However, even if this court determines that Indiana's death penalty scheme does not violate the federal constitution if a jury is not obligated to find that the aggravating circumstance outweighs the mitigating evidence beyond a reasonable doubt, the statute cannot be saved by excising only that provision allowing for judge-sentencing.

> A statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand if separable from the bad. But a provision, inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand in case others included in the act and held bad should fall.

State v. Monfort, 723 N.E.2d 407, 415 (Ind. 2000), quoting *Dorchy v. Kansas*, 264 U.S. 286, 289-90 (1924). In that case, despite finding that the legislature overstepped its bounds and violated the separation of powers clause in the state constitution by abolishing a superior court during the middle of that court's term, the Indiana Supreme Court held that the remaining portions of the statute could stand because "we think it is clear that the legislative intent was to abolish Jasper

Superior No. 2 and that the legislature would have passed the statute without the invalid date." *Id.* at 416.

The same rationale cannot be applied to Ind. Code § 35-50-2-9. First, Vann maintains that all the provisions of the statute concerning the finding of the aggravating circumstances and the weighing of the aggravating circumstances against the mitigating evidence, whether it be performed by the jury or the judge, are unconstitutional pursuant to *Hurst* and the statute does not pass constitutional muster in the first place.

Second, even if this Court determines that sub-paragraph (l) is constitutional, a point that Vann does not concede, the legislature did not intend for the remaining portions of the death penalty statute to stand if the sub-paragraphs (f) and (g) are found to be unconstitutional. *State v. Montfort*, *id.* ("This Court must determine if 'it is apparent [that] the Legislature would not have passed the act except as a whole,' [citation omitted] or otherwise stated, if 'the Legislature would have passed the statue had it been presented without the invalid features. [citation omitted]."

It is clear that the Legislature intended for the possibility of the jury recommending the sentence, and, if the jury could not reach a unanimous decision on the sentence, that the judge perform that function. However, as clearly shown by *Hurst*, the judge may not perform that role in capital sentencing schemes.

Severing any offending portion will not satisfy the legislative intent behind enacting the statute. As such, the statute as a whole is invalid and Vann requests that this court find that Ind. Code § 35-50-2-9 is unconstitutional as written.

F. The death penalty statute is also unconstitutional under the state constitution

According to the statute constitution, Indiana citizens are endowed "with certain inalienable rights." Ind. Const. Art. 1, § 1. Protections provided by the Indiana Constitution may be more extensive than those provided by the federal constitution. *Taylor v. State*, 639 N.E.2d 1052, 1053 (Ind. Ct. App. 1994). Nonetheless, "the federal constitution operates on the states through the provisions of the fourteenth amendment which prohibit a state from falling below certain minimal standards." *Id.*

The rights afforded citizens pursuant to the Sixth and Eighth Amendments, as set forth and argued above, are also enshrined in the Indiana Constitution: "In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury," Ind. Const. Art.1, § 13; "Cruel and unusual punishments shall not be inflicted," Art. 1, §16; "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." Art. 1, § 19.

The existence of the federal constitutional rights, as interpreted by *Hurst*, *Ring*, and other death penalty cases, apply with equal force to the provisions of the state constitution. *Taylor, supra* ("Indiana's decision to apply federal constitutional interpretations to state constitutional provisions must be made on a case-by-case basis. In the event Indiana courts interpret our constitutional provisions consistent with federal interpretation, the decision is one of Indiana law.").

Because the state constitutional rights are co-extensive with the federal constitutional rights, Ind. Code § 35-50-2-9 is unconstitutional where it allows the

jury to recommend a sentence of death using proof that is less than that of beyond a reasonable doubt, and it is unconstitutional where it allows a judge to determine the sentence. *Hurst, supra.* Indiana may not fall below these minimal standards when prosecuting capital cases. *Taylor, supra.*

WHEREFORE, Defendant Darren D. Vann moves this Court for an Order declaring Ind. Code § 35-50-2-9 unconstitutional in accordance with the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, with the 1st, 13th, 16th and 19th sections of Article I of the Indiana Constitution, and in accordance with the U.S. Supreme Court decision in *Hurst v. Florida, supra.*

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing document was hand-delivered to the Lake County Prosecutor's office this ___ day of August, 2016 and a copy was placed in the United States Mail, First Class postage prepaid, to the following counsel:

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____

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