IN THE CIRCUIT COURT OF MAYCOMB COUNTY, ALABAMA

STATE OF ALABAMA, \*

 \*

v. \* Case No. CC-00-0000

 \*

JOE CLIENT. \*

 **MOTION TO PROHIBIT DEATH PENALTY**

 **WITHOUT UNANIMOUS JURY VERDICT**

 Joe Client respectfully moves this Court to impose a sentence of life imprisonment without parole if the jury fails to return a unanimous verdict in favor of a death sentence. In support of this motion, Mr. Client submits the following:

 1. Mr. Client has been charged with capital murder and the State is seeking the death penalty.

 2. The Sixth Amendment requires that “each fact necessary to impose a sentence of death” must be found by a unanimous jury beyond a reasonable doubt. Hurst v. Florida, 136 S. Ct. 616, 619 (2016); see also Ring v. Arizona, 536 U.S. 584, 589 (2002) (capital defendants have Sixth Amendment right to “a jury determination of any fact on which the legislature conditions an increase in their maximum punishment”); Apprendi v. New Jersey, 530 U.S. 466, 494 (2000) (any “required finding [that] expose[s] the defendant to a greater punishment than that authorized by the jury’s guilty verdict” must be submitted to jury and proved beyond a reasonable doubt).

 3. Alabama’s death penalty scheme permits the jury to return a non-unanimous verdict in favor of the death penalty, Ala. Code § 13A-5-46(f), which fails to ensure that the death penalty is not imposed without a unanimous jury vote as required by the Constitution. See Ring, 536 U.S. at 610 (Scalia, J., concurring) (explaining that Ring majority’s holding mandates that facts increasing punishment be found by “a unanimous jury . . . beyond a reasonable doubt”).

 4. When revisiting its statute after Hurst, the Florida Supreme Court found that the Constitution requires a unanimous jury verdict, holding “under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury’s recommended sentence of death must be unanimous.” Hurst v. State, 202 So. 3d 40, 44 (Fla. 2016) (per curiam), cert. denied 137 S. Ct. 2161 [“Hurst II”]; see also id. at 60 (“If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.”).

 5. Similarly, the Delaware Supreme Court, in reviewing its substantially similar capital sentencing statute after the decision in Hurst, held that the Sixth Amendment requires jury unanimity at the sentencing phase of a capital trial. Rauf v. State, 145 A.3d 430, 433-34 (Del. 2016).

 6. The Florida Supreme Court’s determination that the Eighth Amendment, in addition to Hurst, requires unanimity, see Hurst II, 202 So. 3d at 44, is consistent with United States Supreme Court precedent. The Court has consistently held that “there is a significant constitutional difference between the death penalty and lesser punishments,” Beck v. Alabama, 447 U.S. 625, 637 (1980), and the Eighth Amendment demands that the administration of the death penalty must reflect “‘the evolving standards of decency that mark the progress of a maturing society,’” Kennedy v. Louisiana, 554 U.S. 407, 446 (2008) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). “[T]his principle requires that use of the death penalty be restrained,” the Court has explained, and “must be reserved for the worst of crimes and limited in its instances of application.” Id. at 446-47. Such restraints include “heightened reliability . . . in the determination whether the death penalty is appropriate,” Sumner v. Shuman, 483 U.S. 66, 72 (1987), and a requirement that the class of people who may be sentenced to death is narrowed to include only the most culpable individuals, Zant v. Stephens, 462 U.S. 862, 876-77 (1983). To impose a death sentence where the jury does not return a unanimous verdict in favor of death would violate the Eighth Amendment.

 7. When assessing the constitutionality of a particular criminal punishment practice under the Eighth Amendment, the Supreme Court looks to whether state legislative and sentencing trends evince a national consensus against it. See, e.g., Kennedy, 554 U.S. at 422-26; Roper v. Simmons, 543 U.S. 551, 564-67 (2005); Atkins v. Virginia, 536 U.S. 304, 312-17 (2002). Alabama is one of only three states — out of thirty-one death penalty states and the federal and military justice systems — where the standard sentencing procedure does not require that the jury return a unanimous verdict in support of death before a death sentence may be imposed. The only other states that permit such a result are Montana and Nebraska. See Mont. Code § 46-18-305; Neb. Rev. Stat. § 29-2521.[[1]](#footnote-1) Two other states allow imposition of a death sentence without a unanimous jury verdict in only a narrow category of cases where the jury is deadlocked. See Ind. Code § 35-50-2-9(e)-(f); Mo. Stat. § 565.030(4).[[2]](#footnote-2)

 8. Given that the “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures,” Atkins, 536 U.S. at 312 (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)) (internal quotation marks omitted), Alabama’s outlier status in this respect is evidence that its unusual practice is contrary to the national consensus. See Burch v. Louisiana, 441 U.S. 130, 138 (1979) (in Sixth Amendment context, noting that only two states allowed non-unanimous jury verdicts in six-person jury cases and finding that “this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not”). That only four other states allow imposition of a death sentence without a unanimous jury verdict in favor of death and that such sentences are exceedingly rare evince a clear consensus against this practice. Under the Supreme Court’s Sixth and Eighth Amendment jurisprudence, this is powerful evidence that Alabama’s practice falls outside the line “delimiting . . . between those jury practices that are constitutionally permissible and those that are not.” Id.

 9. Further, the consensus requiring unanimity to impose a death sentence is consistent with the history of right to trial by jury, which in Alabama has traditionally required a unanimous verdict. See Opinion of the Justices, 692 So. 2d 115, 115-23 (Ala. 1997) (describing Alabama constitutional convention’s rejection of proposal for non-unanimous jury verdicts and concluding that “if such a radical restructuring of the judicial process to authorize less than unanimous verdicts is deemed wise or necessary, it must be accomplished by an amendment to Alabama’s Constitution”); see also Apodaca v. Oregon, 406 U.S. 366, 371 (1972) (Powell, J., concurring) (“At the time the Bill of Rights was adopted, unanimity had long been established as one of the attributes of a jury conviction at common law.”). Because the jury’s sentence verdict is now binding, permitting a death sentence without a unanimous verdict in favor of that punishment would violate Section 11 of the Alabama Constitution.

 10. Accordingly, if Mr. Client is convicted of the capital offense with which he has been charged, the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law require that this Court impose a sentence of life imprisonment without parole if the jury returns any sentencing verdict that is not a 12-0 verdict in favor of the death penalty.

 For these reasons, Mr. Client respectfully requests that this Court:

a. instruct the jurors that to return a verdict of death they must unanimously vote in favor of the death penalty; and

 b. enter a sentence of life imprisonment without parole if the jury returns a non-unanimous vote with respect to Mr. Client’s sentence.

 Respectfully submitted,

 /s/ Linda Lawyer

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 [CERTIFICATE OF SERVICE]

 **[MOTION UPDATED ON 12/04/17]**

1. As of September 2017, just two people are on death row in Montana (both of whom were sentenced over two decades ago), see State v. Smith, 931 P.2d 1272, 1276 (Mont. 1996); State v. Gollehon, 864 P.2d 249, 254 (Mont. 1993), and only eleven people are sentenced to death in Nebraska, see State v. Torres, 894 N.W.2d 191, 199 (Neb. 2017); State v. Ellis, 799 N.W.2d 267, 280 (Neb. 2011); State v. Sandoval, 788 N.W.2d 172, 191 (Neb. 2010); State v. Vela, 777 N.W.2d 266, 275 (Neb. 2010); State v. Galindo, 774 N.W.2d 190, 208 (Neb. 2009); State v. Lotter, 771 N.W.2d 551, 556 (Neb. 2009); State v. Hessler, 741 N.W.2d 406, 411 (Neb. 2007); State v. Moore, 718 N.W.2d 537, 539-49 (Neb. 2006) (per curiam); State v. Gales, 694 N.W.2d 124, 138-39 (Neb. 2005); State v. Mata, 668 N.W.2d 448, 462 (Neb. 2003); WOWT 6 News, Nikko Jenkins Sentenced to Death by Panel of Judges (May 30, 2017), available at: http://www.wowt.com/content/news/Nikko-Jenkins

--425337014.html (viewed Nov. 30, 2017). [↑](#footnote-ref-1)
2. As of September 2017, only two people are on death row in Missouri and one in Indiana as a result of those provisions. See State v. Shockley, 410 S.W.3d 179, 185-86 (Mo. 2013) (en banc); State v. McLaughlin, 265 S.W.3d 257, 261-62 (Mo. 2008) (en banc); Holmes v. State, 671 N.E.2d 841, 845 (Ind. 1996). In Missouri, one of these two death sentences was recently vacated by the federal district court because it was based on a finding — specifically, that the aggravating circumstances in the case were not outweighed by the mitigating circumstances — that was made by the trial judge rather than the jury. McLaughlin v. Steele, 173 F. Supp. 3d 855, 890, 896-97 (E.D. Mo. 2016). [↑](#footnote-ref-2)